

# REVIEW OF EXISTING LAWS AND POLICIES IN LESOTHO TO DETERMINE HARMONY WITH UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES



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Regina Lephoi

LNFOOD Chairperson

## Acronyms

<b>ACHPR</b>	African Charter on Human and Peoples Rights
<b>ACRWC</b>	African Charter on the Rights and Welfare of the Child
<b>ARI</b>	Agreement on Rehabilitation Institutions
<b>AU</b>	African Union
<b>CEDAW</b>	Convention on Elimination of all forms of Discrimination Against
<b>CESCR</b>	Committee on Economic, Social and Cultural Rights
<b>CP&amp;E</b>	Criminal Procedure and Evidence Act
<b>CRC</b>	Convention on the Rights of the Child
<b>CRPD</b>	Convention on the Rights of Persons with disabilities
<b>GOL</b>	Government of Lesotho
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>IDAL</b>	Intellectual Disability Association of Lesotho
<b>KI</b>	Key Informants
<b>KII</b>	Key Informants Interviews
<b>LNFOOD</b>	Lesotho National Federation of Organisations of Disabled
<b>LNAPD</b>	Lesotho National Association of Physically Disabled
<b>LNIVP</b>	Lesotho National League of Visually Impaired Persons
<b>MI Principles</b>	Principles for the Protection of Persons with mental illness and the Improvement of mental health care 1991
<b>MOET</b>	Ministry of Education and Training
<b>MOHSW</b>	Ministry of Health and Social Welfare
<b>NADAL</b>	National Association of the Deaf in Lesotho
<b>PWDs</b>	Persons with Disabilities

<b>SADC</b>	Southern African Development Community
<b>SOA</b>	Sexual Offences Act
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNDP</b>	United Nations Development Programme
<b>WHO</b>	World Health Organization

## **Executive Summary**

Lesotho National Federation of Organizations of the Disabled (LNFOD) is implementing a project on the Policy and Legislative Reform for Persons with Disabilities. The project is funded by the Open Society Initiative for Southern Africa (OSISA). It is on this basis that LNFOD engaged a team of qualified consultants who have experience on working in the Justice sector to review the existing laws and policies in Lesotho in order to determine their harmony with article 4 of the United Nations Convention on the Rights of Persons with disabilities (UNCRPD), the outcome of which will be used to advocate for the enactment of new laws and amendments to existing laws for adherence to the UNCRPD.

This review has been guided by a human-rights based approach to disability using international, regional and national human rights commitments made by Lesotho as the starting point for framing the enquiry, designing the tools for analysis, analyzing the findings and developing the recommendations. This review examines the legal and policy context in Lesotho, with the broader aim of recognising and responding to the underlying inequalities that impact upon access to justice.

The consultants conducted a qualitative study utilising key informant interviews (KIIs) with relevant stakeholders to identify key human rights issues affecting access to justice by persons with disabilities. KIIs were also assistive in assessing the knowledge of stakeholders especially the legal, regulatory and policy environment in terms of the extent to which they are conducive to protecting the rights of people with disabilities.

It has been found from the review that Lesotho has very limited coordinated disability database to provide statistics of people with disabilities. More importantly, it has been found that there is no comprehensive national disability survey that has been undertaken in the country. However, the results of the national census conducted by the Bureau of Statistics (BOS) in 2014 indicate that about 3.7% of the population of Lesotho has some form of disability or another.

Over and above the limited data on issues of disabilities in general, findings in this study have revealed that persons with disabilities in Lesotho do suffer from discrimination, stigmatization , and yet, these are perceived as charity cases by other members of society therefore not given due and adequate consideration for addressing them. This is because due

to the nature of Basotho society, people with disabilities have historically been subjected to different barriers resulting in isolation and exclusion from the society and extreme dependency on their families including the society at large. In addition, they often do not enjoy the same opportunities as other people because of lack of access to essential services such as access to justice. As a result, most of their fundamental human rights including but not limited to right to equality before the law, freedom from discrimination, right to equal opportunity, right to independent living and full integration in the country are often violated.

It has been found from the review that there are several international and regional human rights conventions and treaties, as well as declarations, commitments and guidelines which deal specifically with access to justice by persons with disabilities that Lesotho is a party to. While the consultants take note that declarations and guidelines are not legally binding, they are generally reflections of the application and interpretation of accepted international and regional human rights principles set out in the treaties and conventions in the context of the disabilities. In this respect, they provide important guidance for Lesotho in its interpretation of its own human rights standards in the context of disability issues.

The findings of this study have shown that there are existing laws and policies that are not in conformity and/or in harmony with the international standards in particular Article 4 of UNCRPD. The findings have also indicated that there is lack of political will towards enacting relevant legislation that deals with disability such as the Disability Equity Bill etc. This fact has the effect of *watering down* the good intention of other laws and policies relating to disability and also delaying the intended benefits for persons with disabilities.

As a result, there are a number of recommendations which have been suggested as actions points by LNFOD and its members. This includes but are not limited to the following; There should be an advocacy towards the review of the existing laws and policies so that they are in harmony with international standards more specifically Article 4 UNCRPD; LNFOD should take an opportunity to add explicit wording on specific provisions of the Disability Equity Bill before it is passed; The disability -specific law should be enacted which will respond to legal challenges that are faced by persons with disabilities when accessing justice in Lesotho; Protection from disability related discrimination should be included within Disability Equity Bill alternatively consideration should be given to the enactment of general anti-discrimination legislation which includes disability as a prohibited ground of discrimination etc.



## **1. Introduction**

This report presents findings of **Review of Existing Laws and Policies in Lesotho to Determine Harmony with United Nations Convention on the Rights of Persons with Disabilities** (UNCRPD) study. The study was commissioned by the Lesotho National Federation of Organizations of the Disabled (LNFOD) supported by the Open Society Initiative for Southern Africa (OSISA).

## **2. Background**

The Lesotho National Federation of Organizations of the Disabled (LNFOD) is an umbrella body of organizations dealing with disability in Lesotho. Its mission is to promote, protect, and ensure the respect of the rights of persons with disability. LNFOD is implementing a project on the Policy and Legislative Reform for Persons with Disabilities funded by the Open Society Initiative for Southern Africa (OSISA). It is on this basis that LNFOD engaged a team of qualified consultants who have experience on working in the justice sector to review the existing laws and policies in Lesotho to determine their harmony with article 4 of the UNCRPD.

## **3. Terms of Reference**

### **3.1 Objectives of the Study**

The main objective of the study is to review the existing laws and policies in Lesotho to determine harmony with article 4 of the UNCRPD, the outcome of which will be used to advocate for the enactment of new laws and amendments to existing laws for adherence to the UNCRPD. In undertaking the review, LNFOD emphasised that the review should be directed to laws and policies that impact on access to justice for persons with disabilities.

### **3.2 Scope of the Study**

- Review national laws and policies to access compliance with the UNCRPD.
- Interview the selected programme stakeholders.
- Determine the extent to which Lesotho is in compliance with Article 4 of the UNCRPD.
- Design and deliver content of the study

### 3.3 Key Deliverables

- ✚ Identify and collect relevant policy, legal and research documents for literature review.
- ✚ Identify with LNFOD the key stakeholders to be consulted.
- ✚ Review article 4 of the UNCRPD and other international, regional and national human rights obligations, particularly those relevant people with disabilities.
- ✚ Review access to justice including institutional frameworks for access to justice and law enforcement in relation to people with disabilities.
- ✚ Assess the current legal, regulatory and policy environment in terms of the extent to which they are conducive to protecting the rights of people living with disabilities.
- ✚ Compile recommendations related legal and policy environment, law review and reform, strengthening access to justice as well as ensure enforcement of rights, and creation of an effective response in relation to people living with disability.

## 4. Methodology

### 4.1 Implementation Modalities

The review has been guided by a human-rights based approach to disability issues using international, regional and national human rights commitments made by Lesotho as the starting point for framing the enquiry, designing the tools for analysis, analyzing the findings and developing the recommendations. In the context of disability, this approach aims to promote the right to full access to justice by people with disabilities. It examines the legal and policy context in Lesotho, with the broader aim of recognising and responding to the underlying inequalities that impact upon their access justice.

The main principles of the rights based approach that are proposed as guiding principles for the situational analysis are *the principles of equality and non-discrimination; participation and inclusion of rights-holders; capacity building of duty-bearers and accountability*. In this regard, the situational analysis recognises the inter-relationship between all human rights principles, including health rights and equality rights, and seeks to balance human rights goals in developing the rights of all people in particular, people with disabilities.

To address the objectives of this review, the consultants conducted a literature review of human rights documentation relating to issues of disabilities in general. This included a

review of laws, regulations and policies directly or indirectly dealing with disabilities and human rights frameworks. Documents reviewed include but are not limited to the following:

- International and regional human rights commitments dealing with people with disabilities;
- National laws, policies and strategies, plans and guidelines where relevant;
- Annual reports, research reports and other documents of civil society organizations (CSO) working on disability issues,
- Reports of government ministries, statutory bodies (such as the Law Reform Commission), regional and international organisations and academic publications.

The desk review was aimed at determining the nature, extent, efficacy and impact of the legal and regulatory frameworks (including laws, regulations and policies as well as access to justice and law enforcement issues) for protecting rights and promoting universal access to justice by persons with disabilities in Lesotho. The desk review included an initial focus on the key issues identified in the preparatory phase of the project. It also identified the national laws and human rights issues of concern within Lesotho for further exploration during key informant interviews. Based on the literature review, recommendations for law review and reform were made. In addition, strategies to strengthen access to justice and law enforcement in the country by people with disabilities were also proposed.

## **4.2 Interviews**

Consultants conducted a qualitative study utilising key informant interviews (KIIs) with relevant stakeholders to identify key human rights issues affecting access to justice by peoples with disabilities. KIIs were assistive in assessing the knowledge of stakeholders especially the legal, regulatory and policy environment in terms of the extent to which they are conducive to protecting the rights of people with disabilities.

## **4.3 Key Informant Interviews (KII)**

Key informants were selected from across a range of sectors, including from government ministries/ departments, CSO, the private sector and other partner institutions working on issues of disability, law and human rights issues. These included the Ministries of Health, Social Development, Justice and Human Rights, Law and Constitutional Affairs, Labour and Employment, Police, the Judiciary and other law enforcement agencies. Key informants interviews among CSOs included representatives from organisations of people with

disabilities. These are: Lesotho National League of Impaired Persons (LNVIP); Intjareng Vocational Centre (IVTC); National Association of the Deaf in Lesotho (NADL); and Intellectual Disability Association of Lesotho (IDAL).

A total of 16 KII out of the initial 17 were conducted in the capital and administrative district of Maseru. They provided qualitative information on the views of decision-makers on disability issues in Lesotho; they also provided the impact of the legal and regulatory frameworks on the response to access to justice by people with disabilities. In addition, the feedback of the KII gave recommendations for strengthening the legal and regulatory framework to protect human rights of people with disabilities and how Lesotho can best advance access to justice of people with disabilities.

*(See Annexure A for a list of key informants interviewed and Annexure B which is the research tool used)*

#### **4.4 Limitations of the Study**

The following limitations to the situational analysis should be noted.

- Time and resource constraints
- Limited availability of existing research
- Research fatigue amongst some Key informants especially from the government ministries and department
- Too much information from the interviews that had to be minimized without compromising their key responses on the issue.

## **5. LITERATURE REVIEW**

### **5.1 Background and Definition of Disability**

Lesotho's human rights regime consists of the following elements: international treaties and conventions, regional treaties and conventions, the Constitution and national laws (statutes, the common law and customary law). This section examines the international, regional and national human rights frameworks in the context of access to justice by people with disabilities in Lesotho. It further looks at the extent to which Lesotho has domesticated and used the international and regional instruments for rights-based responses to access to justice especially in the context of people with disabilities. At national level, this section discusses relevant constitutional, national law provisions and policy frameworks and the extent to

which they promote access to justice to people with disabilities specifically looking at whether it is in alignment with article 4 of the UNCRPD. The said article calls for countries that have ratified the Convention to engage in the development and implementation of policies, laws and administrative measures aimed at securing the rights of people with disabilities and to abolish laws, regulations, customs and practices that constitute discrimination towards people with disabilities.<sup>1</sup> This will be done with the purpose of advocating for the enactment of new laws and the amendments of existing laws for adherence to the UNCRPD especially on laws and policies that impact on access to justice for people with disabilities. The UNCRPD has been adopted by the United Nations in 2006 with the overall goal of promoting, protecting and ensuring the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities.<sup>2</sup>

Previous studies have shown that in the 1960s and 1970s, the individual and medical view of disability was challenged and a range of social approaches were developed. These approaches shifted attention away from the medical aspects of disability and instead focused on the social barriers and discrimination that people with disabilities face. Disability was redefined as a societal problem rather than an individual problem and solutions became focused on removing barriers and social change, not just medical cure.<sup>3</sup> In 2006, the United Nations adopted the Convention on the Rights of Persons with Disabilities (UNCRPD) which defines disability as an evolving concept that results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.<sup>4</sup> This definition by the UNCRPD shows that disability is a development issue which needs to be tackled by policy and law as opposed to medication only.<sup>5</sup> It is on this basis that the term ‘*people with disabilities*’ is used to refer to persons who have long-term physical, mental, intellectual or sensory impairment.

Reports indicated that people with disabilities (PWDs) make up an estimated total of 15% of the world’s population.<sup>6</sup> This has been supported by other findings which indicate that

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<sup>1</sup> Article 4 of the UNCRPD

<sup>2</sup> Nicholas and Kuhn, John, (2001) *Has Mbeki heard of Nuremberg*

<sup>3</sup> Community Based Rehabilitation (CBR) Guidelines p15

<sup>4</sup> Convention on the Rights of Persons with Disabilities, 2006. New York, United Nations ([www.un.org/esa/socdev/enable/rights/convtexte.htm](http://www.un.org/esa/socdev/enable/rights/convtexte.htm), accessed 16 June 2010)

<sup>5</sup> *Ibid*

<sup>6</sup> Chitereka C, “People with disabilities and the role of social workers in Lesotho”, (2010) *Social Work and Society International online journal* vol. 8

approximately 3.7% of the total population of Lesotho live with some form of disability.<sup>7</sup> Almost one-fifth of the estimated global total of PWDs (between 110 - 190 million) encounter significant disadvantages in their societies and are often subjected to stigma and discrimination, largely marginalized, disproportionately poorer, frequently unemployed and have higher rates of mortality.<sup>8</sup> Studies have indicated that failure to tackle disability may constitute an international crime against humanity.<sup>9</sup> This is because any form of disability presents the entire humanity with intractable life questions that do not have easy answers.<sup>10</sup> According to Nicholas, “tackling disability in reality is to engage in the struggle to promote and defend the universally recognized but diversely protected human right to access to justice.”<sup>11</sup> In the light of disability definition, access to justice has to be defended and promoted together with socio-economic, civil and political rights.

In Lesotho, access to justice in as far as people with disabilities are concerned has shown a consistent pattern through which discrimination, marginalization, stigmatization and lack of respect for human rights and dignity of individuals and groups heighten their vulnerability.<sup>12</sup> It then stands to reason that:

‘Without a rights-based response to any form of disability, the impact of marginalization will increase, and the law enforcement ability to respond will be hampered’.<sup>13</sup>

Thus, the respect for human rights is imperative regardless of the scale and form of disability and this is against the provisions of the Article 4 of UNCRPD which strongly calls upon the states to enact laws and/or policies that prohibit discrimination against people with disabilities.

This argument was supported by one KI from the Prosecutor’s office in Maseru who stated that unless the negative attitudes of the law enforcement officials in general is dealt with, persons with disabilities will remain vulnerable in as far as access to

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<sup>7</sup>Lesotho Population and Housing Census Analytical Report, 2006. Volume IIIB Socio Economics Characteristics

<sup>8</sup>Chitereka C, “People with disabilities and the role of social workers in Lesotho”, (2010) Social Work and Society International online journal vol. 8, no.1

<sup>9</sup>Nicholas and Kuhn, John, (2001) *Has Mbeki heard of Nuremberg?* **Mail & Guardian** December 7 to 13 p. 29

<sup>10</sup> Ibid

<sup>11</sup> Ibid

<sup>12</sup> Letuka et al. 2008 Gender, HIV and the Law in Lesotho: Embracing Rights Based Approach to Realise Sexual and Reproductive Health in Lesotho; WLSA Publication, Morija

<sup>13</sup> The General Comment on CRPD

justice is concerned. The KI further reiterated that, if for example, ‘one officer is allocated the case involving the victim is a person with disabilities, normally those kind of cases do not reach finality due to the fact that officers already have an attitude that such cases are difficult to prove- and depending on the type of disability, in some instances the victim has visual impairment or is deaf -mute for instance.’<sup>14</sup>

The same notion was shared by the Officer from the Human Rights Unit that;

*People with disabilities are not treated with the amount of care they should actually be treated with. They are ridiculed from the moment they report their case all the way to the courts because it is perceived that they are not in a position to give credible evidence. When they bring their grievances before the police, they are taken as challenges by the police because a lot of effort has to be put in to bring the case to finality. She indicated that in one incidence in the beginning of this year (2015), a girl with mental disability was raped in Morija; her case dragged for a very long time because of lack of evidence until she passed away sometime in April 2015 and the post mortem report showed that she had a heart attack.*<sup>15</sup>

As an intervention to the above challenges which were mostly brought up by most KI during the interviews, it is the consultants’ views especially taking into consideration the provisions of Article 4 of UNCRPD, that LNFOD, its members and other key partners should initiate lobbying programmes that specifically targets parliamentarians with the purpose of enacting Disability Law (***Which could be called The Disability Civil Rights law***). The justification for this proposition is that such a law has the high potential of addressing issues of discrimination and access to justice in an adequate manner. It was also asserted that such a law must also recognise ‘***Sign Language***’ as an official language in Lesotho because without a law in place, although there are efforts to teach people on Sign Language in the country, enforcement still remains a barrier to a certain extent. This has been seen in many instances that though the law and/or policy cannot bring permanent solution to all negative attitudes towards disability issues, non-existence of a specific law makes it even more difficult for the law enforcement and community leaders to intervene. ***The proposed Disability Civil Rights law*** should

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<sup>14</sup> Interview with Prosecutor in the Magistrate Court of Maseru

<sup>15</sup> The Officer from the Human Right Unit in Maseru

provide for trained and qualified Sign Language personnel within the law enforcement agencies and suitable infrastructure to those offices for people with disabilities.

## **5.2 International Frameworks**

### **5.2.1 Overview**

The dynamic between international, regional and national human rights standards remains the guiding principle to navigate disability and human rights issues. International, regional and national human rights law provide an overarching framework for an analysis of disability, law and human rights issues in Lesotho. International and regional human rights law is set out in various charters, treaties and conventions signed and ratified by member states. Signature and ratification of an international instrument by a member state implies that such a member state commits itself to be legally bound by the provisions of such instrument.

In Lesotho, international treaties are only enforceable by the courts to the extent that they have gone through the process of adoption by Parliament. However, they are an important aid for interpretation of the national law.<sup>16</sup> The courts appear to have adopted the principle that where there is uncertainty regarding domestic legislation, an international treaty becomes relevant, because there is a prima facie presumption that the legislature does not intend to act in breach of international law, including treaty obligations.<sup>17</sup> Some treaty provisions have been adopted in the justiciable Bill of Rights (Part II) provisions of the Lesotho Constitution while others are reflected in the non-justiciable Principles of State Policy (Part III) provisions of the Constitution.<sup>18</sup> In addition to treaties, declarations by the international community on access to justice serve as additional important guidelines for states in their efforts to meet international obligations. In its attempt to enhance access to justice among people with disabilities among other things, the following have been adopted by the Government of Lesotho.

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<sup>16</sup> Pholo, M., 'Lesotho Justice Sector and the Rule of Law: A review by AfriMAP and the Open Society Initiative for Southern Africa,' Open Society Foundations, 2013

<sup>17</sup> Ibid

<sup>18</sup> Ibid





**Table 1: International Conventions**

Year	Declaration, Resolution or Guideline	Purpose	Relevance to access to Justice by persons with disabilities
1948	The Universal Declaration on Human Rights (UDHR)	It provides that "all human beings are born free and equal in dignity and rights. It is based on the "inherent dignity" of all people and affirms the equal rights of all men and women, in addition to their right to freedom.	UDHR recognises a range of basic civil, political, economic, social and cultural human rights principles applicable to all people which apply equally. Article 25 of the UDHR provides for the right to adequate standard of living <sup>19</sup> .
1976	International Covenant on Economic, Social and Cultural Rights (ICESCR),	Encourages State parties to promote and protect economic, social and cultural rights (ESCR), also known as second-generation rights.	The ICESCR obliges member states to take steps necessary to protect economic, social and cultural rights including rights to health for the prevention, treatment and control <sup>20</sup> .
1976	International Covenant on Civil and Political Rights (ICCPR)	Calls for right to equality, freedom from non-discrimination and <i>access to justice</i> entitled without any discrimination to equal protection of the law.	The ICCPR recognises a range of civil and political rights such as rights to equality, non-discrimination, privacy and protection from cruel, inhuman and degrading treatment or punishment which protect all people including those with disabilities <sup>21</sup> .

<sup>19</sup> Disability is explicitly referred to as one of the grounds for “the right to security” in order to preserve an adequate standard of living.

<sup>20</sup> Disability is not listed as a prohibited ground of discrimination in the non-discrimination provisions of ICESCR. However, despite this omission, protection of PWDs may be inferred from the term “other status” used in these provisions. The ESCR Committee on General Recommendation of Articles 2 (2) proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of **physical or mental disability...** which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health

<sup>21</sup> See Note 8 above

1979	Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	Calls for all elimination of all forms of discrimination against women, including reviewing and reforming laws that discriminate against women	In its General Recommendations, the Committee on the Elimination of Discrimination Against Women, (the monitoring body of CEDAW), emphasized that disabled women suffer from double discrimination and are a particularly vulnerable group. CEDAW Committee recommended that governments should provide information on disabled women in their periodic reports and on special measures that governments have taken to ensure that women with disabilities have equal <b>access to justice</b> , education and employment, health services and social security, and to ensure that they can participate in all areas of social and cultural life <sup>22</sup> .
	Convention on the Rights of the Child (CRC)	It lists disability as one of the prohibited grounds of discrimination. It explicitly states that: States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's ... disability... <sup>23</sup>	The CRC in article 23 directly addresses the rights of children with disabilities stating that they are entitled to a full and decent life of dignity and participation in the community. It places obligations on States Parties, to provide within available resources, special care and assistance to disabled children and those responsible for such children.
1989	Convention on the Rights of Persons with Disabilities	Serves to promote, protect and ensure full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for inherent dignity. <sup>24</sup> It adopts a broad categorization of PWDs and reaffirms that all	The CRPD highlights the need for States Parties to recognize that persons with disabilities have the right to the enjoyment of all human rights including the right to the highest attainable standard of health without

<sup>22</sup> General Recommendation 18 adopted by the Committee in its 10th Session in 1991 document A/46/38

<sup>23</sup> Article 2(1) CRC

		persons with all types of disabilities must enjoy all human rights and fundamental freedoms without discrimination.	discrimination on the basis of disability. <b>States Parties are mandated to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;</b> <b>b. To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;</b> <b>c. To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes<sup>25</sup>.</b>
1985	African Charter on Human and Peoples Rights	The Charter prohibits discrimination on the grounds of “race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth <i>or any status</i> .” <sup>26</sup> That is, although disability is not specifically listed in the prohibited grounds of discrimination, it can be inferred from the phrase “...any status” in Article 2 of the Charter	Article 18 (4) provides that the disabled have a right to special measures of protection in keeping with their physical and moral needs. Although the article does not specify the measures to which PWDs are entitled, it however places an obligation on States Parties to ensure that such measures of protection enable PWDs to keep with their physical and moral needs <sup>27</sup> .
1999	Protocol to the African Charter on the Rights of Women	Provide standards for managing HIV in prisons	It mandates States Parties to ensure the right of women with disabilities to freedom from violence, including sexual abuse,

<sup>25</sup> The UN Convention on the Rights of Persons with Disabilities, Article 4( 1) a ) b) c)

<sup>26</sup> Article 2 of the African Charter on Human and Peoples Rights

<sup>27</sup> In enforcing this Article the African Commission dealt with the case of *Purohit and others v The Gambia*. This case was brought against the government of The Gambia with regard to conditions of detention in the Gambian mental health institution. The Commission held that Gambia had violated the provisions of Article 18 and 16 of the African Charter. It emphasized that enjoyment of the right to health is crucial to the realization of other fundamental rights and freedoms and should be accorded to all without discrimination. It went on to state that mental health patients should be accorded special treatment to enable them to attain their optimum level of independence and performance in line with article 18(4) of the African Charter as well as the standards outlined in the UN Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care.

			discrimination based on disability and the right to be treated with dignity <sup>28</sup> .
1993	African Charter on the Rights and Welfare of the Child Declaration	The Charter places an obligation on States Parties, subject to available resources, to ensure those children with disabilities and those responsible for their care, assistance, for which application is made and appropriate to the child's condition. In particular they are mandated to ensure that children with disabilities have access to training, preparation for employment and recreation activities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development	Provides that every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community <sup>29</sup>
2008	SADC Protocol on Gender and Development	the Protocol seeks to harmonies the implementation of the various instruments to which SADC Member States have subscribed to at the regional, continental and international levels on gender equality and equity which, amongst them is UNCRPD	Article 9 provides that States Parties shall, in accordance with the SADC Protocol on Health and other regional and international instruments relating to the protection and welfare of people with disabilities to which Member States are party, adopt legislation and related measures to protect persons with disabilities that take into account their particular vulnerabilities <sup>30</sup> .

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<sup>28</sup> Article 23(b)

<sup>29</sup> Article 13 (1)

<sup>30</sup> SADC Protocol on Gender and Development Article 9



### 5.2.2 Conclusion

As indicated above, there are several international and regional human rights conventions and treaties, as well as declarations, commitments and guidelines which deal specifically with access to justice by people with disabilities that Lesotho is a party to. While the declarations and guidelines are not legally binding, they are generally reflections of the application and interpretation of accepted international and regional human rights principles set out in the treaties and conventions, in the context of the disability. In this respect, they provide important guidance for Lesotho in its interpretation of its own human rights standards in the context of disability.

The international and regional guidance set out above is referred to throughout the study in setting out, analysing and recommending rights-based responses to access to justice in as far as people with disabilities are concerned in Lesotho more especially Article 4 CRPD , based on national human rights frameworks and current laws, policies and plans. From the discussion of different international human rights instruments to which Lesotho is a party, it is concluded that although most of them such as the UDHR, the ICCPR and the ICESCR have non-discrimination provisions, they however make reference to the rights of PWDs. That is, most of them do not have provisions which cater for specific needs of people with disabilities but UNCRPD is the most comprehensive as it covers all aspects in particular civil and political rights of people with disabilities which are inclusive of access to justice.

However, as indicated by the Officer from the Human Rights Unit when she said *“It is true that we have these international conventions which Lesotho is a party to, but unless we domesticate the Conventions, we still have a long way to go, Organisations of people with disabilities and human rights organisations together with relevant Ministries like ours and the Ministry of Social Development have to work harder towards the domestication of UNCRPD because signing and ratification does not bind our country in any manner, it is as good as not being there because they can only guide.”*<sup>31</sup>

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<sup>31</sup> Interview with the Officer from the Human Right Unit in Maseru

## **6. Access to Justice by Persons with Disabilities in Lesotho versus Article 4 of UNCPRD<sup>32</sup>**

### **6.1 Brief Analysis of Disability in Lesotho**

According to the Ministry of Health and Social Welfare's National Disability and Rehabilitation Policy (2011), Lesotho has a limited coordinated disability database to provide statistics of people with disabilities. More importantly, there is no comprehensive national disability survey that has been undertaken in the country. However, the results of the national census conducted by the Bureau of Statistics (BOS) indicate that about approximately 3.7% of the population of Lesotho have some form of disability or another.<sup>33</sup> According to these statistics, 2.1% constitute males while 1.6% constitutes females. The 2009 population census indicates that for all types of disability except for blindness, disability ratios are almost twice as high for males as opposed to females.<sup>34</sup> Disability rates for each type disability are considerably higher in rural than in urban areas.<sup>35</sup>

Over and above the general lack of resources, people with disabilities in Lesotho suffer from discrimination, stigmatization and are often viewed as charity cases by other members of society.<sup>36</sup> This is so because Basotho have historically imposed barriers that subject people with disabilities to isolation and exclusion from the society and extreme dependency on their families and the society at large.<sup>37</sup> In addition, they often do not enjoy the same opportunities as other people because of lack of access to essential services such access to justice.<sup>38</sup> As a result, most of their fundamental human rights for instance, right to equality before the law, freedom from discrimination, right to equal opportunity, the right to independent living and full integration within the society are often violated.

### **6.2 Brief Overview of Human Rights in relation to People with Disabilities in Lesotho**

Lesotho is a state party to the UNCPRD, but has not yet domesticated its provisions. Lesotho as a state is accountable and assumes obligations to provide for and protect the human rights

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<sup>32</sup> See Annex C to the report which is a brief table describing the laws that do not comply with Article 4 of UNCPRD and a proposed intervention

<sup>33</sup> Lesotho Population and Housing Census Analytical Report, 2006. Volume IIIB Socio Economics Characteristics

<sup>34</sup> Lesotho Population Census, 2006

<sup>35</sup> Chitereka C, "People with disabilities and the role of social workers in Lesotho", (2010) Social Work and Society International online journal vol. 8, no.1.

<sup>36</sup> Ibid

<sup>37</sup> Chitereka (note 22 above)

<sup>38</sup> Chitereka (note 22 above)



of its citizens either directly or through a delegated process or both and as a result people with disabilities are not an exception.<sup>39</sup> However, it has been found in this study that, major human rights violations against people with disabilities still exist in certain areas, with widespread violence and societal discrimination on the basis of disability.<sup>40</sup> The section below discusses existing policies, laws including constitutional provisions which are relevant to access to justice by people with disabilities in Lesotho and how they can be amended in order to be in harmony with Article 4 of the UNCRPD which calls for countries that have joined the Convention to engage in the development and implementation of policies, laws and administrative measures aimed at securing the rights of people with disabilities and to abolish laws, regulations, customs and practices that constitute discrimination towards people with disabilities.

### **6.3 Constitutional Analysis**

The constitution of any country is considered to be so important that it should be called the “mother of Law” in the land.<sup>41</sup> The Lesotho Constitution provides that Lesotho shall be a sovereign democratic kingdom.<sup>42</sup> It further provides that the Constitution is the supreme law of Lesotho and if any other law is inconsistent with the Constitution, that other law shall, to the extent of inconsistency, be declared null and void.<sup>43</sup> No other law, including laws relevant to persons with disabilities can afford to be in conflict with the Constitution.

Most of the civil, political, social and economic rights in international instruments have been provided for in the Lesotho Constitution. For example, civil and political rights are provided for in Chapter II while social, economic and cultural rights are catered for in Chapter III of the Lesotho Constitution.<sup>44</sup> Chapter II of the Constitution provides for justiciable rights, thereby protectable in the judicial system, while Chapter III rights are not justiciable but are rather “Principles of State Policy.”<sup>45</sup> Principles of State Policy place an obligation upon the government to take steps to realize them on a progressive basis, for example through policy frameworks and law reforms.<sup>46</sup> The effect is that those socio-economic rights, including rights such as the right to livelihood; right to work; right to health and right to education

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<sup>39</sup> Likoti F.J, Obioha E.E, Matobo T.A., Tanga P.T, and Manyeli T.F, *Lesotho CGPU Evaluation Report 2007*

<sup>40</sup> Interview with Officers from the Ministry of Social Development

<sup>41</sup> Kasozi, 1999. Introduction to law of Lesotho, Morija Printing Works, Morija

<sup>42</sup> Section 2 of the Lesotho Constitution of (1993)

<sup>43</sup> Ibid.

<sup>44</sup> Lesotho Constitution, 1993

<sup>45</sup> Ibid

<sup>46</sup> Lesotho African Peer Review Mechanism (APRM) Report, 2008.

among others, while they cannot simply be claimed and enforced through the courts on the basis of the Constitution,<sup>47</sup> should be reflected in a relevant statute or policy document in order to be justiciable. Since all rights are interlinked and the enjoyment of civil and political rights is premised on the realisation of socio-economic rights, it is critical that states give meaning to these socio-economic rights in law and policy.

Section 4 (1) of the Constitution of Lesotho provides that “every person is entitled to fundamental human rights and freedoms despite their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>48</sup> Unlike Article 4 of the UNCRPD, the Constitution of Lesotho does not *specifically* include disability as a prohibited ground of entitlement to fundamental human rights. In essence this provision makes no specific mention of grounds like people with disabilities as stated in the UNCRPD hence the understanding of *every person* can be interpreted to also include people with disabilities.

On this issue, an Officer from the Law Reform Commission was of the opinion that the Constitution of Lesotho should be reviewed and be as inclusive as possible and that it should explicitly mention **people with disabilities** rather than using the term *every person* because that has created a lot of confusion and is subject to different interpretations by different people. She also highlighted that the Lesotho Constitution has a lot of gaps in as far as people with disabilities are concerned and needs to be revisited so that it can be easy for other subsequent laws dealing with disability issues to be enacted. She made reference to the Disability Equity Bill as an example of progressive laws which attempts to specifically address needs of people with disabilities in Lesotho.<sup>49</sup>

### ➡ **Right to equality and freedom from discrimination**

Section 18 of the Lesotho Constitution states that “Every person has a right to equal protection of the law including the enjoyment of rights set out in the Constitution without discrimination on any ground.”<sup>50</sup> The non-discrimination provision of the Constitution of

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<sup>47</sup> Kathang Tema Baitsooli & Anor v. Maseru City Council & Others Constitutional Case 1/2004(HC) (unreported); Baitsooli & Anor v. Maseru City Council & Others C of A (Civ) No.4/05 (CA) (unreported)

<sup>48</sup> Section 4 of the Lesotho Constitution of 1993

<sup>49</sup> Interview with the Officer from the Law Reform Commission in Maseru

<sup>50</sup> Section 18 (3), Lesotho Constitution of 1993

Lesotho provides that no law shall make any provision that is discriminatory either of itself or in its effect.<sup>51</sup> It goes further to say that no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or authority.<sup>52</sup>

Similarly, the wording of Section 18 does not specifically refer to categories of people, such as people with disabilities, but to people in general. However, it does provide for protection from discrimination on *any ground* and prohibits “affording different treatment to different persons attributable to ... birth or other status whereby persons of one such description are subjected to...restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”<sup>53</sup> As a result, it can be argued that the non-discrimination clause covers grounds such as *disability status*.

As stated earlier, majority of KIs interviewed in this study are of the opinion that the Constitution of Lesotho needs to be reviewed so that disability appears to be one of the prohibited grounds of discrimination explicitly rather than impliedly. Out of 16 KIs that have been interviewed, 13 of them are of the opinion that unless the Constitution of Lesotho addresses the rights of people with disabilities explicitly under Chapter II of the Constitution just like the South African Constitution for example, which is in line with the UNCRPD, access to justice for people with disabilities in Lesotho will remain ‘a far-fetched issue.’<sup>54</sup>

### ➡ **Equality before the Law and the Equal Protection before the Law**

Apart from the above provisions one could make reference to another general provision that the Constitution makes with regard to human rights at Section 19 which provides for the right to equality before the law and the equal protection before the law for *every person*<sup>55</sup> and that alludes to freedom to fair trial. As stated in the arguments above, one common thing with this general provision is that they do not talk directly to people with disabilities as the UNCRPD indicates that state parties should ensure and promote the full realization of all human rights and freedoms for all people with disabilities. The presumption is that it should put people

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<sup>51</sup> Section 18, Lesotho Constitution, 1993

<sup>52</sup> Ibid

<sup>53</sup> Section 18 (3), Lesotho Constitution of 1993

<sup>54</sup> Interview with KI in Maseru

<sup>55</sup> Section 19 Lesotho Constitution of the 1993

with disability at a similar position as their fellow counterparts. In an interview with an officer from IDAL, he stated that the reasons why access to justice is a challenge for people with disabilities especially people with mental disability and their parents, is solely because Section 19 of the Constitution which talks of fair trial does not have people with disabilities as the categories or group of people who have such a right hence unavailability of both the technical and structural assistance in our courts systems.<sup>56</sup>

### ➡ Equality and Justice

Section 26 of the Constitution of Lesotho also provides for Equality and Justice in general terms. It states that Lesotho shall adopt policies aimed at promoting a society, based on equality and justice for all its citizens regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*. The Constitution further qualifies it by making a provision that: In particular, the state shall take appropriate measures in order to promote equality of opportunity for the disadvantaged groups in society to enable them to participate fully in all spheres of public life.<sup>57</sup>

### ➡ Rehabilitation Training and Social Resettlement

Section 33 of the Constitution explicitly talks about people with disabilities though it is not under access to justice. It provides for rehabilitation, training and social resettlement of people with disabilities, and states that with a view to ensuring the rehabilitation, training, and social resettlement of people with disabilities, Lesotho shall adopt policies designed to provide training facilities including specialized institutions, public or private; place people with disabilities in employment and encourage employers to admit people with disabilities to employment.<sup>58</sup>

Although this is an individual opinion, it seems to be a step ahead and responds to Article 4 of the UNCRPD. Even though it does not talk of access to justice by people with disabilities, it alludes and recognises that people with disabilities also have the right to recreation. It is of course the Consultant's view that if other sections of the Constitution which have been discussed above can be reviewed and adopt similar wording, then, the Lesotho Constitution as the Supreme law will be considered to be inclusive of people with disabilities under access

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<sup>56</sup> KII with an Officer from IDAL in Maseru

<sup>57</sup> Section 26, Lesotho Constitution of 1993

<sup>58</sup> Section 33, Lesotho Constitution of 1993

to justice provisions. During the interview with some KI, most people especially those from organisations of people with disabilities were of the view that the Constitution of Lesotho only mentions them on sections which are *less important* to their day to day challenges which they come across. They alluded to the fact that the right to *recreation* as opposed to *access to justice* is not that important to them.<sup>59</sup>

### ➡ Elections to National Assembly and Qualifications for membership of Parliament

Section 57 read with Section 58 of the Lesotho Constitution provides that no person shall be qualified to be registered as an elector in elections to the National Assembly who, at the date of his application to be registered is, under any law in force in Lesotho, adjudged or otherwise declared to be of unsound mind or shall not be so qualified unless, at the date of his nomination for election, he is able to speak and, unless incapacitated by blindness or other physical cause, to read and write either the Sesotho or English language well enough to take an active part in the proceedings of the National Assembly.<sup>60</sup>

Though most of the KI interviewed in the study were not aware of these provisions, it is the consultant's view that these provisions are not in accordance with Article 4 of UNCRPD as they limit the right of people with disabilities to freely participate in decision making processes. Hence, it is necessary for LNFOD to advocate for the reviews of provisions like this one as they are discriminatory against some groups of people with disabilities especially the deaf-mute and the visually impaired. It is the consultants' opinion that if people with disabilities are not represented in parliament, it will be difficult for people who do not have disabilities to push the agenda of people with disabilities hence the need for the review of such provisions so that they are in harmony with Article 4 of the UNCRPD.

#### 6.3.1 Conclusion

In the African context, although disability is not explicitly prohibited as a ground for non-discrimination by some international and regional human rights treaties except for the few, it is generally accepted that such discrimination is implicitly prohibited under international and regional human rights instruments through 'reading' into the equality and non-discrimination clauses as has been done at an international and regional level. Article 4 of UNCRPD may be seen as an indication of the seriousness with which disability related discrimination is

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<sup>59</sup> Interview with LNIVP, IDAL and NADAL

<sup>60</sup> Section 57 and Section 58 of the Lesotho Constitution

viewed. Additionally, since the provisions in the ‘Bill of Rights’ ought to be interpreted to **promote rather than to restrict human rights**, extending protection from discrimination to disability is a Constitutional imperative. Lesotho, like any other country, does not have static provisions of law. As a result, in interpreting and reforming its laws, it should be flexible and take into consideration the prevailing circumstances and **explicitly consider disability as a prohibited ground**. This therefore means that from time to time key stakeholders like LNFOD should call for interventions in that regard so as to respond to and/or conform to Article 4 of UNCRPD.

It is against the above analysis and views from the KI that the Consultants recommend that LNFOD, its members and partners need to engage with relevant stakeholders towards reviewing and amending section 18 of the constitution to read as follows:

*“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, **disability**, religion, conscience, belief, culture, language and birth...*

#### **6.4 The Lesotho Penal Code Act 2010**

The Penal code Act 2010 is a working document in the criminal courts of the land and it makes particular provisions that impact directly on persons with disabilities.

##### **➡ Abortion**

Section 45 of the Penal Code deals with prohibition of abortion in Lesotho. It provides that a person, who does any act of bringing about the premature termination of pregnancy in a female person with the intention of procuring a miscarriage, commits the offence of abortion.<sup>61</sup> It goes further in section (2) to state that; it shall be a defence to a charge under this section that the act intended to terminate pregnancy was performed by a registered medical practitioner in order to prevent the birth of a child who will be seriously physically or mentally handicapped, and the person performing the act has obtained in advance from another registered medical practitioner a certificate to the effect that the termination of the pregnancy is necessary to avoid the birth of a seriously physically or mentally handicapped child....<sup>62</sup>

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<sup>61</sup> Penal Code, 2010, Section 45

<sup>62</sup> Sections 45 of the Penal Code of 2010

When dealing with knowledge of any laws that protects the rights of persons with disabilities, all the KI were aware of this section of the Penal Code but the challenge was that each KI was giving it a different interpretation. For example, the KI from organisations of people with disabilities were of the view that this Section discriminates against them (people with disabilities) because it allows the medical practitioners to perform an abortion where there is a satisfactory evidence that a child to be born has *a serious disability* whilst KI informants from the Government institutions like the Ministry of Health were of the view that Section 45 has been enacted with the spirit of protecting the rights of people with disabilities.

In the views of Consultants, it is proposed that where the law is not clear to an extent that it is subject to different interpretations such provisions of the law *have and or must* be reviewed so that the beneficiaries can have the same interpretation and understanding envisaged thereof. The review of this section has to be done in consultation with organisations of people with disabilities so that there can be consensus of all involved stakeholders. One magistrate even mentioned that she wishes that a case of that nature cannot be brought up before her due to the ambiguity or vagueness of that section as the term *Serious Disability* has not been fully explained in order for a lay person to appreciate the intention of the legislature.<sup>63</sup>

### ➡ **Abduction**

Sections 46 of the Penal Code also read with the **Laws of Lerotholi**<sup>64</sup> have provisions on abduction of people with disabilities. As far as abduction is concerned, both the Penal code and the Laws of Lerotholi provide that a person who unlawfully takes or entices ... any person of *unsound mind* out of the custody of the lawful guardian of such person, with or without the consent of such guardian, for the purpose of marriage, sexual intercourse, or commercial and labour exploitation, commits the offence of unlawful sexual act and or abduction.<sup>65</sup> Sub Section 46 (2) of the Penal Code further provides that a guardian who consents to the enticement or taking of any ... person of *unsound mind* out of his or her custody for the purpose of marriage, sexual intercourse or commercial and labour exploitation commits the offence of unlawful sexual act and or abduction.<sup>66</sup>

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<sup>63</sup> KI interview with the Maseru magistrate

<sup>64</sup> Laws of Lerotholi, 1908

<sup>65</sup> Sections 46 of the Penal Code of 2010

<sup>66</sup> Sections 46 of the Penal Code of 2010

In addressing the issue of access to justice especially in the courts of law in as far people with disabilities are concerned, majority of the KI confirmed that accessing justice in the courts of law especially for people with mental disability, the deaf and visually impaired remains a challenge as more often, interpreters are not available hence this kind of cases take longer time or even remain unattended. The Officer from the Human Rights Unit had this to say when explaining the challenges of access to courts by people with disabilities;

*“People with disabilities are not treated with the amount of care they should actually be treated with. They are ridiculed from the moment they report their case all the way to the courts because it is perceived that they are not in a position to give credible evidence. When they bring their grievances before the police, they are taken as challenges by the police because a lot of effort has to be put in to bring the case to finality. In one example, she continued; a girl with a mental disability was raped at Morija, her case dragged for a very long time because of lack of evidence until she passed away because of heart attack. We had to keep calling the police as a follow up but their pace was not convincing at all.”<sup>67</sup>*

This was even confirmed by an officer from the Child and Gender Protection Unit (CGPU) when she said “even though we do not have many cases of people with disabilities, the moment we receive a case involving a person with disabilities especially mental disability, the visually impaired or the blind people, no police officer wants to deal with such cases because we do not have capacity to handle them, cases which are not difficult to handle are those involving people with physical disability, all other forms are a challenge to us.”

### ➡ **Unlawful Sexual Act**

Section 52 of the Penal Code deals with unlawful sexual offences against people with disabilities and it provides as follows; a sexual act is unlawful if committed under the following circumstances; if the complainant is affected by the physical disability, mental incapacity, sensory disability, medical disability, intellectual disability, or other disability, whether permanent or temporary.<sup>68</sup>

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<sup>67</sup> KI interview with the Maseru magistrate

<sup>68</sup> Sections 52 of the Penal Code of 2010



As indicated earlier, access to justice especially in courts of Lesotho remains a challenge due to unavailability of interpreters and the technical know-how of handling cases of people with disabilities. This was supported by an interview with one magistrate who stated that “*I remember a case where there was a witness who had mental disability and she did not answer questions put to her in the court room. The case was dismissed because the whole law enforcement officials are not sensitized on how to deal with people with disabilities, and that was not the only case, they are many more and this tells us that we must all be trained to handle cases of that nature. Everyone in the court room must have that training because currently the courts are not assisting them in any manner, and it is more complicated by the fact that there is no specific law dealing with disability issues in Lesotho.*”<sup>69</sup>

Having discussed the sections on abduction and unlawful sexual act of people with mental disability or that of **unsound person** as stipulated in the laws of Lesotho, it is the consultants view that these provisions of the laws are not in accordance with Article 4 of the UNCRPD hence the recommendation of the advocacy on the enactment of The Disability Civil Rights law because such a law will definitely address issues of language, attitudes and provide for mandatory sign language law which can be enforced by all stakeholders involved. The proposed Disability Civil Rights law should describe the forms of **mental capacity** in which a person with disability can be taken not to be **competent** to make an informed decision. The law should take into consideration that there are people with a minimal mental disability who can still have capacity to decide and make an informed decision in as far as sexual and reproductive health rights are concerned because as it stands now, these sections are too general and seem to be discriminatory in that they deprive any person with mental disability their sexual and reproductive health rights not taking into consideration the level or degree of disability of that person.

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<sup>69</sup> KI interview with the Maseru magistrate

## **6.5 Sexual Offences Act of 2003 read with Children’s Protection and Welfare Act of 2011**

### **➡ Unlawful Sexual Act**

Part V of Sexual Offences Act provides for unlawful sexual offences against people with disabilities. Section 15 (1) reads as follows: ‘A person who commits a sexual act in relation to; or in the presence of a disabled person commits an offence; (2) reads as follows; a person who commits any act with the intent to invite or persuade a disabled person to allow any person to commit a sexual act in relation to that disabled person commits an offence.’<sup>70</sup>

The judiciary stated that they often come across a challenge in implementing that section as it does not distinguish the level of mental disability as some people though they can be taken to have the mental disability, it is not that extreme as they can still understand the implications of what they are entering into.<sup>71</sup> So they are of the opinion that the LNFOD and its members should approach the parliamentarians and the Law Reform Commission for the amendment or review of that section so that such a law can accommodate those who are still capable of giving the consent against those who have serious mental disability and consider different forms of disability depending on the degree of such disability.

## **6.6 Criminal Procedure and Evidence Act of 1981 as Amended**

The Criminal Procedure and Evidence Act of 1981 specifically provides that every person not expressly excluded by the Act from giving evidence is competent and compellable to give evidence in a criminal case in any court in Lesotho or before a Magistrate in a Preparatory Examination.<sup>72</sup> Section 218 however, makes a proviso that it shall be competent for the court in which any criminal case is pending to decide upon all questions concerning the competency or compellability of any witness to give evidence.<sup>73</sup>

In essence, according to these two sections, one cannot be regarded as incompetent to give evidence purely on the basis of their disability, except if the disability has a bearing on the reliability of the evidence he or she gives before the court. This is also reflected in section 219 which provides that no person appearing or proved to be afflicted with idiocy, lunacy, or

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<sup>70</sup> Sexual offences Act 2003 section 15

<sup>71</sup> Interview with Prosecutors and magistrates in Maseru

<sup>72</sup> Section 215

<sup>73</sup> Section 215

inability or labouring under any imbecility arising from intoxication or otherwise.<sup>74</sup> It is worth mentioning that majority of the KI were not conversant with the provision of this law except for the law enforcement personnel who stated that these sections have to be reviewed as they are highly misused by lawyers on the basis that people with disabilities cannot give reliable evidence in court.

This according to the Consultants is not in harmony with Article 4 UNCRPD and like the previous sections dealing with the mental capacity of a person. Consultants are of the view that LNFOD can use both the existing Disability Equity Bill and the proposed Disability Civil Rights law to explain and describe the degree of person's disability and make a distinction of what a person has capacity to do under such a degree. For example, when looking into the *Disability Law of Germany*, it mandates that there has to be a formal procedure by the competent doctor to determine level of apprehension. The law mandates administration for the evaluation of disabilities and the recognition of disability degrees taking into consideration that some mental disability improves. It further provides that's if the disabled person's status improves, the degree of disability will be adjusted or totally revoked.<sup>75</sup>

### **6.7 Marriage Act of 1974**

This law governs civil marriages in Lesotho. It provides that any person above the age of 21 can contract a valid marriage except where that person has a mental incapacity. In essence it provides that any person who has a mental disability cannot enter into a valid civil marriage. In this case the comments articulated under The Penal Code and the Sexual Offences Act still applies since the degree of the mentally capacity differs, so in order to be in harmony with Article 4 UNCRPD, the legislature must review the law and reconsider the right of every person to enter into marriage.

### **6.8 Disability Equity Bill of 2014**

The Bill represents the mile stone from domesticating some of the provisions of UNCRPD. The Bill provides for the Rights of People with disabilities and states that the Minister responsible for social Welfare shall take necessary steps to the maximum of its available resources to achieve the full realization of the rights of people with disabilities. Whilst not so many KI are aware of this Bill except for members of the organisations of people with disabilities, the Consultants are of the view that Access to Justice Provision in this Bill is too

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<sup>74</sup> Section 219

<sup>75</sup> Germany Disability Law

strict and or narrow to clearly explain the kind of access that is needed to achieve full realization of the rights. Consults opine that at this stage, that Bill should be explicit enough of what constitutes the rights of people with disabilities and the responsibilities of each stakeholder towards their full realization as opposed to putting the Minister as the only person who should see to it that the rights of persons with disabilities are respected.

## **7. National policies**

### **7.1 The National Disability and Rehabilitation Policy of 2011**

The policy provides that one of its objectives is to strengthen access to justice to include people with disabilities. The strategies geared towards this objective include among others, to upgrade a department of rehabilitation services to fully administer services for people with disabilities in all districts, to ensure that services cater for people with disabilities. One of the strategies of the policy is to advocate for the implementation of existing health laws and other laws related to disabilities.

In as much as this policy is good it remains the guiding tool and cannot be enforced before the courts of law, the major problem is that the current health legal system does not cater for people with disabilities, therefore, the best strategy would be to advocate for adoption of disability related health laws because as of 2011 when this policy was adopted, not much has been done to cater for rights of people with disabilities.

### **7.2 The National HIV & AIDS policy 2006**

The above policy has a section on people with disabilities and policy statements. The policy emphasizes that government shall; ensure that HIV related prevention information, education, treatment, care and support strategies and materials are tailor made for ,and accessible to people with disabilities; ensure protection of all people with disabilities from abuse that leads to increased risk of contracting HIV and AIDS and ensure that all responses to HIV and AIDS consider the implications for people with disabilities and plan for more effective responses based on models of national and international best practice.

### **7.3 Poverty Reduction Strategy (PRS) 2004/2005 – 2005/2006**

The PRS sought to address the following issues that are relevant to this study: To improve access to justice by vulnerable groups i.e. government is concerned that poor and vulnerable groups have difficulty accessing the legal system and are not afforded adequate protection therefore high priority will be given to the following activities:

- draft legislation to provide legal protection to vulnerable groups including persons with disabilities, children, and people living with HIV and AIDS;
- establish child, juvenile and family courts with child-friendly environments;
- sensitize the community on the rights of vulnerable groups;<sup>76</sup>

The PRS in as far as access to justice for persons with disabilities is concerned is in harmony with Article 4 of UNCRPD because it mandate the country to draft disability responsive laws to make sure that access to justice by persons with disability is enhanced.

### **7.4 National Development Strategic Plan 2012 – 2017**

The national development strategic plan has an article on the law enforcement agencies and Administration of Justice which alludes to the following stand point; the rule of law, equitable access and efficient administration of justice are prerequisites for human rights protection, sustainable social and economic development. The plan is cognizant of the fact that a number of challenges still exist which are inclusive of the fact that the vulnerable groups do not have adequate access to the justice system due to low capacity of legal aid unit and limited skills to deal with disabled within the court system.<sup>77</sup>

Having discussed the policies and the plans, it is as indicated above, there are several, commitments and guidelines which deal specifically with the rights of persons with disabilities. While the guidelines are not legally binding, they are generally reflections of the application and interpretation of accepted human rights principles set out in in the context of access to justice to justice in as far as persons with disabilities are concerned. In this respect, they provide important guidance for Lesotho in its interpretation of its own human rights standards in the context of access to justice. In addition, many strategies and plans include guidance on law and policy responses to access to justice in as far as people with disabilities

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<sup>76</sup> Poverty Reduction Strategy 2004/2005 – 2005/2006

<sup>77</sup>The National Development Strategic Plan

are concerned. As such, they provide important and persuasive guidance for national response to disability that the GOL of Lesotho can easily implement.

## 8. General Conclusions

Literature has confirmed that people with disabilities in Lesotho suffer from discrimination, stigmatization and are often viewed as charity cases by other members of society. This is so because Basotho have historically imposed barriers that subject persons with disabilities to isolation and exclusion from the society and extreme dependency on their families and the society at large. In addition, they often do not enjoy the same opportunities as other people because of the lack of access to essential services like access to justice. As a result, most of their fundamental human rights including right to equality before the law, freedom from discrimination, right to equal opportunity, the right to independent living and full integration within the society are often violated.

The findings in this study have also shown that where pieces of disability related legislation exist, they are not in conformity and or in harmony with the international standards in particular Article 4 of UNCRPD; they have rarely been evoked, thus resulting in weak implementation and enforcement. Slowness in the enactment of pieces of legislation dealing with disability like the Disability Equity Bill and review of existing laws policies has remained a serious concern. This fact has the effect of watering down the good intention of the laws and policies and also delaying the intended benefits for people with disabilities.

In summary, one key informant from the Law Reform Commission during this study stated that one of the reasons that Disability Equity law is still in a *Bill* form is because of the statuses granted to right to access for persons with disabilities under the Constitution. In her opinion, she said “Access to justice by persons with disabilities can only be fully achieved if the Constitution can recognise disability as the protected status under civil rights.”<sup>78</sup> Finally, one concludes that policy and legal frameworks should be reviewed to respond to challenges that are faced by people with disabilities and thus be in harmony with UNCRPD which Lesotho is a party to.

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<sup>78</sup> Key Informant interview with Law Reform Commission Officer

## 9. General Recommendations

Laws and policies discussed above do not give legal effect to access to justice for people with disabilities, and are in most instances not in harmony with Article 4 UNCRPD, it is therefore recommended that:

- ✚ There should be advocacy programmes towards the review of the existing laws and policies so that they are in harmony with international standards particularly Article 4 UNCRPD;
- ✚ The Government of Lesotho should ensure that people with disabilities are represented when making budgets, planning, implementing and monitoring policies to safeguard their interests;
- ✚ The Legislature should involve people with disability when issues relevant to them are being discussed;
- ✚ The disability specific law should be enacted so that it responds to legal challenges that are faced by people with disabilities when accessing justice in Lesotho;
- ✚ The disability specific law must protect and promote human rights of people with disabilities and prohibit all forms of discrimination on the basis of disability status;
- ✚ Protection from disability related discrimination should be included within Disability Equity Bill alternatively consideration should be given to the enactment of general anti-discrimination legislation which includes disability as a prohibited ground of discrimination;
- ✚ Existing human rights and constitutional guarantees for all people including people with disabilities should be enforced;
- ✚ Lesotho may also consider an amendment to the Constitution to explicitly include disability as a prohibited ground of discrimination
- ✚ The law enforcement agencies must be sensitized on how to handle people with disabilities when accessing justice because they end up scaring them from accessing justice;
- ✚ Programmes should be put in place to provide legal literacy and legal services to people with disabilities so that they know their rights and applicable laws, and can be supported to access the justice system when aggrieved;



- ✚ Law enforcement officials, parliamentarians, judiciary, police, health and social care providers need to be trained to recognize and uphold the human rights of people with disabilities; and
- ✚ People with disabilities must also be trained and capacitated to be assertive of their own human rights.

## 10. References

### 10.1 Laws and Policies

- Children’s Protection and welfare Act 2011
- Constitution of SA 1996
- Constitution of Lesotho 1993
- Criminal Procedure and Evidence Act 1981
- Disability Equity Bill of 2014
- Disability Law of Germany
- Education Sector Strategic Plan 2005 – 2015
- Laws of Lerotholi of 1903
- Marriage Act of 1974
- National Disability and rehabilitation Policy 2011
- National HIV/ AIDS Policy 2006
- Penal Code of 2010
- Poverty Reduction Strategy 2004/2005 – 2005/2006
- Sexual Offences Act 2003
- The National Development Strategic Plan 2012 – 2017

### 10.2 Cases

- Khathang-tema Baitsokoli v Maseru City Council and others.
- Purohit and others v The Gambia (2003) African Human Rights Law Reports, 96.

### 10.3 Articles, Reports and Books

- Brown, L. B. (2015). The United Nations Convention on the rights of Persons with Disabilities: Issues in the U.S. Ratification Debate, CRS
- Chitereka C, “People with disabilities and the role of social workers in Lesotho”, (2010) Social Work and Society International online journal vol. 8
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- Lesotho African Peer Review Mechanism (APRM) Report,’ 2008
- Lesotho Health and Demographic Survey 2006

- Lesotho Population and Housing Census Analytical Report, 2006. Volume IIIB Socio Economics Characteristics
- Letuka et al. 2008 Gender, HIV and the Law in Lesotho: Embracing Rights Based Approach to Realise Sexual and Reproductive Health in Lesotho; WLSA Publication, Morija
- Likoti F.J, Obioha E.E, Matobo T.A., Tanga P.T, and Manyeli T.F, Lesotho CGPU Evaluation Report 2007
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- Nul-consuls: report on the coverage and inclusion of disability specific issues in the laws of Lesotho (2011)
- Pholo, M., ‘Lesotho Justice Sector and the Rule of Law: A review by AfriMAP and the Open Society Initiative for Southern Africa,’ Open Society Foundations, 2013
- SAFOD Research Programme (SRP) LNFOD Country Report on [www.safod.org](http://www.safod.org)

#### 10.4 International and Regional instruments

- African Charter on Human and Peoples’ Rights 1981
- African Charter on the Rights and Welfare of the Child 1999 *Available at:* [www.achpr.org/instruments/achpr/](http://www.achpr.org/instruments/achpr/)
- Convention on Elimination of all forms of Discrimination against Women 1979
- Convention on the Rights of Persons with Disabilities 2006
- Convention on the Rights of the Child 1981 *Available at:* [www.umn.edu/humanrts/africa/afchild](http://www.umn.edu/humanrts/africa/afchild)
- Declaration on the Rights of Deaf-Blind Persons 1979
- Declaration on the Rights of Disabled Persons 1975
- Declaration on the Rights of Mentally Retarded Persons 1971
- International Covenant on Civil and Political Rights (ICCPR), 1976. *Available at:* [www.ohchr.org/english/bodies/hrc/docs/ngos/DCI\\_2\\_Israel99.pdf](http://www.ohchr.org/english/bodies/hrc/docs/ngos/DCI_2_Israel99.pdf)
- International Covenant on Economic, Social and Cultural Rights 1966 *Available at:* [www.un-documents.net/icescr](http://www.un-documents.net/icescr)
- SADC Protocol on Gender and Development, 2008 *Available at:* [www.sadc.int/files/.../Protocol\\_on\\_Gender\\_and\\_Development\\_2008.pdf](http://www.sadc.int/files/.../Protocol_on_Gender_and_Development_2008.pdf)

- ➡ Universal Declaration of Human Rights (UDHR), 1948. Available at:  
[www.un.org/en/documents/udhr/](http://www.un.org/en/documents/udhr/)

## 11. Annexures

### Annexure A

#### List of Key Informants Interviewed

- ✚ Chief Magistrate (North)
- ✚ Chief Prosecutor
- ✚ Child and Gender Protection Unit
- ✚ Children's Court
- ✚ Human Rights Unit
- ✚ IDAL
- ✚ IVTC
- ✚ Law Reform Commission
- ✚ LNVIP
- ✚ Ministry Of Education
- ✚ Ministry Of Gender Youth Sport and Recreation
- ✚ Ministry of Health
- ✚ Ministry Of Labour and Employment
- ✚ Ministry Of Law
- ✚ Ministry Of Police
- ✚ Ministry Of Social Development
- ✚ NADAL
- ✚ Women and Law in Southern Africa

## **Annexure B**

### **Research tools used during interviews for KI**

#### **1. INTRODUCTION**

This section covers the proposed tools to be used by the Consultants. The purpose of the tool kit is to allow for gathering of background information on access to justice in as people with disabilities are concerned; to facilitate questions for discussions and feedback on common issues relevant to all stakeholders and to facilitate discussion of points on key issues relevant to each particular organization or institution.

#### **2. ETHICAL REVIEW AND APPROVAL**

Like other studies that collect data from people, the consultants are aware of observing certain standards with regard to ethical issues and data protection.

As a result the consultants will ensure that all interviewees are assured of confidentiality of their information and will be requested to give their informed consent as follows:

You have been identified as a key stakeholder who can provide information and perspectives on the legal and regulatory framework regulating the response to people with disabilities in Lesotho. Please help us by answering the following questions based on your experiences, expertise and opinions learnt through your work.

**The questions are designed to help us to identify:**

- The nature and extent of human rights violations relating to people with disabilities in Lesotho, which often results in restriction or limitation of human rights of people with disabilities.
- The extent to which the legal and regulatory framework in Lesotho protects rights and promotes access to justice in the context of people with disabilities.
- Weaknesses, gaps and challenges in the current framework, and recommendations for strengthening the framework to support effective responses to the legal needs of people with disabilities.

**Please indicate whether you are willing to answer the questions below, and the extent to which you would require your participation in this process to be confidential. For example, please indicate:**

- Are you willing to have your name and organisation identified as a key informant in our final report? **YES/NO**
- Are you willing to have your opinions and perspectives accredited to you in our final report?

**Note to the interviewer:** For each respondent, prioritize and concentrate on the questions most relevant given their background and expertise. Provide some explanation or examples, where required, although this should be done carefully and for purposes of illustration, so as not to pre-empt the key informants' own opinions and thoughts on each question.

**3. KEY INFORMANTS TOOLS**

**Background of Respondent**

**KI Facilitator:** .....

**KI Note Taker/s:** .....

**Institution** .....

**Age of Respondent**....., **Gender**....., **Position**.....

**Name of Respondent:**.....

**KNOWLEDGE AND ACCESS TO JUSTICE ON MATTERS RELATED TO PEOPLE WITH DISABILITIES AND HUMAN RIGHTS**

3. Are protective laws in relation to people with disabilities enforced? Why or why not?

**Probes:**

- What are laws, policies, regulations, customs and practices that prohibit discrimination against people with disabilities?
- Are laws, policies, regulations, customs and practices that prohibit discrimination against people with disabilities enforced?
- Do law enforcement agencies take protective, appropriate actions in cases of where the rights of people with disabilities have been violated?
- Are protective laws at workplaces enforced?
- Are there legal support services to help people with disabilities' access to information, advice, referrals and support to uphold their rights?

4. Are there programmes to sensitise and train law enforcement officials on law, human rights and how to handle cases of people with disabilities?

5. Are there laws, policies and programmes in place to address the needs of people with disabilities, if so mention them, if not why do you think this is the case?

6. Are people with disabilities able to advocate for their legal rights? If so to what level and if not why do you think that is the case?

7. Do people with disabilities have organisations/networks of their own and do they discuss human rights and entitlements?
8. Do key opinion leaders and service providers understand the link between law, human rights and disabilities?

#### **Probes**

- Traditional leaders
- Faith leaders
- Parliamentarians
- Judiciary
- Police
- Lawyers
- Educators etc.

9. Are there organisations and institutions that provide legal aid or legal support services for those whose rights have been violated? If so, how do you treat cases of people with disabilities compared to other cases of people without disabilities?
10. Are there systems available for investigating and enforcing human rights violations relating to people with disabilities? (Probe: National Human Rights Institutions – present, role, level of activity in the field of human rights, etc.)
11. Are people with disabilities in Lesotho able to access justice services such as sign language interpreter? And if so how many cases have dealt with which had such provision? And are there those which you have to deal without such provisions, what happens?
12. Do you think people with disabilities have adequate access to justice? If yes, explain. If not, what are the problems experienced that hinder access their access to services?

#### **RECOMMENDATIONS**

13. What in your opinion are the major strengths within the current legal and policy framework on matters related to human rights protection of people with disabilities?
14. What in your opinion are the major weaknesses, challenges and gaps within the legal and policy framework that hinders access to justice for people with disabilities?
15. What do you think should be done to strengthen the legal and policy framework to enhance access to justice for people with disabilities?
16. What in your opinion should be done to strengthen law enforcement agencies to better enhance access to justice for people with disabilities.

17. Are professionals and staff working with persons with disabilities trained so as to better their skills in providing the assistance and services aimed at protecting, enhancing and guaranteeing human rights of people with disabilities?





## Annexure C

Brief summary detailing the laws and policies in Lesotho that are not in harmony with Article 4 of UNCRPD and a proposed intervention

Year	Laws	Provisions that are not in harmony with Article 4 of UNCRPD	Proposed Intervention
1993	The Constitution of Lesotho	Sections 4, 18, 19, 26,33 and 57 generally provides for equality before the law, non-discrimination on any ground, free entitlements to fundamental human rights, disqualification of membership to parliament by virtue of mental disability etc. All these provisions make no specific mention of grounds like persons with disabilities as stated in the UNCRPD.	It against these analysis that the Consultants recommend that LNFOD, its members and partners to engage with relevant stakeholders towards reviewing and amending section 4, 18, 19, 26 of the constitution to read as follows: <i>“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, <b>disability</b>, religion, conscience, belief, culture, language and birth...</i>
2010	The Lesotho Penal Code Act	Section 45 deals with prohibition of abortion. It provides that a person, who does any act of bringing about the premature termination of pregnancy in a female person with the intention of procuring a miscarriage, commits the offence of abortion. It goes further in (2) to say that; it shall be a defence to a charge under this section that the act intended to terminate pregnancy was performed by a registered medical practitioner in order to prevent the birth of a child who will be seriously physically or mentally handicapped, and the person performing the act has obtained in advance from another registered medical practitioner a certificate to the effect that the termination of the pregnancy is necessary to avoid the	It is our view that where the law is not clear to an extent that it is subject to different interpretations like section 45 such provision of the law has and or must be reviewed so that the beneficiaries can have the same interpretation. The review of this section has to be done in consultation with organisations of persons with disabilities so that there can be consensus of all involved stakeholders. One magistrate even mentioned that she wishes that a case of that nature cannot be brought up before her due to the ambiguity or vagueness of that section as the term Serious Disability has not been fully

		birth of a seriously physically or mentally handicapped child.	explained in order for a lay person to appreciate the intention of the legislature
1903 2010 2003	Laws of Leretholi read together with the Penal Code and the Sexual Offences Act	Sections 46 of the Penal Code read with the Laws of Leretholi have provisions on abduction of persons with disabilities. They provides that a person who unlawfully takes or entices ... any person of unsound mind out of the custody of the lawful guardian of such person, with or without the consent of such guardian, for the purpose of marriage, sexual intercourse, or commercial and labour exploitation, commits the offence of unlawful sexual act and or abduction . Sub Section (2) further provides that a guardian who consents to the enticement or taking of any ... person of unsound mind out of his or her custody for the purpose of marriage, sexual intercourse or commercial and labour exploitation commits the offence of unlawful sexual act and or abduction	Consultants recommend that LNFOD, its members and partners to engage with relevant stakeholders like parliamentarians towards the enactment of <i>The Disability Civil Rights Act</i> because such a law will address issues of language, attitudes and provide for mandatory sign language law enforcement personnel. That Act should describe the forms of mental capacity in which a person with disability can be taken not to be competent to make an informed decision. The Act should take into consideration that there are people with a minimal mental disability who can still have capacity to decide and make an informed decision in as far as sexual and reproductive health rights are concerned because as it stands now, these sections are too general and seem to be discriminatory in that they deprive any person with mental disability their sexual and reproductive health rights not taking into consideration the level of disability.
1981	The Criminal Procedure and Evidence Act as Amended	It provides that every person not expressly excluded by the Act from giving evidence is competent and compellable to give evidence in a criminal case in any court in Lesotho or before a Magistrate in a Preparatory Examination. Section 218 however, makes a proviso that it shall be competent for the court in which any criminal case is pending to decide upon all questions concerning the competency or compellability of any witness to give evidence. Section 219 further provides that no person appearing or proved to be afflicted with idiocy, lunacy, or inability or labouring under any imbecility arising from intoxication or otherwise.	Just like the previous sections dealing with the mental capacity of a person, the consultants are of the view that LNFOD can either use the existing Disability Equity Bill or the proposed Disability Civil Rights Act to explain and describe the degree of person's disability and make a distinction of what a person has a capacity to do under such a degree.

1974	Marriage Act .	This law governs civil marriages in Lesotho. It provides that any person above the age of 21 can contract a valid marriage except where that person has a mental incapacity.	In this case the comments articulated under The Penal Code and the Sexual Offences Act still applies since the degree of the mentally capacity differs, the legislature must review the law and reconsider the right of every person to enter into marriage depending on the degree of disability
2014	Disability Equity Bill of .	Section 12 of the Bill provides for the Rights of People with disabilities and states that the Minister responsible for social Welfare shall take necessary steps to the maximum of its available resources to achieve the full realization of the rights of people with disabilities. The Consultants are of the view that Access to Justice Provision in this Bill is too strict and or narrow to clearly explain the kind of access that is needed to achieve full realization of the rights.	It is proposed that Bill should be explicit enough of what constitutes the rights of persons with disabilities and the responsibilities of each stakeholder towards their full realization as opposed to putting the Minister as the only person who should see to it that the rights of persons with disabilities are respected

