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Legal Assessment

Review of the Kenyan Legislative and International Framework governing the Right to Equal Work and Employment for persons with disabilities

Supported by: Equal Rights Trust



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¹ British Broadcasting Corporation Media Action, Central Organization of Trade Unions Kenya, The Equal Rights Trust, Innovations for Poverty Action, Kenya Female Advisory Organization, LINC, Sightsavers, Ulula and United Disabled Persons of Kenya.

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Executive Summary

Discriminatory stereotypes, inaccessible infrastructure and broader social inequalities mean that persons with disabilities often experience barriers to work and employment. Once in employment, many persons with disabilities continue to encounter discrimination in areas ranging from remuneration to career advancement and vocational training. Certain groups, such as women, older persons, and ethnic and racial minorities, experience unique forms of disadvantage due to the intersection of their disability status and other personal characteristics. The diversity of persons with disabilities also means that people with certain types of impairment may experience inequality in work and employment differently to others.

Purpose and Structure

At the global level, States have pledged to improve human rights protections for persons with disabilities through their endorsement of the Sustainable Development Goals (SDGs). Through its ratification of the Convention on the Rights of Persons with Disabilities (CRPD), amongst other human rights treaties, Kenya has accepted specific obligations to ensure equal work and employment to persons with disabilities. To meet its commitments, Kenya has adopted a wide range of laws and policies that prohibit discrimination in employment. However, the legal framework is fragmented, containing gaps, weaknesses and inconsistencies that undermine its effectiveness in practice. To address these issues, legal reform is sorely needed.

This Report provides a detailed assessment of national legislation against international human rights standards. It aims to support the work of civil society organisations, policymakers and others who are committed to using the law to create an equal world. The Report is divided into **three parts**:

Part A sets out the international human rights law framework governing equality, non-discrimination and the right to equal work and employment. UN treaty bodies have increasingly engaged with this topic, culminating in the publication of new guidance by the Committee on the Rights of Persons with Disabilities in October 2022. To meet its treaty obligations, Kenya is required to respect, protect, and fulfil the right to work for persons with disabilities. This requires the elimination of discrimination, the adoption of a wide range of positive equality measures, and the establishment of effective implementation and enforcement mechanisms.

Part B introduces the Kenyan legal system. This Part begins by exploring the role and status of international human rights treaties within the domestic legal order, before examining protections established under the Constitution, specific equality legislation (focusing on the Persons with Disabilities Act of 2003), and national employment law. This Part identifies a range of areas in which the Kenyan legal framework falls below international standards; issues that must be addressed if the rights of persons with disabilities are to be made effective and realisable at the domestic level.

Part C contains the Report's conclusions and recommendations. The Report notes that whilst the Constitution reflects a strong commitment to the principles of equality and non-discrimination, the equality law framework is fragmented. There are inconsistencies between laws in relation to the grounds of discrimination and areas of life covered, the forms of discrimination prohibited, applicable rules of evidence and proof, and the availability of remedies. These issues generate significant uncertainty in the application of the law, and in some cases have resulted in contradictory judgments and decisions that do not meet international legal standards. The Persons with Disabilities Act and the Employment Act continue to reflect a medical model of disability and contain broad exceptions clauses that serve to limit their scope of application. The Persons with Disabilities Act is now twenty years old. The law is significantly outdated and fails to reflect contemporary developments in international human rights law. Addressing these issues will require a wide range of action.

Principal recommendations

To address the concerns outlined in this Report we make two **specific recommendations**:

1.1 Adopt Comprehensive Anti-Discrimination Legislation

Consistent with previous recommendations received in this area, and to address the fragmentation of the existing legal framework, Kenya should adopt comprehensive anti-discrimination legislation in line with international standards. To be comprehensive, such legislation should – at a minimum – prohibit all forms of discrimination on the basis of an open-ended and extensive list of grounds, including disability, in all areas of life regulated by law. The law should establish clear procedures and mechanisms of redress and make the necessary adaptations to rules on evidence and proof to enable victims of discrimination to access justice and secure effective remedy. The law should both require and provide for the full range of positive action and other proactive measures required to

give effect to the rights to equality and non-discrimination for persons with disabilities and other groups exposed to discrimination.

1.2 Repeal and Replace the Persons with Disabilities Act

In line with recommendations received by the Committee on the Rights of Persons with Disabilities in 2015, Kenya should expedite the adoption of a new Persons with Disabilities Act and ensure its consistency with international standards. The Act should promote a human rights-based approach to disability, explicitly define and prohibit all recognised forms of discrimination, and include specific, enforceable and targeted equality and accessibility measures. The State should ensure the inclusive and effective participation of persons with disabilities, including those with different types of impairment, alongside organisations working with and on behalf of such groups and ensure that their views are fully considered and meaningfully inform the process.

In addition to these measures, we make a series of **broad recommendations** that are focused on addressing systemic barriers to the equal participation of persons with disabilities in Kenya.

2.1 Respect the Rights to Equality and Non-Discrimination

Kenya should undertake a review of its national legal and policy framework and amend, and where necessary, abolish, existing laws, regulations and policies that conflict or are incompatible with the right to equality. As part of this process, Kenya should review the Employment Act and related legislation to ensure that the provisions of the Act are fully consistent with the State's obligations towards persons with disabilities under international law.

2.2 Ensure Effective Access to Justice and Remedy

Kenya should ensure effective access to justice to persons with disabilities, including those that have experienced discrimination in the areas of work and employment. The State should review its legal framework and ensure that the legal capacity of persons with disabilities to bring claims is recognised. To ensure access to justice, the State should ensure that justice mechanisms are available to all persons with disabilities – including those living in rural areas. The State should ensure that courts are physically accessible, and work proactively to identify and remove access barriers that may prevent effective participation in legal proceedings, including through the provision of procedural accommodations. The State should seek to harmonise its rules governing evidence and proof in discrimination cases to ensure that persons whose rights have been violated are not prevented from obtaining remedy. Persons who cannot afford to pay should be provided with legal aid and assistance. In accordance with their powers under the Constitution and other legislation, courts should ensure effective remedy to persons with disabilities, including through the provision of effective, dissuasive and proportionate sanctions, compensation and restitution; and institutional and societal remedies designed to address the root causes of

inequality. Training should also be provided to judges, lawyers and other enforcement actors on equality and non-discrimination principles.

2.3 Build Strong and Effective Institutions and Accountability Mechanisms

Kenya should ensure that all bodies that are charged with a specific role in ensuring the rights of persons with disabilities to equal work and employment have the necessary powers, training, and resources to effectively fulfil their mandate. In particular, the State should ensure that the National Council for Persons with Disabilities is enabled to issue adjustment orders challenging inaccessible infrastructure in accordance with its powers, established under national legislation.

2.4 Equality Impact Assessment

In accordance with their obligations under Article 10 of the Constitution, all public bodies, and those exercising public functions, should pay due regard to the need to promote equality and ensure the right to non-discrimination as part of public decision-making processes. In practice, this requires equality impact assessment, which should be informed by and include as an essential element, public participation processes. To be effective the assessment should consider both qualitative and quantitative data, and the results published to ensure transparency. Follow up measures should also be adopted to ensure that decisions do not produce unanticipated discriminatory impacts. Within the context of work and employment, it is particularly important that public authorities consider the impacts of their decisions on, and opportunities to promote the rights of, persons with disabilities who are engaged in informal work within the informal economy.

2.5 Broader Equality Measures

In addition to, and as part of, the actions listed above, the State and other duty-bearers should adopt broader equality measures designed to ensure the equal participation of persons with disabilities in society. This should include, **inter alia**, the adoption of enforceable accessibility standards to address environmental barriers that may prevent persons with disabilities from gaining access to work and employment or vindicating their rights; the adoption of training, sensitisation and awareness-raising measures designed to address the root causes of discrimination, including ableism, stigma and prejudice; and the adoption of specific positive action measures that seek to advance equality for persons with disabilities in the world of work.

2.6 Support the Work of Equality Defenders

Finally, we recommend that the State continues to work in cooperation with trade unions, civil society organisations and others who play an essential role in upholding the rights of

persons with disabilities to equal work and employment. Equality defenders should be provided with support to carry out their work and be actively included within decision-making processes.

Introduction

This legal assessment was prepared by the Equal Rights Trust (the Trust), with generous funding provided by the Global Labor Program as part of the Inclusive Futures initiative, funded by the United States Agency for International Development (USAID). The report is one of the outputs of a five-year collaborative project, led by Sightsavers, which aims to increase the inclusion of persons with disabilities within the Kenyan labour market. It was developed based on desk research and builds upon the findings of a few recent publications in this area.

1 Purpose and structure of this report

Discriminatory stereotypes, inaccessible infrastructure and broader social inequalities mean that persons with disabilities often experience barriers to work and employment. The result of these inequalities is stark: one study, conducted in 2018 by the United Nations (UN) Department of Economic and Social Affairs, found that the “employment to population ratio for persons with disabilities aged 15 years and older is 36 percent on average”, compared to 60 percent for the general population.² Once in employment, many persons with disabilities continue to encounter discrimination in areas ranging from remuneration to career advancement and vocational training. Certain groups, such as women, older persons, and ethnic and racial minorities, experience unique forms of disadvantage due to the intersection of their disability status and other personal characteristics.³ The diversity of persons with disabilities also means that people with certain types of impairment may experience inequality in work and employment differently to others.

States have pledged to improve human rights protections for persons with disabilities through their endorsement of the Sustainable Development Goals (SDGs). Concurrent with the overarching objective of the SDGs to “leave no person behind,” Goal 10 aims to “reduce inequality within and among countries,” whilst Target 8.5 seeks to ensure the “full and

² United Nations Department of Economic and Social Affairs, Disability and Development Report, 2018, p. 152.

³ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 22.

productive employment and decent work for (...) persons with disabilities, and equal pay for work of equal value.” States have also accepted specific obligations to ensure equal work and employment for persons with disabilities through the ratification of international human rights instruments. At the time of writing, 186 States – including Kenya – are party to the Convention on the Rights of Persons with Disabilities (CRPD), whilst several more are signatories to the Convention.

To meet its international commitments, Kenya has adopted a wide range of laws and policies that prohibit discrimination in employment and ostensibly seek to foster equality for people with disabilities. However, the legal framework is fragmented, containing gaps, weaknesses and inconsistencies that undermine its effectiveness in practice. To address these issues, legal reform is sorely needed. This Report provides a detailed assessment of national legislation against international human rights standards. It aims to support the work of civil society organisations, policymakers and others who are committed to using the law to create an equal world. It is divided into **three parts**:

Part A sets out the international human rights law framework governing equality, non-discrimination and the right to equal work and employment. UN treaty bodies have increasingly issued guidance in this area, culminating in the publication of General Comment No. 8 of the Committee on the Rights of Persons with Disabilities in October 2022. To meet their treaty obligations, States are required to respect, protect, and fulfil the right to work for persons with disabilities. This requires the elimination of discrimination, the adoption of a wide range of positive equality measures, and the establishment of effective implementation and enforcement mechanisms.

Part B introduces the Kenyan legal system. This Part begins by exploring the role and status of international human rights treaties within the domestic legal order, before examining protections established under the Constitution, specific equality legislation (focusing on the Persons with Disabilities Act of 2003), and national employment law. This Part identifies a range of areas in which the Kenyan legal framework falls below international standards; issues that must be addressed if the rights of persons with disabilities are to be made effective and realisable at the domestic level.

Part C contains the Report’s principal conclusions and recommendations. Whilst Kenya has expressed a commitment to improving the work and employment prospects of persons with disabilities, the current legal framework is inadequate. To address identified shortcomings a wide range of actions are needed. This includes the adoption of comprehensive anti-discrimination legislation, the adoption of a new Persons with Disabilities Act, the revision of the Employment Act and associated regulations, and a review of all other laws and policies that have a bearing on the rights of persons with disabilities, to ensure that they do not discriminate in their purpose or effect.

Recent legislative initiatives provide a unique opportunity for policymakers and civil society to come together to effect positive legal change. Without it, persons with disabilities will continue to experience barriers to work, impeding their capability to exercise their choices and participate in society as equals. The year 2023 marks the 75th anniversary of the adoption of the Universal Declaration of Human Rights. As part of the global year for action,⁴ Kenya must act to ensure that the foundational principles of the Declaration are met: to create a society in which all persons, irrespective of their disability status or other personal characteristics may live free and equal in dignity and in rights.

2 Conceptual Framework

This Report takes as its conceptual framework the unified human rights perspective on equality.⁵ Since 2020, the Trust has worked in collaboration with the UN High Commissioner for Human Rights to produce ‘Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation.’⁶ The Guide sets out the core normative content of the rights to equality and non-discrimination, as derived from international human rights instruments and their interpretation by the UN treaty bodies. It was developed in consultation with a broad range of stakeholders including UN special procedure mandate holders, governments, national human rights institutions, equality bodies, civil society, academics and other experts in equality law. In a recent speech at the World Justice Forum, Michele Bachelet, the former UN High Commissioner, endorsed the Guide, noting the “transformative power” of anti-discrimination legislation in addressing inequality.⁷ This theme was captured in Forum’s closing statement, which calls on all governments to “adopt, implement, and enforce comprehensive anti-discrimination laws” as a means to create “just communities in which all people, irrespective of their status, identity or belief, can participate on an equal basis.”⁸ Following its advanced launch, on 7 December 2022, 32 UN Special Procedure Mandate Holders – including the UN Special Rapporteur on the Rights of Persons with Disabilities, Gerard Quinn – issued a joint-statement noting that the Guide “provides clear and complete guidance for States on the laws which are required to meet their obligations to respect, protect and fulfil the rights to equality and non-discrimination and to deliver their

⁴ See OHCHR, “Comprehensive anti-discrimination legislation must be a priority, say UN experts ahead of Universal Declaration anniversary”, 7 December 2022.

⁵ The Equal Rights Trust, Declaration of Principles on Equality, London, 2008.

⁶ United Nations Human Rights Office, ‘Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation’, New York and Geneva, 2023.

⁷ OHCHR, “World Justice Forum 2022 - Video statement by Michelle Bachelet”, 31 May 2022. Similar sentiments have been expressed by the current UN High Commissioner. See further, OHCHR, “Statement by Volker Türk, United Nations High Commissioner for Human Rights at the launch of the OHCHR-Equal Rights Trust Comprehensive Anti-Discrimination Law Guide”, 6 December 2022.

⁸ World Justice Forum, Final Statement on Building More Just Communities, 2022, available at: <https://worldjusticeproject.org/news/world-justice-forum-2022-final-statement>

ambitions to leave no one behind.”⁹ The Guide was officially published in 2023, and has informed the assessment of Kenya’s international law obligations in Parts A-B.

Throughout this Report, we adopt a human rights-based approach to disability, which is reflected in the preamble to the Convention on the Rights of Persons with Disabilities. According to the Convention, disability is understood as “an evolving concept” that “results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.” The human rights-based approach recognises the inherent dignity of persons with disabilities as rights-holders and their autonomy as decision-makers.¹⁰ The Convention marks a shift away from a “charity-based” or “medical” model of disability, encapsulated in many national laws and policies, which frequently treat disability as a “social protection and welfare issue.”¹¹

3 Scope and Limitations

International law establishes minimum standards of labour protection that must be enforced by States through their national legal and policy frameworks. This Report examines a sub-set of these standards: those relating to equality and non-discrimination. By identifying gaps, inconsistencies and weaknesses in national laws and policies, the Report aims to ensure that existing labour protections are afforded on an equal and non-discriminatory basis, and that legal mechanisms are established through which persons with disabilities can challenge rights violations and achieve redress. The Report does not, however, seek to assess the quality of labour legislation generally. Similarly, whilst the Report touches upon related areas of human rights practice, such as the right to education and the right to social security, these rights are framed as a means to achieving equality for persons with disabilities in work and employment, rather than as goals in themselves.

As elaborated in Part B of this Report, Kenya has a devolved system of Government. Under Article 185 of the Constitution, County Assemblies are empowered to legislate on particular matters relevant to the performance of their functions, which are listed in Part 2 of Schedule 4. According to Part 1 of the same schedule, labour standards fall within the exclusive legislative competence of the National Government. Consequently, whilst many County Assemblies have adopted laws governing the rights of persons with disabilities, these laws are not discussed in

⁹ OHCHR, “Comprehensive anti-discrimination legislation must be a priority, say UN experts ahead of Universal Declaration anniversary”, 7 December 2022.

¹⁰ Convention on the Rights of Persons with Disabilities, Article 3.

¹¹ For a discussion on the progression in understanding of disability, see United Nations Department of Economic and Social Affairs, ‘Disability and Development Report’, 2018, Chapter 1.

further detail.¹² Instead, the Report concentrates its analysis on nationally applicable legal standards, with a particular focus on the Constitution, the Persons with Disabilities Act of 2003, and relevant employment legislation.

In practice, many individuals are engaged in informal work, and fall outside the scope of the formal legal protections. According to a recent study, in 2019 the “informal economy accounted for 83 percent of total employment” in Kenya, a slight rise on previous years.¹³ Persons with disabilities are overrepresented within the informal economy,¹⁴ which is marked by decent work deficits, including inadequate social protection and hazardous working conditions. To address some of these gaps, both the Committee on the Rights of Persons with Disabilities and the International Labour Organization have urged States to facilitate the transition of individuals engaged in informal work to the formal economy.¹⁵ This requires a concerted range of action, including the adoption of an integrated legal and policy framework that places the elimination of discrimination, and the promotion of equality at its heart.¹⁶ As noted elsewhere, equality law has an important role to play in this process.¹⁷ And whilst it is beyond the scope of this Report to provide an in-depth assessment of informal work in Kenya, it is clear that for the transition to formality to be successful, formal legal protections must be robust and robustly implemented.¹⁸

Every effort has been made to verify the accuracy of the information contained in this Report. All information was believed to be correct as of January 2023. Nevertheless, the Equal Rights Trust and Global Labor Program – Inclusive Futures cannot accept responsibility for the consequences of its use for other purposes or in other contexts. Whilst every effort has been made to ensure the accuracy of text cited in this Report, readers are recommended to refer to the original text when citing or relying on referenced materials. Throughout this Report, we have sought to ensure an inclusive approach to language that reflects best practice approaches in the field of human rights law.¹⁹ However, this approach is not always reflected in national court judgments and legislation, and some deviations may occur as a result.

¹² For an analysis of practice at the county level see, Kenya National Commission on Human Rights, Review of County Legislation on the Rights of Persons with Disabilities, 2022.

¹³ Federation of Kenya Employers, ‘The Informal Economy in Kenya’, 2021, p. 8.

¹⁴ United Nations Department of Economic and Social Affairs, ‘Disability and Development Report’, 2018, p. 155.

¹⁵ See, for instance, Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 38; International Labour Organization, Transition from the Informal to the Formal Economy Recommendation No. 204, 2015.

¹⁶ Ibid., ILO Recommendation 204, para. 11(f).

¹⁷ See further, Equal Rights Trust and the International Lawyers Assisting Workers (ILAW) Network, ‘A Promise Not Realised: The Right to Non-Discrimination in Work and Employment’, forthcoming 2023, Section 3.4.

¹⁸ Ibid., Section 3.3.

¹⁹ See United Nations Office at Geneva, Disability Inclusive Language Guidelines, 2021.

Part A: The International Legal Framework

1 The Right to Work for Persons with Disabilities

The right to work and employment is established under a range of human rights instruments. To be effective, the right must be afforded on an equal basis, including to persons with disabilities. States have specific obligations in this regard, which have been elaborated by human rights treaty bodies within the context of the respect, protect and fulfil framework.

1.1 The Right to Equal Work under International Law

Under Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), States agree to “take appropriate steps to safeguard” the right to work, which includes “the right of everyone to the opportunity to gain [their] living by work” freely chosen. Article 7 of the Covenant expands upon this broad guarantee, detailing States’ specific obligations to ensure “just and favourable conditions of work”, which includes inter alia “equal remuneration for work of equal value”, fair wages, a decent living, safe working conditions, equal opportunities for promotion and career advancement, and the provision of (paid) leave, rest and holiday time. Article 8 of the Covenant elaborates States’ obligations to ensure the right of every person to form and participate in trade unions, and to strike. This has been described as “the collective dimension” of the right.²⁰ By virtue of Article 2(2) of the Covenant, these articles are to be afforded “without discrimination of any kind.” In its general comments, the CESCR Committee has recognised disability as a form of other status (a ground of discrimination) protected under the Covenant.²¹

The right to work is also established under ground-specific human rights treaties. Article 5(e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), for example, prohibits racial discrimination in the area of employment. Discrimination is also prohibited in respect of the right to form and join trade unions by virtue of Article 5(e)(ii). Under Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) States agree to take “all appropriate measures” to “eliminate discrimination against women in the field of employment.” Both of

²⁰ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 2.

²¹ Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 28.

these conventions distinguish different elements of the right to work, which includes inter alia equal employment opportunities, the free choice of employment, equal conditions of work, safe working conditions, and the right to receive vocational training.²² Each of the CERD and CEDAW Committees have recognised the obligation of States to address “multiple” or “intersectional” discrimination, including on the basis of disability status,²³ under their respective treaties.²⁴ In addition to these treaties, several Articles of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) set out elements of the right to work, which must be provided “without distinction” on the basis of disability as well as other listed and unlisted grounds.²⁵

Articles 5 and 27 of the CRPD establish a positive obligation on States to ensure the equal and non-discriminatory enjoyment of the right to work and employment for persons with disabilities.²⁶ According to Article 27(1), States must ensure that the labour market and work environment is made “open, inclusive and accessible.” Different components of the right are set out in paragraphs (a) to (k), whilst Article 27(2) prohibits forced and compulsory labour, slavery and servitude. In 2022, the CRPD Committee published its first General Comment on the rights of persons with disabilities to work and employment.²⁷ The General Comment provides essential clarity and guidance to States on the nature of their obligations and the measures needed to ensure the right to work on an equal and non-discriminatory basis.

Outside of the UN treaty body system, the International Labour Organization (ILO) has built a large collection of materials on labour standards. Eight conventions were originally designated “fundamental” to the protection of the right to work, which have been ratified by at

²² International Convention on the Elimination of All Forms of Racial Discrimination, Articles 5(e)(i) and (ii); Convention on the Elimination of All Forms of Discrimination against Women, Article 11(1).

²³ Disability has been recognised as a protected characteristic by both Committees. See, for example, in the context of racial profiling, Committee on the Elimination of Racial Discrimination, General Recommendation No. 36, UN Doc. CERD/C/GC/36, 2020, paras. 18 and 47; and more broadly, Committee on the Elimination of Discrimination against Women, General Recommendation No. 18, 1991.

²⁴ Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, UN Doc. CERD/C/GC/32, 2009, para. 7; Committee on the Elimination of Discrimination against Women, General Recommendation No. 28, UN Doc. CEDAW/C/GC/28, 2010, para. 18.

²⁵ Both the Committee on Migrant Workers and the Committee on the Rights of the Child have recognised disability as a ground of discrimination on a number of separate occasions. See, for example, in the context of discriminatory nationality laws, Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 of the Committee on the Rights of the Child, UN Doc. CMW/C/GC/4-CRC/C/GC/23, 2017, para. 25.

²⁶ Including on intersecting grounds. See Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 19.

²⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022.

least 92% of all States worldwide.²⁸ Of particular relevance to this Report is Convention No. 100 (the Equal Remuneration Convention) and Convention No. 111 (the Discrimination (Employment and Occupation) Convention). Whilst these Conventions contain closed lists of grounds that do not expressly include disability, they offer useful guidance on the content and application of the rights to equality and non-discrimination in work and employment. The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has consistently issued guidance and recommendations to States in respect of the rights of persons with disabilities, particularly where protections have been established under national law.²⁹ Additionally, in 2019 the ILO adopted Convention No. 190 (the Violence and Harassment Convention), which requires participating States to adopt “laws, regulations and policies ensuring the right to equality and non-discrimination in employment and occupation.”³⁰ Other ILO documents also have an important bearing on the rights of persons with disabilities to equality and non-discrimination in work.³¹

The right to work and employment is also established under regional human rights instruments. Article 15 of the African Charter on Human and Peoples’ Rights (the Charter) provides that “every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work.” By virtue of Articles 2 and 3, this right should be afforded on a non-discriminatory basis. In 2010, the African Commission adopted ‘Guidelines and Principles on Economic, Social and Cultural Rights’ under the Charter. The guidelines identify disability as a ground of discrimination and make specific recommendations in connection with the right to work.³² In 2018 a Protocol to the African Charter on the Rights of Persons with Disabilities in Africa was adopted. Article 5 of the Protocol sets out the prohibition of discrimination, whilst Article 6 concerns the right to

²⁸ Following a Resolution of the International Labour Conference in June 2022, this list has been extended. At the time of writing, 11 Conventions are considered Fundamental to the right to work, including the 2014 Protocol to the Forced Labour Convention, the Occupational Safety and Health Convention, and the Promotional Framework for Occupational Safety and Health Convention. See International Labour Organization, Conventions and Recommendations, 2022, available at: <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>; and 2021, available at: <https://web.archive.org/web/20210224002158/https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>

²⁹ See, for example, the International Labour Organization Committee of Experts on the Application of Conventions and Recommendations, Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Direct Request (Kenya) adopted 2020, published 109th ILC session (2021).

³⁰ International Labour Organization, Convention No. 190 (Violence and Harassment Convention), Article 6.

³¹ See, for instance, International Labour Organization, Convention No. 159 (Vocational Rehabilitation and Employment (Disabled Persons) Convention); and Recommendation No. 204 (Transition from the Informal to the Formal Economy Recommendation), para. 7(i).

³² See African Commission on Human and Peoples’ Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, 2010, paras. 1(d) and 56-59.

equality. A broad duty to ensure accessibility is established under Article 15, whilst Article 19 concerns the right to work. In February 2022 Kenya became one of the first States to ratify the Protocol, although this instrument is yet to enter into force.³³

Both international and regional human rights bodies have recognised the importance of securing the right to work on an equal and non-discriminatory basis to the effective enjoyment of other human rights.³⁴ In this Connection, the African Commission has noted that “the right to work (...) forms an inseparable and inherent part of human dignity and is integral to an individual’s role within society. Access to equitable and decent work (...) can also be critical for both survival and human development.”³⁵ In its General Comment No. 8, the CRPD Committee notes that the “right to work is a fundamental right, essential for realising other human rights, and forms an inseparable and inherent part of human dignity. The right to work also contributes to the survival of individuals and to that of their family, and, insofar as work is freely chosen or accepted, to their development and recognition within the community.”³⁶

1.2 The Respect, Protect, Fulfil Framework

Ratifying a human rights treaty gives rise to three interrelated duties: obligations to respect, protect, and fulfil. In recent years, UN treaty bodies have elaborated this framework within the work and employment context, establishing clear standards that States are required to meet to ensure that the rights are made practical and effective, and afforded on an equal and non-discriminatory basis.

(a) The Obligation to Respect

The obligation to respect the right to work consists of a number of elements. Firstly, it entails a duty to refrain from discrimination. Under Article 27 of the CRPD, States commit to ensure the right to work “on an equal basis” and under Article 4(1)(d) agree not to engage “in any act or practice that is inconsistent with the (...) Convention and to ensure

³³ Kenya Ministry of Foreign Affairs, “Kenya Deposits Three Instruments with AU”, 7 February 2022, available at: <https://mfa.go.ke/kenya-deposits-three-instruments-with-au/>

³⁴ See also, Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/46/47, 2021, para. 20.

³⁵ African Commission on Human and Peoples' Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, Part 4, para. 57.

³⁶ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 2.

that public authorities and institutions act in conformity” with this obligation.³⁷ The duty to refrain from discrimination in work and employment has been recognised by a range of human rights mechanisms, including the CESCR Committee.³⁸ In its guidance, the African Commission on Human and Peoples’ Rights has noted the obligation of States to “refrain from interfering directly or indirectly with the enjoyment of economic, social and cultural rights.”³⁹ On the basis of Articles 2 and 3 of the Charter, this includes a discrete obligation to abstain from discriminatory conduct. The duty to refrain from discrimination in the right to work may also impose obligations on the State in respect of private actors. In particular, the CESCR Committee has noted that States should avoid “procuring goods and services from individuals and enterprises that abuse the right.”⁴⁰

In addition to refraining from discrimination, States are required to review their laws and policies, and amend or remove any that have the effect of discriminating against persons with disabilities. This obligation is made explicit under Article 4(1)(b) of the CRPD, through which States commit “to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination.” In its general comments, the CESCR Committee has noted that “violations of the obligation to respect the right to work include laws, policies and actions that contravene the standards laid down in Article 6 of the Covenant.” This includes laws and policies that discriminate.⁴¹ As a clear parallel to this obligation, the Committee has further noted the duty of States to refrain from repealing or suspending “legislation necessary for continued enjoyment of the right to work.”⁴²

Whilst the right to work may be progressively realised, subject to a State’s maximum available resources,⁴³ the UN treaty bodies have been clear that the right to non-

³⁷ In its General Comment No. 8, the CRPD Committee expands on this obligation in the context of the right to work. See Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, paras. 55 and 57.

³⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 58. See also, more broadly, Committee on the Elimination of Discrimination against Women, General Recommendation No. 28, UN Doc. CEDAW/C/GC/28, 2010, para. 9.

³⁹ African Commission on Human and Peoples’ Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, 2010, Part 2, paras. 5-6.

⁴⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 59.

⁴¹ Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, paras. 27(b) and 33.

⁴² Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, para. 32.

⁴³ Convention on the Rights of Persons with Disabilities, Article 4(2); International Covenant on Economic, Social and Cultural Rights, Article 2(1).

discrimination “is immediately applicable and is neither subject to progressive implementation nor dependent on available resources.”⁴⁴ The right “is directly applicable to all aspects of the right to work.”⁴⁵ Consequently, a State cannot explain its failure to meet its non-discrimination obligations by reference to purely resource-based considerations.⁴⁶ The African Commission on Human and Peoples’ Rights has made similar observations. Whilst the obligation to ensure economic, social and cultural rights is progressively realisable, “the obligation to prevent discrimination” in the enjoyment of these rights is “immediate upon ratification of the Charter.”⁴⁷

(b) The Obligation to Protect

The obligation to protect requires States to adopt measures to prevent discrimination by private, as well as public actors. This duty is clearly established under Article 4(1)(e) of the CRPD, which requires States to “take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise.”⁴⁸ A range of human rights bodies, including the Human Rights Committee, the CEDAW Committee and the CERD Committee have recognised States’ obligations to protect individuals from discrimination by private entities and individuals.⁴⁹ This includes all forms of discrimination in the area of employment. In this context, the CESCRC Committee has noted that “the obligation to protect requires States parties to take measures that prevent third parties, including private sector employees and enterprises, from interfering with the enjoyment of the right.”⁵⁰ Similarly, in its guidance, the African Commission has noted that “the obligation to protect requires the State to take positive measures to ensure that non-State actors such as multi-national corporations, local companies, private persons, and armed groups do not

⁴⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, para. 33. See also, Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 12; Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, paras. 54 and 63.

⁴⁵ *Ibid.*, Committee on Economic, Social and Cultural Rights.

⁴⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 13.

⁴⁷ African Commission on Human and Peoples’ Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, 2010, Part 2, para. 16.

⁴⁸ See also Article 4(1)(c), which requires States to “take into account the protection (...) of the human rights of persons with disabilities in all policies and programmes.”

⁴⁹ See Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 58, and the sources cited in footnote 44.

⁵⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, para. 22; Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 59. See also, in the context of the right to non-discrimination, Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 11.

violate economic, social and cultural rights.”⁵¹ As with the duty to respect the right, the African Commission has noted that the “obligation to protect the individual from discrimination is immediate” in nature and is therefore not subject to progressive realisation.⁵²

To meet their obligations to protect, States are required to adopt a range of measures, which should include the adoption of specific employment legislation.⁵³ To ensure the right to work on an equal basis, national legislation must also protect individuals from discrimination. This obligation is made clear under Article 5 of the CRPD, which requires States to “prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.” To give effect to this obligation, the CRPD Committee has identified the need for comprehensive anti-discrimination legislation.⁵⁴ There is now broad consensus on the need for such legislation at the international and regional levels.⁵⁵ In the work context, the CESCR Committee has noted that comprehensive anti-discrimination law is required “to guarantee equal treatment” in areas such as “hiring, promotion and termination.”⁵⁶ In its Concluding Observations, the African Commission on Human and Peoples’ Rights has also called on States to adopt such law.⁵⁷

The International Labour Organization has recognised that comprehensive anti-discrimination legislation is needed to address “persisting patterns” of discrimination and inequality in employment.⁵⁸ To be effective, such legislation should: (i) possess a wide material scope

⁵¹ African Commission on Human and Peoples’ Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, 2010, Part 2, para. 7.

⁵² African Commission on Human and Peoples’ Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, 2010, Part 2, para. 19.

⁵³ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 50.

⁵⁴ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 22.

⁵⁵ The obligation to adopt such law is discussed at length in Part One of the Practical Guide. The Guide expands upon the necessary content of comprehensive anti-discrimination legislation, by reference to established international and regional human rights standards. See further, United Nations Human Rights Office, ‘Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation’, New York and Geneva, 2023, pp. 1-15; and OHCHR, “Comprehensive anti-discrimination legislation must be a priority, say UN experts ahead of Universal Declaration anniversary”, 7 December 2022.

⁵⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 33.

⁵⁷ See for example, African Commission on Human and Peoples’ Rights, Concluding Observations on the Republic of Kenya, 2016, para. 55.

⁵⁸ International Labour Organization, Report of the Committee of Experts on the Application of Conventions and Recommendations, 2009, para. 109, available at:

[https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2009-98-1A\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2009-98-1A).pdf)

“covering the broadest group of workers” in all areas of employment; (ii) include explicit definitions of the different forms of discrimination; (iii) allocate clear and “explicit supervisory responsibilities to competent national authorities”; (iv) introduce effective and “dissuasive sanctions” alongside “appropriate remedies” in cases of rights violations; (v) establish ameliorated procedural rules governing the burden of proof, which should shift from the claimant to the respondent once a **prima facie** case of discrimination is established; (vi); explicitly prohibit victimisation; (vii) provide for the adoption of positive action measures; (viii) establish equality duties requiring the “adoption and implementation of equality policies or plans at the workplace”; and (ix) include specific rules relating to data-collection and disaggregation.⁵⁹ Each of these requirements is expanded and elaborated in the UN Human Rights Office’s recent ‘Practical Guide’.⁶⁰

(c) The Obligation to Fulfil

The obligation to fulfil requires the adoption of a wide-ranging and comprehensive package of “legislative, administrative, budgetary, judicial and other measures” to promote equality in the right to work.⁶¹ The CRPD Committee has noted that promoting equality is a “cross-cutting obligation” under the Convention which, alongside the prohibition of discrimination, is of immediate application and “not subject to progressive realisation.”⁶² States’ obligations in this area can be separated into three main components, discussed below and detailed further in Sections 2.5 and 3 of this Report.

Firstly, States are required to adopt positive action to promote equality for persons with disabilities in employment. This obligation is made explicit under Article 27(1)(h) of the CRPD, which requires States to “promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures.” Such measures, according to Article 5(4), “shall not be considered discrimination under the terms of the present Convention” provided that they are necessary “to accelerate or achieve de facto equality of persons with disabilities.”⁶³

Secondly, as set out under Article 8(2)(b) of the CRPD, States are required to adopt measures to address ableism and other stereotypes that may **de facto** prevent the employment of

⁵⁹ Ibid., para. 109.

⁶⁰ See, in particular, United Nations Human Rights Office, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, New York and Geneva, 2023, pp. xi- xix.

⁶¹ See, for example, Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, paras. 22 and 27.

⁶² Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 12.

⁶³ Positive action is discussed in further detail in Section 2.5 of this Report.

persons with disabilities. This obligation applies in “all areas of life” and includes a discrete obligation to address “prejudices and harmful practices” that occur on an intersectional basis.⁶⁴ Human rights bodies have identified different practical measures that are needed to give effect to this obligation.⁶⁵ This includes, for example, awareness-raising, training and rights-sensitisation programmes.

Finally, States are required to undertake equality planning. This should include, at a minimum, the enactment of a national equality plan;⁶⁶ the adoption of a national employment strategy and accompanying plan of action;⁶⁷ and the development of workplace employment policies that seek to identify and eliminate barriers to participation in both the public and private sectors.⁶⁸ According to Article 4(1)(c) of the CRPD, the rights of persons with disabilities should be mainstreamed in all policies and programmes.⁶⁹ To achieve this goal, equality impact assessment is required. In many countries novel equality duties have been adopted to instrumentalise States’ equality obligations in this area.

2 Components of the Right to Work

As previously noted, Article 27 of the CRPD requires States to “recognise the right of persons with disabilities to work on an equal basis with others.” The phrase “on an equal basis” is substantively linked to the principle of non-discrimination, which operates as both an immediate and overarching obligation.⁷⁰ Discrimination is prohibited under Article 5 of the Convention, and defined under Article 2 as “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.” From this general definition, the CRPD Committee has identified four “main” forms of discrimination. This includes direct discrimination, indirect discrimination, denial of reasonable accommodation, and harassment. Reflecting upon the Committee’s guidance, and the practice of other UN

⁶⁴ Convention on the Rights of Persons with Disabilities, Article 8(2)(b).

⁶⁵ See the discussion in Section 3.1(b) of this Report.

⁶⁶ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 73(j).

⁶⁷ See, for example, Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, para. 26.

⁶⁸ See, illustratively, International Labour Organization, Report of the Committee of Experts on the Application of Conventions and Recommendations, 2009, para. 109, available at: [https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2009-98-1A\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2009-98-1A).pdf)

⁶⁹ Convention on the Rights of Persons with Disabilities, Article 4(1)(c).

⁷⁰ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, paras. 7, and 12.

and regional human rights bodies, the United Nations Human Rights Office has offered the following definitions of these terms:⁷¹

- **Direct discrimination** occurs when a person is treated less favourably than another person is, has been or would be treated in a comparable situation on the basis of one or more protected grounds; or when a person is subjected to a detriment on the basis of one or more grounds of discrimination.
- **Indirect discrimination** occurs when a provision, criterion or practice has or would have a disproportionate negative impact on persons having a status or a characteristic associated with one or more grounds of discrimination.
- **Ground-based harassment** occurs when unwanted conduct related to any ground of discrimination takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
- **Reasonable accommodation** means necessary and appropriate modifications or adjustments or support, not imposing a disproportionate or undue burden, to ensure the enjoyment or exercise, on an equal basis with others, of human rights (...) and equal participation in any area of life regulated by law. Denial of reasonable accommodation is a form of discrimination.

In addition to these prohibited conducts, the Committee has identified **segregation** as a distinct form of harm.⁷² The Committee has further stressed States' obligations to prohibit victimisation.⁷³

Discrimination may involve both acts, and failures to act, and the Committee has made clear that “the motive or intention of the discriminating party is not relevant to a determination of whether discrimination has occurred.”⁷⁴ To benefit from protection from discrimination, it is not necessary to actually possess a protected characteristic: the Committee has made clear that discrimination may be directed against individuals “who are presumed to have a disability, as well as those who are associated with a person with a disability.”⁷⁵ Discrimination may occur on the basis of disability alone, or in connection with

⁷¹ United Nations Human Rights Office, ‘Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation’, New York and Geneva, 2023, pp. xiii and 29-47.

⁷² See, for example, in the context of inclusive education. Committee on the Rights of Persons with Disabilities, General Comment No. 4, UN Doc. CRPD/C/GC/4, 2016.

⁷³ Discussed further below. Sometimes victimisation is termed “reprisal” or “retaliation”.

⁷⁴ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 18 (a).

⁷⁵ Ibid., para. 20.

another ground such as race, age, gender, or sexual orientation. This is known as “multiple” or “intersectional” discrimination.⁷⁶ To meet their obligations in the area of work and employment, States are required to recognise and legally prohibit each of these forms and manifestations of discrimination.

Article 27(1)(a) of the CRPD expressly requires States to “prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment.”⁷⁷ The different components of this right are then elaborated in paragraphs (b) to (k) and include, **inter alia**, the free choice of work; equal conditions of work; trade union rights; and vocational training, advancement and rehabilitation. In addition to prohibiting discrimination, in each of these areas States are also required to adopt positive action measures to advance equality for persons with disabilities.⁷⁸

2.1 Work Freely Chosen

Article 27 of the CRPD sets out “the right of persons with disabilities to work on an equal basis with others.”⁷⁹ To meet the requirements of the Convention, States are obliged to ensure to persons with disabilities “the opportunity to gain a living by **work freely chosen or accepted** in a labour market and work environment that is open, **inclusive and accessible** to persons with disabilities.”⁸⁰ Free choice of work includes the opportunity of self-employment, and encompasses obligations relating to both the formal and informal economy.⁸¹

Various UN human rights instruments capture aspects of this right,⁸² which has also been elaborated at the regional level. For example, in its guidance on Article 15 of the Charter, the African Commission on Human and Peoples’ Rights has noted that “the right to work includes the right to freely and voluntarily choose what work to accept.”⁸³ The Commission

⁷⁶ In additional-to-additional grounds. See *Ibid.*, paras. 19 and 21.

⁷⁷ Convention on the Rights of Persons with Disabilities, Article 27(1)(a).

⁷⁸ *Ibid.*, Articles 27(h) and 5(4).

⁷⁹ See also, International Covenant on Economic, Social and Cultural Rights, Article 6; African Commission on Human and Peoples’ Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, 2010, para. 58.

⁸⁰ Convention on the Rights of Persons with Disabilities, Article 27(1).

⁸¹ Convention on the Rights of Persons with Disabilities, Article 27(1)(f). In the context of self-employment, it is important that persons with disabilities are ensured full legal capacity to enter into contracts. This forms part of a broader obligation, which is elaborated in the CRPD Committee’s General Comment No. 1.

⁸² See the discussion below, particularly in respect of compulsory labour.

⁸³ African Commission on Human and Peoples’ Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, 2010, Part 4, para. 58.

has called on States to take “appropriate steps to realise the right”, whilst providing illustrative examples of measures to be adopted.⁸⁴ Similarly, under Article 1 of ILO Convention No. 122 (the Employment Policy Convention), States parties undertake to “declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment.” The CEACR has also issued guidance on some of the actions needed to realise this goal.⁸⁵

Implicit within the concept of “free choice” is the notion of consent. This notion has been elaborated by several treaty bodies, including the CRPD Committee, in varying contexts.⁸⁶ To meet human rights standards, consent must not just be given, but “freely informed”.⁸⁷ This implies the availability of real choice, and the absence of coercion.⁸⁸ Consequently, States are required to ensure that workplaces and work environments are fully accessible to persons with disabilities, and that a “lack of meaningful alternatives” does not force such persons to work in unsafe conditions, or limit the availability of employment to particular areas of work or segregated facilities, such as sheltered workshops.⁸⁹

(a) Inclusion and Accessibility

To meet the requirements of Article 27, workplaces and the labour market must be “open, inclusive and accessible.”⁹⁰ Elaborating this requirement, the CRPD Committee has noted that “persons with disabilities cannot effectively enjoy their work and employment rights, as described in Article 27 of the Convention, if the workplace itself is not accessible.”⁹¹ Article 9 of the CRPD establishes an independent right to accessibility, which requires States parties to “take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural

⁸⁴ Ibid., para. 59(e).

⁸⁵ See for example, International Labour Organization Committee of Experts on the Application of Conventions and Recommendations, ‘General Observation adopted 2020, published 109th ILC session’, 2021, available [here](#).

⁸⁶ See for example, in the context of the healthcare Committee on the Rights of Persons with Disabilities, General Comment No. 1, UN Doc. CRPD/C/GC/1, paras. 40-41. UN Special Procedure mechanisms have also elaborated this concept in their annual reports. See, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/64/272, 2009.

⁸⁷ Ibid.

⁸⁸ These concepts are elaborated in para. 53 of the CRPD Committee’s General Comment No. 8.

⁸⁹ Ibid.

⁹⁰ Convention on the Rights of Persons with Disabilities, Article 27(1).

⁹¹ Committee on the Rights of Persons with Disabilities, General Comment No. 2, UN Doc. CRPD/C/GC/2, 2014, para. 41. See also Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 47(c).

areas.” To meet this obligation, States should take steps to identify and eliminate “obstacles and barriers to accessibility” in the workplace.⁹² This, in turn, requires the adoption and enforcement of minimum accessibility standards, which should be developed in consultation with persons with disabilities and their representative organisations, and establish clear enforcement, oversight and monitoring mechanisms.⁹³

The content of the right to accessibility in work and employment was expounded by the CRPD Committee in its General Comment No. 2. There, the Committee drew a distinction between the duty to ensure accessibility and the duty to provide reasonable accommodation. Whilst reasonable accommodation is an individual right, applicable “from the moment an individual with an impairment needs it in a given situation”,⁹⁴ accessibility is an “ex ante duty” which should be provided before “an individual request to enter or use a place or service” is received.⁹⁵ In this sense the duty to ensure accessibility is a broader, proactive obligation that seeks to address systemic barriers to participation. Whilst the duty to ensure reasonable accommodation is limited by the concept of “undue burden”, “the obligation to implement accessibility is unconditional, i.e., the entity obliged to provide accessibility may not excuse the omission to do so by referring to the burden of providing access for persons with disabilities.”⁹⁶

For States to meet their accessibility obligations, they must adopt accessibility standards. These standards should govern all areas of life, including the workplace, and related areas, such as “transport and support services” which are required to guarantee persons with disabilities’ equal access to work.⁹⁷ Adopted standards should also establish clear obligations for private actors, including employers.⁹⁸ In this regard, the Committee has drawn a further distinction between the duty to “ensure access to all newly designed, built or produced objects, infrastructure, goods, products and services” and the duty to “remove barriers and ensure access to the existing physical environment and existing transportation, information and communication, and services.”⁹⁹ Whilst the former obligation is immediate, requiring that all new objects observe the principle of universal design, the latter “is to be implemented

⁹² Amongst other areas. See Convention on the Rights of Persons with Disabilities, Article 9(1)(a).

⁹³ *Ibid.*, Article 9(2)(a). See also, Committee on the Rights of Persons with Disabilities, General Comment No. 2, UN Doc. CRPD/C/GC/2, 2014, paras. 28, 30, and 33. For an example of good practice in this area, see the Accessible Canada Act, and the discussion of the Act provided by the Canadian Human Rights Commission in its 2021 Submission to the Committee on the Rights of Persons with Disabilities, which is available [here](#).

⁹⁴ *Ibid.*, para. 26.

⁹⁵ *Ibid.*, para. 25.

⁹⁶ *Ibid.*, para. 25.

⁹⁷ *Ibid.*, para. 41.

⁹⁸ *Ibid.*, paras. 24 and 30.

⁹⁹ *Ibid.*, para. 24.

gradually”, requiring the adoption of specific measures which set “definite time frames and allocate adequate resources” for removing existing barriers.”¹⁰⁰

The Committee has provided several examples of accommodating and accessibility measures, which may include – for instance – the adaptation of information and communication systems, as well as the transformation of the physical environment and provision of assistive devices.¹⁰¹ A “refusal to adapt the workplace” contrary to established standards “constitutes a prohibited act of disability based discrimination.”¹⁰² The duty applies to all aspects of work, including, **inter alia**, job adverts, selection processes, trade union rights, and vocational training and rehabilitation.¹⁰³

Other UN treaty bodies have also recognised a duty to ensure accessibility. This duty is made clear under Article 5(f) of the ICERD, which requires States to guarantee without discrimination “the right of access to any place or service intended for use by the general public.” The CESCR Committee has developed the concept in its general comments, particularly in the context of the right to health.¹⁰⁴ In the employment sphere, the Committee has noted the obligation of States to ensure “an enabling labour market environment” which requires adaptations to “the workplace and equipment for persons with disabilities in the public sector” alongside the establishment of incentives for “the private sector” to do likewise.¹⁰⁵ The ILO has issued similar guidance.¹⁰⁶ Accessibility has also been identified as an important element of access to justice, discussed further in Section 4 of this Report.¹⁰⁷

(b) Forced Labour, Segregation and Sheltered Workshops

To ensure the right to work to persons with disabilities, work must be “freely chosen or accepted.”¹⁰⁸ The CESCR Committee has noted that the condition of free choice implies – at

¹⁰⁰ Ibid., paras. 24 and 31. On the need for universal design in the context of the right to work, see also Committee on Economic, Social and Cultural Rights, General Comment No. 24, UN Doc. E/C.12/GC/24, 2017, para. 24.

¹⁰¹ Ibid., para. 41. See also Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/46/47, 2021, para. 52.

¹⁰² Ibid., paras. 31 and 41.

¹⁰³ Ibid., para. 41.

¹⁰⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 14, 2000, para. 12(b).

¹⁰⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 64. See also Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, para. 12.

¹⁰⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 5, 1994, para. 22.

¹⁰⁷ See, for example, Committee on the Elimination of Discrimination against Women, General Recommendation No. 33, UN Doc. CEDAW/C/GC/33, 2015, para. 14(c).

¹⁰⁸ Convention on the Rights of Persons with Disabilities, Article 27(1); International Covenant on Economic, Social and Cultural Rights, Article 6; African Commission on Human and Peoples' Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, para. 58.

a minimum – that individuals cannot be “forced in any way whatsoever to exercise or engage in employment.”¹⁰⁹ Article 27(2) of the CRPD makes this obligation explicit, requiring States to ensure that “persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.” Equivalent provisions are included in a range of human rights instruments adopted at both the international and regional levels.¹¹⁰

To ensure free choice of work, the choice must be “real.”¹¹¹ This implies the absence of conditions that may “unfairly deprive” a person with disabilities the opportunity of employment.¹¹² To meet this requirement, States must adopt a wide range of measures to facilitate equal access to the labour market. The enforcement of laws and policies that prohibit discrimination, the provision of accessibility and accommodating measures, and the adoption of positive action are essential to achieving this goal. Where persons with disabilities can only achieve employment in segregated facilities, the requirements of Article 27(1) are not met. In this connection, the CESCR Committee has noted that “the ‘right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’ is not realised where the only real opportunity open to [workers with disabilities] is to work in so-called ‘sheltered’ facilities under substandard conditions.”¹¹³

The CRPD Committee has identified segregation as an independent form of discrimination on a number of separate occasions, and in various contexts.¹¹⁴ In the area of employment, the Committee has urged States to “facilitate the transition away from segregated work environments for persons with disabilities and support their engagement in the open labour market.”¹¹⁵ The term “segregation” is not expressly defined in any of the core UN human rights treaties, however, the OHCHR has recently offered a definition based on an assessment of practice across the international and regional human rights systems. In short, segregation “occurs when persons sharing a particular ground are, without their full, free and

¹⁰⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, para. 6.

¹¹⁰ See illustratively, International Covenant on Civil and Political Rights, Article 8; International Labour Organization Convention No. 29 (Forced Labour), Article 2(1); African Commission on Human and Peoples' Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, para. 59(a).

¹¹¹ Committee on Economic, Social and Cultural Rights, General Comment No. 5, 1994, para. 21.

¹¹² Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, para. 6.

¹¹³ Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, para. 17.

¹¹⁴ See, for example, Committee on the Rights of Persons with Disabilities, General Comment No. 4, UN Doc. CRPD/C/GC/4, 2016, para. 13 and Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, paras. 30, 64, 67(a) and 73(c).

¹¹⁵ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 67(a).

informed consent, separated and provided different access to institutions, goods, services, rights or the physical environment.”¹¹⁶

Reflecting this approach, the CRPD Committee has urged States to eliminate sheltered workshops, which have the effect of separating persons with disabilities from the rest of society, and which fail to meet the requirements of full, free and informed consent.¹¹⁷ As segregation is recognised as a form of discrimination, this obligation is immediate in nature.¹¹⁸ However, the closure of sheltered workshops may itself produce discriminatory impacts, due to the immediate prospects of a loss of employment for persons with disabilities. Consequently, the Committee has urged States to phase these systems out “within a time-bound schedule” whilst adopting a “plan for transfer of those currently employed (...) into the open labour market.”¹¹⁹ In the meantime, States are under a strict obligation to “ensure the immediate applicability of labour rights” to existing sheltered settings.¹²⁰

2.2 Just and Favourable Conditions of Work

Article 27(1)(b) of the CRPD requires States to “protect the rights of persons with disabilities (...) to just and favourable conditions of work.” This includes “equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances.”¹²¹ Article 7 of the ICESCR contains an equivalent provision, requiring States to recognise “the right of everyone to the enjoyment of just and favourable conditions of work” in areas including remuneration, working conditions, rest, leisure and working hours. The conditions of Article 7 have been elaborated by the CESCR Committee in its General Comment No. 23.¹²² The right to just and favourable conditions of work

¹¹⁶ See United Nations Human Rights Office, ‘Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation’, New York and Geneva, 2023, pp. xiii, and 42.

¹¹⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, paras. 12-15, 73, and 82(i).

¹¹⁸ See the discussion in Section 1.2 of this Report.

¹¹⁹ See for instance, Committee on the Rights of Persons with Disabilities, Concluding Observations on Luxembourg, UN Doc. CRPD/C/LUX/CO/1, 2017, para. 47. See also, Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 82(i).

¹²⁰ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 67(a). These requirements do not affect the nature of States’ non-discrimination obligations, and it is clear from international practice that sheltered workshops continue to infringe the right to work freely chosen and on an equal basis. See, for instance, Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, para. 17.

¹²¹ Convention on the Rights of Persons with Disabilities, Article 27(1)(b).

¹²² Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016.

has been described as “the corollary of the right” to work “freely chosen or accepted.”¹²³ Whilst the former focuses on the absence of barriers that may prevent persons with disabilities accessing the labour market on an equal basis, the latter seeks to ensure that persons with disabilities are not disadvantaged in the conditions of their employment.

(a) Equal Conditions of Employment

The CESCR Committee has clarified that the right to just and favourable conditions of work “is a right of everyone, without distinction of any kind.”¹²⁴ The use of the term “everyone” reinforces the prohibition of discrimination, making clear that “the right applies to all workers in all settings, regardless of gender, as well as young and older workers, workers with disabilities, workers in the informal sector, migrant workers, workers from ethnic and other minorities, domestic workers, self-employed workers, agricultural workers, refugee workers and unpaid workers.”¹²⁵ The ban on discrimination is made clear under Article 27(1)(a) of the CRPD, which requires States to “prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions.” This list of areas is illustrative rather than exhaustive,¹²⁶ and it is clear that the ban on discrimination applies to all aspects of work at every stage of the employment process, including contracting, promotion and termination.¹²⁷

The prohibition of discrimination incorporates each of the recognised forms of prohibited conduct discussed at the beginning of this Section, including direct discrimination, indirect discrimination and segregation.¹²⁸ In addition to these forms of harm, Article 27(1)(i) of the CRPD expressly requires the provision of reasonable accommodation in the workplace, whilst Article 27(1)(b) prohibits harassment. The fact that these forms of discrimination are explicitly listed under Article 27 does not indicate that they are of greater or lesser severity. The CRPD Committee has clarified that every form of discrimination is “equally contrary to the Convention”, and that there can be no scope to “differentiate among contraventions of

¹²³ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 25.

¹²⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 5.

¹²⁵ *Ibid.* para. 5.

¹²⁶ *Ibid.*, para. 5.

¹²⁷ In this connection, the CRPD Committee has been critical of States where the right to reasonable accommodations has been limited to particular areas of life or applied solely as a de facto protection against dismissal. See, for example, Committee on the Rights of Persons with Disabilities, Concluding Observations on Russia, UN Doc. CRPD/C/RUS/CO/1, 2018, paras. 13 and 14; Concluding Observations on the Philippines, UN Doc. CRPD/C/PHL/CO/1, 2018, paras. 10, 11, 46 and 47.

¹²⁸ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 18.

the right to equality and non-discrimination in terms of their so-called degree of seriousness.”¹²⁹

In its practice the Committee has identified different examples of discriminatory laws and policies that States are required to address to give effect to their non-discrimination obligations. This includes, for instance, “policies requiring certifications to establish that persons with disabilities are fit for employment”, laws that limit the employment of particular groups of persons with disabilities in certain posts or sectors, and capacity to work and medical fitness examinations.¹³⁰

There may be times where a differentiation relating to disability is justified. This is most clear in respect of reasonable accommodation, where the Committee has developed the concepts of “disproportionality” or “undue burden.” These concepts reflect that the duty to accommodate is not violated where a modification would impose an “excessive or unjustifiable burden on the accommodating party.”¹³¹ To determine whether an accommodating measure is disproportionate, “requires an assessment of the proportional relationship between the means employed” and the aim of ensuring equal participation.¹³² Thus, for example, it may be disproportionate to require a small employer with limited financial resources to make structural changes to a building, when the cost would vastly exceed their annual income.¹³³

In respect of other forms of prohibited conduct, the Committee has not issued clear guidance on the justification test to be employed, although other treaty bodies have been more directive in this regard. Based on an assessment of international and regional human rights practice, the OHCHR has identified three core elements of the justification test. Firstly, measures must pursue a legitimate aim. For example, a job test which requires a firefighter to demonstrate that they can control a hose may be legitimate to the aim of ensuring public

¹²⁹ Committee on the Rights of Persons with Disabilities, ‘VFC v. Spain’, UN Doc. CRPD/C/21/D/34/2015, para. 8.5.

¹³⁰ Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/46/47, 2021, para. 37.

¹³¹ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 25(b).

¹³² *Ibid.*, para. 26(d).

¹³³ The Committee lists some of the contextual factors to be considered in this determination. To determine whether an accommodation is “reasonable” requires an assessment of the appropriateness of a measure in achieving its stated goal. Reasonableness is a distinct concept, which is separate from the question of justification. As noted in Section 2.1(a) of this Report, the duty to comply with accessibility standards is absolute and cannot be justified by reference to economic or other criteria. See *Ibid.*, paras. 25(a) and 26(e).

safety.¹³⁴ Secondly, measures adopted must be necessary. This means that no less restrictive measures could achieve the same objective. Finally, measures must be proportionate.¹³⁵

Translated into the employment context, it is apparent that these conditions are not met where broad standards relating to persons with disabilities as a group are developed and applied to the individual. This issue arose in the case of **VFC v. Spain**.¹³⁶ The applicant had been involved in a traffic accident. Pursuant to legislation he was designated as having a “permanent total disability” and forced to take compulsory retirement.¹³⁷ In its assessment, the Committee found a violation of Articles 27 and 5 of the Convention, noting that the application of the rules had the effect of precluding the possibility of reasonable accommodation and the “opportunity for an assessment of fitness for alternative duties” for persons in the applicant’s position.¹³⁸ Mirroring the findings of the Human Rights Committee in this area, the CRPD Committee has signalled the need for “individualised assessment to determine suitability for bona fide occupational requirements.”¹³⁹ Capacity to work should be assessed based on the essential requirements of a job, rather than arbitrary, stereotyped or subjective criteria.¹⁴⁰ This requires “objective standards for hiring, promotion and termination that are aimed at achieving equality.”¹⁴¹

(b) Equal Remuneration for Work of Equal Value

The right to just and favourable conditions of work under Article 27(1)(b) of the CRPD includes “equal remuneration for work of equal value.” This condition is expanded under Article 7 of the ICESCR, to include fair wages and a decent standard of living, alongside equal pay for women.¹⁴² Article 5(e)(i) of the ICERD establishes similar conditions, guaranteeing the right of ethnic and racial minorities to “equal pay for equal work” and “just and favourable remuneration.” Similarly, under the CEDAW, States parties commit to ensure

¹³⁴ Indeed, the Human Rights Committee has accepted the protection of public safety as a legitimate aim. See Human Rights Committee, *EG v. Italy*, UN Doc. CCPR/C/128/D/2979/2017, 2020.

¹³⁵ See United Nations Human Rights Office, ‘Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation’, New York and Geneva, 2023, pp. 51-56.

¹³⁶ Committee on the Rights of Persons with Disabilities, ‘*VFC v. Spain*’, UN Doc. CRPD/C/21/D/34/2015.

¹³⁷ *Ibid.*, para. 2.2

¹³⁸ *Ibid.*, paras. 8.10 and 8.12.

¹³⁹ Committee on the Rights of Persons with Disabilities, *Concluding Observations on Jordan*, UN Doc. CRPD/C/JOR/CO/1, 2017, para. 50(a). See also Human Rights Committee, ‘*EG v. Italy*’, UN Doc. CCPR/C/128/D/2979/2017, 2020.

¹⁴⁰ This also applies to perceived safety risks. For comparative case law, see Committee on the Elimination of Discrimination against Women, ‘*Medvedeva v. Russia*’, UN Doc. CEDAW/C/63/D/60/2013, 2016, para. 11.3.

¹⁴¹ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 33.

¹⁴² International Covenant on Economic, Social and Cultural Rights.

the “right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.”¹⁴³ As discussed in Section 1.1 of this Report, both the CEDAW and CERD Committees have recognised that the prohibition of discrimination under their treaties includes intersectional discrimination on the basis of gender, race and disability. The African Commission has also clarified that the “right of everyone to equitable and satisfactory conditions of work” includes “fair remuneration.”¹⁴⁴ This protection should be afforded on an equal and non-discriminatory basis to all categories of workers, including those working in the informal sector.¹⁴⁵

To meet the requirements of international law, remuneration must be fair. The term “remuneration” is broader than that of “salary” or “wages” and includes “additional direct or indirect allowances in cash or in kind paid by the employer to the employee that should be of a fair and reasonable amount, such as grants, contributions to health insurance, housing and food allowances, and on-site affordable childcare facilities”¹⁴⁶ The CESCR Committee has noted that remuneration must be set at a level to enjoy a decent standard of living and the full enjoyment of other Covenant rights.¹⁴⁷ The establishment of a national minimum wage is a core obligation of States parties, and essential to ensuring that this condition is met.¹⁴⁸ The minimum wage should be set out in national legislation, periodically reviewed and “indexed at least to the cost of living.”¹⁴⁹ Whilst the minimum wage might “differ across sectors, regions, zones and professional categories,” the establishment of differential standards must not result in direct or indirect discrimination.¹⁵⁰ This requires States to pay close attention to the concentration of protected groups in particular fields and forms of work, and to ensure that these are “not undervalued” when establishing minimum standards, compared to other fields and sectors.¹⁵¹ The CRPD Committee has emphasised States’ proactive obligations to ensure that persons with disabilities are not paid less than the minimum wage and do not “lose the benefit of disability allowances when they start work.”¹⁵²

¹⁴³ Convention on the Elimination of All Forms of Discrimination against Women, Article 11(1)(d).

¹⁴⁴ African Commission on Human and Peoples' Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, para. 59(h).

¹⁴⁵ *Ibid.*, paras. 59(h) and (i).

¹⁴⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 11-12.

¹⁴⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 18.

¹⁴⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 65.

¹⁴⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 19-23.

¹⁵⁰ *Ibid.*, paras. 23 and 65.

¹⁵¹ *Ibid.*, paras. 23 and 65.

¹⁵² Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 67(c). See also Committee on Economic, Social and Cultural Rights, General Comment No. 5, 1994, para. 25.

As part of the right to work, workers must be provided fair wages “without distinction of any kind.”¹⁵³ The concept of fairness “is not static, since it depends on a range of non-exhaustive objective criteria, reflecting not only the output of the work but also the responsibilities of the worker, the level of skill and education required to perform the work (...) and the impact on the worker’s personal and family life” amongst other factors.¹⁵⁴ At a minimum, fair wages include equal pay for equal work.¹⁵⁵ Where individuals are performing the same, or substantively the same jobs, they should receive equal remuneration.¹⁵⁶ In this regard, the CESCR Committee has noted that workers with disabilities “may not be discriminated against with respect to wages or other conditions if their work is equal to that” of workers without disabilities.¹⁵⁷ It is important that adjustments or additional forms of support required by persons with disabilities do not inform the assessment of whether work is of an equal value. Where accommodations are required, they must be paid for by the accommodating party, and should not come out of the employee’s salary or be ‘passed on’ to the employee in setting their level of remuneration.¹⁵⁸

In addition to ensuring equal wages for the same work, the CESCR Committee has emphasised that “remuneration should also be equal even when (...) work is completely different but nonetheless of equal value when assessed by objective criteria.”¹⁵⁹ This requirement applies both to salary and other associated work-related benefits.¹⁶⁰ To ensure that the evaluation of work value is fair, it should “cover a broad selection of functions” and identify essential elements of the role, including skills needed and “responsibilities and effort required by the worker” amongst other factors.¹⁶¹ To ensure objectivity, employers may

¹⁵³ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 9.

¹⁵⁴ *Ibid.*, para. 10.

¹⁵⁵ See, for example, Convention on the Elimination of All Forms of Discrimination against Women, Article 11(1)(d).

¹⁵⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 16.

¹⁵⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 5, 1994, para. 25.

¹⁵⁸ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 26(f). More broadly, the CESCR Committee has noted that “workers should not have to pay back part of their wages for work already performed and should receive all wages and benefits legally due.” See Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 10.

¹⁵⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 11. See also, Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 28.

¹⁶⁰ *Ibid.*, CESCR Committee, para. 11.

¹⁶¹ *Ibid.*, para. 12.

choose to compare remuneration levels in similar organisations, fields and roles,¹⁶² and develop pay bands.

The CESCR Committee has noted that “objective job evaluation is important to avoid indirect discrimination when determining rates of remuneration and comparing the relative value of different jobs.”¹⁶³ For example, bonus systems which are applied only to full time workers, may disproportionately impact workers with disabilities, who may be more likely to take part time work for reasons relating to their impairments.¹⁶⁴ The Committee has stressed that persons with disabilities must not experience lower standards in labour protection, including wage discrimination “due to a perceived reduced capacity for work.”¹⁶⁵ At all times, the “extent to which equality is being achieved requires an ongoing objective evaluation of whether the work is of equal value and whether the remuneration received is equal.”¹⁶⁶ As the job evaluation test is objective, employers must not consider irrelevant criteria relating to the personal characteristics of an employee.¹⁶⁷

(c) Leave, Rest and Other Employment Benefits

As part of the right to just and favourable conditions of work, under Article 7(d) of the ICESCR States parties undertake to ensure to all workers equal “rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.”¹⁶⁸ These conditions are essential to achieving other human rights guaranteed by the Covenant, and may “help workers to maintain an appropriate balance between professional, family and personal responsibilities and to avoid work-related stress, accidents and disease.”¹⁶⁹

The CESCR Committee has expanded upon each of the components listed above in its general comments. To protect the right to work, States are required to adopt – in legislation –

¹⁶² Ibid., para. 12.

¹⁶³ Ibid., para. 13.

¹⁶⁴ Ibid., para. 13. See also Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/46/47, 2021, para. 9.

¹⁶⁵ Ibid., CESCR Committee, para. 13.

¹⁶⁶ Ibid., UN Doc. E/C.12/GC/23, 2016, para. 12.

¹⁶⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 47(c). See also, Committee on Economic, Social and Cultural Rights, General Comment No. 5, 1994, para. 25.

¹⁶⁸ See also, African Commission on Human and Peoples' Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, Part 4, para. 59(h).

¹⁶⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 34.

measures which limit the daily and weekly hours of workers.¹⁷⁰ Whilst the Committee has recognised the need for flexibility in this area, it recommends that daily work be limited to no more than 8 hours a day, and that weekly work is limited to no more than 40 hours.¹⁷¹ Throughout the day, individuals should be provided with periods of rest, which should be accompanied by at least 24 consecutive hours of rest within any 7 day period.¹⁷² The Committee notes the importance of rest to ensuring the physical and mental health of workers. Where individuals are required to work additional hours, they should be fairly compensated – including payment for overtime.¹⁷³

In addition to rest, all workers should be guaranteed annual leave, which should be provided in addition to public holidays.¹⁷⁴ Annual leave should consist, “at a minimum, of three working weeks of paid leave for one year of full-time service.”¹⁷⁵ The duty to ensure adequate annual leave applies in respect of both full and part-time workers. The Committee notes that restricting leave to full-time workers may have discriminatory impacts.¹⁷⁶ This is particularly true in respect of persons with disabilities, who – as noted above – are disproportionately more likely to be in part-time employment.¹⁷⁷ A flexible approach to leave and working hours is needed to ensure that there is no discrimination against individuals who require time off for reasons relating to a protected characteristic.¹⁷⁸ This may include, for example, workers with disabilities who require amended working schedules to accommodate travel to the workplace, or who need time off to attend medical appointments. Reasonable accommodations should be provided to ensure that there is no discrimination against workers with disabilities or members of their families who need to take leave to attend to their care or support responsibilities.¹⁷⁹

¹⁷⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 35-37.

¹⁷¹ Ibid.

¹⁷² Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, paras 38-40.

¹⁷³ Ibid.

¹⁷⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 41-44.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid., para. 42.

¹⁷⁷ Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/46/47, 2021, para. 9.

¹⁷⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 35-43.

¹⁷⁹ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 20. In respect of reasonable accommodation, see Committee on the Rights of Persons with Disabilities, Concluding Observations on the European Union, UN Doc. CRPD/C/EU/CO/1, 2015, paras. 78-79. See also, the Committee’s recent discussion of “discrimination by association” in ‘MSB v. Italy’, UN Doc. CRPD/C/27/ D/51/2018, 2022, paras. 7.9 – 7.10.

The CESC Committee has stressed the need to avoid stereotypes when considering the need for leave.¹⁸⁰ For instance, it should not be assumed that male workers require less time off work than women to provide childcare.¹⁸¹ In a similar vein, it is important that assumptions relating to the requirements of persons with disabilities are not made on their behalf, and without their prior consent. Whilst employers and other duty-bearers have clear obligations to provide reasonable accommodations in the workplace at the moment they become aware, or should have become aware, that an accommodation is required,¹⁸² accommodations must be agreed in consultation with the employee, rather than imposed.¹⁸³ Reflecting this, in its initial outline for the development of a draft general comment, the CRPD Committee noted that measures which forcibly limit working hours are “over-protective” and “paternalistic” and may risk creating “additional barriers for persons with disabilities to get into the labour market.”¹⁸⁴

In addition to annual and holiday leave, persons with disabilities are entitled to other benefits, which should be included under national legislation.¹⁸⁵ This includes, for example, “entitlements to maternity, paternity and parental leave, to leave for family reasons and to paid sick leave.”¹⁸⁶ The CESC Committee has emphasised that “workers should not be placed on temporary contracts in order to be excluded from such leave entitlements.”¹⁸⁷ This is an important guarantee for workers with disabilities, as well as members of their family, who may need to take more sick or special leave than other employees for reasons relating to an impairment.

¹⁸⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 36.

¹⁸¹ *Ibid.*, para. 36.

¹⁸² Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 24(b). This point is particularly important in the light of emerging digital technologies. It has been noted, for instance, that online recruitment processes often fail to provide information to an applicant on how to indicate that an accommodation is needed. The fact that an applicant has not expressly requested an accommodation does not alter the obligation. See Business Disability International, Submission to the Committee on the Rights of Persons with Disabilities, 2021, p. 1.

¹⁸³ For instance, this could include the situation where a person with visual impairments suggests that they are encountering difficulties reading a screen. See Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, paras. 23, and 24(b).

¹⁸⁴ See Committee on the Rights of Persons with Disabilities, Outline for the Preparation of a General Comment on Article 27 of the CRPD (the right to work and employment), 2021, available at: https://www.ohchr.org/Documents/HRBodies/CRPD/GC/Outline_GeneralComment_EN.docx Whilst this reflection was not included in the final version of the draft, the Committee has made similar observations as part of its review of States party reports. See, for example, Committee on the Rights of Persons with Disabilities, Concluding Observations on Mongolia, UN Doc. CRPD/C/MNG/CO/1, 2015, para. 40.

¹⁸⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 44.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

(d) Safe and Healthy Working Conditions

Closely related to the provision of rest and leave is the obligation to ensure safe and healthy working conditions. This is an independent and essential component of the right to work, which is expressly recognised in a number of human rights treaties.¹⁸⁸ The obligation can be understood as having two main elements. Firstly, States are required to adopt measures to ensure that the physical environment is safe. Secondly, States are required to ensure protection from harm perpetrated by individuals in work.

The CESCR Committee has noted that “preventing occupational accidents and disease is a fundamental aspect of the right to just and favourable conditions of work, and is closely related to other Covenant rights, in particular the right to the highest attainable level of physical and mental health.”¹⁸⁹ To give effect to this obligation, States should adopt a national policy which seeks to identify environmental risks in the workplace and identify mitigating measures.¹⁹⁰ As discussed in Section 3.2 of this Report, this policy should mainstream the rights of persons with disabilities, who should be directly engaged – including through representative organisations – in the development and oversight of the policy. Where individuals acquire impairments on the job or during the course of their employment they should be provided with rehabilitation.¹⁹¹ If, as a result of acquiring an impairment, a person with disabilities is no longer able to continue in their original role, they should be supported through reasonable accommodations not imposing an undue burden to continue working with equal remuneration for work of equal value.¹⁹²

To ensure that the rights of persons with disabilities are fully met, the State and other duty bearers must work to identify genuine safety risks in employment and ensure that persons with disabilities are not forced to work in unsafe conditions.¹⁹³ This requires the provision of reasonable accommodation to identify and eliminate barriers to participation.¹⁹⁴ As with the limitation of working hours, it is important that the duty to ensure safe and healthy working conditions is not applied in a way that unduly restricts the employment opportunities of persons with disabilities. An individual’s capacity to work should be based on objective criteria

¹⁸⁸ See, for example, International Covenant on Economic, Social and Cultural Rights, Article 7(b); Convention on the Rights of Persons with Disabilities, Articles 27(1)(a) and (b); and Convention on the Elimination of All Forms of Discrimination against Women, Article 11(1)(f).

¹⁸⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 25.

¹⁹⁰ Ibid.

¹⁹¹ See Section 2.4 of this Report.

¹⁹² Committee on the Rights of Persons with Disabilities, *VFC v. Spain*, UN Doc. CRPD/C/21/D/34/2015.

¹⁹³ On this point, see Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 53.

¹⁹⁴ Ibid., para. 53.

and individualised assessment, rather than blanket prohibitions based on stereotyped or medical notions of impairment.¹⁹⁵ Expanding upon this point in the context of gender discrimination, the CEDAW Committee has found laws that prohibit the employment of women in certain professions deemed “dangerous” to their physical and reproductive health to violate international human rights law.¹⁹⁶

Article 27(1)(b) of the CRPD requires States to adopt measures to protect individuals from harassment in the area of work and employment. Harassment can take many forms. As discussed at the outset of this Section, the CRPD Committee has defined ground-based harassment to occur when “unwanted conduct related to disability or other prohibited grounds takes place with the purpose or effect of violating the dignity of a person [or] of creating an intimidating, hostile, degrading, humiliating or offensive environment.”¹⁹⁷ This can transpire through “actions or words”, which “have the effect of perpetuating the difference and oppression of persons with disabilities.”¹⁹⁸

Harassment can also include sexual harassment – which relates specifically to sexual conduct and is not ground-specific – and harassment and violence. This latter concept, which may include actions “such as rape, abuse and exploitation, hate-crime and beatings”,¹⁹⁹ has recently been recognised by the International Labour Organization as a particularly serious violation of the right to work.²⁰⁰ Both sexual harassment, and discriminatory violence require a specific legislative response, involving the use of criminal, as well as civil and administrative sanctions.²⁰¹ States must act with due diligence to prevent these forms of harm, including through the adoption of adequate protective, preventative, and investigatory mechanisms.²⁰²

2.3 Trade Union Rights

Article 8 of the ICESCR establishes the “right of everyone to form trade unions and join the trade union of [their] choice, subject to the rules of the organisation concerned, for the

¹⁹⁵ Committee on the Rights of Persons with Disabilities, Concluding Observations on Jordan, UN Doc. CRPD/C/JOR/CO/1, 2017, para. 50(a).

¹⁹⁶ Committee on the Elimination of Discrimination against Women, *Medvedeva v. Russia*, UN Doc. CEDAW/C/63/D/60/2013, 2016, para. 11.3.

¹⁹⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 18(d).

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ International Labour Organization, Convention No. 190 (the Violence and Harassment Convention).

²⁰¹ For a discussion of sanction, see Section 4.1 of this Report.

²⁰² The due diligence framework has been most clearly developed by the CEDAW Committee in the context of gender-based violence. See Committee on the Elimination of Discrimination against Women, General Recommendation No. 35, UN Doc. CEDAW/C/GC/35, 2017.

promotion and protection of [their] economic and social interests." Any restrictions on the right may only be established where "prescribed by law" and "necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others."²⁰³ The CESCR Committee has noted States' obligations to expressly "recognise the right of persons with disabilities to have access to trade and labour unions."²⁰⁴ This requirement is made explicit under Article 27(1)(c) of the CRPD, which requires States to "ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others." The right to form and participate in trade unions is set out in a number of additional human rights instruments.²⁰⁵

The CESCR Committee has noted that the "role of trade unions is fundamental" to "ensuring respect for the right to work at the local and national levels and in assisting States parties to comply with their obligations" under the Convention.²⁰⁶ In its General Comment No. 8, the CRPD Committee makes similar observations, noting that "trade union rights, freedom of association and the right to strike are crucial means of introducing, maintaining and defending just and favourable conditions of work."²⁰⁷ This is true both in the open labour market and in segregated facilities, to the extent that such facilities continue to operate as States transition to an open-work environment.²⁰⁸ The CESCR Committee has recognised the importance of consulting trade unions and other organisations representing the rights of persons with disabilities in policy development; recommending the provision of training to such bodies, and the adoption of measures to ensure their adequate funding.²⁰⁹

In addition to facilitating the right to work, trade unions are also important duty bearers, with responsibilities to refrain from discrimination and promote the equality of persons with disabilities in the workplace, including through collective bargaining. The CESCR Committee has noted that "remuneration set through collective agreements should be aimed at ensuring

²⁰³ International Covenant on Economic, Social and Cultural Rights, Article 8(1)(a).

²⁰⁴ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 67(j).

²⁰⁵ See for example, International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(e)(ii). The right has also been recognised at the regional level. See, for instance, African Commission on Human and Peoples' Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, Part 4, para. 59(b).

²⁰⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, para. 54.

²⁰⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 31.

²⁰⁸ *Ibid.* See also, Committee on Economic, Social and Cultural Rights, General Comment No. 5, 1994, para. 26.

²⁰⁹ *Ibid.*, CESCR Committee, paras. 26 and 67(h). See also Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 32.

equality for work of equal value.”²¹⁰ It is important that such agreements do not themselves entrench inequality. As part of the development of the CRPD’s General Comment No. 8, several organisations expressed concern in this regard, noting **inter alia**, that in some countries, trade unions have prevented the provision of reasonable accommodations, “such as moving from a night to a day shift, on the grounds that member seniority, as embedded in [a collective] agreement takes precedence over the duty to accommodate.”²¹¹ Persons with certain types of impairment, including “intellectual and developmental disabilities” may be particularly affected by this practice.²¹² Reflecting these concerns, the General Comment notes the importance of ensuring that collective bargaining agreements do not lead to discrimination. Where such agreements “specify working conditions” they “must include a mechanism by which employees can seek reasonable accommodation.”²¹³

2.4 Vocational Training, Advancement and Rehabilitation

In addition to ensuring the right to work freely chosen and equal conditions of employment, Article 27 of the CRPD sets out specific, positive measures which States are required to adopt to facilitate the full enjoyment of rights by persons with disabilities in the work sphere.

Under Article 27(1)(d) of the Convention, States are required to adopt measures aimed at enabling “persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training.” This requirement has been recognised as an essential element of free choice of work by the African Commission on Human and Peoples’ Rights,²¹⁴ and is developed by the CRPD Committee in its General Comment No. 6. There, the Committee urges States to adopt measures aimed at promoting “the right to supported employment, including to work assistance, job coaching and vocational qualification programmes”, and ensuring “access to training, retraining and education, including vocational training and capacity-building for employees with disabilities”, alongside “training on the employment of persons with

²¹⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 15.

²¹¹ Business Disability International, Submission to the Committee on the Rights of Persons with Disabilities, 2021, p. 1.

²¹² Inclusion Canada, et. al., Submission to the Committee on the Rights of Persons with Disabilities, 2021, p. 9.

²¹³ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 34.

²¹⁴ African Commission on Human and Peoples’ Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, 2010, Part 4, para. 59(e).

disabilities and reasonable accommodation for employers.”²¹⁵ In its General Comment No. 8, the Committee provides guidance on enabling measures that States and other duty-bearers could adopt to ensure that persons with disabilities can “develop their careers.”²¹⁶ This includes, for example, the establishment of “reskilling and upskilling” programmes, work experience, mentoring, bursaries, apprenticeships, and other “workplace-based learning schemes.”²¹⁷ For States to meet their obligations, the General Comment recommends the “explicit inclusion of persons with disabilities” in all laws and policies relating to vocational training, and reiterates the need to ensure that such training is inclusive and accessible, with reasonable accommodations provided where necessary.²¹⁸

In its General Comment No. 8, the CRPD Committee notes that vocational training “includes training undertaken by workers with disabilities to advance their careers.”²¹⁹ Article 27(1)(e) of the CRPD expressly requires States to “promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment.” The African Commission has restated this requirement in its guidance.²²⁰ The CESCR Committee has also engaged with the topic, noting the right to “equal opportunity for promotion through fair, merit-based and transparent processes that respect human rights.”²²¹ This requirement clearly extends to persons with disabilities, who should be ensured “equal opportunities regarding career advancement opportunities through regular assessment meetings with their managers and by defining the objectives to be achieved, as a part of a comprehensive strategy.”²²² Any assessment of competences required for a role should “include an assessment of individual circumstances.”²²³ This requires “the analysis of direct and indirect obstacles to promotion, as well as the introduction of measures such as training and initiatives to reconcile work and

²¹⁵ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, paras. 67(b) and (h).

²¹⁶ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 36.

²¹⁷ *Ibid.*, paras. 36 and 46. The duty to “promote the acquisition by persons with disabilities of work experience in the open labour market” is a specific requirement of Article 27(1)(j) of the CRPD.

²¹⁸ *Ibid.*, para. 35. The duty to ensure accessibility and reasonable accommodation forms a core obligation of States and is discussed in the preceding Sections of this Part. The need to mainstream the rights of persons with disabilities in policies and programmes is recognised under Article 4(1)(c) of the CRPD.

²¹⁹ *Ibid.*, General Comment No. 8, para. 37.

²²⁰ African Commission on Human and Peoples' Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, Part 4, para. 59(o).

²²¹ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 31.

²²² Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 67(g).

²²³ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 31.

family responsibilities.”²²⁴ The Committee has noted that positive action measures may be required to ensure equality in promotion, which should be accompanied by sanctions “in the event of non-compliance.”²²⁵

Article 27(1)(k) of the CRPD requires States to “promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.”²²⁶ Such measures are essential to ensuring that persons with disabilities are able to stay in employment and (where applicable) re-join the workforce.²²⁷ If an individual acquires a disability during the course of their employment they should be provided with reasonable accommodations, which could include a move to a new role, modified duties, the provision of assistive devices, or other appropriate modifications needed to facilitate equal participation.²²⁸ Any consideration of a new role, must “fully respect the choice and preferences of the person” and should not lead to the promotion of “employment in segregated work settings.”²²⁹ In addition to access to rehabilitation services, “States parties should ensure that workers with disabilities as a result of an accident or illness and, where relevant, their dependants receive adequate compensation, including for costs of treatment, loss of earnings and other costs.”²³⁰ As set out in the previous Section, in all cases persons with disabilities should receive equal remuneration for work of equal value.

2.5 Positive Action

In addition to prohibiting discrimination in employment States are required to adopt targeted equality measures to advance the rights of persons with disabilities. This includes positive action, which has been defined to encompass “a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups.”²³¹ According to Article 27(1)(h) of the CRPD, States undertake to “promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures.” These measures “shall not be considered discrimination

²²⁴ Ibid., para. 32.

²²⁵ Ibid., para. 32.

²²⁶ The duty to ensure habilitation and rehabilitation, both in work and other areas, is detailed under Article 26 of the Convention.

²²⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 48.

²²⁸ Ibid., paras. 50 and 77. See further, Committee on the Rights of Persons with Disabilities, ‘VFC v. Spain’, UN Doc. CRPD/C/21/D/34/2015; and Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, paras. 25-27.

²²⁹ Ibid., para. 77.

²³⁰ Ibid., para. 49.

²³¹ Declaration of Principles on Equality, Equal Rights Trust, Principle 3. See also, the discussion of States’ implementation obligations in Section 3 of this Report.

under the terms of the present Convention” as long as they are necessary “to accelerate or achieve de facto equality.”²³²

(a) The Requirements of Positive Action

The need for positive action has been recognised by a range of human rights bodies. The CESCR Committee, for instance, has noted that States are “under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination.” Both the CEDAW and the CERD Committees have issued detailed guidance in this area, calling on States to adopt “temporary special measures” in the area of employment.²³³ The African Commission has likewise identified that “the right to equality includes the adoption of special measures for the purpose of securing the adequate advancement of members of vulnerable and disadvantaged groups to enable their equal enjoyment of economic, social and cultural rights.”²³⁴ The duty to adopt positive action is mandatory,²³⁵ and requires the promotion of employment opportunities for persons with disabilities in both the public and private sectors.²³⁶

Because positive action involves treating groups differently, specific rules have been adopted to ensure that these measures do not result in discrimination. Firstly, measures adopted must serve to “accelerate or achieve de facto equality of persons with disabilities.”²³⁷ In this regard, the CRPD Committee has noted that measures based on discriminatory stereotypes, which reflect a paternalistic, medical or charitable approach to disability, fail “to acknowledge persons with disabilities as full subjects of rights and as rights holders” and would not meet the requirements of the Convention.²³⁸ Secondly, positive action measures should be “temporary.”²³⁹ Whilst this does not necessarily mean “short” in length, it is important that adopted measures are regularly assessed to ensure that they do

²³² Convention on the Rights of Persons with Disabilities, Article 5(4).

²³³ Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, 2004, para. 37; Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, UN Doc. CERD/C/GC/32, 2009, para. 13.

²³⁴ African Commission on Human and Peoples' Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, Part 3, para. 34.

²³⁵ See, for example, Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, 2004, para. 24, and the references contained in footnote 3.

²³⁶ Convention on the Rights of Persons with Disabilities, Article 27(1)(h).

²³⁷ Convention on the Rights of Persons with Disabilities, Article 5(4).

²³⁸ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, paras. 2 and 29.

²³⁹ *Ibid.*, para. 28. This condition is included in the text of several human rights instruments, which refer to positive action as “temporary special measures”. See for instance, Article 4(1) of the CEDAW.

not lead to “the maintenance of unequal or separate standards.”²⁴⁰ In this connection, adopted measures should be routinely reviewed and “discontinued when the objectives of equality of opportunity and treatment have been achieved.”²⁴¹ Finally, as noted by the CESCR Committee, positive action measures should be “proportional” to their aims.²⁴²

The CRPD Committee has identified several types of measure that may be adopted by States and other actors as legitimate and proportionate forms of positive action. This includes, for example, the development of targeted “outreach and support programmes,” measures that involve the “allocation and/or reallocation of resources,” and “targeted recruitment, hiring and promotion (...) advancement and empowerment measures.”²⁴³ Measures should be adopted in consultation with person with disabilities and groups working on their behalf, be monitored to ensure that their objectives are being achieved, and account for the specific experience of intersectional groups.²⁴⁴ Where specific positive action measures are introduced that require employers and other duty bearers to act, sanctions should be included for non-compliance.²⁴⁵

(b) Quotas for the Employment of Persons with Disabilities

A common form of positive action adopted by States is quotas. In the area of work, these quotas typically take the form of reserving a percentage of positions for the employment of persons with disabilities in both public and private bodies of a particular size. According to statistics compiled by the UN High Commissioner for Human Rights, “just over 100 countries around the world currently provide for such employment quotas in their national legislation” whilst many more States “are planning to introduce them.”²⁴⁶ The CRPD Committee has

²⁴⁰ See, for example, Convention on the Elimination of All Forms of Discrimination against Women, Article 4(1); Convention on the Elimination of All Forms of Racial Discrimination, Article 1(4). See also African Commission on Human and Peoples' Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, Part 3, para. 35.

²⁴¹ Ibid., CEDAW Article 4(1) and ICERD, Article 1(4). See also Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 9.

²⁴² Ibid., para. 9.

²⁴³ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 28.

²⁴⁴ Ibid., paras. 25(c), 29, and 32.

²⁴⁵ See for example, Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 32; African Commission on Human and Peoples' Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, para. 35.

²⁴⁶ Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/46/47, 2021, para. 40.

identified quotas as a potentially legitimate form of positive action, and on some occasions has encouraged their adoption.²⁴⁷

The use of quotas in employment, both for persons with disabilities, and other disadvantaged groups, has proven controversial. As part of the development of the CRPD Committee's recent General Comment, several civil society organisations and National Human Rights Institutions (NHRIs) expressed concern that quotas may be ineffectual in practice, leading "to negative unintended consequences in certain labour markets, societies and circumstances."²⁴⁸ To meet their employment quota, it has been noted that many employers focus on "impairment rather than ability,"²⁴⁹ choosing to employ persons who are judged to require "low levels of support," resulting in the continued exclusion of certain groups, such as persons with intellectual disabilities, who may require additional assistance to ensure their equal participation.²⁵⁰ In some countries, quotas have also been interpreted by employers as imposing an "upper-limit" on the employment of persons with disabilities. This interpretation clearly falls foul of the requirements of the CRPD.

Where quotas are introduced, the CRPD Committee has noted that they should be accompanied by measures to ensure their enforcement, including "sanctions for non-compliance, both in the public and private sectors."²⁵¹ By themselves, however, sanctions may prove ineffective at ensuring compliance, particularly where they are set at low levels. For instance, the OHCHR has noted the "documented phenomenon" in some countries "of large companies or other service providers 'paying a discrimination license,' i.e., being willing to leave discrimination problems unaddressed in practice and simply paying fines in individual cases, if these are insufficiently high."²⁵² Citing ILO Data, the UN High Commissioner has also questioned the success of fines in addressing non-compliance:

According to evidence collected by [the] ILO, financial and other incentives, vocational training and employment-related support are more effective in encouraging employers to fulfil their quota obligations than the impositions of fines for lack of compliance. An

²⁴⁷ See, for example, Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 28; Committee on the Rights of Persons with Disabilities, Concluding Observations on El Salvador, UN Doc. CRPD/C/SLV/CO/2-3, 2019, para. 51(b).

²⁴⁸ Business Disability International, Submission to the Committee on the Rights of Persons with Disabilities, 2021, p. 2.

²⁴⁹ European Disability Forum, Submission to the Committee on the Rights of Persons with Disabilities, 2021, p. 5.

²⁵⁰ See, for example, Czech Public Defender of Rights, Submission to the Committee on the Rights of Persons with Disabilities, 2021, p. 2; Inclusion Canada, et. al., Submission to the Committee on the Rights of Persons with Disabilities, 2021, p. 3.

²⁵¹ Committee on the Rights of Persons with Disabilities, Concluding Observations on Kenya, UN Doc. CRPD/C/KEN/CO/1, 2015, para. 48(a).

²⁵² United Nations Human Rights Office, 'Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation', New York and Geneva, 2023, p. 79.

incentive for companies who meet the employment quota for persons with disabilities could be to grant special access to public procurement contracts.²⁵³

To avoid discrimination, where quotas are introduced, it is essential that they meet the requirements of positive action outlined above. In particular, the CRPD Committee has noted that such measures “must not result in [the] perpetuation of isolation, segregation, stereotyping, stigmatisation or otherwise discrimination against persons with disabilities.”²⁵⁴ Where, for example, quotas are only introduced in the context of sheltered workshops, it is clear that these conditions are not met.²⁵⁵ As noted in Section 2.1 of this Report, employment through quotas must be “real”, providing persons with disabilities an opportunity to participate in the labour market on an equal basis with others in work that is “freely chosen or accepted.”²⁵⁶

It must also be remembered that quotas operate as a single form of positive action. They are, by themselves, an inadequate means for States to discharge their positive equality obligations. This point is reflected in the General Comment No. 8, which identifies additional examples of measures that may be adopted, including “targeted funding,” public procurement incentives, “apprentice wage supports, payroll tax deductions, and wage subsidies.”²⁵⁷ Each of these measures must also fulfil the conditions of positive action outlined above, and should be effectively monitored to ensure that they do not have the effect of perpetuating stereotypes or inequality.²⁵⁸

3 Implementation Measures

In addition to prohibiting discrimination, States must adopt a comprehensive package of measures designed to address structural inequalities, eliminate harmful stereotypes and

²⁵³ Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/46/47, 2021, para. 43. In this connection, as discussed in Section 1.2(a) of this Report, the CESCR Committee has detailed the obligation of States to avoid “procuring goods and services from individuals and enterprises” who violate the right to equality. See Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 59.

²⁵⁴ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 29.

²⁵⁵ For a discussion of the human rights implications of sheltered workshops see Section 2.1(b) of this Report. See also, Business Disability International, Submission to the Committee on the Rights of Persons with Disabilities, 2021, p. 4.

²⁵⁶ See the discussion in Section 2.1 of this Report.

²⁵⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 42.

²⁵⁸ See, in particular, criticisms of “wage subsidy” systems provided in response to the consultation process. Inclusion Canada, et. al., Submission to the Committee on the Rights of Persons with Disabilities, 2021, p. 3.

promote the equal enjoyment of the right to work for persons with disabilities and other disadvantaged groups. Whilst States have some discretion in the specific measures, they choose to adopt to give effect to their international law obligations, the UN treaty bodies have provided important guidance in this area. As noted by the CRPD Committee, the duty to adopt measures aimed at promoting equality is immediate, and thus is not subject to progressive realisation.²⁵⁹

3.1 Addressing Discriminatory Stereotypes

Harmful stereotypes relating to disability are pervasive, creating barriers to the equal enjoyment of the right to work and employment. The UN High Commissioner for Human Rights has noted that “the labour market reflects the social prejudices and disadvantages that undermine equality and dignity” for persons with disabilities.²⁶⁰ In this context, “ensuring equality and non-discrimination in access to work is crucial.”²⁶¹ The Convention on the Rights of Persons with Disabilities contains a discrete provision which requires States to “combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life.”²⁶² This obligation extends to all areas of work and employment. Specific, practical measures that are needed to fulfil States’ obligations in this area are set out under Article 8(2) of the Convention and discussed in further detail below.

(a) Tackling Ableism

UN special procedure mandate holders and treaty bodies have paid increased attention to disability stereotypes and their implications for the equal enjoyment of rights. It has been recognised that “ableist assumptions lie at the root of discriminatory practices,” contributing towards the exclusion of persons with disabilities from the labour market, and their separation into segregated forms of employment, such as sheltered workshops.²⁶³ The term “ableism” has recently been defined by the Special Rapporteur on the Rights of Persons with Disabilities as:

²⁵⁹ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 12.

²⁶⁰ Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/46/47, 2021, para. 30.

²⁶¹ Ibid.

²⁶² Convention on the Rights of Persons with Disabilities, Article 8(1)(b).

²⁶³ Report of the Special Rapporteur on the Rights of Persons with Disabilities, UN Doc. A/HRC/43/41, 2019, para. 10; Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/46/47, 2021, para. 28; Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 3.

[A] value system that considers certain typical characteristics of body and mind as essential for living a life of value. Based on strict standards of appearance, functioning and behaviour, ableist ways of thinking consider the disability experience as a misfortune that leads to suffering and disadvantage and invariably devalues human life.²⁶⁴

Some individuals may experience discrimination as a consequence of intersecting stereotypes, for instance, relating to their disability status and gender. Recognising this trend, the OHCHR has noted that “working women with disabilities often experience unequal hiring and promotion standards, unequal access to training and retraining, unequal pay for work of equal value and occupational segregation.”²⁶⁵ States are expressly required to address compounded stereotypes as part of their obligations under Article 8(1)(b) of the CRPD.²⁶⁶

(b) Practical Measures

Under Article 8(1) of the CRPD, States undertake to adopt “immediate, effective and appropriate measures” to combat stereotypes, raise awareness of the rights of persons with disabilities and their capabilities, and “foster respect for the rights and dignity” of members of this group. Article 8(2) of the CRPD expands upon this requirement, detailing specific, practical measures which should be adopted by States to give effect to their obligations under this Convention.

Such measures should include:

- Public awareness-raising campaigns designed “to nurture receptiveness to the rights of persons with disabilities”, promote “positive perceptions and greater social awareness” and to recognise the “skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market.”²⁶⁷
- Public education measures designed to facilitate “at all levels of the education system, including in children from an early age, an attitude of respect for the rights of persons with disabilities.”²⁶⁸ This requirement is expanded upon under Article 24 of the CRPD, which recognises the right of persons with disabilities to an education on an equal

²⁶⁴ Ibid., Report of the Special Rapporteur on the Rights of Persons with Disabilities, para. 9.

²⁶⁵ Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/46/47, 2021, para. 32.

²⁶⁶ See also Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 39.

²⁶⁷ Convention on the Rights of Persons with Disabilities, Article 8(2)(a).

²⁶⁸ Ibid., Article 8(2)(b).

basis, and requires “respect for human rights, fundamental freedoms and human diversity.”

- Sensitisation measures aimed at “encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of” the Convention, alongside training measures, including programmes covering the rights of persons with disabilities, their capabilities, the importance of recognition and the avoidance of stereotypes.²⁶⁹

Several UN human rights treaties contain equivalent provisions.²⁷⁰ The CESCR Committee has also provided guidance on relevant practical measures in its general comments, recommending the adoption of “public leadership and programmes to raise awareness about systemic discrimination,” “human rights education and training programmes for public officials,” and “teaching on the principles of equality and non-discrimination” which “should be integrated in formal and non-formal inclusive and multicultural education, with a view to dismantling notions of superiority or inferiority based on prohibited grounds and to promote dialogue and tolerance between different groups in society.”²⁷¹ Relevant guidance has also been provided at the regional level.²⁷²

In connection with the right to work, the CESCR Committee has noted that the obligation to fulfil requires States to undertake “educational and informational programmes to instil public awareness on the right.”²⁷³ States should also “take appropriate measures to ensure that both the private and public sectors reflect an awareness of the right to work in their activities.”²⁷⁴ These points are elaborated in the CRPD Committee’s General Comment No. 8, which calls for the adoption of “appropriate education, information and awareness-raising

²⁶⁹ Ibid., Article 8(2)(c).

²⁷⁰ See, for example, Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women, which requires States to adopt measures to eliminate “prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of (...) the sexes or on stereotyped roles for men and women”. See also, Article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination, which establishes the need for public education measures.

²⁷¹ Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, paras. 38-39.

²⁷² African Commission on Human and Peoples' Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, Part 2, paras. 8-9.

²⁷³ Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, para. 27.

²⁷⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, para. 43.

campaigns, including gender mainstreaming, in both the private and public sectors.”²⁷⁵ These campaigns “should target private and public sector employers and employees, recruiters and employment agencies, and the general public, and should be in relevant languages and accessible formats for persons with disabilities.”²⁷⁶ Implementation measures should be directed at all levels of society and relevant stakeholders, including trade unions and persons with disabilities themselves.²⁷⁷

3.2 Equality Duties and Equality Impact Assessment

To give effect to their implementation obligations, many States have adopted novel equality duties, which provide a means to instrumentalise the rights to equality and non-discrimination in the right to work and ensure that the rights of persons with disabilities are fully integrated into the legal and policy framework. In different settings, UN treaty bodies have called for the adoption of equality duties, which may be divided into one of three categories: (i) preventative duties, which seek to prevent discrimination in employment, for instance through the adoption of workplace anti-harassment and equal pay policies; (ii) institutional duties, which seek to integrate equality planning into the work of public and private bodies; and (iii) mainstreaming duties, which seek to embed the rights of persons with disabilities in all aspects of public policy development.²⁷⁸ In addition to equality duties, States and other duty bearers have specific obligations to undertake equality impact assessment, which seeks to identify barriers to participation, mitigate the risk of discrimination, and promote equality for persons with disabilities in all aspects of the work cycle.

(a) Preventative Duties

As discussed in Section 1.2 of this Report, States have an immediate obligation to refrain from, and protect individuals from, discrimination in employment. To meet these obligations, UN treaty bodies have identified the need for institutional policies and strategies that seek to identify and mitigate the risk of discrimination in the workplace. This should include, at a minimum, the development of workplace anti-harassment policies and measures to ensure equal remuneration for work of equal value. These policies should be developed at the

²⁷⁵ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 62.

²⁷⁶ *Ibid.*, para. 62.

²⁷⁷ In this regard the General Comment notes that labour legislation should allocate “responsibility to ensure that trade union workers, employers and labour market institutions are fully aware of issues of equality and non-discrimination in the context of the work and employment of persons with disabilities.” See *Ibid.*, para. 33.

²⁷⁸ See further, the European Network of Equality Bodies (EQUINET), Compendium of Good Practices on Equality Mainstreaming, 2021, p. 19, available at: <https://equineteurope.org/wp-content/uploads/2022/02/0.-Compendium-of-Good-Practices-on-Equality-Mainstreaming.pdf>

national level and require the adoption of specific policies in the workplace that create binding obligations for both public and private bodies.²⁷⁹

As discussed in Section 2.2(d) of this Report, harassment has been recognised as a form of discrimination by a number of UN treaty bodies.²⁸⁰ The CRPD Committee has identified harassment as one of the four “main forms” of conduct prohibited under Article 5 of the Convention.²⁸¹ Harassment may include ground based harassment, where an individual is treated differently in work on account of their disability status, as well as sexual harassment, which relates to conduct that is sexual in nature.²⁸² Both forms of harassment should be prohibited under national law, and States have clear obligations to protect individuals from harassment committed by private actors.²⁸³

States have also accepted obligations to address harassment through the ratification of ILO instruments, including, most recently, the Violence and Harassment Convention. Whilst discriminatory violence requires a specific legislative response, and therefore falls outside of the scope of this Report, the Convention nonetheless contains useful guidance on the obligations of States and other duty-bearers in this area. Under Article 8, States undertake to adopt “regulations requiring employers to take appropriate steps commensurate with their degree of control to prevent (...) harassment in the world of work.” This, in turn, requires the adoption and implementation of a workplace policy on harassment, which should be developed “in consultation with workers and their representatives” and seek to “identify hazards and assess the risks” of harassment, establish preventative and protective measures, and provide accessible information to workers on their rights and the availability of such measures in the workplace.²⁸⁴

The Committee on Economic, Social and Cultural Rights has also identified harassment as a form of discrimination.²⁸⁵ In 2016, the Committee issued its General Comment No. 23, which provides detailed guidance on the responsibilities of the State and private actors to eliminate harassment in the right to work.²⁸⁶ To meet their obligations under the Convention, States

²⁷⁹ See, for example, in the context of harassment, Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 48.

²⁸⁰ See further, the discussion of harassment in Section 2.2(d) of this Report.

²⁸¹ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 18(d).

²⁸² *Ibid.*, para. 18(d).

²⁸³ Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, paras. 7 and 11.

²⁸⁴ International Labour Organization, Convention No. 190 (the Violence and Harassment Convention), Article 9.

²⁸⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 7.

²⁸⁶ See Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 48.

must adopt a national anti-harassment policy “to be applied in the workplace in both the public and private sectors.”²⁸⁷ In addition to prohibiting harassment, the policy should identify the “specific duties of employers, managers, supervisors and workers to prevent and, where relevant, resolve and remedy harassment cases”; establish legal mechanisms to ensure effective access to justice, including through the provision of “free legal aid”; ensure training for employers and employees; provide for the establishment of organisational focal points “as well as avenues of complaint and redress”; explicitly prohibit retaliation for making a complaint or participating in discrimination proceedings; establish “procedures for notification and reporting to a central public authority of claims of sexual harassment and their resolution”; and provide for the development of “clearly visible workplace-specific” policies, which should be developed in consultation with all relevant stakeholders, including persons with disabilities and their representative organisations.²⁸⁸

In addition to prohibiting workplace harassment, employers must also put in place mechanisms to ensure the “objective evaluation” of job functions, to ensure that all individuals, including persons with disabilities, are provided equal remuneration for work of equal value.²⁸⁹ To give effect to this requirement, many States have adopted “pay gap preventive duties,” which require employers of a certain size to “identify and justify pay differentials and take action to respond to unjustified pay differentials.”²⁹⁰ The obligation of States to adopt measures, including laws policies, regulations, and independent “machinery for wage determination” to ensure equal remuneration, is detailed under the International Labour Organization Equal Remuneration Convention.²⁹¹ Whilst this instrument relates specifically to “equal remuneration for men and women workers,” the CESCR Committee has reiterated that equality in work and employment “applies to all workers without distinction,”²⁹² including persons with disabilities. The Committee has recommended specific measures that may help to ensure equal remuneration, including the “comparison of rates of remuneration across organisations, enterprises and professions.” States have broad obligations under the CESCR to adopt “positive measures” to facilitate the equal enjoyment of the right to work, and to “ensure that third parties, such as private sector employers and enterprises” do not interfere with the right. This, in turn, requires the establishment of specific equal remuneration policies,

²⁸⁷ Ibid.

²⁸⁸ Ibid., para. 48(a)-(i).

²⁸⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, paras. 11-12. See further, the discussion in Section 2.2(b) of this Report.

²⁹⁰ European Network of Equality Bodies (EQUINET), Making Europe More Equal: A Legal Duty, 2016, p. 19, available at: https://equineteurope.org/wp-content/uploads/2016/12/positiveequality_duties-finalweb.pdf

²⁹¹ International Labour Organization, Convention No. 100 (Equal Remuneration Convention), Articles 1 and 2.

²⁹² Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, paras. 11-12.

and mechanisms including “obligatory notification schemes” to ensure that the right is overserved.²⁹³

(b) Institutional Duties

Under Article 4(1)(e) of the CRPD, States parties agree to “take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise.” This obligation is expanded in the work context under Article 27(1)(h), which requires States to “promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures.”

To give effect to these obligations, several States have adopted institutional equality duties, which provide a framework for promoting equality for persons with disabilities in the practice of both public and private sector employers.²⁹⁴ The International Labour Organization’s Committee of Experts has noted that measures “providing for the adoption and implementation of equality policies or plans at the workplace” are essential to ensuring the right to non-discrimination in work.²⁹⁵ The Committee “has also welcomed the adoption in a number of countries of initiatives such as codes of practice or guidelines which provide further guidance concerning the prohibition and prevention of discrimination at work to complement national legislation.”²⁹⁶

Institutional equality duties require “organisations to establish systems and processes to promote equality for employees.”²⁹⁷ These duties are essential for employers to identify barriers that may prevent the equal participation of persons with disabilities in the workplace, for instance due to a lack of accessibility, and to establishing mechanisms through which positive action measures may be identified and applied.²⁹⁸ In its general recommendations, the CEDAW Committee has noted that laws governing positive action should cover both “governmental actors as well as private organisations or enterprises.”²⁹⁹ Similarly, in its General Comment No. 8, the CRPD Committee notes that strategies for increasing the

²⁹³ Ibid., paras. 59-62.

²⁹⁴ See European Network of Equality Bodies, *Making Europe More Equal: A Legal Duty*, 2016, pp. 22-27.

²⁹⁵ International Labour Organization, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 2009, para. 109.

²⁹⁶ Ibid., para. 109.

²⁹⁷ European Network of Equality Bodies, *Making Europe More Equal: A Legal Duty*, 2016, p. 3.

²⁹⁸ For positive example of institutional equality duties in the area of employment, see the discussion of the Tanzanian Employment and Labour Relations Act, and the Finnish Non-Discrimination Act in HelpAge International and the Equal Rights Trust, *Advancing Equality for Older People*, 2022, pp. 57 and 60.

²⁹⁹ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25*, 2004, para. 31.

participation of persons with disabilities in public sector employment “are equally applicable to the private sector.”³⁰⁰

The duty to adopt institutional equality duties can be inferred from States’ broader monitoring obligations. Under Article 33(2) of the CRPD, States are required to adopt “a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation” of the Convention. In the context of the right to work, the CESCR Committee has noted States’ specific obligations to “develop and maintain mechanisms to monitor progress towards the realisation of the right to freely chosen or accepted employment, to identify the factors and difficulties affecting the degree of compliance with their obligations and to facilitate the adoption of corrective legislative and administrative measures.”³⁰¹ The ILO Committee of experts has similarly observed that “the collection of relevant data” is essential to ensuring equality in the workplace.³⁰²

In practice, these obligations can only be fulfilled where both public and private bodies are required to monitor the employment of persons with disabilities in their workforce, and report against measures undertaken to ensure equal access. The ILO has noted that that “companies, whether private or public, that claim to be diverse and inclusive must ensure that their workplaces and environments are conceived as accessible and free from any physical, digital or social barriers.”³⁰³ Despite this, evidence suggests that only a small number of business have “committed to including disability in their strategies” absent a strict legal requirement.³⁰⁴

(c) Mainstreaming Duties

Mainstreaming duties seek to integrate the rights to equality and non-discrimination in all aspects of public planning, requiring “public authorities to have due regard to the need to promote equality in in carrying out their functions, including legislating, budgeting, regulating, and policy making.”³⁰⁵ The obligation to mainstream the rights of persons with disabilities is made explicit under Article 4(1)(c) of the CRPD, which requires States to “take into account the protection and promotion of the human rights” of members of this group “in all policies

³⁰⁰ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 42.

³⁰¹ Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, para. 45.

³⁰² International Labour Organization, Report of the Committee of Experts on the Application of Conventions and Recommendations, 2009, para. 109.

³⁰³ International Labour Organization, Making the Future of Work Inclusive of Persons with Disabilities, 2019, p. 24.

³⁰⁴ Ibid, p. 24.

³⁰⁵ See the European Network of Equality Bodies, Compendium of Good Practices on Equality Mainstreaming, 2021, p. 6.

and programmes.” In right to work context, the obligation can be seen to possess three discrete components.

Firstly, States are required to adopt a broad equality policy or strategy that “is inclusive and accessible to all persons with disabilities.”³⁰⁶ This policy should be developed “in close consultation with organisations of persons with disabilities, national human rights institutions and other relevant stakeholders, such as equality bodies.”³⁰⁷ In its General Comment No. 8, the CRPD Committee expands upon this requirement, noting that the policy “should have sufficient resources allocated to it to increase the participation of persons with disabilities, particularly women with disabilities.”³⁰⁸

Secondly, States are required to adopt a national employment strategy and accompanying plan of action, which mainstreams the rights of persons with disabilities and other groups exposed to discrimination. This requirement has been detailed by a range of human rights bodies, including the African Commission on Human and Peoples’ Rights.³⁰⁹ According to the Commission, the policy should consider the particular situation of “disadvantaged groups”, include “information on indicators, time-frames and benchmarks, by which progress can be closely monitored”, and be “devised and periodically reviewed, on the basis of a participatory and transparent process.”³¹⁰ The plan should address “the concerns of all workers” in “both the formal and informal sectors.”³¹¹

The CESCR Committee has discussed States’ obligations in this area on a number of separate occasions. According to the Committee, the national employment policy “must take particular account of the need to eliminate discrimination in access to employment” and mainstream the rights of marginalised and disadvantaged groups,³¹² such as persons with disabilities. The policy should cover all aspects of the right to work, including equal remuneration, access to technical and vocational training, and self-employment.³¹³ National mechanisms should be established to oversee the implementation of the policy, which should include “numerical targets and a time frame for implementation,” as well as a “means

³⁰⁶ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 73(i).

³⁰⁷ *Ibid.*, para. 73(i).

³⁰⁸ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 61.

³⁰⁹ This requirement is also made explicit under relevant ILO instruments. See, in particular, ILO Convention No. 122 (the Employment Policy Convention); and Convention No. 111 (the Discrimination (Employment and Occupation) Convention), Article 2.

³¹⁰ African Commission on Human and Peoples’ Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, 2010, Part 2, paras. 26, and 27.

³¹¹ *Ibid.*, Part 4, para. 59(d).

³¹² See Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, paras. 44 and 27.

³¹³ *Ibid.*, para. 44.

of ensuring compliance with the benchmarks established.”³¹⁴ The process of developing the policy should be “participatory and transparent”, and involve all relevant stakeholders, including employers, trade unions and organisations working with and on behalf of groups who experience discrimination.³¹⁵ Specific measures “to increase the resources allocated to reducing the unemployment rate, in particular among women, the disadvantaged and marginalised” should be integrated into the policy.³¹⁶

Finally, States are required to mainstream the rights of persons with disabilities into all other policies and programmes, including those that have a specific bearing on the right to work.³¹⁷ This may include, for example, budgetary processes, policies governing vocational training, and poverty alleviation programmes.³¹⁸ The rights of persons with disabilities should also be integrated into occupational health and safety policies.³¹⁹ The development of such policies forms an essential component of the right to work, as elaborated by the CESCR Committee.³²⁰ In its General Comment No. 8, the CRPD Committee calls on States to “formulate and implement an integrated policy framework that is inclusive of persons with disabilities, ensuring coordination across different levels of government and cooperation between the relevant bodies and authorities.”³²¹ Where policies are adopted, they “should ensure, through political and financial support” the “effective participation of the population” including persons with disabilities and their representative organisations, “in all phases of policy and programme design, implementation, monitoring and review.”³²²

(d) Equality Impact Assessment

Equality impact assessment is a tool which can be used by States and other duty bearers to ensure that their policies, practices, and procedures do not result in discrimination. Equality

³¹⁴ Ibid., para. 38.

³¹⁵ Ibid., paras. 27 and 42.

³¹⁶ Ibid., para. 26.

³¹⁷ Convention on the Rights of Persons with Disabilities, Article 4(1)(d). See also Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, paras. 14 and 15.

³¹⁸ See, for example, African Commission on Human and Peoples' Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, Part 2, para. 26, and Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 60.

³¹⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 26-28.

³²⁰ Ibid.

³²¹ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 39.

³²² African Commission on Human and Peoples' Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, Part 2, para. 29.

impact assessment also provides a means to ensure that the rights of groups who experience discrimination in work and employment are mainstreamed, through the identification of barriers to equal participation and opportunities for advancing equality. The duty to adopt equality impact assessment can be derived from States' obligations to respect, protect, and fulfil the rights to equality and non-discrimination, outlined in Section 1 of this Report. At the most basic level, it is essential that laws and policies are reviewed before they are introduced to ensure that they will not produce discriminatory impacts. This forms an essential component of the duty to refrain from discrimination.³²³ Equality impact assessment should also be conducted after measures have been introduced, to ensure that they do not have the effect of discriminating against persons with disabilities or any other protected group.³²⁴

In the context of work and employment, the CESCR Committee has alluded to the need for equality impact assessment on different occasions, albeit without explicitly using the term. For instance, in its General Comment No. 23, the Committee notes that “equality in promotion requires the analysis of direct and indirect obstacles to promotion, as well as the introduction of measures such as training and initiatives to reconcile work and family responsibilities.”³²⁵ In its General Comment No. 24, in the context of business activities, the Committee repeatedly calls for the adoption of “human rights impact assessments.” These assessments are necessary to ensure that any negative human rights impacts of business decisions are identified, and that their effect on particular groups are fully understood and mitigated.³²⁶ The UN Special Rapporteur on the Rights of Persons with Disabilities has also called on businesses and other private entities to adopt such assessments, to mitigate the risk of discrimination in the context of emerging digital technologies.³²⁷

The right to work and employment is subject to progressive, rather than immediate, realisation.³²⁸ To comply with the requirements of international law, States “have the burden of proving” that any potentially retrogressive measures relating to the right to work “have been introduced [only] after consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use

³²³ See the discussion in Section 1.2(a) of this Report.

³²⁴ This is also implicit in the duty to refrain from discrimination. See *Ibid.*

³²⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 32.

³²⁶ In this case, their impact on indigenous persons and communities. See Committee on Economic, Social and Cultural Rights, General Comment No. 24, UN Doc. E/C.12/GC/24, 2017, paras. 13, 17, and 38.

³²⁷ See, for instance, Report of the Special Rapporteur on the rights of persons with disabilities, UN Doc. A/HRC/49/52, 2021, para. 78(b).

³²⁸ See, for example, Convention on the Rights of Persons with Disabilities, Article 4(2).

of the States parties' maximum available resources."³²⁹ Unlike the right to work, the right to non-discrimination is subject to immediate realisation, and the CESCR Committee has clarified that any measures introduced must not "disproportionately affect disadvantaged and marginalised individuals and groups" or be "applied in an otherwise discriminatory manner."³³⁰ The only way in which States can give effect to these obligations, is to assess the impacts of their policies before they are introduced. In this regard – as noted above – Article 4(1)(d) of the CRPD requires that the "protection and promotion of the human rights of persons with disabilities" be taken into account "in all policies and programmes."

In its Practical Guide, the Office of the UN High Commissioner for Human Rights identifies some of the necessary elements of equality impact assessment, based on an analysis of practice amongst the UN treaty bodies and special procedure mandate holders. In brief, such assessments should: be mandatory; seek to identify and remove any discriminatory policy impacts before policies are introduced; ensure the participation of groups who may be disadvantaged by the policy, including persons with disabilities; and be published to ensure that the assessment is subject to appropriate scrutiny and results in real change.³³¹ At a practical level, "it is important to note that qualitative data through engagement with groups exposed to discrimination and experiencing inequality is extremely valuable and can be just as valuable where quantitative data is not available."³³² In some contexts, "qualitative data can in fact be **more** valuable" as quantitative data is often "only available after the harm has been done."³³³

4 Enforcement and the Right to Work

Article 13 of the CRPD establishes a right of access to justice. Under this provision, States parties shall ensure the right to persons with disabilities "on an equal basis, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages."³³⁴ The

³²⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, para. 21.

³³⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 22, UN Doc. E/C.12/GC/22, 2016, para. 38.

³³¹ United Nations Human Rights Office, 'Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation', New York and Geneva, 2023, pp. 117-119.

³³² See Equal Rights Trust, #NoCoviDiscrimination Training Manual, 2020, p. 24, available at: <https://www.equalrightstrust.org/sites/default/files/images/%23NoCOVIDiscriminationTrainingManualERT.pdf>

³³³ Ibid., p. 24.

³³⁴ Convention on the Rights of Persons with Disabilities, Article 13(1). Under Article 13(2), States commit to "promote appropriate training for those working in the field of administration of justice."

requirements of access to justice, including in the work context, have been detailed by several human rights bodies. In its General Recommendation No. 33, the CEDAW Committee distinguishes six core elements of the right, which include justiciability, availability, accessibility, good quality, provision of remedies and accountability.³³⁵ In 2020, the CRPD Committee, in collaboration with the UN Special Rapporteur on the Rights of Persons with Disabilities, issued a set of 'International Principles and Guidelines on Access to Justice for Persons with Disabilities,' which further elaborate States' obligations in this area.³³⁶

4.1 Enforcement Mechanisms, Remedy and Sanction

To ensure access to justice in the area of work and employment, "States parties must put into place an adequate monitoring and accountability framework."³³⁷ Different administrative and judicial bodies may be established under national legislation to enforce the right to non-discrimination in the area of work and employment, including courts and tribunals, equality bodies, national human rights institutions, ombuds, and labour inspectorates.³³⁸ Where such bodies are established, it is essential that they "comply with international standards of independence, impartiality and efficiency and the provisions of international human rights law."³³⁹ Justice institutions must be made accessible at all stages of the justice process, with information provided in an accessible format and the provision of procedural

³³⁵ Committee on the Elimination of Discrimination against Women, General Recommendation No. 33, UN Doc. CEDAW/C/GC/33, 2015, Part II(A).

³³⁶ Committee on the Rights of Persons with Disabilities, et. al, International Principles and Guidelines on Access to Justice for Persons with Disabilities, 2020.

³³⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 80.

³³⁸ See for example, Committee on the Elimination of Discrimination against Women, General Recommendation No. 33, UN Doc. CEDAW/C/GC/33, 2015, para. 54; Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 40; International Labour Organization, Report of the Committee of Experts on the Application of Conventions and Recommendations, 2009, para. 109; and African Commission on Human and Peoples' Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, Part 2, para. 22.

³³⁹ Ibid., CEDAW Committee. See also Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 40; and in respect of national human rights institutions, African Commission on Human and Peoples' Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, Part 3, para. 49.

accommodations to persons with disabilities where required.³⁴⁰ In all cases, the full legal capacity of persons with disabilities to initiate and pursue complaints must be recognised.³⁴¹

Where the right to work has been violated, individuals must be provided with an effective remedy. In some circumstances, this may involve the imposition of criminal sanctions,³⁴² for instance, where violence against persons with disabilities occurs in the workplace.³⁴³ States must ensure that – where a risk of violence is identified – persons with disabilities and other workers “have the right to remove themselves from a work situation (...) without suffering retaliation or other undue consequences, and the duty to inform management.”³⁴⁴ States must also adopt measures designed to protect persons with disabilities from violence, and ensure that labour inspectorates and other bodies “are empowered to deal with violence (...) in the world of work, including by issuing orders requiring measures with immediate executory force, and orders to stop work in cases of an imminent danger to life, health or safety.”³⁴⁵

For the reasons set out below, cases concerning discrimination in the right to work that do not involve discriminatory violence or other offences that are inherently “criminal” in nature, should be remedied through the application of the civil and administrative law.³⁴⁶ A range of UN and regional human rights mechanisms have detailed essential elements of remedy, both in the

³⁴⁰ For a discussion of accessibility requirements see Section 2.1(a) of this Report. The CRPD Committee has distinguished procedural accommodations from reasonable accommodations. Whilst the latter are qualified by the concept of “undue burden”, the former is not. See Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 25(d). See further, Committee on the Rights of Persons with Disabilities, et. al, International Principles and Guidelines on Access to Justice for Persons with Disabilities, 2020, Principles 2, 3 and 4.

³⁴¹ Committee on the Rights of Persons with Disabilities, General Comment No. 1, UN Doc. CRPD/C/GC/1, 2014, paras. 38-39. See also, *Ibid.*, International Principles and Guidelines on Access to Justice for Persons with Disabilities, Principle 1.

³⁴² See for example, the recommendations of the Committee on Economic, Social and Cultural Rights in respect of the “failure of employers to respect the minimum wage”. Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, paras. 24 and 59.

³⁴³ This requirement is implicit within Article 16(1) of the Convention on the Rights of Persons with Disabilities, which requires States to “take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects,”

³⁴⁴ International Labour Organization, Convention No. 190 (Violence and Harassment Convention), Article 10(g).

³⁴⁵ *Ibid.*, Article 10(f).

³⁴⁶ This refers, in particular, to hate crimes, which are discussed at length in United Nations Human Rights Office, ‘Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation’, New York and Geneva, 2023, pp. 77-78 and 167-170. For a discussion on the importance of civil and administrative remedies, see the discussion of the burden of proof in the following Section.

context of work and employment and the right to non-discrimination.³⁴⁷ These rights require States to adopt measures ensuring that all duty-bearers, including public and private actors, are held accountable for their actions, and that individuals who have experienced harm can achieve redress.³⁴⁸ Possible remedies should include “adequate reparation, restitution, compensation, satisfaction or guarantees of non-repetition,”³⁴⁹ as well as the imposition of sanctions, which must be “effective, proportionate and dissuasive.”³⁵⁰

In addition to sanctioning discrimination, and remedying harm caused to an individual, UN treaty bodies have identified the need for broader, societal and institutionally focused remedies which seek to address the conditions that foster discrimination and inequality and discourage future human rights violations.³⁵¹ In this regard, the CRPD Committee has noted that where “discrimination is of a systemic nature” States should adopt and effectively implement “forward-looking, non-pecuniary remedies in their legislation.”³⁵² This point is reinforced in the ‘International Principles and Guidelines on Access to Justice for Persons with Disabilities’, which state that remedies under national law must seek to “address the systemic nature of human rights violations.”³⁵³ In its General Comment No. 8, the CRPD Committee applies this guidance in the work context, noting that “individual remedies should be accompanied by effective changes in the workplace to prevent future violations.”³⁵⁴ Examples of institutional and societal remedies may include public acknowledgements of wrongdoing and apologies, equality training for employers, and other structural injunctions that oblige duty-bearers to take

³⁴⁷ See for example, Committee on the Elimination of Discrimination against Women, General Recommendation No. 33, UN Doc. CEDAW/C/GC/33, 2015, para. 19; Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, paras. 50, 57, and 80, and General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 40; Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 22; Committee on the Rights of Persons with Disabilities, et. al, International Principles and Guidelines on Access to Justice for Persons with Disabilities, 2020, principle 8; and African Commission on Human and Peoples' Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, para. 21.

³⁴⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 59.

³⁴⁹ Ibid., para. 57.

³⁵⁰ Ibid., para. 59. See also, Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 31(f).

³⁵¹ For further discussion on this point, see United Nations Human Rights Office, ‘Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation’, New York and Geneva, 2023, pp. 81-84.

³⁵² Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 22.

³⁵³ Committee on the Rights of Persons with Disabilities, et. al, International Principles and Guidelines on Access to Justice for Persons with Disabilities, 2020, p. 24.

³⁵⁴ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 30.

specific action to address inequality, for instance, through requiring the adoption of workplace anti-harassment policies and strategies.³⁵⁵

4.2 Investigation, Protection and Procedural Mechanisms

To meet their international law obligations, States must establish impartial bodies and procedures to investigate potential violations of the right to work and employment on an equal basis.³⁵⁶ It is essential that discrimination complaints are thoroughly investigated,³⁵⁷ and that the specific requirements of persons with disabilities are considered to ensure equal access to justice, including through the provision of reasonable accommodation and accessibility measures.³⁵⁸ In practice, different bodies may be mandated to investigate discrimination complaints, including labour inspectorates. The CESCR Committee has noted that such bodies, as well as “other investigation and protection mechanisms” should be empowered to “cover conditions of work in the private sector and provide guidance to employers and enterprises.”³⁵⁹

It is important that individuals are not disadvantaged in work due to their participation in enforcement and investigation proceedings. The CRPD Committee has made this point clearly, noting States’ duties to ensure protection from victimisation (sometimes termed retaliation or reprisal) which includes “adverse treatment or adverse consequences in reaction to a complaint or to proceedings aimed at enforcing compliance with equality provisions.”³⁶⁰ This obligation is made explicit under some international instruments. For example, the ILO Violence and Harassment Convention requires States to ensure “protection against victimisation of or retaliation against complainants, victims, witnesses and whistle-blowers.”³⁶¹ In the area of

³⁵⁵ On the use of structural injunctions more broadly, see the Equal Rights Trust, *Economic and Social Rights in the Courtroom*, 2014, Section 3.7.

³⁵⁶ See, for example, Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 40; Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 59.

³⁵⁷ *Ibid.*, General Comment No. 20, para. 40.

³⁵⁸ For further information on the requirements of investigatory bodies, see Committee on the Rights of Persons with Disabilities, et. al, *International Principles and Guidelines on Access to Justice for Persons with Disabilities*, 2020, pp. 23-24.

³⁵⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 59.

³⁶⁰ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 31(c).

³⁶¹ International Labour Organization, Convention No. 190 (Violence and Harassment Convention), Article 10(b).

workplace harassment, the CESCR Committee has similarly noted States' duties to ensure the "explicit prohibition of reprisals."³⁶²

To facilitate access to justice, States should adapt their procedural law frameworks to ensure that persons bringing a discrimination complaint are not discouraged or prevented from making a claim. To this end, treaty bodies have recognised the important role that third parties, such as trade unions and national human rights institutions or equality bodies, may play in enforcement proceedings.³⁶³ The amendment of procedural rules to allow for actions brought in the public interest (**actio popularis**) and for the direct and indirect participation of interested third parties in cases concerning the discriminatory denial of the right to work, are important facilitating measures.³⁶⁴ Treaty bodies have also recognised the importance of legal aid and assistance in facilitating access to justice for individuals who do not have the financial means to enforce their rights.³⁶⁵

Perhaps the most significant adjustment required to States' procedural law frameworks concerns the burden of proof. In most civil and administrative proceedings, the burden of proving that an individual's rights have been violated rests on the party making the claim. This party is required to demonstrate – typically on a balance of possibilities or an equivalent legal standard – that harm was in fact caused by the defendant. In discrimination cases, however, this requirement can create barriers to justice, as the evidence that may support a discrimination claim is often held by the discriminating actor.³⁶⁶ To overcome this procedural hurdle, treaty bodies have recognised that the burden of proving discrimination should shift to the defendant once evidence that discrimination may have occurred (a prima facie case) has been presented.³⁶⁷ The defendant is then required to "rebut" the burden by demonstrating that their actions were not discriminatory, but rather based on legitimate and objective criteria.³⁶⁸ The reversal of the burden of proof is only appropriate in civil and

³⁶² Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, paras. 48-49.

³⁶³ Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18, 2006, para. 48.

³⁶⁴ See, for example, Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 53; and (in the context of prisoners with disabilities), Committee on the Rights of Persons with Disabilities, et. al, International Principles and Guidelines on Access to Justice for Persons with Disabilities, 2020, p. 17.

³⁶⁵ See for example, *Ibid.*, CRPD Committee, paras. 31(g) and 73(h); Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 57; and African Commission on Human and Peoples' Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, Part 2, para. 23.

³⁶⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 40. See also, Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 73(i).

³⁶⁷ *Ibid.*

³⁶⁸ The justification test is discussed further in Section 2.2(a) of this Report.

administrative cases; in criminal cases, a higher standard of proof applies and reversing the burden may conflict with the presumption of innocence.³⁶⁹ It is for this, and related reasons that ordinary discrimination cases, not involving violence or hate crimes, should be heard by civil and administrative, rather than criminal, tribunals.³⁷⁰

³⁶⁹ See, for example, International Covenant on Civil and Political Rights, Article 14(2); Human Rights Committee, General Comment No. 32, UN Doc. CCPR/C/GC/32, 2007, para. 30.

³⁷⁰ See United Nations Human Rights Office, 'Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation', New York and Geneva, 2023, pp. 77-78 and 167-170.

Part B: The National Legal Framework

This Part of the Report provides an assessment of the legal framework governing equality, non-discrimination and the right to work in Kenya. It begins, in Section 5, with a brief account of the political and judicial system: the main sources of legislative power, the hierarchy of laws, and the role, competencies and structure of the courts. Section 6 goes on to examine the State’s record of ratifying international human rights treaties, before discussing the status of these instruments within the domestic legal order. In Section 7, the Report outlines the principal laws governing equality, non-discrimination and the right to work; with a particular focus on the Constitution, the Persons with Disabilities Act of 2003 and the Employment Act. Each of these laws are assessed for compliance with international legal standards, as set out in Part A. Finally, in Section 8, the Report discusses the topic of enforcement.

5 An Introduction to the Kenyan Legal System

The Constitution of Kenya was adopted in 2010, replacing the Independence Constitution which had been in force, albeit in significantly amended forms, since 1963. Article 4 of the Constitution declares Kenya to be a “sovereign republic”, and “multi-party democratic State” based on the principles of accountability, democracy, good governance, and the rule of law.³⁷¹ Under Article 10, equality and non-discrimination are listed as important “national values” that bind the State and other persons responsible for interpreting and applying the Constitution; enacting, interpreting or applying legislation; and making or implementing public policy decisions.³⁷² These, and associated values,³⁷³ are embedded throughout the Constitution, in particular in Chapter four, which establishes the Kenyan Bill of Rights.

Chapters 8-10 of the Constitution set out detailed rules concerning the composition, responsibilities, and powers of the three branches of Government: the executive, legislature and judiciary. The executive branch is led by the President, who is the recognised Head of State.³⁷⁴ The President is supported by a Deputy President, and between 14 and 22 Cabinet secretaries.³⁷⁵ Together with the Attorney-General, these actors make up the Cabinet.³⁷⁶ Legislative power vests in the National Parliament, which consists of a National Assembly

³⁷¹ Constitution of Kenya, Articles 4(2) and 10(2).

³⁷² Ibid., Article 10(1) and (2).

³⁷³ Including “human dignity, equity, social justice, inclusiveness, (...) human rights (...) and protection of the marginalised”. See Ibid., Article 10(2)(b).

³⁷⁴ Ibid., Articles 130(1) and 131(1).

³⁷⁵ Ibid., Articles 130(1), 131(1), and 152(1).

³⁷⁶ Ibid., Article 152(1). Article 130(2) of the Constitution further stipulates that the composition of the national executive should “reflect the regional and ethnic diversity of the people of Kenya.”

and Senate.³⁷⁷ Parliament is the main law-making body in Kenya; its powers are detailed under Article 109 of the Constitution. As a product of devolution, legislative competence is shared with the County Assemblies, which are empowered to legislate on particular matters relevant to the performance of their functions.³⁷⁸ The separate functions of the National Government and the County Governments are listed in Schedule 4 of the Constitution. Whilst the County Governments are responsible for regulating issues such as trade, planning, public works, and the provision of services at the county level, the National Government is responsible for developing labour standards.³⁷⁹

Chapter 10 of the Constitution concerns the judiciary. Article 162 sets out the basic structure of the judicial system. The subordinate courts consist of the Magistrates courts, which hear a majority of civil and criminal cases at first instance;³⁸⁰ the Kadhis' courts, which hear particular matters relating to the application of Muslim law on personal status, marriage, divorce, and inheritance;³⁸¹ the Courts Martial, which deal with military matters;³⁸² and any other courts and tribunals established under legislation.³⁸³ The superior courts consist of the High Court, the Court of Appeal, and the Supreme Court, alongside specialised courts, including the Employment and Labour Relations Court and the Environment and Land Court.³⁸⁴

The High Court exercises original jurisdiction in criminal and civil matters.³⁸⁵ The Court is also empowered to determine questions relating to the proper interpretation of the Constitution, and the Bill of Rights.³⁸⁶ Legislation, alongside acts and omissions, deemed inconsistent with the Constitution is invalid and void to the extent of the inconsistency.³⁸⁷ Where a right or fundamental freedom set out in the Bill of Rights is threatened or denied,

³⁷⁷ Ibid., Article 93(1).

³⁷⁸ Ibid., Article 185(2) and Schedule 4.

³⁷⁹ See Schedule 4 to the Constitution. As noted in the Introduction to this Report, a range of legislation relevant to the rights of persons with disabilities has been adopted at the county level pursuant to Article 185 of the Constitution. However, as labour standards are principally governed by national legislation, these laws are not explored in further detail. For an independent analysis, see Kenya National Commission on Human Rights, *Review of County Legislation on the Rights of Persons with Disabilities*, 2022.

³⁸⁰ Ibid., Article 169(1)(a). See further, Sections 6 and 7 of the Magistrates' Courts Act of 2015.

³⁸¹ Ibid., Articles 169(1)(b) and 170. According to Article 170(5), for a Kadhis' court to have jurisdiction, all parties to proceedings must "profess the Muslim religion" and agree to the case being heard by the court.

³⁸² Ibid., Article 169(1)(c).

³⁸³ Ibid., Article 169(1)(d). For further discussion of the subordinate courts, see Republic of Kenya Judiciary, *Courts*, accessed 23 August 2022, available at: <https://www.judiciary.go.ke/courts/>

³⁸⁴ Ibid., Article 162.

³⁸⁵ Ibid., Article 165(3)(a).

³⁸⁶ Ibid., Article 165(3)(b) and (d).

³⁸⁷ Ibid., Articles 2(4) and 165(b) and (d).

the Court may issue appropriate relief.³⁸⁸ The High Court also has jurisdiction to hear cases relating to the respective powers of the National and County Governments.³⁸⁹ Where a conflict of laws arises, the Court is required to adjudicate disputes in accordance with the requirements of Article 191.³⁹⁰ The Employment and Labour Relations Court has the same status as a High Court, and is charged with “exclusive original and appellate jurisdiction” to hear cases concerning employment and labour relations.³⁹¹ In practice, however, Kenyan High Courts have continued to assert their jurisdiction to hear cases concerning employment and labour disputes when Constitutional rights guarantees have been invoked.³⁹² The Court of Appeal hears appeals from the High Court and any other court prescribed by an Act of Parliament, including the Employment and Labour Relations Court.³⁹³ The Supreme Court sits at the apex of the judicial branch. It possesses exclusive original jurisdiction to hear disputes relating to presidential elections, and appellate jurisdiction to hear and determine appeals from the Court of Appeal and any other court or tribunal as set out in national legislation.³⁹⁴ The Court may also give advisory opinions on matters relating to the county governments.³⁹⁵

The Constitution operates as the highest source of law, and – as discussed – laws, policies and practices that contravene its requirements are invalid and void to the extent of the inconsistency.³⁹⁶ Other sources of law include legislation adopted by the National and County Governments; treaties duly ratified by the State; the “general rules of international law”; and customary law, to the extent that it complies with the requirements of the Constitution.³⁹⁷ As a common law jurisdiction, judicial decisions are capable of establishing legal precedent that binds all lower courts, and courts of an equivalent level.³⁹⁸ The decisions of the Supreme Court are binding on all lower courts.³⁹⁹

Besides the courts, a range of independent bodies have been established under national law and charged with a specific equality and human rights mandate. Article 59 of the Constitution provides for the creation of a National Human Rights and Equality Commission. The functions of the Commission are shared between three separate institutions whose powers

³⁸⁸ Ibid., Articles and 165 and 23.

³⁸⁹ Ibid., Article 165(3)(d)(iii).

³⁹⁰ Ibid., Articles 165(3)(d)(iv) and 191.

³⁹¹ Ibid., Articles 162(2)(a) and 165(5)(b). Employment and Labour Relations Court Act, Section 12(1).

³⁹² See the discussion in Section 8.1(b) of this Report.

³⁹³ Constitution of Kenya., Article 164(3) and the Employment and Labour Relations Court Act, Section 17(1).

³⁹⁴ Constitution of Kenya, Article 163(3).

³⁹⁵ Ibid., Article 163(6).

³⁹⁶ Ibid., Article 2.

³⁹⁷ Ibid., Article 2.

³⁹⁸ See further, Kenya Law, ‘What is Law Reporting?’, accessed 23 August 2022.

³⁹⁹ Constitution of Kenya, Article 163(7).

and responsibilities are detailed under national legislation.⁴⁰⁰ This includes the National Gender and Equality Commission (Kenya's principal equality body),⁴⁰¹ the Kenya National Commission on Human Rights (which receives complaints regarding human rights violations, conducts research and participates in the development of domestic policy on broad human rights themes)⁴⁰² and the Commission on Administrative Justice (the Ombudsman).⁴⁰³ Each of these bodies has a different area of focus, although each has a mandate relevant to the areas of work and employment and has developed research and publications relating to the rights of persons with disabilities.⁴⁰⁴

6 International and Regional Law

This Section provides an overview of Kenya's international and regional law obligations governing equality, non-discrimination, and the right to work. Kenya has ratified or acceded to a wide range of human rights treaties, and has thereby expressly agreed to protect, respect and fulfil the rights contained therein. Following the adoption of a new Constitution in 2010, treaties ratified by the State now form part of domestic law. Kenya is also bound by the requirements of customary international law, which provides important legal protections against discrimination.

6.1 Ratification of Human Rights Treaties

Kenya has a relatively good record of participation in international human rights instruments, having ratified seven of the nine core UN human rights treaties. This includes the International Covenant on Economic, Social and Cultural Rights, which prohibits discrimination in the areas of work and employment;⁴⁰⁵ the International Covenant on Civil and Political Rights, which provides a freestanding right to non-discrimination;⁴⁰⁶ the

⁴⁰⁰ The main functions of these Commissions are detailed under Article 59(2) of the Constitution.

⁴⁰¹ See further the National Gender and Equality Commission Act, and the National Gender and Equality Commission (Complaints Handling Procedure) Regulations, 2022. The functions and powers of the Commission are set out under Part II of the Act, whilst the Committee's investigative powers are detailed under Part III of the Act. The Kenyan Courts have examined the scope of these powers in recent cases. See 'Rose Wangui Mambo & 2 others v. Limuru Country Club & 17 others' [2014] eKLR, paras. 74-83.

⁴⁰² See the Kenya National Commission on Human Rights Act, and in particular Sections 8 and 26-44.

⁴⁰³ See the Commission on Administrative Justice Act and the Commission on Administrative Justice Regulations, 2013.

⁴⁰⁴ United Disabled Persons of Kenya, from 'Affirmation to Practice: Assessing a Decade of Implementing the Constitution of Kenya 2010 for Persons with Disabilities', 2020, p. 22.

⁴⁰⁵ International Covenant on Economic, Social and Cultural Rights, Articles 2(2) and 6-8.

⁴⁰⁶ International Covenant on Civil and Political Rights, Article 26. See also, Human Rights Committee, General Comment No. 18, 1989, para. 12.

Convention on the Rights of the Child, which prohibits discrimination against children and their parents or guardians,⁴⁰⁷ and the Convention on the Rights of Persons with Disabilities, which elaborates the prohibition of disability discrimination in several key areas of life.⁴⁰⁸ Kenya is also a party to the Convention on the Elimination of All Forms of Discrimination against Women, and the International Convention on the Elimination of All Forms of Racial Discrimination; each of which prohibits intersectional discrimination arising on the basis of disability and other protected grounds.⁴⁰⁹ Kenya has not ratified the International Convention for the Protection of All Persons from Enforced Disappearance and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The State has also failed to recognise the competence of any of the UN treaty bodies to consider individual complaints: a notable enforcement gap.⁴¹⁰

Core UN Human Rights Treaties	Ratified
International Covenant on Civil and Political Rights	Y
International Covenant on Economic, Social and Cultural Rights	Y
Convention on the Rights of Persons with Disabilities	Y
Convention on the Elimination of All Forms of Discrimination Against Women	Y
International Convention on the Elimination of All Forms of Racial Discrimination	Y
Convention on the Rights of the Child	Y
Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment	Y

⁴⁰⁷ Including on the basis of disability and other grounds. See Convention on the Rights of the Child, Article 2(1).

⁴⁰⁸ See in particular, Convention on the Rights of Persons with Disabilities, Articles 5 and 27.

⁴⁰⁹ See further, Section 1.1 of this Report. Under Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, discrimination is identified as a constituent element of torture. In its general comments, the Committee against Torture has also identified disability as a ground of discrimination. See further, Committee against Torture, General Comment No. 2, UN Doc. CAT/C/GC/2, 2008, para. 21; and General Comment No. 3, UN Doc. CAT/C/GC/3, 2012, para. 32.

⁴¹⁰ Despite several recommendations in this regard. See, for instance, Human Rights Committee, Concluding Observations: Kenya, UN Doc. CCPR/C/KEN/CO/4, 2021, paras. 4 and 5(d); and Committee on Economic, Social and Cultural Rights, Concluding Observations: Kenya, UN Doc. E/C.12/KEN/CO/2-5, 2016, para. 63.

International Convention for the Protection of all Persons from Enforced Disappearance	N
International Convention on the Protection of the Rights of All Migrant Workers	N

Kenya has ratified a majority of the fundamental ILO Conventions, including the Equal Remuneration Convention, the Discrimination (Employment and Occupation) Convention, the Forced Labour Convention (excluding its 2014 Protocol), the Abolition of Forced Labour Convention, the Minimum Age Convention, the Worst Forms of Child Labour Convention, and the Right to Organise and Collective Bargaining Convention. Kenya has not ratified the Freedom of Association and Protection of the Right to Organise Convention, nor the relevant treaties governing occupational safety and health.⁴¹¹ Kenya is also yet to ratify the recent Violence and Harassment Convention, which contains additional non-discrimination guarantees in the world of work.

International Labour Organization Treaties	Ratified
Equal Remuneration Convention (C100)	Y
Discrimination (Employment and Occupation) Convention (C111)	Y
Forced Labour Convention (C029)	Y
Right to Organise and Collective Bargaining Convention (C098)	Y
Abolition of Forced Labour Convention (C105)	Y
Minimum Age Convention (C138)	Y
Worst Forms of Child Labour Convention (C182)	Y
Freedom of Association and Protection of the Right to Organise Convention (C087)	N
Occupational Safety and Health Convention (C155)	N
Promotional Framework for Occupational Safety and Health Convention (C187)	N

⁴¹¹ See the Occupational Safety and Health Convention, and the Promotional Framework for Occupational Safety and Health Convention.

Protocol of 2014 to the Forced Labour Convention (P029)	N
Violence and Harassment Convention (C190)	N

In addition to international human rights and labour treaties, Kenya is a party to several African Union (AU) instruments, including the African Charter on Human and Peoples' Rights (the Charter), and the Protocol to the Charter on the Rights of Persons with Disabilities in Africa, although the Protocol is yet to enter into force.⁴¹² Kenya has also ratified the Protocol to the Charter on the Establishment of an African Court on Human and Peoples' Rights. The State has not, however, made the relevant declaration under Article 34(6) of the Protocol, recognising the competence of the Court to hear individual complaints, or those submitted by relevant non-governmental organisations.⁴¹³ Consequently, cases will usually only be brought before the Court following a reference from the African Commission on Human and Peoples' Rights.⁴¹⁴

African Union Human Rights Treaties	Ratified	In Force
African Charter on Human and Peoples' Rights (the Charter)	Y	Y
Protocol to the Charter on the Rights of Persons with Disabilities in Africa	Y	N
Protocol to the Charter on the Rights of Women in Africa	Y	Y
Protocol to the Charter on the Rights of Older Persons	Y	N
Protocol to the Charter on the Establishment of an African Court on Human and Peoples' Rights	Y	Y

⁴¹² According to Article 38(1), at least 15 member States must ratify the Protocol for it to enter into force. At the time of writing just three States – Kenya, Mali and Rwanda – have deposited instruments of ratification. For further information see the African treaty webpage, which can be accessed at: <https://au.int/treaties>

⁴¹³ See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Articles 5(3) and 34(6).

⁴¹⁴ Ibid., Article 5(1).

6.2 The Reception and Status of International Law

Historically, human rights treaties ratified by Kenya had to be transformed into domestic law in order to establish legally enforceable rights. Whilst unincorporated treaties could be used – in particular circumstances – as an aid to statutory construction,⁴¹⁵ without implementing legislation these treaties had no **direct** legal effect. The 2010 Constitution appeared to mark a shift away from this strictly “dualist” legal position.⁴¹⁶ Articles 2(5) and (6) stipulate that the “general rules of international law” and “any treaty or convention” duly ratified by the State “shall form part of the law of Kenya.” The adoption of the 2010 Constitution was well-received by UN treaty bodies. In its 2015 Concluding observations, the Committee on the Rights of Persons with Disabilities noted with approval that the CRPD is now “an integral part of the Kenyan Constitution.”⁴¹⁷ The Committee on Economic, Social and Cultural Rights made similar comments in its 2016 review of Kenya’s State Party report, welcoming “the incorporation of Covenant rights in the 2010 Constitution” as well as “the rulings of the High Court that recognise these rights.”⁴¹⁸

Despite these positive affirmations, until relatively recently a number of questions relating to the operation of Articles 2(5) and (6) remained unanswered. The Constitution does not specify the relationship or hierarchy between treaty and customary norms and national legislation. In the event of a conflict, it was unclear which law should take precedence and how potential conflicts should be resolved.⁴¹⁹ The Constitution is also silent on the status of guidance and decisions issued by human rights mechanisms.⁴²⁰ Whilst Kenyan courts have cited a range of human rights materials – including general comments and concluding observations – in recent cases, the use of these materials has been uneven.⁴²¹ Moreover, as discussed further elsewhere,⁴²² some judgments appear to directly contradict long-standing

⁴¹⁵ For instance, to resolve uncertainty or ambiguity in a text. See further, Nyarango, A. (2018). A Jigsaw Puzzle or a Map? The Role of Treaties under Kenya's Constitution. *Journal of African Law*, 62(1), 25-50, pp. 27-28.

⁴¹⁶ See broadly, the discussion in Nyarango, above.

⁴¹⁷ Committee on the Rights of Persons with Disabilities, Concluding Observations: Kenya, UN Doc. CRPD/C/KEN/CO/1, 2015, para. 4.

⁴¹⁸ Committee on Economic, Social and Cultural Rights, Concluding Observations: Kenya, UN Doc. E/C.12/KEN/CO/2-5, 2016, para. 3.

⁴¹⁹ For further discussion on this point see Nyarango, A. (2018). A Jigsaw Puzzle or a Map? The Role of Treaties under Kenya's Constitution. *Journal of African Law*, 62(1), 25-50.

⁴²⁰ *Ibid.*, pp. 41-44.

⁴²¹ Compare, for example, the cases of ‘Juliet Mwangeli Muema v. Smollan Kenya Limited’ [2019] eKLR and ‘Wilson Macharia v. Safaricom PLC’ [2021] eKLR, discussed in Section 7.2(d) of this Report. Whilst both cases refer to provisions of the Convention on the Rights of Persons with Disabilities, the quality of the judgments – and the level of understanding of reasonable accommodation – varies significantly.

⁴²² See, for instance, in respect of the ‘Gitari’ decision below, Human Rights Watch, “Kenya: Court Upholds Archaic Anti-Homosexuality Laws”, 24 May 2019, available at:

<https://www.hrw.org/news/2019/05/24/kenya-court-upholds-archaic-anti-homosexuality-laws>

principles of international law,⁴²³ whilst the implementation of African Commission and Court judgments has left much to be desired.⁴²⁴

A further complexity arises when considering the direct and indirect effect of treaty provisions. Whilst some provisions – such as those prohibiting discrimination – are largely self-executing: requiring specific action on the part of the State; others – such as those governing positive action – are drafted in broad terms, affording wide discretion to duty-bearers on the methods and means of implementation.⁴²⁵ Article 21(4) of the Constitution foresees this potential difficulty, requiring the State to “enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.”⁴²⁶ Nonetheless, as discussed further in the following Sections of this Report, several aspects of the Kenyan legal framework continue to fall below international standards,⁴²⁷ and until recently, it was unclear whether some – or indeed any – treaty provisions were capable of being directly enforced without the adoption of further implementing measures.

In the absence of clear guidance, Kenyan courts have embraced different approaches to the treatment of international law, often resulting in conflicting decisions.⁴²⁸ However, a number of important points were clarified in 2021, when the Supreme Court of Kenya delivered

⁴²³ See for example, the 2019 decision of the Nairobi High Court in ‘Gitari & Others v. Attorney General’, which upheld penal provisions criminalising same-sex sexual conduct. The Court was referred to a range of international law materials during the course of argument, including the 1994 case of ‘Toonen v. Australia’, in which the Human Rights Committee held that a similar ban violated provisions of the ICCPR. The Court based its decision, in large part, on the requirements of Article 45(2) of the Constitution, which takes precedence over Article 2(5). However, it is important to note that in its interpretation of Constitutional rights, ‘Toonen’ and other international law materials were accorded broadly the same legal significance as comparative jurisprudence.

⁴²⁴ See the discussion of the Endorois People communication in Nyarango, above, p. 43. Recent publications indicate that the implementation gap remains. See Minority Rights Group International, et. al., ‘Implement Endorois Decision 276/03’, 2022, available at: <https://minorityrights.org/publications/endorois-decision/>

⁴²⁵ Although UN treaty bodies have clarified that the adoption of such measures is mandatory, rather than permissible. See illustratively, International Convention on the Elimination of All Forms of Racial Discrimination, Article 1(4); Convention on the Elimination of All Forms of Discrimination against Women, Article 4(1); Convention on the Rights of Persons with Disabilities, Article 5(4); and Committee on the Elimination of Discrimination against Women, General Recommendation No. 25, 2004, endnote 3.

⁴²⁶ In its most recent report to the CRPD Committee, Kenya acknowledged this requirement, noting that the State is obliged to take all “policy, legislative or administrative measures” needed to fulfil the conditions of the Convention. See further, Committee on the Rights of Persons with Disabilities, State Party Report: Kenya, UN Doc. CRPD/C/KEN/1, 2014, para. 56.

⁴²⁷ See, for instance, Committee on the Rights of Persons with Disabilities, Concluding Observations: Kenya, UN Doc. CRPD/C/KEN/CO/1, 2015, paras. 5-6.

⁴²⁸ ‘Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others’ [2021] KESC 34 (KLR), para. 124.

judgment in the case of ‘Mitu-Bell Welfare Society v. Kenya Airports Authority’.⁴²⁹ The case concerned the demolition of an informal settlement in Mitumba Village, which lay in the vicinity of a flight path at Wilson Airport. The original petitioners in the case had sought a conservatory order from the High Court to prevent the demolition, which went ahead as planned despite the relevant order being made. Many of the arguments presented in the case centred on the role and status of international human rights law, which the Supreme Court divided into two principal areas of analysis: (1) the applicability of international law under Articles 2(5) and 2(6) of the Constitution; and (2) the Role of UN Guidelines in the Interpretation and Clarification of the Bill of Rights.

On the first point, the Court restated the “obvious” position that international treaty obligations are binding upon States under international law.⁴³⁰ However, whilst some treaties require specific action on the part of the State to give effect to its international law obligations, responsibility does not attach to any “particular institution” of government. It does not follow, therefore, that domestic courts are **bound** to apply and give effect to these obligations.⁴³¹ Despite this finding, the Court emphasised that Articles 2(5) and 2(6) of the Constitution recognise treaty and customary law as forming part of the law of Kenya.⁴³² Where there is an absence of domestic law, or an interpretive gap that needs to be filled, international law standards “must” be applied, provided that they are relevant, and do not “conflict with, the Constitution, local statutes, or a final judicial pronouncement.”⁴³³ In the same manner, the Kenyan courts are “at liberty to refer to a norm of international law, as an aid in interpreting or clarifying a Constitutional provision.”⁴³⁴ Thus, whilst international law cannot be said to take precedence over domestic legislation, in practice, it remains highly relevant and may guide the development of domestic legal standards.

The Court then turned to the second question, on the role and status of UN guidance. In the immediate case, the trial judge had relied upon General Comment No. 7 of the Committee on Economic, Social and Cultural Rights in finding a violation of the applicant’s Constitutional rights and Kenya’s international law obligations. The Court of Appeal held that the trial court had erred in this finding. According to the Court, Article 2(5) of the Constitution was intended to cover the limited category of peremptory or **jus cogens** norms of international law, as opposed to the broader corpus of customary international

⁴²⁹ Ibid., paras. 123-156.

⁴³⁰ Ibid., paras. 126 and 131.

⁴³¹ Ibid., para. 127.

⁴³² Ibid., para. 132.

⁴³³ Ibid., para. 132.

⁴³⁴ Ibid., para. 132. It should be noted that whilst the Court expressly refers to the Constitution, interpretive gaps or “lacuna” may appear in respect of ordinary legislation. See, for instance, discussion on the meaning of the term “reasonable accommodation”, which is not defined under the Persons with Disabilities Act, in ‘Juliet Mwangeli Muema v. Smollan Kenya Limited’ [2019] eKLR and Section 7.2(d) of this Report.

law.⁴³⁵ Moreover, given its hierarchy in the Kenyan legal system, it was clear that the Constitution prevailed over the general rules of international law in the event of any conflict of norms. In the present case, the Court intimated that the guidance of the CESCR Committee on evictions was inconsistent with the Constitution.⁴³⁶

The Supreme Court rejected this analysis on both counts. In the first instance, Article 2(5) of the Constitution must be interpreted as covering all rules of customary international law, including norms established through the general practice of States.⁴³⁷ Whilst – as a soft law document – General Comment No. 7 could not be said to have achieved this status,⁴³⁸ the guidance was “intended to breathe life into the right to dignity and the right to housing under the ICCPR and the ICESCR respectively” and could be referred to when interpreting Article 21 of the ICESCR under Article 2(6) of the Constitution.⁴³⁹ It was unclear why the Court of Appeal had found any inconsistency between General Comment No. 7 and the requirements of the Constitution. To the contrary, the guidance offered a means to overcome an existing “lacuna” in the law on “how the Government ought to carry out evictions” and could have been used by the trial judge as an interpretive aid when fashioning remedies.⁴⁴⁰ The Court reiterated in this regard that whilst the guidance of the UN treaty bodies is not binding in nature, “there is nothing wrong in a court of law making reference” to such guidance when interpreting Constitutional rights guarantees.⁴⁴¹

The decision in ‘Mitu-Bell’ brings welcome clarity to this area of law, although some questions remain. In particular, whilst the Supreme Court was clear that treaty and customary law “must be applied” in the absence of domestic law, it was also acknowledged that “a large number of modern-day treaties, conventions, and protocols are non-self-executing” meaning that “further legislative or administrative action” is required in order to give rise to domestically enforceable rights.⁴⁴² The Court did not provide guidance on which treaty provisions can be applied directly where a “lacuna” in national legislation is found to exist.⁴⁴³ And whilst it may be inferred

⁴³⁵ Ibid., para. 137.

⁴³⁶ Ibid., para. 135.

⁴³⁷ Ibid., paras. 138-140.

⁴³⁸ Ibid., para. 143.

⁴³⁹ Ibid., paras. 142 and 143.

⁴⁴⁰ Ibid., para. 142.

⁴⁴¹ Ibid., para. 143. For an example of good practice in this area, see *M A O & another v. Attorney General & 4 others* [2015] eKLR, citing a range of guidance issued by the UN treaty bodies and African Commission, in finding of a violation of Articles 27(4), 28, 29 (a-d, f), 39(1, 3), 43(1[a], 2-3), 45(1), and 53(d) of the Constitution.

⁴⁴² Ibid., para. 132 and 133.

⁴⁴³ Although the judgment indicates that this determination is a practical one: what provisions can be practically enforced without the need for “further legislative or administrative action.” See Ibid., para. 133.

from recent decisions that the prohibition of discrimination is self-executing,⁴⁴⁴ the reflection is of little consequence given that the right to non-discrimination is established directly under the Constitution.⁴⁴⁵ A separate – open – question relates to customary international law. Whilst the Court directly identifies the Universal Declaration on Human Rights as a source of custom,⁴⁴⁶ it is unclear which elements of, and to what extent, the rights to equality and non-discrimination have yet attained this status.⁴⁴⁷

Notwithstanding these complexities, the judgment makes clear that Kenya is “bound by its obligations under customary international law and its undertakings under the treaties and conventions, to which it is a party.”⁴⁴⁸ As such, the State is required to adapt its legal framework to ensure that the right to equal work and employment is made available to all without distinction.⁴⁴⁹ Unfortunately, as documented in the proceeding Sections of this Report, the current legal framework contains several gaps, weaknesses and inconsistencies that may undermine rights guarantees in practice.

7 The National Legal Framework

This section presents the main pieces of legislation governing equality, non-discrimination and the right to work for persons with disabilities in Kenya. It begins with an assessment of the Constitution, before turning its attention to the Persons with Disabilities Act, the Employment Act and related employment legislation. In order to assess the full picture of Kenya’s legal framework as it relates to equality, this Part should be read together with, and in the context of, Part A of this Report, which sets out the international law framework, and Section 8 of this Part, which discusses issues of enforcement.

⁴⁴⁴ See, in particular, ‘Steve Isaac Kawai & 2 others v. Council of Legal Education & 2 others’ [2021] eKLR, paras. 41-56. Whilst noting that Article 126 of the Treaty for the Establishment of the East African Community was not self-executing, the Nairobi High Court went on to find that the denial of educational opportunities to refugees from South Sudan violated Kenya’s international law obligations as well as the Constitutional equality guarantee, citing provisions of the Refugee Convention, Convention on the Rights of the Child, the Universal Declaration on Human Rights and the UNESCO Convention against Discrimination in Education, in its judgment.

⁴⁴⁵ Indeed, in its final analysis in the Kasawi case (above) the High Court of Kenya at Nairobi based its decision on Article 27 of the Constitution. See *Ibid.*, para. 71.

⁴⁴⁶ ‘Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others’ [2021] KESC 34 (KLR), para. 141.

⁴⁴⁷ For a detailed discussion on this point, see Schabas, W., ‘The Customary International Law of Human Rights’, Oxford University Press, 2021, Chapter 5.

⁴⁴⁸ ‘Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others’ [2021] KESC 34 (KLR), para. 131.

⁴⁴⁹ See the discussion in Part A of this Report.

7.1 The Constitution of Kenya 2010

The Constitution of Kenya 2010 was approved by a referendum on 4 August 2010, becoming effective a little over three weeks later on 27 August 2010.⁴⁵⁰ The Constitution demonstrates a strong commitment to equality and non-discrimination, and both rights are invoked as values or interpretative principles at a number of points. Article 27, the provision enshrining the right to equality and freedom from discrimination, significantly expands the list of protected grounds and the scope of the right to non-discrimination when compared to the repealed Constitution.⁴⁵¹ Article 41 of the Constitution governs labour relations and establishes the right of all persons to “fair labour practices.” Reading this provision together with Article 27, it is clear that the Constitution provides significant legal protections against discrimination in the field of employment.⁴⁵² These provisions are supplemented in Part Three of the Bill of Rights by a number of articles providing for the application of rights to particular groups, including persons with disabilities, youth and children, minorities and marginalised groups, and older persons.⁴⁵³ A range of additional rights guarantees are established throughout Chapter 4, which both permit, and in some places require, the adoption of positive action measures.⁴⁵⁴

(a) Principal Legal Provisions

The preamble to the Constitution lists equality as one of six essential values upon which governance should be based. This expression of principle is given legal force in Article 10, which includes human dignity, equity, social justice, inclusiveness, participation, equality, non-discrimination, and protection of the marginalised among the national values and principles of governance that are to be used in applying and interpreting the Constitution and other laws, and in making or implementing policy decisions. This is further emphasised in Article 20(4)(a) which lists equality and equity as values to be promoted in interpreting the Bill of Rights and Article 21(3) which imposes a duty on State actors to address the needs of “vulnerable groups” in society. Article 19(3) states that the rights and fundamental freedoms set out in Chapter 4 (the Bill of Rights) belong to everyone. Every person is entitled to enjoy their fundamental rights and freedoms to the greatest extent consistent with the nature of the right or freedom concerned.⁴⁵⁵

⁴⁵⁰ President Kibaki, The New Constitution of Kenya, Promulgation, L.N. 133/2010, 27 August 2010.

⁴⁵¹ See further, Equal Rights Trust, ‘In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya’, 2012, pp. 32-35.

⁴⁵² Constitution of Kenya, Articles 27(4) and (5), and 41.

⁴⁵³ *Ibid.*, Articles 52-57.

⁴⁵⁴ See the discussion in Section (e) (Equality Measures), below.

⁴⁵⁵ Constitution of Kenya, Article 20(2).

Article 27 of the Constitution establishes the right to equality and freedom from discrimination. Under Sub-Article 1, “every person” is declared “equal before the law” and has “the right to equal protection and equal benefit of the law.”⁴⁵⁶ The right to equality “includes the full and equal enjoyment of all rights and fundamental freedoms” established under the Constitution, including the right to work.⁴⁵⁷ Article 27(3) establishes the right to equal treatment and opportunities for men and women in broad spheres of life, whilst Sub-Articles 4 and 5 prohibit discrimination on the basis of disability and other protected grounds.⁴⁵⁸ Sub-Articles 6 to 8 concern positive action, requiring the State to adopt measures aimed at redressing historic disadvantage.⁴⁵⁹ These provisions should be read alongside Articles 54 and 56 of the Constitution, which make further provision for the application of rights and freedoms to persons with disabilities and other marginalised groups.

Article 41 of the Constitution concerns labour relations. Under Sub-Article 1, “every person has the right to fair labour practices.”⁴⁶⁰ Sub-Article 2 expands upon this broad guarantee by detailing the right of every worker to fair remuneration and reasonable working conditions; the right to form, join and participate in the activities and programmes of a trade union; and the right to strike. Employers are entitled to participate in an employer’s organisation, and both trade unions and employers’ organisations are guaranteed the right to engage in collective bargaining.⁴⁶¹

(b) Personal and Material Scope

Article 27 of the Constitution prohibits discrimination by the State on the basis of “race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”⁴⁶² Sub-Article 5 extends this prohibition to private actors, including employers, who are required to ensure the right to work to persons with disabilities on an equal and non-discriminatory basis.⁴⁶³ Article 27 grants substantially increased protection to persons with disabilities than the repealed

⁴⁵⁶ Ibid., Article 27(1).

⁴⁵⁷ Ibid., Article 27(2) and 41.

⁴⁵⁸ Ibid., Article 27(4) and (5).

⁴⁵⁹ Ibid., Article 27(6)-(8).

⁴⁶⁰ Whilst the term is not defined, Kenyan courts have held that discrimination would constitute an “unfair labour practice” under Article 41(1). See, for example, ‘Yvonne Achitsa Odedere v. Maseno University’ [2017] eKLR.

⁴⁶¹ Constitution of Kenya, Articles 41(3)-(5).

⁴⁶² Ibid., Article 27(4).

⁴⁶³ Ibid., Articles 27(5), 27(2) and 41. For a recent example in this area, see ‘Gichuru v. Package Insurance Brokers Ltd’, [2021] KESC 12 (KLR). As noted above, Kenyan Courts have identified discrimination as an “unfair labour practice” under Article 41 of the Constitution. See ‘Yvonne Achitsa Odedere v. Maseno University’ [2017] eKLR.

Constitution, which excluded disability from its list of grounds.⁴⁶⁴ Unlike its earlier counterpart, Article 27(4) is also open ended, allowing for the recognition of new grounds over time.⁴⁶⁵ Through the interpretation of this provision, Kenyan Courts have identified additional characteristics – such as sexual orientation – as falling within the scope of protection.⁴⁶⁶ However, unlike some comparative jurisdictions, Kenya has not adopted legislation establishing a test for the identification of new grounds.⁴⁶⁷ Without clear statutory guidance, some practice has emerged in the decisions of the Kenyan courts that is inconsistent with the requirements of international law.⁴⁶⁸

Disability is defined under Article 260 of the Constitution to include “any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual’s ability to carry out ordinary day-to-day activities.”⁴⁶⁹ It has been noted elsewhere that this definition, and its focus on a person’s “ability to carry out day-to-day activities” may result in a narrower conception of disability than provided for by the CRPD, which focuses on the interaction of a person’s impairment with attitudinal and environmental barriers that may impede equal participation.⁴⁷⁰ By using the word “includes”, the Constitution does, however, permit for a wider reading.⁴⁷¹ Whilst there has been comparatively little discussion about

⁴⁶⁴ See the repealed Constitution, Articles 70 and 82(3). For further discussion on this point see, Equal Rights Trust, ‘In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya’, 2012, p. 132.

⁴⁶⁵ This is indicated by the term “including”, which is defined under Article 259(4)(b) to mean “includes, but not limited to.” Article 27(5) refers back to the grounds “specified or contemplated in clause (4).” As such, it is clear that the prohibition of discrimination based on other status applies to private, as well as public, actors.

⁴⁶⁶ See, for instance, ‘Gitari v. NGO Co-ordination Board & 4 others’, No 440 of 2013 [2015] eKLR, paras. 137-8, upheld by the Court of Appeal in 2019, and more recently by a 3-2 majority of the Supreme Court in ‘Non-Governmental Organizations Co-Ordination Board v. Eric Gitari & others’ [2023].

⁴⁶⁷ See, for example, the South African Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, Article 1(xxii)(b).

⁴⁶⁸ In a recent case, the High Court upheld the constitutionality of fundamentally discriminatory legal provisions that criminalise same-sex sex, noting that sexual orientation may only be read into Article 27 “where circumstances allow”. This approach runs contrary to the practice of UN and regional human rights bodies, both in respect of the recognition of grounds and its treatment of sexual orientation specifically. See ‘Gitari & Others v. Attorney General’, Petition 150 & 234 of 2016, paras. 372 and 400. See further, United Nations Human Rights Office, Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation, New York and Geneva, 2023, pp. 20-21, and Human Rights Committee, Concluding Observations: Kenya, UN Doc. CCPR/C/KEN/CO/4, 2021, paras. 12-13.

⁴⁶⁹ Constitution of Kenya, Article 260.

⁴⁷⁰ See Convention on the Rights of Persons with Disabilities, Preamble, para. (e), and Article 1. See also, Equal Rights Trust, ‘In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya’, 2012, p. 176.

⁴⁷¹ As noted above, under Article 259(4)(b), “the word “includes” means “includes, but is not limited to.”

what constitutes a disability under the Constitution, the Supreme Court has indicated that an impairment does not need to be permanent in nature.⁴⁷²

The Constitution does not indicate whether a person needs to **belong** to a protected class in order to benefit from protection from discrimination, and there has been little judicial practice in this area. The reference to community perceptions under Article 260 may indicate a degree of protection from discrimination based on perception. However, this is far from clear.⁴⁷³ In some cases, courts have defined discrimination to include the “possession” of a characteristic.⁴⁷⁴ In others, courts have linked the entitlement of persons with disabilities to “rights and privileges” under the Constitution and Persons with Disabilities Act, to “certification and registration by the National Council for Persons with Disabilities.”⁴⁷⁵ This, in turn requires a completed medical report.⁴⁷⁶ Taken together, these cases may indicate that persons with disabilities must prove their disability status in order to enjoy protection from discrimination, but this is far from settled law.

In its general commentary, the CRPD Committee has sought to disaggregate the prohibition of discrimination from the broader, positive equality measures required by the Convention, noting that “disability-inclusive” anti-discrimination legislation “seeks to outlaw and prevent a discriminatory act rather than target a defined protected group.”⁴⁷⁷ Legislation “can only be effective” if it incorporates a human-rights based model of disability, and prohibits discrimination against persons “who have a disability at present, who have had a disability in the past, who have a disposition to a disability that lies in the future, who are presumed to have a disability, as

⁴⁷² See, in the context of the Persons with Disabilities Act, ‘Gichuru v. Package Insurance Brokers Ltd’ (Petition 36 of 2019) [2021] KESC 12 (KLR), para. 65.

⁴⁷³ This clause appears to attach to the perceived long-term or substantial ability of a person to carry out day-to-day activities, rather than a person’s imputed disability status. Even upon a broad reading, the reference to “significant sections of the community”, would appear to limit the scope of protection afforded.

⁴⁷⁴ See, for example, ‘Nyarangi & Others v. Attorney General’ [2008] KLR 688, cited by the Supreme Court in ‘Gichuru v. Package Insurance Brokers Ltd’ (Petition 36 of 2019) [2021] KESC 12 (KLR), para. 52; and ‘National Assembly of Kenya v. Kina & another’ [2022] KECA 548 (KLR), para. 45. It should be noted that the Nyarangi decision predated the adoption of the 2010 Constitution, and neither of the cited cases examined a complaint concerning discrimination based on association or perception. Caution should therefore be exercised when placing emphasis on the wording used by the courts. As set out by Lord Denning in ‘Close v. Steel Co of Wales Ltd’, what matters is the “principles accepted and applied as necessary grounds of the decision.” See AC 367 [1962], para. 388-389, citing Sir Frederick Pollock.

⁴⁷⁵ ‘Mary Kerubo Osoro v. Public Service Commission’ [2017] eKLR, paras. 19-22. Other courts have held that registration is not required. See ‘Margaret Martha Byama v. Alice A. Otwala & 3 others’ [2016] eKLR, para. 18.

⁴⁷⁶ See *Ibid.*, ‘Mary Kerubo Osoro v. Public Service Commission’.

⁴⁷⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 73(b).

well as those who are associated with a person with disability.”⁴⁷⁸ Based on current practice, it is unclear if the Constitution meets these requirements. However, recent caselaw indicates that the possession of a characteristic is not required for a finding of discrimination, leaving scope for further judicial developments.⁴⁷⁹

The Constitution is also silent on the topic of intersectional discrimination. Unlike the Constitution of South Africa, from which the Kenyan Constitution drew inspiration,⁴⁸⁰ Article 27 does not expressly prohibit discrimination based on “one or more grounds,”⁴⁸¹ opting instead for the phrase “any ground” and setting out a non-exhaustive list.⁴⁸² Whilst this could, conceivably, encompass acts of discrimination based on intersecting characteristics, there has been limited judicial consideration of this point, particularly in the disability context. Nonetheless, some recent cases indicate that intersectional discrimination is prohibited under Article 27.

In ‘Al Yusra Restaurant Ltd’, for example, the Nairobi High Court held that a decision to terminate a tenancy agreement was made on the basis of the “ethnic and religious affiliation of the Petitioner’s Directors and prospective tenants.”⁴⁸³ The Court based its decision on the fact that the tenants were both “Muslim and Somali”; the intersection of the tenants ethnic origin and religion appeared to be a determining factor in the disadvantage they experienced.⁴⁸⁴ In ‘M A O’ the High Court was even more explicit in its finding: holding that the detention of mothers who had recently given birth in a hospital for failure to pay a medical bill was based on their “status as poor, socially and economically marginalised

⁴⁷⁸ Ibid., paras. 20 and 73(b).

⁴⁷⁹ See for instance, ‘Al Yusra Restaurant Ltd v. Kenya Conference of Catholic Bishops & another’ [2017] eKLR, paras. 71-75. Interpreting, Article 260 of the Constitution, the Court held that a restaurant could experience discrimination on account of the ethnic and religious profile of its directors and patrons. Whilst the restaurant could not properly be said to “possess” these characteristics, as a “juristic person” it had experienced disadvantage due to its association with individuals belonging to a protected class. The UK Employment Appeal Tribunal has adopted a similar approach, when deciding cases under the Equality Act 2010. See, for example, ‘EAD Solicitors LLP and 7 Others v. Garry Abrams’, UKEAT/0054/15/DM, paras. 20-30.

⁴⁸⁰ See broadly, Constitution of Kenya Review Commission, ‘The Final Report of the Constitution of Kenya Review Commission’, 2005.

⁴⁸¹ Constitution of South Africa, Articles 9(3) and (4).

⁴⁸² It should, however, be noted that the definition of “marginalised group” under Article 260 of the Constitution includes “a group of people who (...) are disadvantaged by discrimination on one or more of the grounds in Article 27(4),” thereby implying a degree of protection against discrimination on multiple grounds.

⁴⁸³ ‘Al Yusra Restaurant Ltd v. Kenya Conference of Catholic Bishops & another’ [2017] eKLR, para. 91.

⁴⁸⁴ Ibid., paras. 61, and 103.

women.”⁴⁸⁵ The Court made explicit reference to guidelines of the African Commission on Human and Peoples’ Rights recognising the prohibition of intersectional discrimination under the Charter in reaching its decision.⁴⁸⁶ In the 2012 case of ‘Fredrick Gitau Kimani v. Attorney General and Others’, it was held that a failure to extend the retirement age of a worker with disabilities in line with the requirements of the Persons with Disabilities Act constituted discrimination on the “grounds of health, age and disability.”⁴⁸⁷ The Court made this finding based **inter alia** on the requirements of Article 27 of the Constitution. Taken together, these cases support the view that intersectional discrimination is prohibited in the same way as single-ground claims, although there remains room for further guidance in this area.

(c) Forms of Discrimination

Articles 27(4) and (5) of the Constitution require that relevant duty-bearers do not “discriminate directly or indirectly” against any person on the basis of their protected characteristics. These provisions clearly prohibit direct and indirect discrimination, although neither term is defined, and other forms of discrimination – such as harassment, segregation, and denial of reasonable accommodation, are not expressly listed as forms of prohibited conduct.⁴⁸⁸ Despite this gap, in the years since the Constitution was adopted Kenyan Courts have had the opportunity to elaborate the requirements of Article 27 in a wide range of cases. In 2021, the Supreme Court issued judgment in the case of ‘Gichuru v. Package Insurance Brokers Ltd’, which represents the most recent pronouncement on the matter. In the case, the Court provided detailed commentary on the meaning of the terms “direct and indirect discrimination,” and – significantly – held that a failure of the respondent employer to accommodate an employee with disabilities violated Article 27 of the Constitution.⁴⁸⁹

The Appellant in the case, Simon Gichuru, had been employed by ‘Package Insurance Brokers Ltd’ in the position of operations manager. In 2014 Mr Gichuru travelled to India to have spinal surgery in order to remove a tumour. Following the surgery, the appellant was required to take a significant period of sick leave from work. His employer subsequently requested a medical report indicating when the appellant would likely be able to return to work. Whilst the report was provided (albeit later than the respondent had hoped), the appellant was

⁴⁸⁵ ‘M A O & another v. Attorney General & 4 others’ [2015] eKLR, para. 198(b). See also, para. 190, in which the Court found that the “disproportionate impact on poor women’s ability to access health care” constituted “discrimination on the basis of social origin” and negated “the right of women to enjoy their constitutionally guaranteed rights and freedoms.”

⁴⁸⁶ *Ibid.*, para. 175. See further, African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, para. 38.

⁴⁸⁷ ‘Fredrick Gitau Kimani v. Attorney General & 2 Others’ [2012] EKLR, para. 24, cited with approval in ‘Paul Pkiach Anupa & Another v. Attorney General & Another’ [2012] eKLR, at para. 47.

⁴⁸⁸ It should be noted, however, that some of these types of conduct are prohibited by other Kenyan legislation governing specific areas of life. See the discussion in the following Sections of this Report.

⁴⁸⁹ ‘Gichuru v. Package Insurance Brokers Ltd’ (Petition 36 of 2019) [2021] KESC 12 (KLR).

suspended, and subsequently dismissed following a performance review. The appellant submitted a complaint to the Employment and Labour Relations Court, claiming a breach of his Constitutional right to equality, and wrongful termination under various provisions of the Employment Act. The trial court found in his favour; however, the Court of Appeal partly overturned the judgment, holding that whilst Mr Gichuru had been unlawfully dismissed, there was insufficient evidence of discrimination. Mr Gichuru subsequently appealed to the Supreme Court, which again found in his favour.

The Court began its analysis of the discrimination claim by setting out several definitions of discrimination.⁴⁹⁰ Having studied these different definitions it went on to provide its own. Accordingly, discrimination can be understood to occur when “a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification.”⁴⁹¹ From this broad definition, the Court went on to distinguish direct and indirect discrimination, relying on the 2008 case of ‘Nyarangi & Others v. Attorney General’. According to the High Court in ‘Nyarangi’, “**direct discrimination** involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances.”⁴⁹² By contrast “**indirect or subtle discrimination** involves setting a condition or requirement which a smaller proportion of those with the attribute are able to comply with, without reasonable justification.”⁴⁹³ The High Court gave the US Case of ‘Griggs v. Duke Power Company’, which involved the adoption of an aptitude test that was shown to disproportionately disqualify Black applicants, as a useful example of indirect discrimination.⁴⁹⁴

There are several issues with the above definitions. Firstly, direct discrimination is described as requiring the **possession** of a particular characteristic. For the reasons given in the previous Section, UN and regional human rights bodies have emphasised that a demonstration of group membership is not required for a finding of discrimination.⁴⁹⁵ Secondly, the definition of discrimination relies on the use of a comparator. Whilst comparison may help to evidence discrimination in some cases, comparators are not always available. To avoid this problem, both the CRPD and CESCRC Committees have defined discrimination to occur where an individual is subject to a detriment arising in connection with

⁴⁹⁰ Gichuru v. Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR), paras. 48-50.

⁴⁹¹ Ibid., para. 51.

⁴⁹² Ibid., para. 52, citing Nyarangi & Others v. Attorney General [2008] KLR 688.

⁴⁹³ Ibid., para. 52, citing Nyarangi & Others v. Attorney General [2008] KLR 688.

⁴⁹⁴ Ibid., para. 52, citing Nyarangi & Others v. Attorney General [2008] KLR 688.

⁴⁹⁵ See United Nations Human Rights Office, Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation, New York and Geneva, 2023, pp. 25-36.

a protected characteristic, even “where there is no comparable similar situation.”⁴⁹⁶ Finally, the High Court defined indirect discrimination as “subtle” in nature. This is potentially misleading. Indeed, in the ‘Griggs’ case, discrimination was overt: evidence suggested that the Duke Power Company had designed and deployed the aptitude test as a way to deliberately exclude Black candidates, with serious and far-reaching consequences.⁴⁹⁷

Despite these definitional issues, it must be noted that the Supreme Court also relied on a range of comparative jurisprudence, which it cited with approval.⁴⁹⁸ In ‘Sarka Angel Walkins Singh v. the Governing Body of Aberdare Girls High School, & Another’, the UK High Court set out a four stage test for evidencing indirect discrimination. Firstly, it is necessary to identify the provision, criterion or practice (PCP) that is alleged to have resulted in discrimination. Once the PCP has been located, a pool must then be identified “for the purpose of making a comparison of the relevant disadvantage.” Thirdly, it must be demonstrated that the PCP personally impacted upon the claimant. Finally, it must be considered whether the PCP was – in any case – justified. To pass this test, it must be shown that the PCP represented a proportionate means of achieving a legitimate aim.⁴⁹⁹ In ‘Essop & ors v. Home Office; Naeem v. Secretary of State for Justice’, the UK Supreme Court elaborated some essential features of indirect discrimination. Firstly, and importantly, whilst “direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic (...) indirect discrimination does not. Instead, it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual.” There is no need to explain why “a particular PCP puts one group at disadvantage when compared to others.” Indeed, there are many reasons why “one group may find it harder to comply with the PCP.” Similarly, it is not necessary to demonstrate that every person sharing the applicant’s personal characteristic experiences similar disadvantage: some may not. Evidencing indirect discrimination can often (although not exclusively) be supported through statistical evidence. In all cases, it remains open for the relevant duty-bearer to demonstrate that the PCP was justified.⁵⁰⁰

Based on these extracts and an analysis of the case at hand, the Supreme Court found that the respondent’s actions “amounted to indirect discrimination due to differential treatment.”⁵⁰¹ This was perhaps an unusual holding: as set out in the comparative jurisprudence cited, indirect discrimination involves differential **impacts**, whilst direct discrimination is concerned with

⁴⁹⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 10(a); and Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 18(a).

⁴⁹⁷ In other cases, Kenyan courts have clarified that discrimination need not be “overt” in nature. See, for instance, Marion Mwangi v. Magnet Ventures Limited [2016] eKLR, para. 56.

⁴⁹⁸ Gichuru v. Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR), para. 56.

⁴⁹⁹ Ibid., para. 54. The justification test is discussed in further detail in the proceeding Section.

⁵⁰⁰ Ibid., para. 55.

⁵⁰¹ Ibid., para. 61.

differential treatment.⁵⁰² However, the Court appears to have been influenced by the fact that the respondent employer had failed to adapt its policies to accommodate the requirements of the appellant. The Court's reasoning, in this regard, is best illustrated by a 2017 judgment of the Court of Appeal.

The case of 'Seventh Day Adventist Church Limited' involved a claim relating to religious accommodations. The appellant in the case had argued that a policy decision, requiring Adventist students to attend compulsory classes on Saturdays when such students were required to observe the Sabbath, violated the rights to equality and freedom of religion guaranteed by the Constitution. Citing an earlier decision of the Court of Appeal, delivered in 'Fugicha',⁵⁰³ the Court emphasised that:

[E]quality before the law must never be confused with uniformity. Equality does not presuppose the elimination of differences. It does not imply levelling or homogenisation of behaviour, but an acknowledgement and acceptance of difference. And difference cannot and should not be the basis for exclusion, marginalisation, stigma or punishment.⁵⁰⁴

In finding that the students' rights had been violated, the Court referred to comparative South African jurisprudence. In 'Pillay', the Constitutional Court of South Africa set out some basic factors that might be relevant to a determination that reasonable accommodations were required:

First, reasonable accommodation is most appropriate where, as in this case, discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but which nevertheless has a marginalising effect on certain portions of society. Second, the principle is particularly appropriate in specific localised contexts, such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck (...) At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights

⁵⁰² As noted in the introduction to Section 2 of this Report, the same distinction has been drawn by the UN treaty bodies and regional human rights tribunals. For further discussion on this point, see United Nations Human Rights Office, 'Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation', New York and Geneva, 2023, pp. 30-36. In subsequent cases Kenyan courts have also drawn this distinction more clearly. See, for example, 'National Assembly of Kenya v. Kina & another' [2022] KECA 548 (KLR), para. 45.

⁵⁰³ 'Mohamed Fugicha v. Methodist church in Kenya & 3 others' [2016] eKLR. This decision was subsequently overturned by the Supreme Court on technical grounds. See 'Methodist Church in Kenya v. Mohamed Fugicha & 3 others' [2019] eKLR.

⁵⁰⁴ 'Seventh Day Adventist Church (East Africa) Limited v. Minister for Education & 3 others' [2017] eKLR.

equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.⁵⁰⁵

Thus, reasonable accommodation may be seen as a means to avert or avoid the discriminatory impacts of policies and practices. Whilst, in ‘Gichuru’, the Court made a finding of indirect discrimination,⁵⁰⁶ on a principled reading, the case could also have resulted in a finding of direct discrimination, due to the differential treatment of the appellant.⁵⁰⁷ Irrespective of the approach adopted, it is clear based on recent judicial practice that the denial of reasonable accommodation – both in respect of disability, and other grounds – may result in a violation of Article 27 of the Constitution. Importantly, whilst a discussion of indirect discrimination formed the starting point of the analysis, the Court appeared to identify a general duty to make accommodations, applicable from the moment the need for such accommodations is identified.⁵⁰⁸ This moves much closer to the international law position, which recognises the denial of reasonable accommodation as a separate and distinct form of harm.⁵⁰⁹

The recognition of a duty to accommodate under the Constitution, exemplified in recent cases, is undoubtedly a positive development. However, it is unclear whether other forms of discrimination recognised under international law are similarly covered. Article 54(1)(b) of the Constitution recognises the right of persons with disabilities to access “educational institutions and facilities (...) that are integrated into society to the extent compatible with the interests of the person”, but this falls short of a general prohibition of segregation. Moreover, the reference to “facilities for persons with disabilities” could be read restrictively, as permitting the establishment or maintenance of separate, non-inclusive learning institutions.⁵¹⁰

Whilst harassment is not expressly covered by Article 27, in a recent case, the Court of Appeal at Nairobi identified sexual harassment as a “genre of discrimination”, prohibited

⁵⁰⁵ ‘MEC For Education: Kwa Zulu-Natal & 3 Others v. Navaneethum Pillay & 3 Others’, (2006), paras. 78 and 73, cited in ‘Seventh Day Adventist Church (East Africa) Limited v. Minister for Education & 3 others’ [2017 eKLR].

⁵⁰⁶ As noted, the Court appeared to place emphasis on the fact that the employer had failed to adapt their workplace policies to accommodate the employee before making their dismissal decision, noting that the “respondent expected the appellant to continue working in the same conditions as the rest of employees”, which was “outrightly unreasonable.” See, ‘Gichuru v. Package Insurance Brokers Ltd’ (Petition 36 of 2019) [2021] KESC 12 (KLR), para. 70.

⁵⁰⁷ Indeed, this was the approach of the Committee on the Rights of Persons with Disabilities, in a recent case baring very similar facts to ‘Gichuru’. See ‘VFC v. Spain’, UN Doc. CRPD/C/21/D/34/2015, para. 8.10,

⁵⁰⁸ ‘Gichuru v. Package Insurance Brokers Ltd’ (Petition 36 of 2019) [2021] KESC 12 (KLR), para. 64.

⁵⁰⁹ Convention on the Rights of Persons with Disabilities, Articles 2, 5(3), and 27(1)(i).

⁵¹⁰ This point is discussed in further detail in Section 7, which provides an assessment of relevant provisions of the Persons with Disabilities Act.

under the Constitution.⁵¹¹ In the case, the Court set out the "main elements" of sexual harassment which included "unwanted verbal, non-verbal or physical conduct of a sexual nature."⁵¹² Consistent with international best practice, the Court held that "there was no need to show that the conduct was related to the victim's sex, only that it was sexual nature."⁵¹³ For a finding of sexual harassment, the "purpose or effect of the conduct" must be to "violate the victim's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment."⁵¹⁴ Whilst the Court did not go on to consider whether other forms of "ground-based" harassment (for instance, on the basis of race or disability) are equally protected, this may be inferred from the Court's judgment and a reading of Article 28, which establishes the right to human dignity, with the Constitution's broader equality guarantees. As discussed in the following Section, several pieces of legislation – including the Employment Act – prohibit harassment in the workplace and other areas of life.⁵¹⁵

(d) Justification and Exceptions

Article 24 of the Constitution establishes a test for the limitation of rights and fundamental freedoms. Certain rights – such as the right to a fair trial and the right to freedom from slavery and servitude – are excluded from the ambit of this provision by virtue of Article 25. As the rights to equality and non-discrimination, under Article 27 of the Constitution, are not included amongst this list, reasonable limitations on these rights may be imposed. Article 24(1) states:

A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- a) the nature of the right or fundamental freedom;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;

⁵¹¹ It should be noted, due to the timing of the alleged events, the Court made its finding under Section 82 of the former Constitution. However, the ratio is of wider applicability. As noted at the outset of this Section, the 2010 Constitution largely consolidates and enhances the equality provisions of its predecessor. See 'Ooko & another v. SRM & 2 others' [2022] KECA 44 (KLR), para. 30.

⁵¹² Ibid., para. 32.

⁵¹³ Ibid., para. 32.

⁵¹⁴ Ibid., para. 32. Again, this definition is broadly consistent with international law. See further, United Nations Human Rights Office, 'Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation', New York and Geneva, 2023, p. xiii.

⁵¹⁵ See the Employment Act, Sections 5(3)(a) and 6; Person with Disabilities Act, Section 2 (defining the term "discriminate"), and National Cohesion and Integration Act, Section 6.

d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

This provision is noteworthy in two key respects. Firstly, unlike in the previous Constitution, there is no specific limitation of Article 27 itself. Instead, limitations are permissible only under this provision which is deliberately narrow in scope. It is notable that the provision specifies those considerations which should be taken into account in determining whether a restriction on a right is proportionate, including whether there are any less restrictive means of achieving its purpose. Indeed, Articles 24(2) and 24(3) set out detailed requirements applicable to legislation, the state, or persons seeking to justify the limitation of a freedom. Secondly, it includes dignity, equality and freedom as the bases of a democratic society, raising the possibility that the equality impact of an exception would be one of the key factors in determining its justifiability.

Kenyan courts have established a three stage test to determine whether a differentiation in treatment or impact gives rise to discrimination, derived from Article 24. The first test is one of legitimate aim: “there must be a legitimate purpose for the differentiation, and [a] reasonable connection between the differentiation and its purpose.”⁵¹⁶ If a legitimate aim is established, and the means of meeting that aim are appropriate, the court shall apply a proportionality assessment, which is “implied by the provisions of paragraphs (a) to (e) of Article 24(1).”⁵¹⁷ Under this test, “the question asked is whether the differentiation is proportional, namely is it to the extent necessary.”⁵¹⁸ If less restrictive means could be adopted to achieve the same purpose, the differentiation cannot be justified.⁵¹⁹ Finally, the courts must ask “whether the differentiation is necessary in an open and democratic society.”⁵²⁰ This requirement moves beyond a strict necessity test (and the identification of alternate means), placing emphasis on the importance of “human dignity, equality, equity and freedom” as fundamental Constitutional values.⁵²¹ Applying this limb of the test, Kenyan courts have recently found limitations on harmful cultural practices, such as female genital

⁵¹⁶ ‘National Assembly of Kenya v. Kina & another’ [2022] KECA 548 (KLR), para. 54. A similar test is established under UK law. To establish a rational connection between measures adopted and their intended purpose, the UK courts have noted that stereotyped assumptions or “generalisations” are insufficient to justify a potentially discriminatory policy. See ‘Lord Chancellor v. McCloud & Ors’ [2018] EWCA Civ 2844, para. 161.

⁵¹⁷ ‘National Assembly of Kenya v. Kina & another’ [2022] KECA 548 (KLR), para. 54.

⁵¹⁸ *Ibid.*, para. 54.

⁵¹⁹ Constitution of Kenya, Article 24(1)(e).

⁵²⁰ ‘National Assembly of Kenya v. Kina & another’ [2022] KECA 548 (KLR), para. 55.

⁵²¹ *Ibid.*, Articles 24(1) and 20(4)(a).

mutilation, to be legitimate as a result of their disproportionate impact on the rights and dignity of women.⁵²²

In order for a limitation to be legitimate, it must be established “by law.”⁵²³ In the employment context, these limitations are prescribed by the Employment Act.⁵²⁴ Where legislation does not set out clear rules on justification or establish specific exceptions in accordance with Article 24(2) of the Constitution, however, the relevance of Article 24 is questionable. In such circumstances it is unclear whether differential treatment, or an indirectly discriminatory policy or practice, can in fact be justified.⁵²⁵ In South Africa, this difficulty has been overcome through the adoption of the Promotion of Equality and Prevention of Unfair Discrimination Act. The Act was developed pursuant to Section 9 of the South African Constitution, which prohibits “unfair discrimination”. Section 14 of the Act sets out rules for the determination of “fairness or unfairness”, which includes considerations of legitimate aim, and the availability of less restrictive measures, amongst other relevant factors. Unlike South Africa, however, Article 27 of the Kenyan Constitution does not use the term “unfair”, and the State has not adopted comprehensive anti-discrimination legislation. Whilst some courts have referred back to the “unfair” discrimination test when making findings in discrimination cases,⁵²⁶ practice in this area is uneven and there is a risk of confusing, and potentially contradictory, judgments emerging.

There appears to be – at least an implicit – recognition that a general justification test applies in discrimination cases brought under the Constitution. For instance, in ‘Gichuru’, the Supreme Court defined discrimination to occur when (otherwise discriminatory) practices are implemented that have no “objective and reasonable justification”.⁵²⁷ The Court also cited with approval extracts from UK cases, which adopt materially the same legitimate aim and proportionality assessment, discussed above.⁵²⁸ In respect of reasonable accommodation, a separate “undue hardship” test was endorsed, which bears many similarities to the “undue or disproportionate burden” test established under the CRPD.⁵²⁹ The Court noted that “the respondent employer was under “an obligation to (...) accommodate the appellant by devising ways that could ease his movements unless they proved that accommodating the appellant would cause undue hardship to the company.”⁵³⁰ In the immediate case, the

⁵²² ‘Kamau v. Attorney General & 2 others’ [2021] KEHC 450 (KLR), para. 215.

⁵²³ Constitution of Kenya, Article 24(1).

⁵²⁴ Employment Act, Section 5(4).

⁵²⁵ Indeed, this seems to be the position adopted by the Court of Appeal in the SDA ‘Seventh Day Adventist Church (East Africa) Limited v. Minister for Education & 3 others’ [2017] eKLR.

⁵²⁶ See, for instance, ‘Nubian Rights Forum & 2 others v. Attorney General & 6 others; Child Welfare Society & 9 others’ [2020] eKLR, paras. 982-986.

⁵²⁷ ‘Gichuru v. Package Insurance Brokers Ltd’ (Petition 36 of 2019) [2021] KESC 12 (KLR), para. 51.

⁵²⁸ *Ibid.*, paras. 54-56.

⁵²⁹ Convention on the Rights of Persons with Disabilities, Article 2.

⁵³⁰ ‘Gichuru v. Package Insurance Brokers Ltd’ (Petition 36 of 2019) [2021] KESC 12 (KLR), para. 64.

respondent had “failed to demonstrate that there would have been any undue hardship (...) if they chose to reasonably accommodate the needs of the employee by providing amenities such as a ramp to ease the appellant’s movement, or even providing flexible working hours.”⁵³¹ To the contrary, the “respondent expected the appellant to continue working the same conditions as the rest of employees.”⁵³² As a result, the appellant’s Constitutional right to non-discrimination was violated.

Article 58 of the Constitution permits legislation – enacted in response to a declaration of a state of emergency – to limit a right or fundamental freedom in the Bill of Rights to the extent that the limitation is “strictly required by the emergency” and “the legislation is consistent with the Republic’s obligations under [governing] international law.” Specific rules on states of emergency are set out under Article 4 of the ICCPR. To be legitimate, derogating measures must not result in discrimination.⁵³³ Whilst the list of grounds under Article 4 does not expressly include disability, the Human Rights Committee has emphasised that “there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances.”⁵³⁴ In its recent comments, the Committee has expressed the position in even stronger terms. Accordingly, States “may not resort to emergency powers or implement derogating measures in a manner that is discriminatory.”⁵³⁵ In a similar vein, the Committee on the Rights of Persons with Disabilities has emphasised that “non-discrimination must be ensured in situations of risk and humanitarian emergencies.”⁵³⁶ States are further required “to ensure the principle of non-discrimination in all [emergency] programmes and actions.”⁵³⁷

(e) Equality Measures

In addition to prohibiting discrimination, Kenya is required by international law to adopt targeted equality measures, including positive action, aimed at redressing historic disadvantage and making progress towards equality for persons with disabilities and other protected groups.⁵³⁸ Article 27(6) of the Constitution recognises this obligation, requiring the State to “take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because

⁵³¹ Ibid., para. 69.

⁵³² Ibid., para. 70.

⁵³³ International Covenant on Civil and Political Rights, Article 4(1).

⁵³⁴ Human Rights Committee, General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add.11, 2001, para. 8.

⁵³⁵ Human Rights Committee, Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic, UN Doc. CCPR/C/128/2, 2020, para. 2(d).

⁵³⁶ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 43.

⁵³⁷ Ibid., para. 46. Convention on the Rights of Persons with Disabilities, Articles 5 and 11.

⁵³⁸ See further the discussion in Sections 2.5 and 3 of this Report.

of past discrimination.”⁵³⁹ The term “affirmative action” is defined under Article 260 to include “any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom”. In addition to advancing equality, Article 27(7) provides that measures adopted under Section 6 “shall adequately provide for any benefits to be on the basis of genuine need.”⁵⁴⁰ In this way, the Constitution provides a strong legal basis for the adoption of positive action and other equality measures (such as those aimed at addressing disability-related stigma, stereotypes, prejudice and bias).⁵⁴¹ Whilst the duty to adopt such measures rests on the State, specific rights guarantees for persons with disabilities have been set out in legislation, and the adoption of affirmative action is expressly permitted (although not necessarily required) in the employment context, by virtue of Section 5(4)(a) of the Employment Act.

In addition to the general protection from discrimination offered by Article 27, Part Three of the Bill of Rights makes specific provision for particular groups and persons, with the aim of ensuring “greater certainty as to the application of [Constitutional] rights and fundamental freedoms”.⁵⁴² It covers the application of rights to children, persons with disabilities, youth, older persons and “minorities and marginalised groups”.⁵⁴³ Whilst the term “minority” is not defined in the Constitution, Article 260 defines “marginalised groups” to include all those persons disadvantaged by discrimination on one or more of the grounds listed under Article 27(4), including disability.⁵⁴⁴ The article provides for the State to undertake measures – including affirmative action – to ensure the participation of disadvantaged groups in governance, education and employment, to have access to water, health services and infrastructure, and to develop their cultural values, languages and practices.

Article 54 focuses on the rights of persons with disabilities. This article places a duty on the State to ensure progressive implementation of the principle that persons with disabilities should occupy five percent of positions on appointed and elected bodies.⁵⁴⁵ It also creates specific rights of access to educational institutions “that are integrated into society to the extent compatible with the interests of the person” and to all places, public transport and

⁵³⁹ In addition to positive action, the Kenyan courts have indicated that Article 27(6), when read together with the Persons with Disabilities Act, may imply an obligation on behalf of the State to adopt accessibility measures. See ‘Paul Pkiach Anupa & Another v. Attorney General & Another’ [2012] eKLR, paras. 69 and 70.

⁵⁴⁰ This requirement can be seen to address one of the fundamental preconditions for the adoption of positive action: that such measures do not lead the “maintenance of unequal or separate standards” and are “discontinued when the objectives of equality (...) have been achieved.” See further, Section 2.5 of this Report.

⁵⁴¹ See further, the discussion in Sections 2.5 and 3 of this Report.

⁵⁴² Constitution of Kenya, Article 52(1).

⁵⁴³ *Ibid.*, Articles 53-57.

⁵⁴⁴ *Ibid.*, Article 260.

⁵⁴⁵ *Ibid.*, Article 54(2).

information.⁵⁴⁶ Article 54 also contains a right to use sign language, Braille or other means of communication, and to materials or devices to overcome constraints arising from disability.⁵⁴⁷ This supplements provisions elsewhere in the Constitution, where the State is required to promote Kenyan sign language, Braille and “other communication formats and technologies accessible to persons with disabilities”.⁵⁴⁸ By incorporating key aspects of accessibility, inclusiveness and participation for persons with disabilities as entitlements, these provisions are a fundamental step towards facilitating compliance with the CRPD.⁵⁴⁹

An important equality guarantee is included under Article 10 of the Constitution. Article 10(1) requires “all State organs, State officers, public officers” and “all [other] persons” to respect the rights to equality and non-discrimination, alongside other national values and principles of governance, elaborated under Article 10(2), whenever they apply or interpret the Constitution; enact, apply or interpret any law; or make or implement public policy decisions. In principle, this Article introduces a strong equality duty: where relevant duty-bearers fail to integrate equality and non-discrimination considerations in public decision-making processes, Article 10 is violated.

In practice, few cases have been brought before domestic courts challenging discrimination under this provision. The judiciary has, nonetheless, recognised the justiciability of Article 10, which creates an enforceable right, and is immediately effective. As noted by Justice Mwilu in the Supreme Court’s recent ‘BBI’ judgment, “the values espoused under Article 10(2) are neither aspirational nor progressive. This means that violation of this Article is a basis of a cause of action either on its own or in conjunction with other Articles of the Constitution or Statutes as may be appropriate.”⁵⁵⁰ Similar views were expressed by the Court of Appeal in ‘Independent Electoral and Boundaries Commission (IEBC) v. National Super Alliance (NASA) Kenya & 6 others’:

In our view (...) Article 10 (2) of the Constitution is justiciable and enforceable immediately (...) The values are not directive principles (...) human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental (...) Our view on this matter is reinforced by Article 259(1)(a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.⁵⁵¹

⁵⁴⁶ Ibid., Article 54(1)(b) and (c).

⁵⁴⁷ Ibid., Article 54(1)(d) and (e).

⁵⁴⁸ Ibid., Article 7(3)(b).

⁵⁴⁹ See, in particular, the discussion in Section 2.1(a) of this Report.

⁵⁵⁰ Petition No. 12 of 2021 (Consolidated with Petitions Nos. 11 & 13 of 2021), 2022, para. 581.

⁵⁵¹ ‘Independent Electoral and Boundaries Commission (IEBC) v. National Super Alliance (NASA) Kenya & 6 others’ [2017] eKLR, para. 80. Cited with approval by Justice Mwilu in Ibid., para. 581.

In interpreting Article 10, Kenyan courts have stressed the importance of public participation, which is also listed as an essential national value and principle of governance.⁵⁵² By requiring public participation, Article 10 affords members of the public “the opportunity to influence the decision of the law-makers.”⁵⁵³ This, in turn, “requires the law-makers to consider the representations made and thereafter make an informed decision.”⁵⁵⁴ In its jurisprudence, the Supreme Court has elaborated some essential principles of public participation, which should inform public decision-making processes.⁵⁵⁵ According to the Court, “public participation applies to all aspects of governance.”⁵⁵⁶ The “public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.”⁵⁵⁷ The absence of legislation governing public participation “is no excuse” for failing to ensure such participation, which should be “real”, “purposive and meaningful”, rather than a mere “public relations” exercise.⁵⁵⁸ For public participation to be meaningful, “clear and simple” means of engagement should be established, which should be transparent, and easily understood. Ensuring effective participation may also require the adoption of measures to sensitise members of the public to the topic under discussion.⁵⁵⁹

The threshold for determining whether public participation meets the requirements of the Constitution is one of “reasonableness,” which should be “determined on a case-to-case basis.”⁵⁶⁰

In the recent case of ‘Kaps Parking Limited’, the High Court of Kenya at Nairobi elaborated some essential principles to determine whether a “reasonable threshold” for facilitating public participation has been met.⁵⁶¹ First, relevant duty bearers are required to “fashion a programme of public participation that accords with the nature of the subject matter.” Whilst the means of ensuring participation may differ from case to case, and a large degree of

⁵⁵² Constitution of Kenya, Article 10(2).

⁵⁵³ ‘Kaps Parking Limited & another v. County Government of Nairobi & another’ [2021] eKLR, para. 124, citing the Court of Appeal in ‘Legal Advice Centre & 2 others v. County Government of Mombasa & 4 others’.

⁵⁵⁴ *Ibid.*, para. 124.

⁵⁵⁵ See ‘British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v. Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)’ [2019] eKLR, para. 96.

⁵⁵⁶ *Ibid.*, para. 96(i).

⁵⁵⁷ *Ibid.*, para. 96(ii).

⁵⁵⁸ *Ibid.*, para. 96(iii), (iv) and (v).

⁵⁵⁹ *Ibid.*, para. 96(ix).

⁵⁶⁰ *Ibid.*, para. 96(vi).

⁵⁶¹ ‘Kaps Parking Limited & another v. County Government of Nairobi & another’ [2021] eKLR, paras. 128-9.

discretion exists in this area, whatever process is adopted, participation must be effective.⁵⁶² This requires “innovation” on the part of the duty-bearer.⁵⁶³ At a minimum, participation requires “access to and dissemination of relevant information.”⁵⁶⁴ It also requires that groups who are likely to be particularly “affected by a policy, legislation or action (...) have a bigger say in that policy, legislation or action” and that the views of such groups should be actively “sought and taken into account.”⁵⁶⁵ Whilst public participation may not require specific outcomes, all views received must be considered in “good faith”: the requirement of public participation is more than a simple box-ticking exercise.⁵⁶⁶ Participation also requires more than consultation: the public must be meaningfully engaged and duty-bearers are required “to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies.”⁵⁶⁷

Importantly, the courts have stressed that a legitimate public participation process must “show intentional inclusivity and diversity.” In this connection, “any clear and intentional attempts to keep out **bona fide** stakeholders would render the public participation programme ineffective and illegal by definition.”⁵⁶⁸ Where the rights of a particular group, such as persons with disabilities, are likely to be affected, the participation of key stakeholders, including representative organisations, may be required.⁵⁶⁹ In this connection, the Court of Appeal has noted that “the more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect (...) that the potentially affected section of the

⁵⁶² In this connection, the Supreme Court has noted that “Public participation is not necessarily a process consisting of oral hearings (...) [and] the fact that someone was not heard is not enough to annul the process.” There is, however, “need for both quantitative and qualitative components.” See ‘British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v. Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited’ (The Affected Party) [2019] eKLR, paras. 96(iv), (vii) and (viii).

⁵⁶³ ‘Kaps Parking Limited & another v. County Government of Nairobi & another’ [2021] eKLR, para. 129.

⁵⁶⁴ Ibid., para. 129.

⁵⁶⁵ Ibid., para. 129.

⁵⁶⁶ Ibid., para. 129. See further, ‘British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v. Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)’ [2019] eKLR, para. 96.

⁵⁶⁷ See ‘Car Importers Association of Kenya v. Kenya Revenue Authority & 3 other’s [2019] eKLR, para. 41; ‘Kaps Parking Limited & another v. County Government of Nairobi & another’ [2021] eKLR, para. 124.

⁵⁶⁸ Ibid., ‘Kaps Parking Limited’, para. 129.

⁵⁶⁹ Ibid., paras. 121, and 129.

population is given a reasonable opportunity to have a say.”⁵⁷⁰ Participation processes must also be accessible: in ‘Kaps’, the Court found a failure to ensure that a Bill was uploaded in Kiswahili as well as the English language; alongside a failure to produce physical copies for individuals who could not use the internet, resulted in a violation of Article 10.⁵⁷¹

In practice, it is difficult to see how duty-bearers can give effect to their Article 10 obligations without conducting equality impact assessment. Such assessment is necessary to identify the range of groups whose rights and interests are most likely to be affected by public decision-making. If legislators, and other key decision-makers are to ensure that their laws and policies do not discriminate, the equality impacts of potential forms action must be evaluated. The active participation of groups exposed to discrimination is essential to understanding potential risks. Participation can also help to identify forms of positive action, which – in line with Article 27 of the Constitution – the State is required to adopt in order to advance equality and redress disadvantage. Whilst, to date, the courts have not identified an **express** obligation to undertake equality impact assessment, it is clear that Article 10 has a wide scope, and its interpretation raises the prospect that such a requirement may be identified in future cases.⁵⁷² At present, however, the potential power of Article 10 has yet to be fully realised by the Kenyan courts.⁵⁷³

7.2 Specific Equality Legislation: The Persons with Disabilities Act

⁵⁷⁰ ‘Legal Advice Centre & 2 others v. County Government of Mombasa & 4 others’ [2018] eKLR, para. 45, citing with approval the decision of the South African courts in ‘Doctors for Life International v. Speaker of the National Assembly & Others’. See *Ibid.*, para. 121.

⁵⁷¹ *Ibid.*, ‘Kaps Parking Limited’, paras. 146, and 157-159. This finding should be contrasted with the views expressed by Justices of the Supreme Court in the ‘BBI’ judgment, discussed above, which differed in their assessment of what measures were reasonable in the circumstances of the case. See, in particular, Petition No. 12 of 2021 (Consolidated with Petitions Nos. 11 & 13 of 2021), 2022, paras. 862-864; 1277, and 2023.

⁵⁷² For an example of some of the factors that might be considered in completing such an assessment, see ‘R (Brown) v. Secretary of State for Work and Pensions’ [2008] EWHC 3158 (Admin), paras. 90-96.

⁵⁷³ See, for example, ‘Benard Ochuodho (Chairman) & 3 others v. County Government of Migori’ [2017] eKLR, which challenged a failure of the County Government of Migori to set aside funds for persons with disabilities in its 2016/17 budget and annual development plan. Whilst Article 10 was raised by the petitioners, alongside a range of additional Constitutional rights guarantees, the Court noted that it was “not clear which of the Petitioners’ rights under the Constitution were either violated or were threatened with violation or which part of the Constitution was threatened with violation or was indeed violated.” There was also a lack of clarity on the nature of the budget, and whether it did in fact provide funds for persons with disabilities. In this regard, citing Articles 23(3) and 54(1)(c) of the Constitution, the Court emphasised the right of persons with disabilities to access to information, making an order for the respondent Government to provide the petitioners with information on financial allocations and the policies and programs available for persons with disabilities at the county level.

The most obvious deficiency in Kenya’s legal framework on equality is its lack of comprehensive anti-discrimination legislation. In the State’s 2017 dialogue with the CEDAW Committee, it was noted that that the Kenya Law Reform Commission was in the process of developing a draft law.⁵⁷⁴ However, a recent report to the African Commission on Human and Peoples’ Rights indicates a shift away from this position. The report notes that “government has opted to incorporate [equality and non-discrimination] principles into various pieces of legislation, policies, and other interventions in order to afford protection to all persons.”⁵⁷⁵ This approach, conflicts with the clear recommendations of both regional human rights mechanisms and UN treaty bodies,⁵⁷⁶ including the CRPD Committee, which has repeatedly stressed the need for comprehensive anti-discrimination law and has elaborated the core minimum requirements of such legislation.⁵⁷⁷

In the absence of such legislation, the Kenyan legal framework on equality and non-discrimination is fragmented, with different standards and rules applicable to different groups in different areas and fields of life, resulting in gaps and inconsistencies that undermine protections afforded in practice.⁵⁷⁸ Whilst a range of laws and policies establish specific rights guarantees for persons with disabilities, legal provisions often lack effective enforcement and implementation mechanisms, and it has been noted that “it is quite likely that the provisions are largely disregarded.”⁵⁷⁹ Despite these shortcomings, Kenya has adopted specific equality laws addressing discrimination on particular grounds.⁵⁸⁰ Notable in this regard is the Persons with Disabilities Act, which prohibits discrimination against persons

⁵⁷⁴ See OHCHR, “Committee on the Elimination of Discrimination against Women considers the report of Kenya”, 2017, available at: <https://www.ohchr.org/en/press-releases/2017/11/committee-elimination-discrimination-against-women-considers-report-kenya>

⁵⁷⁵ African Commission on Human and Peoples’ Rights, State Party Report: Kenya, 2020, para. 21.

⁵⁷⁶ See for instance, Human Rights Committee, Concluding Observations: Kenya, UN Doc. CCPR/C/KEN/CO/4, 2021, paras. 10-11; Committee on the Elimination of Discrimination against Women, Concluding Observations: Kenya, UN Doc. CEDAW/C/KEN/CO/8, 2017, paras. 10-11; Committee on Economic, Social and Cultural Rights, Concluding Observations: Kenya, UN Doc. E/C.12/KEN/CO/2-5, 2016, paras. 19-20; African Commission on Human and Peoples’ Rights, Concluding Observations: Kenya, 2016, para. 55(ii).

⁵⁷⁷ See Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, paras. 22 and 73; Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 30; and United Nations Human Rights Office, ‘Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation’, New York and Geneva, 2023, pp. 1-15.

⁵⁷⁸ Whilst it is beyond the scope of this Report to provide a full assessment of this framework, further information is provided in Equal Rights Trust, *In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya*, 2012, pp. 200-227, and 247-249.

⁵⁷⁹ United Disabled Persons of Kenya, *From ‘Affirmation to Practice: Assessing a Decade of Implementing the Constitution of Kenya 2010 for Persons with Disabilities’*, 2020, p. 20.

⁵⁸⁰ See, the Persons with Disabilities Act of 2003 and the National Cohesion and Integration Act of 2008.

with disabilities and imposes discrete obligations on duty-bearers towards members of this group. A summary of the Act's main legal provisions is set out in the following Sections.

(a) Principal Legal Provisions

The Persons with Disabilities Act was enacted in 2003, with a majority of provisions entering into force in 2004, two years prior to the adoption of the CRPD. The Act is divided into 8 Parts. Part I sets out the Act's short title and offers a definition of terms. Part II provides for the establishment of a National Council for Persons with Disabilities (the Council), which is invested with a broad range of functions, including policy development, the registration of persons with disabilities, and the provision of assistive devices.⁵⁸¹ Part III concerns the "rights and the privileges of persons with disabilities." This Part of the Act contains the main equality and non-discrimination guarantees: prohibiting discrimination in specific areas of life and requiring the adoption of accessibility and positive action measures. Part IV covers "civic rights", detailing access rules on voting and polling stations, and providing a procedure for the registration of organisations of persons with disabilities. Part V establishes a national development fund for persons with disabilities, which may be administered for a wide range of purposes. Part VI includes provisions on tax reliefs and incentives, whilst Part VII contains miscellaneous provisions, *inter alia*, covering access to legal services, and the adoption of implementing regulations. Part VIII establishes specific offences and penalties, whilst a schedule to the Act contains additional rules relating to the conduct of business and affairs of the Council.

(b) Material Scope

The Persons with Disabilities Act prohibits disability discrimination in specific areas of life, including employment, admission to learning institutions, and access to premises, services and amenities.⁵⁸²

In regard to education, Section 18(1) provides that "no person or learning institution shall deny admission to a person with a disability to any course of study by reason only of such disability, if the person has the ability to acquire substantial learning in that course." Whilst this provision does not use the term "discriminate", it is clear that the discriminatory denial of education to persons with disabilities would fall within its scope. However, Section 18 requires a subjective assessment that a person with disabilities has the "ability to acquire

⁵⁸¹ Persons with Disabilities Act, Section 7.

⁵⁸² Ibid., Sections 12, 15, 18(1) and 25(1). Section 11 requires the Government to "take steps to the maximum of its available resources with a view to achieving the full realisation of the rights of persons with disabilities set out in this Part." Whilst this would presumably encompass the Act's non-discrimination provisions, Kenyan courts have emphasised that the duty to refrain from discrimination is immediate in nature. See, for example, 'M A O & another v. Attorney General & 4 others' [2015] eKLR, paras. 180-183, concerning the right to non-discrimination under Article 27 of the Constitution.

substantial learning” prior to admission. As discussed further below, this criteria conflicts with the requirements of the CRPD, and in particular of Article 24, which establishes the right to inclusive education.⁵⁸³ Whilst Section 18 does not expressly require the provision of reasonable accommodation, Section 18(2) does stipulate that learning institutions are required to “take into account the special needs of persons with disabilities with respect to the entry requirements, pass marks, curriculum, examinations, auxiliary services, use of school facilities, class schedules, physical education requirements and other similar considerations.” The duty to accommodate students is also set out in accompanying regulations, which specify particular types of measure needed to ensure equality of access.⁵⁸⁴

Section 25 of the Act concerns the denial of admission into premises. Under paragraph one, “no person shall, on the ground of disability alone, deny a person with a disability (...) admission into any premises to which members of the public are ordinarily admitted; or (...) the provision of any services or amenities to which members of the public are entitled, unless such denial is motivated by a genuine concern for the safety of such [a] person.” Paragraph 2 goes on to clarify that the “proprietor” of an establishment cannot reserve the right to deny entry to a person with disabilities on the basis of their disability alone. Whilst these provisions offer important protections for persons with disabilities, they only apply when the basis for the denial of access is motivated **exclusively** by “disability”, thus limiting their protective scope. In practice, the reference to safety concerns under paragraph 2, may also act as a broad exception to the rule: there is a risk that a person with disabilities could be denied entry to a premises or access to services because of ableist assumptions relating to their health and safety requirements;⁵⁸⁵ or because physical access is impeded due to a lack of accessibility. In this regard, it is notable that the Act does not establish a general right to reasonable accommodation.⁵⁸⁶ More positively Section 25(3) establishes an independent cause of action – providing that a person whose rights of access have been violated under Subsection one “shall be deemed to have suffered an injury and shall have the right to recover damages in any court of competent jurisdiction.” Whilst this is a welcome addition, few cases have been brought challenging discrimination under this provision.

For the purposes of this Report, the principal non-discrimination guarantees are found under Sections 12 and 15. Section 12(1) provides that “no person shall deny a person with a

⁵⁸³ See further, Committee on the Rights of Persons with Disabilities, General Comment No. 4, UN Doc. CRPD/C/GC/4, 2016.

⁵⁸⁴ Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009, Section 9.

⁵⁸⁵ This exception conflicts with the first of the general principles enumerated in Article 3(a) of the Convention on the Rights of Persons with Disabilities, which states that “respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons” is a principle of the Convention.

⁵⁸⁶ Although the duty to make accommodations in particular areas is recognised under various Sections.

disability access to opportunities for suitable employment.” Under Section 12(2), a “qualified employee with a disability” is entitled to “the same terms and conditions of employment and the same compensation, privileges, benefits, fringe benefits, incentives or allowances as qualified able-bodied employees.” Section 15(1) prohibits discrimination by public and private employers. This prohibition applies in all areas of employment including advertisements, recruitment, the creation, classification or abolition of posts; the determination or allocation of wages, salaries, pensions, accommodation, leave or other such benefits; and the choice of persons for posts, training, advancement, apprenticeships, transfer and promotion or retrenchment. Where a contract of employment violates these standards, it is automatically deemed void to the extent of the inconsistency.⁵⁸⁷ Section 15(5) of the Act requires employers to “provide such facilities and effect such modifications, whether physical, administrative or otherwise, in the workplace as may reasonably be required to accommodate persons with disabilities.” Whilst the recognition of a right to reasonable accommodation under this provision is positive, as noted further below, Section 2 does not identify the denial of such an accommodation as a form of discrimination; a point noted with disapproval by the CRPD Committee in its 2015 Concluding Observations.⁵⁸⁸

The obligations of public service employers towards persons with disabilities are further elaborated under the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations of 2009. Section 11(1) stipulates that “no public service establishment may dispense with, or reduce in rank, an employee merely on account of disability.” Similarly, under Section 11(4), persons with disabilities shall not be denied promotion opportunities “on the ground of his or her disability.” Where an employee acquires an impairment on the job rendering them “not suitable for the post he or she was holding,” they “may be shifted to some other post with the same pay scale and service benefits.”⁵⁸⁹ If this is not possible, the employee “may be kept on a supernumerary post until a suitable post is available or he or she attains the age of superannuation, whichever is earlier.”⁵⁹⁰ Whilst these provisions are ostensibly designed to facilitate equal employment and work for persons with disabilities, the regulations do not expressly require that reasonable accommodations are provided before a decision to change an employee’s position is made, creating a risk that an employee could be moved to a new position when other forms of adjustment (required by Section 15(5) of the Act) would be more appropriate. Moreover, these sections use the permissive term “may be”, indicating that such measures are permitted but not strictly required. The National Council for Persons with Disabilities is also empowered to “exempt any establishment” from compliance, “having regard” to the particular type of work carried

⁵⁸⁷ Persons with Disabilities Act, Section 15(4).

⁵⁸⁸ Committee on the Rights of Persons with Disabilities, Concluding Observations: Kenya, UN Doc. CRPD/C/KEN/CO/1, 2015, paras. 9-10.

⁵⁸⁹ Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009, Section 9(2).

⁵⁹⁰ Ibid., Section 9(3).

out. This generates a risk that persons with particular types of impairment, or those concentrated in a particular field of employment, may fall outside of the scope of protection.⁵⁹¹

(c) Personal Scope

Disability is defined under Section 2 of the Act as a “physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation.” The Supreme Court has embraced a purposive reading of this provision – recognising that an impairment does not need to be permanent in nature for a person to qualify for protection.⁵⁹² Notwithstanding this development, the definition of disability diverges from the CRPD in significant respects. In particular, whilst the CRPD recognises that it is the interaction between an impairment and attitudinal and environmental barriers that hinders equal participation, impairment **per se** is viewed as a limiting factor.⁵⁹³ A lack of understanding and appreciation of this distinction has led to some problematic judgments, and the Act as a whole continues to reflect a medical, rather than human rights model of disability.⁵⁹⁴

As with the Constitution, the Persons with Disabilities Act does not specify whether intersectional discrimination is prohibited. Section 2 of the Act defines the term “discriminate”, to cover acts based “solely or mainly” on the ground of disability, suggesting that some forms of multiple discrimination may be covered.⁵⁹⁵ However, disability must be the “main” source of disadvantage, and – as discussed further below – other Sections of the Act indicate that this clause relates to causation, rather than the personal scope of protection.⁵⁹⁶

⁵⁹¹ Ibid., Section 9(5).

⁵⁹² ‘Gichuru v. Package Insurance Brokers Ltd’ (Petition 36 of 2019) [2021] KESC 12 (KLR), para. 65.

⁵⁹³ See CRPD preamble, para. (e) and Article 1.

⁵⁹⁴ See, for instance, ‘Kinyua Felix v. Ministry of Education & 2 other’s [2021] eKLR, in which the Employment and Labour Relation Court at Nairobi held that an individual did not qualify as “disabled” despite their registration with the National Council for Persons with Disabilities, inter alia, on account of the fact that their “limp” did not have an adverse impact on their “social economic and environmental participation.” In acknowledging this latter point, the CRPD Committee has recommended that proposed amendments to the Act be brought into force. See Committee on the Rights of Persons with Disabilities, Concluding Observations: Kenya, UN Doc. CRPD/C/KEN/CO/1, 2015, paras. 5-6.

⁵⁹⁵ As noted in the previous Section, in at least one case – concerning the failure of an employer to extend the retirement age for a person with disabilities in line with Section 15(6) of the Act – the courts have found a violation of the right to non-discrimination on the basis of intersecting grounds (respectively, age, disability and health status). However, this finding was made by reading the Persons with Disabilities Act together with Article 27 of the Constitution. See ‘Fredrick Gitau Kimani v. Attorney General & 2 Others’ [2012] EKLR, para. 24.

⁵⁹⁶ See for example, Persons with Disabilities Act, Section 15(2)(a).

Similarly, Act does not specify whether discrimination based on association or perception is prohibited. In recent cases, some Kenyan Courts have indicated that a person must possess an impairment in order to benefit from “the rights and privileges under the Persons with Disabilities Act.”⁵⁹⁷ In turn, proof of disability status has been linked to the process of “certification and registration by the National Council for Persons with Disabilities”, which requires, amongst other things, the submission of a medical report.⁵⁹⁸ In other cases, courts have indicated that registration is not required, noting that the registration process exists “simply to create a database for [the] purposes of operationalising the rights conferred” by the Constitution and Persons with Disabilities Act, rather than establishing such rights **per se**.⁵⁹⁹ Whichever of these positions is correct,⁶⁰⁰ the absence of clear legislative provisions prohibiting discrimination based on association and perception may create barriers to rights protection in practice. In this and other respects, the Act fails to meet the requirements of the CRPD.⁶⁰¹

(d) Forms of Discrimination

The term “discriminate” is defined under Section 2 of the Act as according “different treatment to different persons solely or mainly as a result of their disabilities.” This definition is unduly restrictive and gives rise to a number of concerns. Firstly, this section uses the term “differential treatment”, implying that only direct discrimination is covered.⁶⁰² Although recent cases brought, **inter alia**, under the Constitution, Persons with Disabilities Act and the Employment Act, have identified an obligation for employers to address indirect discrimination against persons with

⁵⁹⁷ See, for example, ‘Mary Kerubo Osoro v. Public Service Commission’ [2017] eKLR, para. 19; ‘Suleman Angolo & another v. Executive Officer Teachers Service Commission’ [2015] eKLR

⁵⁹⁸ Ibid., ‘Mary Kerubo Osoro v. Public Service Commission’, paras. 19-22.

⁵⁹⁹ ‘Margaret Martha Byama v. Alice A. Otswala & 3 others’ [2016] eKLR, para. 18.

⁶⁰⁰ Kenyan courts appear divided on this point. The ‘Byama’ case was decided prior to the adoption of the Public Service Regulations of 2020, which clearly link proof of disability status – including (but not limited to) registration with the National Council for Persons with Disabilities – to eligibility to benefit from a higher retirement age of 65. However, the Persons with Disabilities Act, which establishes a mandatory retirement age of 60, contains no equivalent provisions. The lack of clarity in this area is itself a significant shortcoming.

⁶⁰¹ As discussed further in Sections 2 and Section 7.1(b) of this Report, international law is clear that “discrimination ‘on the basis of disability’ can be against persons who have a disability at present, who have had a disability in the past, who have a disposition to a disability that lies in the future, who are presumed to have a disability, as well as those who are associated with a person with a disability.” The CRPD Committee has re-emphasised this point in its recent consideration of individual communications. See further, Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 20; and ‘Bellini v. Italy’, UN Doc. CRPD/C/27/D/51/2018, 2023, para. 7.9.

⁶⁰² The Kenyan Government has similarly indicated that only direct discrimination is covered by the Act. See Republic of Kenya, Common Core Document, UN Doc, HRI/CORE/KEN/2021, 2021, para. 105.

disabilities, it is unclear whether the Persons with Disabilities Act establishes an **independent** basis for this obligation.⁶⁰³

Secondly, whilst a duty to provide reasonable accommodations in the area of employment is established under Section 15(5) of the Act, Section 2 does not expressly identify the denial of reasonable accommodation as a form of discrimination.⁶⁰⁴ This point has been raised with concern by the Committee on the Rights of Persons with Disabilities in its Concluding Observations.⁶⁰⁵ In a recent decision of the Employment and Labour Relations Court at Kericho, citing Article 27 of the Constitution, Section 5 of the Employment Act and Section 15 of the Persons with Disabilities Act, it was held that “the employers’ duty to accommodate person[s] with disability[ies] springs from the overriding obligation not to discriminate.”⁶⁰⁶ Whilst this clarification is welcome, this is an emerging area of law, and judicial approaches to the concept of reasonable accommodation have been uneven, with markedly different results, as the following cases indicate.

In ‘Macharia’, the High Court at Nairobi held that the withdrawal of an offer of employment to a job applicant with a visual impairment did not amount to discrimination.⁶⁰⁷ Whilst the Court did find that the petitioner’s right to dignity and fair administrative action was violated, Section 15 of the Persons with Disabilities Act was not breached.⁶⁰⁸ At several points in the judgment, the Court drew problematic conclusions. At paragraph 48, for instance, the Court suggested that the petitioner would need to demonstrate that other applicants with disabilities were visually impaired and “favoured” in the recruitment process.⁶⁰⁹ This mistaken approach to the use of comparators clearly falls short of the requirements of the CRPD.⁶¹⁰ Furthermore, whilst the Court correctly identified the denial of reasonable accommodation as a form of discrimination at paragraph 24 of the judgment, it concluded that there was no evidence “to demonstrate that

⁶⁰³ See, for example, ‘Lucy Chepkemoi v. Sotik Tea Company Limited’ [2022] eKLR, paras. 53-55, citing the decision of the Supreme Court in ‘Gichuru v. Package Insurance Brokers Ltd’ [2021] KESC 12 (KLR).

⁶⁰⁴ In contrast to Section 2, Section 15(2)(c) of the Act introduces an exception to the prohibition of discrimination, where an accommodation would be “unreasonable.” As detailed further below, this provision appears to suggest that “reasonable” accommodations do in fact form part of the right to non-discrimination.

⁶⁰⁵ Committee on the Rights of Persons with Disabilities, Concluding Observations: Kenya, UN Doc. CRPD/C/KEN/CO/1, 2015, paras. 9-10.

⁶⁰⁶ ‘Lucy Chepkemoi v. Sotik Tea Company Limited’ [2022] eKLR, paras. 53-55.

⁶⁰⁷ ‘Macharia v. Safaricom Plc’ (Petition 434 of 2019) [2021] KEHC 462 (KLR).

⁶⁰⁸ *Ibid.*, para. 60.

⁶⁰⁹ *Ibid.*, para. 48.

⁶¹⁰ The Convention does not require a person requesting a reasonable accommodation to demonstrate that any other person is similarly affected. It is an individual right, applicable from the moment the need for an accommodation arises. The Court appears to endorse a version of the comparator test, which may be used in cases of direct discrimination to determine if a person has been treated differently. However, even in these cases, the Committee has stressed that comparison is not required. See Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, paras. 18(a) and (c), 23, and 24(b).

the respondent discriminated against the petitioner simply because the respondent could not accommodate the petitioner in the company.”⁶¹¹ The Court’s decision appears to have been influenced by the respondent’s submission that accommodating the petitioner would have required them “to make adjustments and technological incorporations to its entire system,” and that such adjustments were not feasible in light of the organisation’s budgetary constraints.⁶¹² In this regard, the Court referred to an exception under Section 15(2) of the Persons with Disabilities Act, which stipulates that the denial of an accommodation will not constitute discrimination if such an accommodation would be unreasonable.⁶¹³ In reaching this conclusion, however, the Court failed to adequately scrutinise the claims of the respondent. Indeed, it was accepted that the respondent had provided no evidence “to guide [the] court as regards the cost of accommodating the petitioner.”⁶¹⁴ To the contrary, the petitioner indicated that they had planned to introduce changes to its systems, calling into doubt its claims around feasibility. Crucially, the Court appeared to place the burden of demonstrating that an accommodation would be unreasonable on the petitioner, rather than the employer, noting that the proposed adjustments had “not been shown to have negligible impact on the budgetary allocation to the respondent.”⁶¹⁵ This approach is inconsistent with the requirements of the CRPD.⁶¹⁶

In ‘Muema’ a very different decision was reached. This case was heard by the Employment and Labour Relations Court at Nairobi.⁶¹⁷ One of the questions for determination was whether an employee had experienced discrimination at work due to the failure of their employer to install accessibility software on a mobile device. The Court found in the employee’s favour, holding – following a detailed consideration of the facts – that the applicant’s rights under Sections 12 and 15 of the Persons with Disabilities Act, Sections 5(3), and 10(5) of the Employment Act, and various provisions of the Constitution had been violated. In reaching this conclusion, the Court noted that the refusal of the employer “to install or provide the claimant with a screen reader, voice command or any other technology to help her overcome her disability” as well as the subsequent demotion of the claimant “amounted to an act of discrimination on the basis of disability.”⁶¹⁸ The decision in ‘Muema’ provides a positive restatement of employers’ duties to provide reasonable accommodations to employees with disabilities. However, the discrepancy between this judgment and that in ‘Macharia’ demonstrates disparities in understanding within the

⁶¹¹ ‘Macharia v. Safaricom Plc’ (Petition 434 of 2019) [2021] KEHC 462 (KLR), paras. 24 and 48.

⁶¹² Ibid., para. 49.

⁶¹³ Ibid., para. 48.

⁶¹⁴ Ibid., para. 46.

⁶¹⁵ Interestingly, a “not negligible impact” is a lower standard for demonstrating an undue financial burden than suggested by the Court in the same paragraph. See Ibid., para. 47.

⁶¹⁶ As elaborated by the CRPD Committee. See further, the discussion of “justification and exceptions” below.

⁶¹⁷ ‘Juliet Mwangeli Muema v. Smollan Kenya Limited’ [2019] eKLR.

⁶¹⁸ Ibid., para. 7.

Kenyan judicial system. As discussed further in the following Sections, these discrepancies may raise challenges for persons with disabilities bringing claims in this area; an issue compounded by the failure of the Persons with Disabilities Act to expressly define the denial of reasonable accommodation as a form of discrimination, contrary to the requirements of the CRPD.⁶¹⁹

As with the other forms of conduct listed above, the Persons with Disabilities Act does not define harassment as a form of discrimination. It does, however, cover some circumstances amounting to harassment: Section 2 makes clear that the use of “words, gestures or caricatures that demean, scandalise or embarrass a person with a disability” may give rise to discrimination. Whilst this addition is welcome, other ground-specific equality legislation adopted by Kenya makes the prohibition of harassment explicit and uses a definition that is largely consistent with international law.⁶²⁰ By excluding such a definition, there is a risk that the Persons with Disabilities Act could be read restrictively or give rise to competing understandings that reduce rights protections for persons with disabilities when compared to other disadvantaged groups.

Similarly, the Persons with Disabilities Act does not define segregation as a form of discrimination. To the contrary, some provisions of the Act expressly ‘permit’ segregation. In respect of education, Section 18(3) provides that “special schools and institutions, especially for the deaf, the blind and the mentally retarded, shall be established to cater for formal education, skills development and self-reliance.” Even when putting to one side the use of retrogressive language within this provision, the Section conflicts with Article 24 of the CRPD, which recognises States’ immediate non-discrimination obligations to provide inclusive education for persons with disabilities, and to ensure that such persons “are not excluded from the general education system on the basis of disability.”⁶²¹ In its 2015 Concluding Observations, the CRPD Committee expressed concern at the “persistence of segregated education institutions” within Kenya; urging the State to “immediately adopt a non-rejection policy for children with disabilities enrolling in regular schools, and provide reasonable accommodation.”⁶²²

In respect of employment, Section 7 of the Act charges the National Council for Persons with Disabilities with the responsibility of putting “into operation schemes and projects for self-employment or regular or sheltered employment for the generation of income by persons with

⁶¹⁹ See, Convention on the Rights of Persons with Disabilities, Articles 2 and 5.

⁶²⁰ Compare, for instance, Section 6 of the National Cohesion and Integration Act, which prohibits “harassment on the basis of ethnicity” with the definition of harassment adopted by the Committee on the Rights of Persons with Disabilities, in its General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 18(d).

⁶²¹ Convention on the Rights of Persons with Disabilities, Article 24(1) and (2)(a).

⁶²² Committee on the Rights of Persons with Disabilities, Concluding Observations: Kenya, UN Doc. CRPD/C/KEN/CO/1, 2015, paras. 43-44.

disabilities.”⁶²³ As elaborated in Section 2.1(b) of this Report, the CRPD Committee has noted that sheltered workshops may constitute a form of segregated employment, inconsistent with the requirements of the Convention.⁶²⁴ In its recent guidance, the Committee has highlighted a range of factors that are characteristic of segregated work.⁶²⁵ And whilst the Committee has acknowledged that certain forms of work initiative – in particular – those “that are managed and led by persons with disabilities”, may be legitimate, the failure of the Act to expressly define and prohibit segregation creates a risk that segregated systems could be put in place, resulting in the denial of rights.⁶²⁶

(e) Justification and Exceptions

Section 15(2) of the Persons with Disabilities Act establishes three exceptions to the prohibition of discrimination in employment. Firstly, “an employer shall be deemed not to have discriminated against a person with a disability if (...) the act or omission alleged to constitute the discrimination was not wholly or mainly attributable to the disability of the said person.”⁶²⁷ This condition is extremely problematic. Employment decisions are often motivated by a range of factors and proving that the “main” reason for differential treatment was disability may prove to be an insurmountable obstacle for claimants. Article 2 of the Convention on the Rights of Persons with Disabilities defines discrimination to occur where “any” distinction made “on the basis of disability” results in disadvantage. The CRPD Committee has also stressed that “the reason for the wide scope of Article 5” of the Convention “is to eradicate and combat **all** discriminatory situations and/or discriminatory conducts that are linked to disability.”⁶²⁸ Any employment decision that treats persons with disabilities differently, in whole or in part, for reasons relating to their impairment, may give rise to discrimination.⁶²⁹ All that is required is the demonstration of a causal link “between a person’s characteristic(s) and the harm that they have experienced.”⁶³⁰ This point was recognised by the UK Supreme Court in the case of ‘Essop and Ors’, which was cited with approval by the Supreme Court of Kenya in its assessment of discrimination under Article 27 of the Constitution. According to the Court, “direct discrimination expressly requires a causal

⁶²³ Persons with Disabilities Act, Section 7(1)(5).

⁶²⁴ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, paras. 12-15.

⁶²⁵ See *Ibid.*, para. 14.

⁶²⁶ Notably, such initiatives must “provide just and favourable conditions of work on an equal basis with others.” See *Ibid.*, para. 15.

⁶²⁷ Persons with Disabilities Act, Section 18(2)(a).

⁶²⁸ Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 20.

⁶²⁹ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 8.

⁶³⁰ United Nations Human Rights Office, ‘Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation’, New York and Geneva, 2023, p. xxiii.

link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the [policy, criterion or practice] and the disadvantage suffered by the group and the individual.”⁶³¹

Section 15(2)(b) provides that discrimination will not be taken to have occurred when “the disability in question was a relevant consideration in relation to the particular requirements of the type of employment concerned.” This provision appears to mirror Article 1(2) of the Discrimination (Employment and Occupation) Convention, which provides that “any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.”⁶³² However, there are important differences between these two clauses. In particular, whilst the ILO Convention is drafted in neutral terms, Section 15 suggests that “disability” itself may be a valid ground for distinction. As currently drafted, this exception is too broad: it risks giving employers **carte blanche** permission to deny employment opportunities to persons with disabilities based on stereotyped criteria, undermining the apparent intention of the Act.⁶³³ The CRPD Committee has urged States to ensure that “individualised assessments are conducted to determine suitability for bona fide occupational requirements.”⁶³⁴ Section 15 does not require an individualised approach.

Finally, Section 15(2)(c) of the Act specifies that an employer does not discriminate if “special facilities or modifications, whether physical, administrative or otherwise, are required at the workplace to accommodate the person with a disability, which the employer cannot reasonably be expected to provide.” This provision is drafted in much the same terms as Section 15(5), and together these clauses appear to limit the scope of the right to reasonable accommodation by making clear that only “reasonable” accommodations are required. What is meant by the term “reasonable” is not detailed under the Act, although in some cases this section has been applied in much the same way as the “undue burden” test established under

⁶³¹ See ‘Gichuru v. Package Insurance Brokers Ltd’ (Petition 36 of 2019) [2021] KESC 12 (KLR), para. 55.

⁶³² ILO, Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Article 1(2).

⁶³³ Similar issues are apparent in other provisions. For instance, Section 14 provides that “persons with disabilities shall be eligible for engagement as apprentices or learners where **their disability is not such as to impede their performance** in particular occupations for periods for which they are hired” (emphasis added).

⁶³⁴ Committee on the Rights of Persons with Disabilities, Concluding Observations on Jordan, UN Doc. CRPD/C/JOR/CO/1, 2017, para. 50(a).

Article 2 of the CRPD.⁶³⁵ In their caselaw, Kenyan Courts have identified a range of factors that may be considered to determine whether an accommodation is “unreasonable”. The financial burden on an accommodating party is particularly germane. As noted in ‘Macharia’, cost can “amount to an undue hardship if it can be established to be, related to the accommodation, probable and not based on surmise or speculation and so substantial that it would either change the essential nature of the operation or substantially impact (...) its financial viability.”⁶³⁶ The size of the accommodating party may also be relevant.⁶³⁷

The inclusion of reasonableness criteria in Section 15(2) is important: as this clause is posed as an exception to the prohibition of discrimination, the duty to demonstrate that an accommodation would be unreasonable appears to rest on the employer, rather than the employee.⁶³⁸ This has been the practice of the Supreme Court of Kenya in cases concerning disability discrimination under Article 27 of the Constitution.⁶³⁹ However, the lower courts have adopted very different positions on this point, with some cases appearing to indicate that it is for an employee to demonstrate that an accommodation is reasonable in order to benefit from protection.⁶⁴⁰ As discussed elsewhere in this Report, this approach clearly conflicts with the requirements of the CRPD.⁶⁴¹

(f) Equality Measures

As noted, the Persons with Disabilities Act provides for the establishment of a National Council for Persons with Disabilities.⁶⁴² Rules on the membership, tenure and leadership of the Council are set out in Sections 4-6, whilst Section 8 concerns funding. The functions of the Council are listed under Section 7. The Council is charged with overseeing the rehabilitation of persons with disabilities, and coordinating service delivery, including through

⁶³⁵ See, for example, ‘Macharia v. Safaricom Plc’ (Petition 434 of 2019) [2021] KEHC 462 (KLR). This approach is not fully consistent with the CRPD. Rather than establishing an exception to the requirement to provide reasonable accommodations, the Committee on the Rights of Persons with Disabilities has clarified that the term “reasonable” in Article 2 relates to the appropriateness of measures adopted: an accommodation will only be considered reasonable under the Convention “if it achieves the purpose (or purposes) for which it is being made, and is tailored to meet the requirements of the person with a disability.” See Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 25(a).

⁶³⁶ ‘Macharia v. Safaricom Plc’ (Petition 434 of 2019) [2021] KEHC 462 (KLR), para. 46.

⁶³⁷ *Ibid.*, para. 46.

⁶³⁸ Indeed, this was the approach taken by the Employment and Labour Relations Court of Kenya at Nairobi in ‘Muema’. See ‘Juliet Mwangeli Muema v. Smollan Kenya Limited’ [2019] eKLR, para. 2.

⁶³⁹ ‘Gichuru v. Package Insurance Brokers Ltd’ (Petition 36 of 2019) [2021] KESC 12 (KLR), paras. 64 and 69.

⁶⁴⁰ See for example, ‘Macharia v. Safaricom Plc’ (Petition 434 of 2019) [2021] KEHC 462 (KLR), paras. 46-49.

⁶⁴¹ See further, Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 45.

⁶⁴² Persons with Disabilities Act, Section 3.

the implementation of vocational guidance and counselling programmes.⁶⁴³ The Council is also responsible for the provision of assistive devices,⁶⁴⁴ issuing adjustment orders⁶⁴⁵ and for registering persons with disabilities.⁶⁴⁶

The Council has broad promotion and prevention functions. It is required, **inter alia**, to develop policies aimed at achieving equal opportunities and eliminating discrimination against persons with disabilities; to provide rights information to members of the public; to undertake, promote and sponsor research; to report on the welfare and rehabilitation of persons with disabilities; to consult with Government on the formulation of curricula for rehabilitation and training centres; to advise Government on relevant provisions of international law; to coordinate Government-led public awareness-raising, information and education campaigns, rights-sensitisation and training programmes; and to produce an annual report on its work.⁶⁴⁷ The Council also has a role in data-collection. Section 17 of the Act requires the Council to establish a database of persons with disabilities, their skills and training, and to maintain adequate records “for the purposes of job placement.” The Council is further required to cooperate with Government during the national census “to ensure that accurate figures of persons with disabilities are obtained in the country, for purposes of planning.”⁶⁴⁸ Despite this provision, questions have been raised relating to the accuracy of recent census data.⁶⁴⁹

Perhaps one of the most important functions of the Council – at least in principle – is its power to issue adjustment orders. This power may be applied against the owner of any premises, or the provider of any service or amenity, that is usually provided or open to the public, where the Council deems that the premises, service or amenity is inaccessible to persons with disabilities by reason of any structural, physical, administrative or other impediment.⁶⁵⁰ Adjustment orders apply to public and private premises, amenities and services. Significantly, however, restrictions apply in relation to public services: the Council cannot issue an adjustment order against any public health facility or education or training

⁶⁴³ Ibid., Section 7(1)(b)(vi)-(viii). In particular, the Council is required to “encourage and secure the rehabilitation of persons with disabilities”, to secure “the establishment of vocational rehabilitation centres”, and to register places providing rehabilitation services. See Ibid., Sections 7(1)(b)(vi), (vii) and (c)(ii)-(iii). Rules on the establishment of relevant institutions are set out in the Persons with Disabilities Act (Care, Support and Maintenance) Regulations, 2009.

⁶⁴⁴ To the “the maximum extent possible.” See Ibid., Section 7(1)(d)(i).

⁶⁴⁵ Ibid., Sections 2, 7(1)(a), 24, 26(1)(a), and 27.

⁶⁴⁶ Ibid., Sections 7(1)(c)(i) and (ii).

⁶⁴⁷ Persons with Disabilities Act, Sections 7(1)(b)(i) and (iii-iv), 7(1)(e), (h) and (i), and Section 11; Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009, Sections 3 and 6.

⁶⁴⁸ Ibid., Section 7(1)(b)(ii).

⁶⁴⁹ United Disabled Persons of Kenya, ‘From Affirmation to Practice: Assessing a Decade of Implementing the Constitution of Kenya 2010 for Persons with Disabilities’, 2020, p. 21.

⁶⁵⁰ Persons with Disabilities Act, Sections 7(1)(a) and 24.

institution without the consent of the relevant Government Minister.⁶⁵¹ Whilst, in theory, this would not necessarily restrict the issuing of adjustment orders, the requirement of consent appears difficult to justify, when viewed in the light of Kenya’s accessibility obligations under Article 9 of the CRPD and its obligations to ensure equal access to education and to the highest attainable standard of health under Articles 24 and 25. The material scope of the Council’s powers is also limited: as most business premises do not ordinarily permit admission to ordinary members of the public, the Council would be unable to issue a relevant order. In practice, however, much of the foregoing discussion been rendered moot due to the failure of the Council to use its powers under the Act. Whilst the failure to comply with an adjustment order is rendered an offence under Section 26(1)(a), it has been noted that “to date, the [Council] has not issued adjustment orders against non-accessible public buildings” due to a perceived lack of “legal and institutional” resources needed to compel enforcement.⁶⁵²

Section 32 of the Act establishes a fund – the National Development Fund for Persons with Disabilities – that may be administered by its trustees for a broad range of purposes,⁶⁵³ contributing to the expenses of organisations of persons with disabilities, institutions that provide training on care for persons with disabilities, and Government projects undertaken “for the benefit of persons with disabilities.”⁶⁵⁴ In addition, the Fund may be used to provide or contribute towards the cost of assistive devices and services, and to pay allowances to certain categories of persons who have no other sources of income, including “persons with severe disabilities”, “aged persons with disabilities”, and “single parents with children with disabilities”.⁶⁵⁵ The Fund has been described as “a welcome innovation” that “could be utilised to address standards of living and social protection, as required by Article 28 [of the] CRPD”.⁶⁵⁶ However, the drafting of Section 33 leaves cause for concern.⁶⁵⁷ The Committee

⁶⁵¹ Ibid., Section 27.

⁶⁵² United Disabled Persons of Kenya, ‘From Affirmation to Practice: Assessing a Decade of Implementing the Constitution of Kenya 2010 for Persons with Disabilities’, 2020, p. 59.

⁶⁵³ Rules relating to the composition and procedures of the board are set out in the Persons with Disabilities Act (National Development Fund for Persons with Disabilities) (Conduct of Business and Affairs of the Board of Trustees) Regulations, 2009.

⁶⁵⁴ Persons with Disabilities Act, Sections 33(2)(a), (b) and (c). Further uses of the Fund, including the provision of financial assistance to universities, are set out in associated regulations. See, in particular, Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009, Section 9(1).

⁶⁵⁵ Ibid., Sections 33(2)(d) and (e).

⁶⁵⁶ Equal Rights Trust, ‘In the Spirit of Harambee: Addressing Inequality and Discrimination in Kenya’, 2012, p. 193.

⁶⁵⁷ In particular, Section 33(e)(i) of the Act indicates that “persons with severe disabilities” are incapable of being trained. The CRPD Committee has noted with concern that persons who aren’t categorised as having “severe” disabilities may fall outside of the scope of social protection schemes, in violation of Article 28 of the Convention. See Committee on the Rights of Persons with Disabilities, Concluding Observations: Kenya, UN Doc. CRPD/C/KEN/CO/1, 2015, para. 50(a).

on the Rights of Persons with Disabilities has urged Kenya to “expand the coverage of the National Development Fund for persons with disabilities and [to] facilitate the involvement of organisations of persons with disabilities in the formulation of [its] goals and priorities,”⁶⁵⁸ whilst noting wider disparities in the availability of support across rural and urban areas, as well as a lack of effective monitoring mechanisms.⁶⁵⁹

Several provisions of the Act provide substantive equality guarantees that ostensibly operate as forms of positive action. Under Section 7, for instance, the Council is mandated to “to make provision for assistance to students with disabilities in the form of scholarships, loan programmes, fee subsidies and other similar forms of assistance in both public and private institutions.”⁶⁶⁰ Section 28(1) entitles all persons with disabilities to the free use of “recreational or sports facilities owned or operated by the Government during social, sporting or recreational activities.” Sections 35, 36 and 41, provide tax exemptions for persons with disabilities, whilst incentivising donations and the development and provision of technical aids and devices.⁶⁶¹ Specific tax incentives for employers are set out under Section 16, whilst Section 13 requires the Council to “endeavour to secure the reservation of five per cent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities.”⁶⁶² The Minister “responsible for matters relating to credit unions, co-operatives and other lending institutions” is placed under a duty, under Section 37 of the Act, “to encourage the extension (...) of credit to persons with disabilities.”⁶⁶³ Whilst these provisions are largely positive, the Act does not impose a general obligation on duty-bearers to adopt positive action, and in practice, many guarantees – such as the disability employment quota – have not been effectively implemented.⁶⁶⁴

Section 15(6) of the Act establishes a mandatory retirement age for persons with disabilities of 60 years. According to the Kenya National Commission on Human Rights the purpose of this

⁶⁵⁸ Ibid., para. 50(b).

⁶⁵⁹ Ibid., para. 49.

⁶⁶⁰ Persons with Disabilities Act, Section 7(1)(f).

⁶⁶¹ These provisions are supplemented by rules set out in the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations of 2009, and the Persons with Disabilities Act (Income Tax Deductions and Exemptions) Order of 2010.

⁶⁶² See also, Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, Section 10.

⁶⁶³ Section 9(1) of the Persons with Disabilities Act (Care, Support and Maintenance) Regulations, 2009 further provides that the Council shall “facilitate access to residences for persons with severe disabilities” in the form of house loans, through the National Development Fund.

⁶⁶⁴ See for example, Committee on Economic, Social and Cultural Rights, Concluding Observations: Kenya, UN Doc. E/C.12/KEN/CO/2-5, 2016, paras. 27-28. It is notable that the Commission on Administrative Justice, which is empowered to investigate complaints of maladministration, unfair treatment and injustice in the public sector, has only managed to achieve 3% employment of persons with disabilities, despite being named an inclusion and diversity champion. See further, Commission on Administrative Justice, Ombudsman Newsletter (Issue No. 01/2021), 2021, p. 10, available at: <https://www.theioi.org/ioi-news/current-news/ombudsman-newsletter-january-june-2021>

provision is to protect “older persons with disability[ies] from unfair/forced retirement while ensuring they have the right to fully participate as productive members in society.”⁶⁶⁵ This objective is ostensibly equality focused: it aims to ensure that persons with disabilities do not find themselves out of work and unable to generate income. Indeed, Kenyan courts have relied upon Section 15(6) in a range of cases to find in favour of claimants with disabilities, holding that their dismissal from work before reaching the retirement age breached the requirements of national law.⁶⁶⁶ Despite this, the concern of UN Special Procedures regarding the discriminatory impacts of mandatory retirement provisions must be acknowledged.⁶⁶⁷ In particular, the UN Special Rapporteur on the rights of persons with disabilities has noted that mandatory retirement may have the effect of preventing older persons with disabilities from continuing in work when they are willing and able to do so.⁶⁶⁸ As persons with disabilities often “incur a range of disability-related extra costs that their peers without disabilities do not,” exclusion from the employment market can have significant and detrimental equality impacts.⁶⁶⁹

For public servants with disabilities, a circular, issued by the Ministry of State for Public Services in 2012, established a higher retirement age of 65.⁶⁷⁰ In 2020, the circular was superseded by the Public Service Regulations, adopted pursuant to the Public Service Commission Act. The regulations establish a number of additional conditions that must be fulfilled for a public servant with disabilities to benefit from a higher retirement age. In particular, Section 70(2)(b) stipulates that such a person must have “been registered in the public body’s human resource database as a person with disability for at least three years before the date of retirement,”⁶⁷¹ whilst Section 70(2)(c) requires registration with the National Council for Persons with Disabilities, and the receipt of “a tax exemption certificate from the Kenya Revenue Authority.” In practice, these conditions have served to prevent

⁶⁶⁵ Kenya National Commission on Human Rights, Response to the Questionnaire on the Rights of Older Persons with Disabilities, 2019, p. 3, available at: [https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/OlderPersons/KenyaNationalCommissionHumanRights.docx#:~:text=Section%2015\(6\)%20of%20the,as%20productive%20members%20in%20society](https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/OlderPersons/KenyaNationalCommissionHumanRights.docx#:~:text=Section%2015(6)%20of%20the,as%20productive%20members%20in%20society)

⁶⁶⁶ United Disabled Persons of Kenya, ‘From Affirmation to Practice: Assessing a Decade of Implementing the Constitution of Kenya 2010 for Persons with Disabilities’, 2020, pp. 42-43.

⁶⁶⁷ See HelpAge International and the Equal Rights Trust, ‘Advancing Equality for Older People’, 2022, p. 46.

⁶⁶⁸ Report of the Special Rapporteur on the rights of persons with disabilities, UN Doc. A/74/186, 2019, para. 39.

⁶⁶⁹ In this regard, the Special Rapporteur has described mandatory retirement as an “arbitrary restriction on the right to work” and a form of discrimination. See *Ibid.*, paras. 39 and 24. See also, Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Doc. A/HRC/48/53, 2021, paras. 65 and 81.

⁶⁷⁰ The circular is available at: <https://ncpwd.files.wordpress.com/2012/08/retirement-age-for-pspwd.jpg>

⁶⁷¹ Public Service Regulations, Section 70(2)(b).

public servants with disabilities from benefiting from a higher retirement age.⁶⁷² They may also have discriminatory impacts on older persons with impairments that are more likely to manifest in later life, and persons with disabilities who acquire an impairment in the final years of their employment contract. In ‘Ogege’, the Employment and Labour Relations Court at Nairobi held that the retroactive application of the regulations was unconstitutional.⁶⁷³ The Court noted that the regulations imposed “onerous and apparently unreasonable and capricious conditions”, bringing into question their legality.⁶⁷⁴ The legality of the regulations is also made doubtful on account of the restrictive definition of “disability” adopted under Section 70(2)(a), which requires that an impairment be of a “permanent” nature. No such requirement is imposed by the Persons with Disabilities Act or the Constitution – as noted by the Supreme Court in its recent jurisprudence.⁶⁷⁵

In addition to positive action, several sections of the Act impose obligations on duty-bearers to ensure accessibility. For example, Section 19 requires the Council to work with educational institutions to ensure – where possible – the availability of Braille and recorded libraries for persons with visual disabilities. The use of the term “where possible” would appear to limit the scope of this provision. However, accompanying regulations make the obligation of duty-bearers clearer.⁶⁷⁶ Section 28 of the Act extends the obligation to ensure accessibility to sports and recreation,⁶⁷⁷ whilst Sections 29-30 include rules relating to participation in elections (which may require accommodations) and polling stations (which should be made barrier-free).⁶⁷⁸ All “persons providing public telephone services shall as far as possible install and maintain telephone devices or units for persons with hearing disabilities and tactile marks on telephone sets to enable persons with visual disabilities to communicate through the telephone system.”⁶⁷⁹ Television stations are also required to “provide a sign language inset or subtitles in all newscasts and educational programmes,

⁶⁷² See for instance the cases of ‘Aminga v. Cabinet Secretary Ministry of Education, Science and Technology & 2 others’ [2023] KEELRC 32 (KLR), and ‘Kinyua Felix v. Ministry of Education & 2 others’ [2021] eKLR.

⁶⁷³ See ‘Ogege v. Cabinet Secretary, Ministry of Transport and Public Works & another’, [2022] eKLR.

⁶⁷⁴ *Ibid.*, para. 46.

⁶⁷⁵ ‘Gichuru v. Package Insurance Brokers Ltd’ (Petition 36 of 2019) [2021] KESC 12 (KLR), para. 65.

⁶⁷⁶ See Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009, Section 9.

⁶⁷⁷ This requires, *inter alia*, the provision of necessary suitable architectural infrastructure, apparatus and equipment, training and medical personnel, and transportation facilities for participants. See Persons with Disabilities Act, Section 28(3)(a)-(c). See also, Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009, Section 9. It should be noted that the regulations mistakenly include two Sections 9, the first relating to education, and the second relating to sports and culture.

⁶⁷⁸ Persons with Disabilities Act., Sections 29-30.

⁶⁷⁹ *Ibid.*, Section 40. See also, Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009, Section 17.

and in all programmes covering events of national significance.”⁶⁸⁰ In 2012, a case was heard by the High Court at Nairobi challenging the failure of a television broadcaster to make its programming accessible. Finding in favour of the applicant, the Court found that the “respondent’s failure to comply with S39 of the Act” amounted “to indirect discrimination (...) on the basis of (...) disability.”⁶⁸¹ Unfortunately, this decision was overturned by the Court of Appeal on technical grounds.⁶⁸² However, the reasoning of the Court remains influential, largely mirroring practice under other provisions of the Act, discussed below.

Section 21 of the Act establishes a broad accessibility duty, which affirms the right of all persons with disabilities “to a barrier-free and disability-friendly environment to enable them to have access to buildings, roads, and other social amenities, and assistive devices and other equipment to promote their mobility.” This guarantee is expanded under Sections 22 and 23, which establish discrete rules relating to the proprietors of public buildings, and operators of public service vehicles.⁶⁸³ Whilst there are no specific offences established pursuant to these provisions, and they do not appear to create an independent cause of action, Kenyan courts have held that the Act gives rise to enforceable rights, and have indicated that the failure of a proprietor of public buildings to take measures to ensure accessibility for persons with disabilities may give rise to a rights violation.⁶⁸⁴ In other cases, Kenyan courts have struck down regulations that would create accessibility issues for wheelchair users, due to their indirectly discriminatory impact on persons with disabilities.⁶⁸⁵

⁶⁸⁰ Persons with Disabilities Act, Section 39. See also, Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009, Sections 15 and 16, concerning television programmes and print media.

⁶⁸¹ ‘Cradle – Children Foundation (suing through the Trustee Geoffrey Maganya) v. Nation Media Group Limited ex parte Cradle – Children Foundation’ (suing through Geoffrey Maganya) [2012] eKLR.

⁶⁸² ‘Nation Media Group Limited v. Cradle - The Children’s Foundation Suing Through Geoffrey Maganya’ [2016] eKLR.

⁶⁸³ See also Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009, Sections 12-14.

⁶⁸⁴ ‘Paul Pkiach Anupa & Another v. Attorney General & Another’ [2012] eKLR, paras. 69 and 70. In this case, the Court found that the “physical structure of the Milimani Law courts” made it a “herculean task” for persons with disabilities to access the court (see para. 66). However, as Section 22 of the Act had only recently entered into force, and Section 22(2) provides a five year period for implementation, the Court declined to make an order against the Government and Judicial Service Commission (para. 69). Nonetheless, the Court indicated that a failure to ensure access may give rise to a violation of Article 27(6) of the Constitution, which requires the State to adopt measures to redress disadvantage experienced by persons with disabilities.

⁶⁸⁵ See broadly, ‘Republic v. Cabinet Secretary for Transport & Infrastructure Principle Secretary & 5 others ex parte Kenya Country Bus Owners Association & 8 others’ [2014] eKLR.

Despite these positive developments, inaccessible infrastructure remains a significant problem in Kenya,⁶⁸⁶ and there has been very little judicial practice in this area. It remains unclear whether the Act's accessibility provisions – read alone, or in conjunction with Article 54 of the Constitution – establish directly enforceable rights.⁶⁸⁷ As inaccessible infrastructure will often give rise to indirect discrimination,⁶⁸⁸ future cases may be initiated under the Constitutional equality guarantee. If this is the case, then developments in this area are expected to be slow. Legal protections against discrimination are essentially reactive: they seek to remedy a wrong that has already occurred or is likely to occur. By contrast, the CRPD Committee has emphasised that accessibility duties are proactive in nature: they require the adoption of national standards, that are implemented on an ongoing basis to address inaccessible situations before the need for an individual accommodation arises.⁶⁸⁹ Whilst the Persons with Disabilities Act confers special powers upon the National Council for Persons with Disabilities to compel listed duty-bearers to ensure access to public goods and services, as set out above, these powers have not been used.⁶⁹⁰ In this regard, the accessibility provisions of the Act remain largely aspirational.

7.3 Employment Legislation

The Kenyan legal framework on work and employment has developed significantly over the course of the last two decades. In 2001, a task-force was established with the purpose of drafting new labour legislation.⁶⁹¹ Five laws were initially introduced, including: (i) the Employment Act, which sets out the basic rights of individuals and obligations of duty-bearers, (ii) the Labour Institutions Act, which details the right of freedom of association and sets out rules on the establishment, registration, and operation of trade unions and employers organisations, (iii) the Labour Relations Act, which provides for the establishment of a range of bodies charged with overseeing the administration of the labour law framework; (iv) the Work Injury Benefits Act, which governs workplace injuries, and (v) the Occupational

⁶⁸⁶ United Disabled Persons of Kenya, 'From Affirmation to Practice: Assessing a Decade of Implementing the Constitution of Kenya 2010 for Persons with Disabilities', 2020, pp. 58-60.

⁶⁸⁷ It should be noted that whilst in 'Anupa', reliance was placed on Section 22 of the Persons with Disabilities Act, the same section indicates that the National Council for Persons with Disabilities is responsible for determining access standards. Where such standards are not adopted, it is unclear whether the Act alone (without reference to Article 27(6) of the Constitution) can be used to support a claim.

⁶⁸⁸ Committee on the Rights of Persons with Disabilities, General Comment No. 8, UN Doc. CRPD/C/GC/8, 2022, para. 18.

⁶⁸⁹ See the discussion in Section 2.1(a) of this Report.

⁶⁹⁰ United Disabled Persons of Kenya, 'From Affirmation to Practice: Assessing a Decade of Implementing the Constitution of Kenya 2010 for Persons with Disabilities', 2020, p. 59.

⁶⁹¹ For further information on this development process see Kenya Human Rights Commission, 'Labour Rights Legal Framework in Kenya', 2019, pp. 2-4. The report summarises the main legal provisions of the most relevant legislation and may be of assistance to individuals seeking to explore the labour rights framework more broadly.

Safety and Health Act, which establishes minimum health and safety standards and establishes a National Council for Occupational Safety and Health.

With the adoption of the 2010 Constitution, many of the rights included in these laws – such as protections against forced labour, the right to fair labour practices, and to trade union membership – have been accorded Constitutional status. In 2011, a new law was adopted which – pursuant to Article 162(2) of the Constitution – establishes an Employment and Labour Relations Court that has broad jurisdiction to hear employment and labour related disputes.⁶⁹² More recently, in 2016, the National Employment Authority Act came into force, establishing a National Employment Authority that is charged with a wide range of responsibilities, including advising on the formulation of employment policies and strategies, registering persons seeking employment and maintaining an up-to-date database of individuals looking for work, amongst other functions.⁶⁹³ These laws sit alongside other laws and policies that contain additional rights guarantees, and establish specific procedures relevant to work, for instance, regulating shipping and trade, the establishment of companies, insolvency, pensions, retirement benefits and industrial training.⁶⁹⁴

(a) Principle Legal Provisions

For the purposes of this Report, the principal piece of employment legislation is the Employment Act, which was adopted in 2007 and most recently amended in 2022. The Act is divided into 13 parts. Part I sets out the Act's short title and provides a definition of terms. Part II establishes a set of general principles, which include the right to non-discrimination, the prohibition of forced labour, and the prohibition of sexual harassment. Subsequent Parts contain detailed rules pertaining to the employment relationship (Part III); the protection of wages (Part IV); rights and duties in employment (Part V); termination and dismissal (Part VI); the protection of children (Part VII); insolvency of an employer (Part VIII); record-keeping (Part IX); employment management (Part X); foreign contracts of service (Part XI); and dispute resolution (Part XII). Part XIII contains miscellaneous provisions.

(b) Material Scope

Section 3 sets out the Act's scope of application. The Act applies to “all employees employed by an employer under a contract of service.”⁶⁹⁵ This includes both public sector and private sector employment, although certain employers – including the Kenya Defence Forces, the Kenya Police, the Kenya Prisons Service, the Kenya Coastguard Service, and the National

⁶⁹² See the Employment and Labour Relations Court Act, Section 12.

⁶⁹³ The National Employment Authority Act, Section 8.

⁶⁹⁴ See, inter alia, the Merchant Shipping Act; the Companies Act; the Insolvency Act; the Pensions Act; the Retirement Benefits Act; and the Industrial Training Act.

⁶⁹⁵ Employment Act, Section 3(1).

Youth Service – are exempted from the Act’s requirements.⁶⁹⁶ The term “employee” is defined under Section 2 to include “a person employed for wages or a salary” including “an apprentice and indentured learner.” The term employer is defined under the same section to include “any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual” including “the agent, foreman, manager or factor of such person, public body, firm, corporation or company.”⁶⁹⁷ A contract of service is defined as “an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time.”⁶⁹⁸ Rules for the establishment of a contract of service are detailed in Part III.

Section 5(3) of the Act contains the principal non-discrimination guarantee. In line with the rest of the Act – which governs all forms of employment – discrimination is prohibited in both the public and private sector.⁶⁹⁹ The prohibition of discrimination applies to all aspects of employment including recruitment, training, promotion, terms and conditions of employment, termination of employment or “other matters arising out of the employment.”⁷⁰⁰ Subsection 5(5) specifically provides for equal remuneration for work of equal value, as required by both the ICESCR and the CRPD.⁷⁰¹ Protection from discrimination extends to both employees and applicants for employment.⁷⁰² In this regard, the Employment Act compares favourably with the Convention.⁷⁰³

(c) Personal Scope

Subsection 5(3) of the Act prohibits discrimination “on the grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status [and] HIV status.” This list does not include a number of grounds recognised under international human rights instruments,⁷⁰⁴ and unlike the Constitution, the list of grounds is closed, creating a risk that acts of discrimination based on other personal

⁶⁹⁶ Ibid., Section 3(2) and 3(3). The Act also does not apply to “an employer and the employer’s dependants where the dependants are the only employees in a family undertaking.” See Ibid., Section 3(2)(a)-(d).

⁶⁹⁷ Ibid., Section 2.

⁶⁹⁸ Ibid. The term does not cover foreign contracts of services, which are regulated under Part XI of the Act.

⁶⁹⁹ Ibid., Section 3(1), which states: “The Act shall apply to all employees employed by any employer under a contract of service.”

⁷⁰⁰ Ibid., Section 5(3)(b).

⁷⁰¹ See further, Section 2.2(b) of this Report.

⁷⁰² Employment Act, Section 5(8)(a).

⁷⁰³ Convention on the Rights of Persons with Disabilities, Articles 27(1)(a) and (b).

⁷⁰⁴ See further, Equal Rights Trust, ‘In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya’, 2012, pp. 212-13.

characteristics may fall outside of the scope of protection.⁷⁰⁵ The Act does not specify whether intersectional discrimination, discrimination based on association, or discrimination based on perception is covered. Whilst the Act does not, on its face, require a person to possess a particular characteristic, or for listed grounds to be the sole source of disadvantage, the absence of an express guarantee against these particular manifestations of harm may have the effect of limiting the personal scope of the law.

More positively, disability is listed as a protected characteristic. It is therefore clear that acts of disability discrimination in employment are prohibited. However, the definition of disability under Section 2 of the Act – which mirrors that included under the Persons with Disabilities Act – continues to reflect a medical model; presenting impairment as the principal source of disadvantage, rather than the environmental and social factors that – in combination with a particular impairment – may impede participation in economic, social, and cultural life.⁷⁰⁶ In its 2015 Concluding Observations, the Committee on the Rights of Persons with Disabilities expressed concern about the “very low employment rate among persons with disabilities” in Kenya, as well as the “stereotypes surrounding persons with disabilities and their lack of training to access employment opportunities,” which may impede participation in practice.⁷⁰⁷

Other pieces of employment legislation adopted by Kenya also contain non-discrimination guarantees. For example, Section 5(1) of the Labour Relations Act provides that “no person shall discriminate against an employee or any person seeking employment for exercising any right conferred in this Act.” Through this provision, discrimination based on trade union membership is prohibited. Section 8 of the Occupational Safety and Health Act prohibits discrimination against employees for reasons relating to their position as a member of a safety and health committee. Kenyan courts have indicated that certain forms of discrimination may also constitute a safety and health issue.⁷⁰⁸ Discrimination is also prohibited against employees who have raised a health or safety complaint. Whilst the Act does not specify the grounds upon which discrimination is prohibited, read in light of the Constitution, and Section 5(3) of the Employment Act, it may be assumed that this provision would extend protection to workers with disabilities who have raised health and safety issues. In practice, as discussed further in the next Section, this provision may operate as an important protection against victimisation.

⁷⁰⁵ In practice, courts tend to interpret the provisions of the Employment Act together with Article 27 of the Constitution, which is open-ended in nature. As a result, protections from discrimination in employment may extend to other grounds of discrimination. However, as noted in the next Section, the standard of proof in Constitutional equality claims may be higher than in regular civil proceedings, and this bifurcated procedure introduces unhelpful complexity, potentially creating challenges for claimants.

⁷⁰⁶ *Ibid.*, Section 2. See also, the discussion of the Persons with Disabilities Act, above.

⁷⁰⁷ Committee on the Rights of Persons with Disabilities, Concluding Observations: Kenya, UN Doc. CRPD/C/KEN/CO/1, 2015, paras. 47-48.

⁷⁰⁸ ‘P O v. Board of Trustees, A F & 2 others’ [2014] eKLR, para. 35.

(d) Forms of Discrimination

The Employment Act covers both direct and indirect discrimination. Ground-based harassment is also prohibited, although no definitions are provided for these forms of conduct.⁷⁰⁹ Sexual harassment is prohibited under Section 6 of the Act. It is defined to occur when an employer, their representative or a co-worker "directly or indirectly" requests an employee for sexual intercourse, sexual contact or "any other form of sexual activity" that contains an express or implied threat of detrimental or preferential treatment.⁷¹⁰ Sexual harassment can also include the use of sexual language (whether written or spoken), the use of visual material of a sexual nature, and unwelcome or offensive "physical behaviour of a sexual nature" provided that the behaviour "has a detrimental effect on [an] employee's employment, job performance, or job satisfaction."⁷¹¹ This definition is largely compliant with the requirements of the CEDAW.⁷¹² However, the Committee has expressed concern about the quality of the Kenyan legal framework on sexual harassment,⁷¹³ and as the Act exempts certain public service organisations from its scope, protections against sexual harassment, alongside other forms of discrimination, in these fields may be limited.⁷¹⁴

Notably, the Act does not identify segregation as a form of prohibited conduct. This omission is particularly stark given the continued practice of sheltered employment. Some protection against victimisation is provided by Section 46(h), which states that the dismissal of an employee or the imposition of disciplinary penalties due to "an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer" is unfair.⁷¹⁵ Disadvantaging an employee after they make a complaint relating to health and safety concerns is likewise prohibited under Section 8 of the Occupational Safety and Health Act.⁷¹⁶ Whilst the inclusion of these provisions is positive, they are overly narrow, and do not fully meet the requirements of international law.⁷¹⁷ For instance, neither Act appears to prohibit the

⁷⁰⁹ Employment Act 2007, Section 5(3).

⁷¹⁰ Ibid., Section 6(1).

⁷¹¹ Ibid., Section 6(1).

⁷¹² See in particular, Committee on the Elimination of Discrimination against Women, General Recommendation No. 19, 1992, para. 18.

⁷¹³ See Committee on the Elimination of Discrimination against Women, Concluding Observations: Kenya, UN Doc. CEDAW/C/KEN/CO/8, 2017, paras. 36-37, commenting on the definition used in the Sexual Offences Act.

⁷¹⁴ See the critique provided in this regard in Equal Rights Trust, 'In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya', 2012, p. 214.

⁷¹⁵ Save where "the complaint is shown to be irresponsible and without foundation". See Section 46(h).

⁷¹⁶ See also, Section 5(c)(iii) of the Labour Relations Act, which provides that an employee shall not be dismissed "or in any other way" prejudiced "for exercising any right conferred by this Act or participating in any proceedings" set out in Part 2 of the Act.

⁷¹⁷ See United Nations Human Rights Office, 'Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation', New York and Geneva, 2023, pp. 46-47.

victimisation of a worker for participating in a discrimination complaint where they are not the principal complainant. Thus, a person supporting a disability discrimination complaint (for instance, by acting as a witness) may fall outside of the scope of protection. This is particularly problematic given the absence of a clear prohibition of discrimination based on association, which may be used to provide protection against the victimisation of an individual due to their association with a person with disabilities.

Unlike the Persons with Disabilities Act, the Employment Act does not expressly require employers to adopt accommodating measures, and the denial of reasonable accommodation is not listed as a form of discrimination.⁷¹⁸ In practice, Kenyan Courts have tended to apply provisions of the Constitution, Persons with Disabilities Act and Employment Act simultaneously, identifying a broad duty to provide reasonable accommodations that stems from the overarching duty to refrain from discrimination.⁷¹⁹ By reading these laws together, protections afforded by the Employment Act may helpfully inform understanding the content of the right to reasonable accommodation.⁷²⁰ However, the lack of an explicit duty may also have the effect of impeding rights protection in specific cases.⁷²¹

Section 45 of the Act concerns unfair dismissal. According to Sections 45(4) and 46(g), a termination shall be deemed unfair where it based on an “employee’s race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability.” Unlike the Persons with Disabilities Act, this provision does not require that “disability” be the sole or main factor motivating a decision. Where a person with disabilities is dismissed for reasons relating to their disability status, by the strict terms of Section 46, the dismissal is unlawful. This is an important guarantee, and in practice, a range of cases challenging discrimination following dismissal have been brought before Kenyan courts. However, the protective scope of these provisions is undermined by Sections 41(1) and 45(ii) of the Act, which together provide that the “physical incapacity” of an employee may

⁷¹⁸ This is true of other employment legislation. See for example, Section 5 of the Labour Relations Act, which contains a general prohibition of discrimination, but does not list the forms of prohibited conduct.

⁷¹⁹ See, for example, ‘Lucy Chepkemoi v. Sotik Tea Company Limited’ [2022] eKLR, paras. 53-55.

⁷²⁰ For instance, Section 19 establishes a narrowly defined set of circumstances in which a deduction from an employee’s wages might be justified. As accommodating measures are not included amongst this list, it may be inferred that the costs associated with accommodation cannot be passed on to the employee. Similarly, Section 10 of the Occupational Safety and Health Act makes clear that an employer cannot charge an employee with disabilities for accommodations needed to ensure their health and safety in the workplace.

⁷²¹ The lack of an explicit duty to accommodate within Kenyan employment legislation is particularly problematic when considering the nature of collective agreements, which are binding upon both the employer and employees (Section 59 of the Labour Relations Act). There is a risk in practice that such an agreement could be invoked as justification for the denial of an accommodation (such as a request for ameliorated working hours) contrary to the requirements of international law. See further, the discussion in Section 2.3 of this Report.

constitute a “fair reason” for dismissal. The Supreme Court has intimated that these provisions may permit the dismissal of an employee on medical grounds, provided that the procedural requirements of the Act are met.⁷²² In more recent cases, the Kenyan courts have sought to distinguish “disability” from “inability”, emphasising that a person’s disability status, **per se**, “does not translate to incapacity to perform employment duties.”⁷²³ Where an employer fails to provide reasonable accommodations to an employee, aimed at facilitating their equal participation in work prior to a dismissal decision, the decision to dismiss will not be “valid and fair within the meaning of Section 45 and 46” of the Act.⁷²⁴

(e) Justification and Exceptions

The Act provides a number of exceptions to the protection against discrimination in employment. Subsection 5(4) provides an occupational requirement criterion, which stipulates that it does not constitute discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. This exception is broadly in line with that specified under the 1958 ILO Discrimination (Employment and Occupation) Convention.⁷²⁵ However, further exceptions which state that it is not discrimination to employ a citizen in accordance with the national employment policy, or to restrict access to limited categories of employment where it is necessary in the interest of State security are far too expansive. Further concerns arise in respect of the general exceptions which apply to the Act as a whole. Thus, the Act does not apply to either the armed forces or reserve, or to the police, the Kenya Prisons Service or the Administration Police Force. These exceptions, while potentially justified in respect of the Act’s general provisions, are overly broad when applied to the non-discrimination protections provided in Section 5.⁷²⁶

(f) Equality Measures

Section 5(1) of the Employment Act establishes the duty of the Minister responsible for labour, labour officers and the Employment and Labour Relations Court to “promote equality of opportunity” and “eliminate discrimination in employment.” A similar duty is imposed on

⁷²² ‘Gichuru v. Package Insurance Brokers Ltd’ (Petition 36 of 2019) [2021] KESC 12 (KLR), para. 77.

⁷²³ ‘Lucy Chepkemoi v. Sotik Tea Company Limited’ [2022] eKLR, para. 41.

⁷²⁴ ‘Lucy Chepkemoi v. Sotik Tea Company Limited’ [2022] eKLR, paras. 45-47. A similar decision was reached by the Supreme Court in *Gichuru v. Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR),

⁷²⁵ Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Article 1(2).

⁷²⁶ None of the National Police Service Act, Prisons Act, or Kenya Defence Forces Act explicitly prohibit discrimination, although the latter does require the Chief of the Defence Forces to instil a non-discriminatory culture within the defence forces (Section 12(k)), and non-discrimination is listed as a condition for the limitation of rights and fundamental freedoms under Part 5 (see Section 43(3)).

employers under Sub-Section 2.⁷²⁷ It is unclear – on the face of the Act – whether (and how) these provisions may be enforced. However, implementing regulations impose a discrete duty on employers to put into place workplace policies designed to meet the requirements of this section.⁷²⁸ The term “employment policy” is defined under Section 5(8)(c) of the Act, and includes measures:

Relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, termination of employment [or] disciplinary measures.

In a recent cases, the Kenyan judiciary has indicated that employers are bound by the requirements of their own internal employment policies and staff handbooks, which may form part of an individual’s terms of employment that can be enforced through the courts.⁷²⁹ Consequently, it may be assumed that the failure of an employer to adopt a workplace anti-discrimination policy,⁷³⁰ or to abide by the terms of such a policy, may provide an avenue for legal action. Similar findings have been made by the courts in respect of employers’ failures to adopt and implement workplace anti-sexual harassment policies,⁷³¹ which are expressly required by Section 6 of the Employment Act.⁷³² However, given the lack of clear guidance on what such a policy must contain, it is unclear how effective these requirements will prove in practice. Notably, the duty to adopt workplace anti-sexual harassment policies only applies to employers with 20 or more staff members.⁷³³

Under Section 15 of the Act every employer is required to display a statement informing employees of their employment rights. The statement should be advertised “in a conspicuous place, which is accessible to all (...) employees.”⁷³⁴ The Employment (General) Rules of 2014 make clear that this statement should include information on employees’ rights to freedom

⁷²⁷ Employment Act, Section 5(2).

⁷²⁸ Employment (General) Rules, 2014, Section 4.

⁷²⁹ See ‘Oyatsi v. Judicial Service Commission’ (Petition E111 of 2021) [2022] KEELRC 3 (KLR), paras. 105-109, and the cases cited therein.

⁷³⁰ As required by the Employment (General) Rules, 2014, Section 4.

⁷³¹ See, for example, ‘C A S v. C S Limited’ [2016] eKLR, para. 35, upheld in ‘CSL v. CASN’ [2020] eKLR.

⁷³² Employment Act, Section 6(2) and (3); Employment (General) Rules, 2014, Section 6 and Schedule 1.

⁷³³ Ibid. Other provisions of the Employment Act contain further rules relating to sexual harassment. Under Section 6(4) the policy must be brought to the attention of employees. Under Section 74(1)(a) employers are required to keep a record of the policy statement. False entries are made an offence under Section 75.

⁷³⁴ Employment Act, Section 15.

from discrimination, including on the basis of disability status.⁷³⁵ A draft statement, set out in Schedule 2 of the Rules, largely mirrors the wording of Section 5 of the Employment Act. However, there are some inconsistencies between the two documents: notably, the draft statement indicates that an employer “may discriminate [against] an employee on the basis of (...) affirmative action (...) inherent job requirements (...) the national employment policy; or (...) the interest of State security.”⁷³⁶ This is inaccurate and potentially misleading. Whilst each of these topics are included within the exceptions clause of the Employment Act, the Act itself does not permit discrimination on these basis, but rather specifies particular areas where differential treatment may be justified. There is a risk, given the current wording of the statement, that misunderstandings may arise amongst both employers (as to their responsibilities) and employees (as regards their legal protections).

Other provisions of the Employment Act permit an employer to adopt positive action measures, although such action is not expressly mandated,⁷³⁷ save to the limited extent that job vacancies are required to be advertised “in such a manner as to encourage applications from suitable candidates” irrespective of their personal characteristics, such as their disability status.⁷³⁸ Various sections of the Act specify that documents, rules and procedures should be made accessible,⁷³⁹ for instance, through making them available in a language understood by an employee. But the Act does not establish specific rules relating to the accessibility of the workplace.⁷⁴⁰ This is a notable shortcoming.

Outside of these laws, the Labour Institutions Act establishes a range of bodies with specific functions relevant to employment and labour rights protection. Section 5 constitutes a National Labour Board, which is mandated, under Section 7, to advise the Minister responsible for labour on “all matters concerning employment ” including the administration of the legal framework, matters relating to trade unions, the implementation of ILO Conventions, the development of policies and codes of good practice, as well as “any aspect of public employment services, vocational guidance, vocational training and the employment of persons with disabilities,” amongst other matters.⁷⁴¹ In fulfilling these functions, the board

⁷³⁵ Employment (General) Rules, 2014, Section 7 and Schedule 2.

⁷³⁶ Ibid., Schedule 2, para. 3(2).

⁷³⁷ Employment Act., Section 5(4)(a). Moreover, whilst the Act makes clear that measures should be equality-focused, it does not specify any other conditions for their implementation, creating a risk that discriminatory or stereotyped measures could be introduced ostensibly for the protection of persons with disabilities.

⁷³⁸ Employment (General) Rules, 2014, Section 5.

⁷³⁹ See, illustratively, Employment Act, Sections 9(4), 12(1)(a), 14, 35(3), and 41(1).

⁷⁴⁰ As noted above, employers are required to adopt policies aimed at facilitating equality of opportunity and eliminating discrimination in employment. Under Section 5(8) of the Employment Act, the “working environment and facilities” fall within the scope of such policies. Thus, a broad duty to ensure accessibility could be read into the law. However, given the lack of practice in this area, this possibility remains largely theoretical.

⁷⁴¹ Labour Institutions Act, Section 7(1).

is entitled to conduct investigations and research into labour issues.⁷⁴² Alongside the Board, the Act provides for the establishment of wage councils that are required, **inter alia**, to “investigate the remuneration and conditions of employment” in different sectors,⁷⁴³ and an Inter-Ministerial Committee responsible for advising the Cabinet Secretary on labour matters.⁷⁴⁴

In addition to these bodies, Kenyan law establishes a National Employment Authority, which is charged with advising national and county governments on the “formulation of employment policies and strategies” and monitoring their implementation.⁷⁴⁵ The Authority has a broad range of responsibilities, ranging from the registration of persons seeking employment, through to the facilitation of training and skills development.⁷⁴⁶ The Authority is empowered to conduct research relevant to the discharge of its mandate and – unlike the bodies listed above – is provided with a specific equality function. Under Section 37 of the relevant legislation, the State is required – acting through the Authority – to “encourage private and public institutions to employ Kenyans in all positions, including positions of leadership and management”, and to “take affirmative action measures and actions designed to promote the employment of Kenyans in management and other levels of employment regardless of their years of experience.”⁷⁴⁷ When viewed in light of the objects and purposes of the Act, this is a welcome provision.⁷⁴⁸ However, the use of the term “Kenyan” in Section 37 is potentially problematic, generating a risk of inconsistency with the Constitution⁷⁴⁹ and Kenya’s

⁷⁴² Ibid., Section 7(3).

⁷⁴³ Ibid., Sections 43, and 44(a).

⁷⁴⁴ Ibid., Section 54A and 54B.

⁷⁴⁵ National Employment Authority Act, Sections 6 and 8(a)-(e).

⁷⁴⁶ Ibid., Section 8. On training and registration see Sections 8(g)-(h), respectively.

⁷⁴⁷ Ibid., Section 37.

⁷⁴⁸ According to Section 3, the Act aims to give effect to Articles 55(c) and 56(c) of the Constitution, which require the adoption of measures aimed at accelerating equality in employment for youth and marginalised groups. Article 260 of the Constitution defines the term “marginalised group” to include all persons “disadvantaged by discrimination on one or more of the grounds in Article 27(4).” This includes the ground of disability.

⁷⁴⁹ Article 2 of the Act defines the term “Kenyan” to mean “a citizen of Kenya as defined in the Constitution”. However, the rights to equality and non-discrimination set out in Article 27 of the Constitution apply to “any person” – they are not limited by citizenship. Non-citizens may also constitute a marginalised group under Article 56(c): Article 27(4) lists ethnic and social origin as a ground of discrimination, and the Kenyan courts have identified “nationality” as a protected ground (see ‘Isaac Kawai & 2 others v. Council of Legal Education & 2 others’ [2021] eKLR). This is also made clear under Section 2 of the National Cohesion and Integration Act, which defines the term “ethnicity” to include “nationality.”

international law obligations.⁷⁵⁰ This risk is compounded by the failure of the Act to specify any conditions for the operation of positive action measures.⁷⁵¹

On a more positive note, the Act includes a novel provision, requiring the Authority to conduct due diligence on “private companies seeking its services”, and preventing the Authority from partnering with any prospective employer that has been involved in “possible employment malpractices or violation of laws of Kenya.”⁷⁵² This would, presumably, include employers that have been found to have violated the right to non-discrimination. This due diligence requirement is consistent with international law and best practice. Unfortunately, equivalent provisions are not included in other relevant legislation, such as the Public Procurement and Asset Disposal Act. Whilst this law does contain a general due-diligence obligation,⁷⁵³ it does not expressly require public bodies to refrain from procuring services or products from enterprises found to abuse the rights of persons with disabilities, contrary to the recommendations of UN treaty bodies.⁷⁵⁴ The Act does, nonetheless, contain a number of other positive equality provisions, with implementing regulations mandating the reservation of 30 percent of procurement spend “for the purposes of procuring goods, works and services from enterprises owned by youth, women and persons with disability[ies].”⁷⁵⁵ However, the implementation of this requirement remains to be seen, and concerns have been raised that “persons with disabilities do not in fact benefit from the reserved procurement quota which is ring-fenced” at the comparatively low rate of “two percent.”⁷⁵⁶

8 Enforcement

States do not meet their obligations to protect people against discrimination by simply prohibiting discrimination in the law. They must also ensure that the rights guaranteed by national law are practical and effective. Having enshrined the right to equality in its Constitution and provided protection against discrimination in its legislation as described

⁷⁵⁰ For example, the CESCR Committee has emphasised that Covenant rights “apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.” See Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 30.

⁷⁵¹ See the discussion in Section 2.5(a) of this Report.

⁷⁵² See National Employment Authority Act, Sections 32 and 33.

⁷⁵³ Public Procurement and Asset Disposal Act, Section 83.

⁷⁵⁴ As recommended by the CESCR Committee. See Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23, 2016, para. 59, discussed in Section 1.2(a) of this Report.

⁷⁵⁵ The Public Procurement and Asset Disposal Regulations, 2020, Section 149.

⁷⁵⁶ United Disabled Persons of Kenya, ‘From Affirmation to Practice: Assessing a Decade of Implementing the Constitution of Kenya 2010 for Persons with Disabilities’, 2020, p. 40.

above, Kenya is required to put in place the legal and administrative mechanisms that guarantee individuals who have experienced discrimination effective access to justice. This requires the provision of appropriate remedies, sanctions for non-compliance, and the amelioration of procedural mechanisms to ensure that rights violators are held to account.

8.1 Enforcement Mechanisms

A number of different mechanisms are established under Kenyan law through which violations of the right to equal work and employment for persons with disabilities may be challenged. The Employment Act foresees two potential avenues for the resolution of an employment dispute: (1) the submission of a complaint to a registered labour officer; and (2) litigation before the Employment and Labour Relations Court.⁷⁵⁷ In practice, many employment contracts also contain provisions requiring some form of alternative dispute resolution (ADR), such as mediation, conciliation or arbitration. Under the Constitution and the Employment and Labour Relations Court Act, courts are encouraged to promote the use of ADR⁷⁵⁸ and may decline to hear a case until alternative dispute resolution mechanisms have been explored by the relevant parties.⁷⁵⁹ In recent cases, however, Kenyan courts have questioned whether an arbitrator would have jurisdiction to hear discrimination claims.⁷⁶⁰ The Courts have also indicated that discrimination may **de facto** prevent parties from consulting in good faith.⁷⁶¹ However, these are far from settled issues, and there remains scope for the further development and clarification of the law in this area.

(a) Complaint to a Labour Officer

Labour officers are appointed by the Minister responsible for labour pursuant to Section 30 of the Labour Institutions Act. Appointed officers are empowered to receive complaints relating to unfair dismissal, as well “misconduct, neglect or ill treatment”, any “injury to the person or property”, and issues relating to the “rights and liabilities” of employers and employees.⁷⁶² Whilst this would conceivably encompass discrimination complaints, this is not self-evident

⁷⁵⁷ Employment Act, Sections 87 and 47.

⁷⁵⁸ Constitution of Kenya, Article 159(2)(c); Employment and Labour Relations Court Act, Section 15.

⁷⁵⁹ See, in particular, Employment and Labour Relations Court Act, Section 15(1) and (4); Employment and Labour Relations Court (Procedure) Rules, Section 15(1)(b), and 19; and Civil Procedure Act, Sections 59, 59A, 59B, 59C, and 59D. Arbitration is regulated by the Arbitration Act.

⁷⁶⁰ See ‘Miriam Nzilani Mweu v. Kiptinness & Odhiambo Associates’ [2019] eKLR, para. 23.

⁷⁶¹ See ‘Agnes Waruguru Gaita & another v. RSM Eastern Africa LLP & another’ [2021] eKLR, para. 30.

⁷⁶² Employment Act, Sections 47 and 87.

on the face of the Act, and in some cases labour officers appear to have declined jurisdiction.⁷⁶³

The powers of labour officers are detailed under Section 35, and include the right to enter employment premises, to require the production of employees and documents (such as wage sheets and employment records), to request information, to inspect buildings and facilities, to examine and make copies of records, to make orders relating to hygiene and sanitation, and to “institute proceedings in respect of any contravention” of these requirements, “or for any [other] offence committed by an employer” under domestic labour legislation.⁷⁶⁴ Labour officers are also empowered to institute appeals “on behalf of any employee in any civil proceedings.”⁷⁶⁵ Obstructing a labour officer, or failing to comply with a relevant order, is made an offence, which may be punished by a fine of up to 100,000 Kenyan shillings, imprisonment for a term not exceeding six months, or both.⁷⁶⁶ Labour officers have discrete powers to suggest remedial action in cases of unfair dismissal, which are set out in Section 49 of the Employment Act (discussed further below). Whilst labour officers are only empowered to make recommendations on suggested courses of action,⁷⁶⁷ the Courts have held that a conciliation agreement concluded before a registered officer is binding on the parties to that agreement.⁷⁶⁸

(b) Litigation

The Constitution, Persons with Disabilities Act, and Employment Act all envisage the possibility of legal proceedings to enforce an individual’s rights. Section 22(1) of the Constitution provides that “every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.” This includes violations of the rights to equality and non-discrimination, under Article 27.⁷⁶⁹ The High Court is granted jurisdiction to hear cases relating to an alleged violation of fundamental rights, whilst Article 162 provides for the establishment of a specialised court, enjoying the same status of a High Court, to hear and determine labour and employment disputes.⁷⁷⁰ Section 15(3) of the Persons with Disabilities Act provides that a complaint of disability discrimination in employment may be

⁷⁶³ See, for example, ‘SWM v. Hardware Trading Store Limited & another’ [2021] eKLR.

⁷⁶⁴ Labour Institutions Act, Sections 34-35.

⁷⁶⁵ Ibid., Section 35(l).

⁷⁶⁶ Ibid., Section 38. See also Section 39 on the potential liability of companies for offences.

⁷⁶⁷ Employment Act, Section 47(2) and 49.

⁷⁶⁸ See, for example, ‘Daniel Njuguna Muchiri v. Sugar Bakery Limited’ [2019] eKLR. The same is true for the conciliation of trade disputes between a trade union and employer or employer’s organisation. See the Labour Relations Act, Part VIII, which governs dispute resolution, and in particular Sections 66-68.

⁷⁶⁹ Constitution of Kenya, Article 27.

⁷⁷⁰ See Constitution of Kenya, Articles 22, 23, 162(2)(a), and 165(3).

brought before the Industrial Court (now the Employment and Labour Relations Court), whilst other provisions of the Act anticipate potential legal action in other courts.⁷⁷¹ Section 5(6) of the Employment Act creates a specific offence of discrimination, whilst other sections detail the entitlement of individuals whose rights have been violated to initiate a claim.⁷⁷² Other pieces of employment legislation also establish legal mechanisms through which disputes may be adjudicated.⁷⁷³

In many cases, the equality and non-discrimination provisions of the above laws have been cited in tandem. Where a potential conflict between them arises, Kenyan courts have stressed that the Constitution takes primacy, and that the requirements of Article 27 of the Constitution cannot be abridged due to a lower standard of protection being established under ordinary legislation.⁷⁷⁴ In this regard, the Employment Act and Persons with Disabilities Act “are not exhaustive or conclusive of the rights of persons with disabilities provided in the Constitution but merely elucidate the rights due to them in certain respects.”⁷⁷⁵ These laws form “part of the measures taken by the State to ensure that the rights of persons with disabilities are realised” and must therefore be read so as to ensure conformity with Constitutional rights guarantees.⁷⁷⁶ These judicial clarifications are welcome. However, procedural inconsistencies governing matters such as the bringing of proceedings, legal standing, remedies and legal fees, may generate access to justice concerns,⁷⁷⁷ and in practice, whilst the Employment and Labour Relations Court is granted exclusive jurisdiction to determine employment and labour

⁷⁷¹ Persons with Disabilities Act, Sections 15(3), 25(3), 26(1)(b) and (c).

⁷⁷² Employment Act, Sections 5(6), 47(3), and 87.

⁷⁷³ See, for example, the Labour Relations Act, Section 10 and Parts VIII (dispute resolution) and IX (the adjudication of disputes); and the Occupational Safety and Health Act, Sections 8 and 116.

⁷⁷⁴ See, for example, ‘Simon Gitau Gichuru v. Package Insurance Brokers Ltd’ [2020] eKLR, para. 23; and ‘Gichuru v. Package Insurance Brokers Ltd’ (Petition 36 of 2019) [2021] KESC 12 (KLR), para. 29 (the submission by the appellant in the cases that an individual does “not lose their right to equality” under the Constitution due to the provisions of some other Act was substantially accepted by the Court.

⁷⁷⁵ ‘Paul Pkiach Anupa & Another v. Attorney General & Another’ [2012] eKLR, para. 45.

⁷⁷⁶ Ibid., para. 56. This is implied by Section 7(1) of Schedule 6 of the Constitution, which provides that “all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.” See also, Article 10(1)(b), which requires duty-bearers to interpret legislation in light of the right to non-discrimination.

⁷⁷⁷ These topics are discussed below. See further, Equal Rights Trust, ‘In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya’, 2012, pp. 229-230.

disputes,⁷⁷⁸ in some cases the High Court has continued to assert its jurisdiction to hear complaints,⁷⁷⁹ leading to tension within the judicial branch.⁷⁸⁰

8.2 Remedy and Sanctions

The remedial powers of the courts in cases concerning an actual or threatened violation of the Kenyan Bill of Rights are set out under Article 23 of the Constitution. According to subsection 3, “a court may grant appropriate relief including: (a) a declaration of rights; (b) an injunction; (c) a conservatory order; (d) a declaration of invalidity (...); (e) an order for compensation; [or] (f) an order of judicial review.”⁷⁸¹ The Supreme Court has indicated that this list is illustrative, rather than exhaustive,⁷⁸² and has asserted the courts’ powers to issue interim relief and structural injunctions provided that “said orders are carefully and judicially crafted” and that they are “specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a Constitutional or statutory mandate to enforce the order.”⁷⁸³ To ensure that such orders are realistic, and to avoid the prospect of “judicial overreach” orders should “not be couched in general terms, nor should they be addressed to third parties who have no Constitutional or statutory mandate to enforce them.”⁷⁸⁴ In practice, both structural and interim injunctions have proven powerful tools to

⁷⁷⁸ The Court replaces the former “industrial” court, which continues to be referenced in a range of Kenyan legislation. See Employment and Labour Relations Court Act, Sections 4 and 12(1). See also, Employment Act, Section 87(2). This Section provides that “no court other than the Industrial Court shall determine any complaint or suit” under the Act, subject to the qualification that a “dispute over a contract of service or any other matter” must be the main issue in dispute. See Employment Act, Sections 87(1) and (3).

⁷⁷⁹ In early cases, jurisdiction was assumed by the High Court because the Industrial Court was yet to be established. In later cases, however, the High Court has continued to assume jurisdiction in employment disputes where Constitutional rights issues have been raised for determination. See, for example, the respective cases of ‘Paul Pkiach Anupa & Another v. Attorney General & Another’ [2012] eKLR, paras. 36-37; and ‘Macharia v. Safaricom Plc’ (Petition 434 of 2019) [2021] KEHC 462 (KLR).

⁷⁸⁰ See, for example, the discussion in ‘Okoti v. Attorney General; Njenga’ [2022] KEELRC 2 (KLR), paras. 97 and 104 -106, which implicitly criticises the High Court in ‘Macharia’ (above) for assuming jurisdiction. As noted by the Court at para. 114 of the judgment, this situation has been exacerbated by the courts’ “inability to identify their exclusive subject matter jurisdiction (...) Judges (...) do not always agree that a matter is employment, labour relations, land, environment or a matter of general constitutional concern.”

⁷⁸¹ Constitution of Kenya, Article 23(3).

⁷⁸² ‘Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others’ [2021] KESC 34 (KLR), para. 118.

⁷⁸³ *Ibid.*, paras. 120-122.

⁷⁸⁴ *Ibid.*, para. 122.

address discrimination in the areas of work and employment,⁷⁸⁵ although the use of such tools in Kenyan employment disputes has been limited.

In addition to their powers as a High Court under the Constitution,⁷⁸⁶ the Employment and Labour Relations Court is vested with powers to make interim preservation orders, prohibitory orders, orders for specific performance, declaratory orders, awards of compensation and damages, and orders for the “reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law,” alongside “any other appropriate relief as the Court may deem fit to grant.”⁷⁸⁷ The Courts are also directed to consider Section 49 of the Employment Act, which provides guidance for Labour Officers on recommendations for remedial action in cases concerning unfair dismissal or the termination of a contract of an employee.⁷⁸⁸ Possible remedies envisioned under this Section include an order to pay wages, reinstatement of the employee or their re-engagement in comparable work, or some other form of “reasonably suitable work” at the same rate of pay.⁷⁸⁹ Decisions on forms of remedy should be guided by the “wishes of the employee” in addition to other considerations detailed under Section 49(4).⁷⁹⁰

Aside from the provision of compensation,⁷⁹¹ the Persons with Disabilities Act does not contain any specific rules on remedy, although it does foresee that a violation of a persons’ right to non-discrimination in employment may be challenged before the Employment and Labour Relations Court.⁷⁹² There is – in general – a lack of clarity surrounding the enforceability of other provisions of the Act, and whether they can give rise to a personal cause of action.⁷⁹³ However, Kenyan courts have indicated that such action is not prohibited, and that the courts may enforce the Act’s provisions “by giving such relief that is consistent” with its requirements.⁷⁹⁴ Where the rights to equality and non-

⁷⁸⁵ See, for example, Equal Rights Trust, *Economic and Social Rights in the Courtroom: A Litigator's Guide to Using Equality and Non-Discrimination Strategies to Advance Economic and Social Rights*, 2014, pp. 104-106; and United Nations Human Rights Office, ‘Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation’, New York and Geneva, 2023, pp. 81-84.

⁷⁸⁶ Constitution of Kenya, Article 162(2)(a).

⁷⁸⁷ Employment and Labour Relations Court Act, Section 12(3).

⁷⁸⁸ Employment Act, Sections 49 and 50.

⁷⁸⁹ *Ibid.*, Section 49(1)-(3).

⁷⁹⁰ *Ibid.*, Section 49(4).

⁷⁹¹ Persons with Disabilities Act, Section 26(3).

⁷⁹² *Ibid.*, Section 15(3).

⁷⁹³ See broadly, Equal Rights Trust, ‘In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya’, 2012, Section 3.4.

⁷⁹⁴ ‘Paul Pkiach Anupa & Another v. Attorney General & Another’ [2012] eKLR, para. 70.

discrimination are violated, it is also clear that the Courts retain remedial powers conferred by Article 23 of the Constitution.⁷⁹⁵

In addition to the general powers of the courts, both the Persons with Disabilities Act and the Employment Act establish specific offences for discrimination in employment, which may result in the application of a fine, the imposition of criminal penalties (in the form of imprisonment) or both.⁷⁹⁶ There are disparities within and between these laws both in respect of the maximum level of the fine to be levied (which ranges from 20,000 to 50,000 Kenyan shillings), and the proposed duration of imprisonment (which ranges from three months to one year).⁷⁹⁷ Other pieces of employment legislation also foresee the application of sanctions, although there are inconsistencies between these laws in their treatment of discrimination complaints.⁷⁹⁸ Taken together, these issues establish a high level of uncertainty in the application of the law. Moreover, as noted elsewhere, the potential application of criminal sanctions for ordinary discrimination cases (not involving violence) may act as a potential barrier to justice, and in view of procedural rules relating to the burden of proof (discussed below) raise fair trial concerns.⁷⁹⁹

8.3 Evidence and Proof

Discrimination cases raise unique procedural challenges for claimants. As discussed further in Section 4.2 of this Report, the proof of discrimination often lies in the hands of the discriminating party. As a result, direct evidence of discrimination can be hard to obtain, creating barriers to justice for claimants. For this reason, UN treaty bodies have repeatedly emphasised the need for States to review and amend their national rules on evidence and proof “to ensure that victims of discrimination are able to obtain redress and enforce their

⁷⁹⁵ Ibid., para. 70.

⁷⁹⁶ Persons with Disabilities Act, Sections 26(1)(b) - (c) and (2); Employment Act, Sections 5(6) and 88.

⁷⁹⁷ Ibid. In respect of other offences, Section 48 of the Persons with Disabilities Act establishes a fine of 10,000 Kenyan shillings.

⁷⁹⁸ See, for example, the Labour Relations Act. Section 82 establishes a general penalty clause, but as no specific offence is established under Section 5, which prohibits discrimination on the basis of trade union membership, the clause does not appear to apply. By contrast, Section 8(2) of the Occupational Safety and Health Act declares discrimination against an employee due to their participation in a safety and health committee, or their role in making a complaint, an offence. The courts have found that sexual harassment is a health and safety issue falling within the scope of Section 8(1) of the Act, and a discrete criminal offence of sexual harassment is also established under Section 23 of the Sexual Offences Act. The CEDAW Committee has expressed concern regarding the scope of this provision in its recent Concluding Observations. See, respectively, ‘P O v. Board of Trustees, A F & 2 others’ [2014]eKLR, para. 35; and Committee on the Elimination of Discrimination against Women, Concluding Observations: Kenya, UN Doc. CEDAW/C/KEN/CO/8, 2017, paras. 36-37.

⁷⁹⁹ For further information on the use of civil and criminal law in discrimination cases see United Nations Human Rights Office, ‘Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation’, New York and Geneva, 2023, pp. 77-78.

rights.”⁸⁰⁰ As part of these measures, national legislation should provide for a shift in the burden of proof from the claimant to the respondent once evidence has been presented from which it may be presumed – absent additional explanation – that discrimination has occurred. This is known as a **prima facie** case.⁸⁰¹ To rebut the presumption, the respondent is required to explain their actions and demonstrate that they were based on non-discriminatory criteria or were otherwise objectively and reasonably justified.⁸⁰²

In Kenya, the rules of evidence that apply in civil claims are regulated by the Evidence Act of 1963. Part I of Chapter IV of the Act concerns the burden of proof. In most cases, the burden of proving a claim rests on the person initiating legal action.⁸⁰³ However, Section 109 establishes an exception to this general rule, providing for an ameliorated procedure when it is established “by any law that the proof of [the] fact[s] shall lie on any particular person.” Section 112 further provides that “in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

The Employment Act contains a number of provisions that appear to facilitate a shift in the burden of proof.⁸⁰⁴ Where discrimination is alleged to have occurred, Section 5(7) provides that an “employer shall bear the burden of proving that the discrimination did not take place (...) and that the discriminatory act [or] omission [was] not based on any of the grounds specified in [Section 5(3)].”⁸⁰⁵ In cases brought under Section 47, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee.⁸⁰⁶ By contrast, “the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”⁸⁰⁷ The Supreme Court of Kenya

⁸⁰⁰ United Nations Human Rights Office, ‘Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation’, New York and Geneva, 2023, pp. 93-96.

⁸⁰¹ See *Ibid.*, Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, paras. 26 (g) and 73 (i); Committee on the Elimination of Racial Discrimination, General Recommendation No. 30, 2005, para. 24; Committee on the Elimination of Discrimination against Women, General Recommendation No. 33, UN Doc. CEDAW/C/GC/33, 2015, para. 15(g); Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, 2009, para. 40; and Human Rights Committee, Concluding Observations on Czechia, UN Doc. CCPR/C/CZE/CO/4, 2019, paras. 9-10.

⁸⁰² United Nations Human Rights Office, ‘Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation’, New York and Geneva, 2023, pp. 93-96. Justification is discussed further in the preceding Sections.

⁸⁰³ Evidence Act, Sections 107-108.

⁸⁰⁴ See, in particular, Employment Act, Sections 5(7), 10(7), and 47(5).

⁸⁰⁵ *Ibid.*, Section 5(7). A different standard is established under Section 11(a) of the Labour Relations Act, which provides that “a party that alleges that a right or protection conferred by this part has been infringed shall prove the facts of the conduct.” This provision appears to attach to the prohibition of discrimination under Section 7.

⁸⁰⁶ *Ibid.*, Section 47(5).

⁸⁰⁷ *Ibid.*, Section 47(5).

has examined these provisions on two separate occasions since 2020, first in the case of ‘Samson Gwer v. Kenya Medical Research Institute’.⁸⁰⁸ and more recently in the case of ‘Gichuru v. Package Insurance Brokers Ltd’.⁸⁰⁹

In ‘Samson Gwer’ the Court noted that “it is a timeless rule of the common law tradition, Kenya’s juristic heritage, and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim.”⁸¹⁰ In light of this tradition, the Court emphasised that “a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden.”⁸¹¹ This requires “substantial material” to be placed before the Court evidencing discrimination. Only “with this threshold transcended” would the evidential burden shift to the respondent, who would be required to demonstrate that their actions were not discriminatory.⁸¹²

In ‘Gwer’, it was clear that the petitioner did not discharge the initial burden. By contrast, in ‘Gichuru’, sufficient evidence was placed before the Court for a finding of discrimination.⁸¹³ Taken together, these two judgments appear to suggest that a person with disabilities making a claim of discrimination in employment has the burden of proving that discrimination has occurred. Whilst it is apparent that Section 5(7) cannot be read as “automatically” shifting the burden of proof, once sufficient evidence has been placed before the Court indicating that a petitioner has experienced harm – the **evidential** burden shifts to the employer, who must demonstrate that their actions were not discriminatory or were otherwise justified.⁸¹⁴ It is, however, unclear, how much evidence is required to be placed before the Court in order to discharge the initial burden, and elements of the Court’s approach to evidence and proof remain unclear.⁸¹⁵

⁸⁰⁸ ‘Samson Gwer & 5 others v. Kenya Medical Research Institute & 3 others’ [2020] eKLR.

⁸⁰⁹ ‘Gichuru v. Package Insurance Brokers Ltd’ (Petition 36 of 2019) [2021] KESC 12 (KLR).

⁸¹⁰ ‘Samson Gwer & 5 others v. Kenya Medical Research Institute & 3 others’ [2020] eKLR, para. 47.

⁸¹¹ Ibid., para. 50, citing the Court’s earlier jurisprudence.

⁸¹² Ibid., para. 51.

⁸¹³ ‘Gichuru v. Package Insurance Brokers Ltd’ (Petition 36 of 2019) [2021] KESC 12 (KLR), para. 46.

⁸¹⁴ Ibid., para. 46. In other cases, the Kenyan courts have discussed the difference between the burden of proof and the evidential burden at length. See, for instance, ‘Odinga & 5 others v. Independent Electoral and boundaries Commission & 4 others’ (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR).

⁸¹⁵ At paragraph 44 of the ‘Gichuru’ judgment, the Supreme Court indicates that the “burden placed upon [an] employer to disprove (...) allegations of discrimination is enormous.” This appears to suggest that a higher standard of proof applies once the initial facts have been evidenced. It is unclear why this should be the case. Alternatively, this sentence could be read as relating to the possible grounds of justification, in which case a higher standard might be appropriate. See also, below, discussion of the standard of proof in claims concerning alleged violations of the Constitutional right to equality.

In other cases, Kenyan courts have been more explicit in their analysis. In a 2020 judgment, the Court of Appeal at Nairobi expressly endorsed the **prima facie** case test, citing Section 5(7) of the Employment Act and Article 27(4) of the Constitution.⁸¹⁶ According to the Court, once a **prima facie** case has been established, “a presumption that the employer discriminated against the employee is raised. The employer must then articulate clear, specific, and non-discriminatory reasons” for their actions.⁸¹⁷ This approach is consistent with the requirements of international law.⁸¹⁸ In other cases, Kenyan courts have recognised the difficulties of establishing data on discrimination,⁸¹⁹ holding that – in the absence of direct proof – inferences of discrimination may be drawn,⁸²⁰ including based on circumstantial evidence.⁸²¹ The trial court in ‘Gichuru’ appeared to suggest that a failure to follow internal rules and procedures may give rise to such an inference.⁸²² The courts have also indicated that a failure to give reasons, in line with the requirements of Article 35(1)(b) of the Constitution,⁸²³ may indicate that a decision was based on discriminatory factors.⁸²⁴ Claimants have relied variously upon the reports of human rights organisations and the Concluding Observations of UN treaty bodies to evidence the discriminatory impacts of policies and practices.⁸²⁵

Viewed collectively, these decisions offer important safeguards to claimants that are essential to ensuring their Constitutional rights to non-discrimination and access to justice.⁸²⁶ However, due to the fragmented structure of the Kenyan equality law framework, and the reactive nature of judicial decision-making, many questions relating to evidence and legal procedure remain unanswered, creating a risk of confusion or inconsistent judgments. Indeed, as discussed above, there remains some uncertainty as to the rules on the burden of

⁸¹⁶ ‘Reuben Wamukota Sikulu v. Director of Human Resource Management, Ministry of Devolution & Planning & 2 others’ [2020] eKLR, paras. 11-12.

⁸¹⁷ *Ibid.* Whilst decided before the two cases, this approach appears to align with the decision of the Supreme Court in ‘Gichuru’ (paras. 46 and 47) and Samson Gwer (paras. 47-51), cited above.

⁸¹⁸ See the discussion at the outset of this Section. See further Section 4.2 of this Report.

⁸¹⁹ ‘Al Yusra Restaurant Ltd v. Kenya Conference of Catholic Bishops & another’ [2017] eKLR, para. 87.

⁸²⁰ *Ibid.*, para. 86. See also, in the context of sexual harassment, ‘Ooko & another v. SRM & 2 others’ [2022] KECA 44 (KLR), para. 43.

⁸²¹ *Ibid.*, para. 89. Whilst this is undoubtedly a positive development, the Court does appear to establish a high standard for raising an inference of discrimination, noting that “the relationship between the act and the prohibited ground for discrimination [must be] so strong that in the mind of a reasonable person confronted with the same facts, it would only lead to the conclusion that indeed, the underlying reason for the said decision was motivated by any of the prohibited grounds.” Motive is discussed further below.

⁸²² ‘Gichuru v. Package Insurance Brokers Ltd’ (Petition 36 of 2019) [2021] KESC 12 (KLR), para. 13.

⁸²³ Under Article 35(1)(b), “every citizen has the right of access to (...) information held by another person and required for the exercise or protection of any right or fundamental freedom.”

⁸²⁴ ‘Oyatsi v. Judicial Service Commission’ (Petition E111 of 2021) [2022] KEELRC 3 (KLR), paras. 126 and 134-135.

⁸²⁵ See, for instance, ‘M A O & another v. Attorney General & 4 others’ [2015] eKLR, paras. 153 and 143.

⁸²⁶ Constitution of Kenya, Articles 27 and 48.

proof in discrimination cases, despite recent judicial pronouncements on the matter.⁸²⁷ Courts also appear to have reached different conclusions on important questions of law. For instance, whilst some recent cases appear to suggest that a claimant must demonstrate proof of intent in direct discrimination claims⁸²⁸ others suggest that intent is not a relevant consideration.⁸²⁹ Only the latter position is consistent with Kenya's international and regional human rights obligations.⁸³⁰ Similarly, in some cases, courts have made concerning observations regarding the use of comparators⁸³¹ as well as proof requirements pertaining to reasonable accommodation and unfair dismissal.⁸³²

⁸²⁷ To some extent – this uncertainty can be traced to the competing requirements of the Employment Act, which treat discrimination and unfair dismissal as separate species of harm, despite their clear overlap in many cases. Whilst Section 5(7) of the Act establishes that the “employer shall bear the burden of proving that (...) discrimination did not take place”, Section 47(5) specifies that the burden of proving that the termination of an employment contract was unfair rests on the employee. Other contradictions are apparent in the law. See, for instance, in respect of sanctions, discussed above. Compare also, Section 5(7) of the Employment Act with Section 11(a) of the Labour Relations Act.

⁸²⁸ See, e.g. ‘Al Yusra Restaurant Ltd v. Kenya Conference of Catholic Bishops & another’ [2017] eKLR, para. 89, referring to the identification of “discriminatory intent.”

⁸²⁹ In recent cases, courts have rejected arguments based on the positive motivations of an employer to protect a person with disabilities from harm. In respect of sexual harassment, the courts have stressed that discriminatory intent is not required. In *Gichuru* the Supreme Court also cited with approval extracts from UK caselaw on the causation test to be applied in direct and indirect discrimination cases, neither of which require evidence of an intent to discriminate. See respectively, ‘Lucy Chepkemoi v. Sotik Tea Company Limited’ [2022] eKLR, para. 13; ‘Ooko & another v. SRM & 2 others’ [2022] KECA 44 (KLR), para. 37; and ‘Gichuru v. Package Insurance Brokers Ltd’ (Petition 36 of 2019) [2021] KESC 12 (KLR), para. 55.

⁸³⁰ See, for example, Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 18(a); and African Commission on Human and Peoples’ Rights, ‘Open Society Justice Initiative v. Côte d’Ivoire’, communication No. 318/06, Decision, February 2016, para. 144.

⁸³¹ See, for example, the discussion of ‘Macharia v. Safaricom Plc’ (Petition 434 of 2019) [2021] KEHC 462 (KLR) above, in which the Court appeared to compare the position of the claimant with that of other persons with visual impairments. Whilst comparators might be needed in certain cases (for instance to evidence alleged pay disparities between men and women workers) UN treaty bodies have stressed that discrimination is prohibited even when “there is no comparable similar situation.” See Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6, 2018, para. 18(a).

⁸³² Contrast para. 62 of the ‘Gichuru’ case, indicating that a person with disabilities may be required to complete a medical assessment demonstrating their capacity to work, with the recent ‘Chepkemoi’ judgment, which rejected similar arguments. According to the Employment and Labour Relations Court, once the dismissal decision was evidenced, the burden of proof fell to the respondent employer to prove that accommodations were provided or else would have imposed an undue burden. This latter position is most clearly aligned with international law. See ‘Gichuru v. Package Insurance Brokers Ltd’ (Petition 36 of 2019) [2021] KESC 12 (KLR), para. 62; ‘Lucy Chepkemoi v. Sotik Tea Company Limited’ [2022] eKLR, paras. 38 and 42; and Committee on the Rights of Persons with Disabilities, ‘VFC v. Spain’, UN Doc. CRPD/C/21/D/34/2015, paras. 8.6 - 8.7.

Because provisions of the Constitution, Persons with Disabilities Act and Employment Act tend to be cited collectively, it is important that these laws adopt the same fundamental procedural and evidential standards to avoid generating contradictory levels of protection. Yet, in many cases, overlaps and disagreements do exist.⁸³³ This is particularly clear in respect of the standard of proof. Whilst ordinary civil claims are determined on the basis of a “balance of probabilities” the Supreme Court has indicated that a higher standard applies in cases challenging violations (or threatened violations) of Constitutional rights.⁸³⁴ Whilst the Court has sought to justify this position on the basis of the “general” formulation of Constitutional rights provisions; given the gaps, weaknesses and inconsistencies in ordinary legislation, and the practice of claimants and courts to determine issues collectively, this requirement is untenable.⁸³⁵ It risks increasing the burden on applicants to prove their discrimination claims and entrenching fragmentation across the legal framework, which may provide different levels of protection depending on the area of life, or ground of discrimination, concerned.⁸³⁶

8.4 Accessibility and Legal Assistance

Section 47 of the Constitution provides that “the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.” Discrete provisions relating to access to justice for persons with disabilities are provided under the Persons with Disabilities Act. Under Section 38(1), the Attorney-General - in consultation with the National Council for Persons with Disabilities and the Law Society of Kenya - shall “make regulations providing for free legal services for persons with disabilities” in cases in which their rights have been violated, their property has been deprived, or where capital punishment may be considered, alongside other circumstances as “may be prescribed in the regulations.” Legal Aid in Kenya is governed by the Legal Aid Act, which was adopted in 2016 and most recently amended in 2017. Non-discrimination, inclusion, and

⁸³³ Compare, for instance, the different rules on legal standing established under Articles 22(2) and 258 of the Constitution (which permit public interest litigation); Section 12(2) of the Employment and Labour Relations Court Act (which only specifies the range of bodies against which action may be initiated), and Section 15(3) of the Persons with Disabilities Act (which on a literal reading would only permit claims from a person with disabilities that is a registered member of a relevant trade union organisation).

⁸³⁴ ‘Samson Gwer & 5 others v. Kenya Medical Research Institute & 3 others’ [2020] eKLR, paras. 47-48.

⁸³⁵ This rationale of the Court is also suspect when considering Section 7 of Schedule 6 of the Constitution, which requires pre-existing law to be “construed with the alterations, adaptations, qualifications and exceptions necessary to bring [them] into conformity with [the] Constitution;” and Article 10(1)(b), which requires relevant duty-bearers to interpret legislation in light of the right to non-discrimination.

⁸³⁶ As noted in the preceding Sections, the levels of protection afforded under the Employment Act, the Persons with Disabilities Act and the Constitution differ in significant respects.

the protection of marginalised groups are listed as guiding principles.⁸³⁷ Section 37 of the Act sets out a list of persons who are eligible for legal aid. Persons with disabilities are not expressly included within this list, a point which has been criticised by the United Disabled Persons of Kenya due to the perceived inconsistency of the law with the requirements of the Persons with Disabilities Act.⁸³⁸ In respect of criminal matters, and in the absence of Regulations envisaged by Section 38 of the Persons with Disabilities Act, Kenyan Courts have emphasised that legal assistance is only available “to persons charged with capital offences” and that the “right to legal representation at State expense is not inherent.”⁸³⁹

Under Subsection 2, the Chief Justice is required to adopt regulations relating to “the exemption, for persons with disabilities, from the payment of fees” in cases where their rights have been infringed, alongside the “the provision, to persons with disabilities who attend court, of free sign language interpretation, Braille services and physical guide assistance.”⁸⁴⁰ The Chief Justice is also required to “endeavour to ensure that all suits involving persons with disabilities are disposed of expeditiously having due regard to the particular disability and suffering of such persons.”⁸⁴¹ In some cases, Kenyan courts have directly addressed the issue of inaccessible court infrastructure, although – as described in the earlier Sections of this Report – little further progress has been made in this area, and there remains a lack of clarity regarding the enforceability of the Act’s accessibility provisions.⁸⁴² Kenyan human rights organisations have criticised for the delay in making regulations under the Act,⁸⁴³ and recent reports indicate that the denial of procedural accommodations, lack of physical access to the courts and other accessibility barriers remain a significant challenge for

⁸³⁷ Legal Aid Act, Sections 4(d) and (e).

⁸³⁸ However, as this section extends coverage to citizens of Kenya, stateless persons, refugees, and internally displaced persons and victims of trafficking, many persons with disabilities would fall within its scope. See United Disabled Persons of Kenya, ‘From Affirmation to Practice: Assessing a Decade of Implementing the Constitution of Kenya 2010 for Persons with Disabilities’, 2020, p. 55.

⁸³⁹ ‘Joseph Gitonga v. Republic’ [2021] eKLR, para. 12.

⁸⁴⁰ Persons with Disabilities Act, Section 38(2).

⁸⁴¹ *Ibid.*, Section 38(4). Similar provisions are contained under Section 29 of the Employment and Labour Relations Court Act, which requires “reasonable, equitable and progressive access to (...) judicial services.” Under Section 25 of the Court’s procedure rules, hearings must be conducted in a manner suitable to ensuring justice.

⁸⁴² See the discussion of ‘Paul Pkiach Anupa & Another v. Attorney General & Another’ [2012] eKLR, paras. 64-69, in Section 7.2(f) of this Report.

⁸⁴³ See Kenya Association of the Intellectually Handicapped (KAIH) et al., Submission in Respect of Human Rights Council Resolution 31/6, 2017, p. 22, available at:

<https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/RightAccessJusticeArticle13/CSO/KenyaAssociationIntellectuallyHandicapped.doc>

persons with disabilities.⁸⁴⁴ These challenges were recognised by the CRPD Committee in its 2015 Concluding Observations, which noted that “the absence of reasonable accommodations throughout court proceedings (...) the lack of information available in accessible formats, additional costs to access sign language interpretation services, and the lack of free legal aid” each impede effective access to justice for persons with disabilities in Kenya.⁸⁴⁵

Part C: Conclusion and Recommendations

The adoption of a new Constitution in 2010 marked a profound moment in the history of Kenya. Seizing upon the opportunity for national renewal presented in the wake of the 2008 post-election violence, the Constitution reflects a strong commitment to the principles of equality, non-discrimination, inclusion, and unity in diversity. The Constitution marked a significant turning point in Kenya’s approach to human rights protection for persons with disabilities, and in the years since its adoption, the judiciary has striven to interpret and apply its provisions in a holistic and progressive manner. However, as this Report demonstrates, considerable challenges remain.

The Kenyan equality law framework is fragmented. There are inconsistencies between laws in relation to the grounds of discrimination and areas of life covered, the forms of discrimination prohibited, applicable rules of evidence and proof, and the availability of remedies. These issues generate significant uncertainty in the application of the law, and in some cases have resulted in contradictory judgments and decisions that do not meet international legal standards. Some of these concerns may be addressed through future judicial decisions. However, the slow nature of litigation means that the development of the law is likely to take place incrementally, delaying justice and preventing rights implementation.

The Persons with Disabilities Act and the Employment Act continue to reflect a medical model of disability and contain broad exceptions clauses that serve to limit their scope of application. The Persons with Disabilities Act is now twenty years old. Once considered a

⁸⁴⁴ See United Disabled Persons of Kenya, ‘From Affirmation to Practice: Assessing a Decade of Implementing the Constitution of Kenya 2010 for Persons with Disabilities’, 2020, pp. 57-58. For a more detailed discussion see Macharia, W., “Access to Justice for Persons with Disabilities in Kenya: From Principles to Practice”, 2020, available at:

<https://repository.gchumanrights.org/server/api/core/bitstreams/158a644a-7673-4530-bcef-68c12658bd0d/content>

⁸⁴⁵ Committee on the Rights of Persons with Disabilities, Concluding Observations on Kenya, UN Doc. CRPD/C/KEN/CO/1, 2015, paras. 25-26. The denial of procedural accommodations to persons with disabilities – in addition to a clear violation of Kenya’s international law obligations (see CRPD/C/GC/6, paras. 25(d) and 51) – may also raise fair trial concerns. Notably, the limitations clause of the Constitution (Article 24) does not cover the right to a fair trial (see Articles 25 and 50), which is absolute in nature. These provisions could be relied upon in future cases to ensure that procedural accommodations are provided to persons with disabilities.

progressive instrument, the law is significantly outdated and fails to reflect contemporary developments in international human rights law. Moreover, some of the more progressive mechanisms established by the Act are impeded by the failure of relevant bodies to establish necessary implementing regulations, and a perceived lack of legal and institutional resources. Addressing these issues will require a wide range of action.

Recommendations

Kenya has accepted clear obligations to respect, protect and fulfil the rights of persons with disabilities to equal work and employment. This entails negative obligations of prohibition and prevention, and positive obligations of promotion and elimination. The recommendations set out below aim to support the State to meet its international commitments. Whilst we consider these recommendations to be essential, they are – by themselves – insufficient. In accordance with the requirements of the Convention on the Rights of Persons with Disabilities, Kenya is required to take “all appropriate legislative, administrative and other measures” needed to secure the rights of persons with disabilities, both in respect of work and employment and other areas of life.

Specific recommendations

To address the concerns outlined in this Report we make two specific recommendations:

1.1 Adopt Comprehensive Anti-Discrimination Legislation

Consistent with previous recommendations received in this area, and to address the fragmentation of the existing legal framework, Kenya should adopt comprehensive anti-discrimination legislation in line with international standards.⁸⁴⁶ To be comprehensive, such legislation should – at a minimum – prohibit all forms of discrimination on the basis of an open-ended and extensive list of grounds, including disability, in all areas of life regulated by law. The law should establish clear procedures and mechanisms of redress and make the necessary adaptations to rules on evidence and proof to enable victims of discrimination to access justice and secure effective remedy. The law should both require and provide for the full range of positive action and other proactive measures required to give effect to the rights to equality and non-discrimination for persons with disabilities and other groups exposed to discrimination.

1.2 Repeal and Replace the Persons with Disabilities Act

In line with recommendations received by the Committee on the Rights of Persons with Disabilities in 2015, Kenya should expedite the adoption of a new Persons with Disabilities

⁸⁴⁶ See United Nations Human Rights Office, ‘Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation’, New York and Geneva, 2023.

Act and ensure its consistency with international standards. The Act should promote a human rights-based approach to disability, explicitly define and prohibit all recognised forms of discrimination, and include specific, enforceable and targeted equality and accessibility measures. The State should ensure the inclusive and effective participation of persons with disabilities, including those with different types of impairment, alongside organisations working with and on behalf of such groups and ensure that their views are fully considered and meaningfully inform the process.

Additional measures

In addition to these measures, we make a series of broad recommendations that are focused on addressing systemic barriers to the equal participation of persons with disabilities in Kenya.

2.1 Respect the Rights to Equality and Non-Discrimination

Kenya should undertake a review of its national legal and policy framework and amend, and where necessary, abolish, existing laws, regulations and policies that conflict or are incompatible with the right to equality. As part of this process, Kenya should review the Employment Act and related legislation to ensure that the provisions of the Act are fully consistent with the State's obligations towards persons with disabilities under international law.

2.2 Ensure Effective Access to Justice and Remedy

Kenya should ensure effective access to justice to persons with disabilities, including those that have experienced discrimination in the areas of work and employment. The State should review its legal framework and ensure that the legal capacity of persons with disabilities to bring claims is recognised. To ensure access to justice, the State should ensure that justice mechanisms are available to all persons with disabilities – including those living in rural areas. The State should ensure that courts are physically accessible, and work proactively to identify and remove access barriers that may prevent effective participation in legal proceedings, including through the provision of procedural accommodations. The State should seek to harmonise its rules governing evidence and proof in discrimination cases to ensure that persons whose rights have been violated are not prevented from obtaining remedy. Persons who cannot afford to pay should be provided with legal aid and assistance. In accordance with their powers under the Constitution and other legislation, courts should ensure effective remedy to persons with disabilities, including through the provision of effective, dissuasive and proportionate sanctions, compensation and restitution; and institutional and societal remedies designed to address the root causes of inequality. Training should also be provided to judges, lawyers and other enforcement actors on equality and non-discrimination principles.

2.3 Build Strong and Effective Institutions and Accountability Mechanisms

Kenya should ensure that all bodies that are charged with a specific role in ensuring the rights of persons with disabilities to equal work and employment have the necessary powers, training, and resources to effectively fulfil their mandate. In particular, the State should ensure that the National Council for Persons with Disabilities is enabled to issue adjustment orders challenging inaccessible infrastructure in accordance with its powers, established under national legislation.

2.4 Equality Impact Assessment

In accordance with their obligations under Article 10 of the Constitution, all public bodies, and those exercising public functions, should pay due regard to the need to promote equality and ensure the right to non-discrimination as part of public decision-making processes. In practice, this requires equality impact assessment, which should be informed by and include as an essential element, public participation processes. To be effective the assessment should consider both qualitative and quantitative data, and the results published to ensure transparency. Follow up measures should also be adopted to ensure that decisions do not produce unanticipated discriminatory impacts. Within the context of work and employment, it is particularly important that public authorities consider the impacts of their decisions on, and opportunities to promote the rights of, persons with disabilities who are engaged in informal work within the informal economy.

2.5 Broader Equality Measures

In addition to, and as part of, the actions listed above, the State and other duty-bearers should adopt broader equality measures designed to ensure the equal participation of persons with disabilities in society. This should include, inter alia, the adoption of enforceable accessibility standards to address environmental barriers that may prevent persons with disabilities from gaining access to work and employment or vindicating their rights; the adoption of training, sensitisation and awareness-raising measures designed to address the root causes of discrimination, including ableism, stigma and prejudice; and the adoption of specific positive action measures that seek to advance equality for persons with disabilities in the world of work.

2.6 Support the Work of Equality Defenders

Finally, we recommend that the State continues to work in cooperation with trade unions, civil society organisations and others who play an essential role in upholding the rights of persons with disabilities to equal work and employment. Equality defenders should be provided with support to carry out their work and be actively included within decision-making processes.