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**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS**

**SUBMISSIONS ON GENERAL COMMENT OF THE COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES ON ARTICLE 27 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES ON THE RIGHT TO WORK AND EMPLOYMENT**

**TO**

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

**15TH MARCH 2021**

Kenya National Commission on Human Rights

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1. **BACKGROUND**

The Kenya National Commission on Human Rights is an Independent National Human Rights Institution established under article 59 of the Constitution and operationalized by the Kenya National Commission on Human Rights Act, 2011 (revised 2012). The Commission has a broad mandate to promote the respect and a culture of human rights in the Republic of Kenya. The Commission’s mandate is implemented through various strategies including research, advocacy and lobbying, education and training, complaints and investigations, litigation, monitoring, partnership building and networking among others. The Commission’s functions are guided by the 1993 United Nations approved principles on the establishment and functioning of national human rights institution (Paris Principles) and is accredited as an ‘A’ status institution for its compliance with the Paris Principles by the Global Alliance of National Human Rights Institutions (GANHRI). The Commission also enjoys Affiliate Status before the African Commission on Human and Peoples’ Rights.

The Commission is the designated National Monitoring Agency under article 33 (2) of the Convention on the Rights of Persons with Disabilities.

The Commission commends the Committee for drafting the general comment on article 27 of the Convention on the Rights of Persons with Disabilities. This is an important step towards expounding further on states obligation and provide much needed guidance to state parties in ensuring they adhere to their obligations under the Convention. The Commission further welcomes the intention to compile and document within the General Comment the best national practices regarding implementation of article 27 of the Convention on the Rights of Persons with Disabilities

1. **SPECIFIC COMMENTS ON GENERAL COMMENT ON THE RIGHT TO WORK AND EMPLOYMENT**
2. **Scope of application of article 27 of the Convention on the Rights of Persons with Disabilities to persons seeking or holding political offices.**

The Commission proposes that the general comment addresses the extent to which article 27 of the Convention on the Rights of Persons with Disabilities applies to rights of persons with disabilities seeking or occupying elective offices as a form of work/employment. The Committee in its draft outline of the general comment on article 27 has noted that

The Committee has also called for the elimination of concepts of “working capacity” or “unemployable” from existing legislation;[[1]](#footnote-1) and the elimination of the requirement of “medical fitness” to work.[[2]](#footnote-2) On this matter, the Committee has also undertaken an inquiry under article 6 of the Optional Protocol to the Convention (CRPD/C/15/4). In its report on the inquiry, the Committee noted that work capability assessments to deem persons with disabilities “fit to work” have been focused on a functional evaluation of skills and capabilities and have put aside personal circumstances and needs and the barriers faced by persons with disabilities in returning to employment, particularly those of persons with intellectual and/or psychosocial disabilities.

The Commission in its evaluation of the legal framework on Kenya and how to implement article 12 of the CRPD on legal capacity has noted that the existence of provisions within the Constitution that restrict ‘persons of unsound mind’ from seeking or holding political offices in Kenya.[[3]](#footnote-3) These include article 99(2)(e) of the Constitution which disqualifies a person of unsound mind from being elected a member of parliament; article 193 (2) (d) which disqualifies persons of unsound mind from being elected member of a county assembly. Article 103 of the Constitution provides that a member of parliament can lose his/her seat upon declaration that they are of ‘unsound mind’. Article 144 and 150 (2) of the Constitution further provides for physical and mental incapacity as a ground for removal of an elected President and Deputy President. The Constitution does not provide a definition for the term unsound mind nor is it defined anywhere in the Laws of Kenya.

The exclusion from participation or holding political offices is further legislated in the Elections Act. Sections 24 (2) (e) and 25 (2) (d) of the Elections Act prohibit persons of unsound mind from holding political office.

The Committee on the Rights of Persons with Disabilities in its concluding observations to Kenya has recommended that Kenya amend laws that exclude persons with disabilities from voting and seeking elective offices but has not addressed the question of protecting persons from losing elective office on the basis of a disability

The absence of definition and provision of reasonable accommodation for persons with disabilities in law has the potential of disenfranchising albeit disproportionately persons with intellectual/psychosocial disabilities and denying them their legal capacity and rights under article 27 of the CRPD.[[4]](#footnote-4)

In addition to elective offices, the Commission notes that the Constitution and other legislation in Kenya, provide for physical or mental incapacity as ground for exclusion or removal from office with respect to Boards of State Corporations and Constitutional Commissions. For example article 251 of the Constitution provides for physical and mental incapacity as a ground for removal for office holders in a Constitutional Commission.

The Commission therefore recommends that the Committee clarify the extent to which the provisions of article 27 of the CRPD apply to those seeking or holding political offices and whether they are entitled to protections under article 27 of the CRPD as a form of work/employment.

1. **Affirmative action programs that States can use to promote the right to employment**

Page 9 of the draft outline of the General Comment calls on State parties to promote right to employment through public procurement. The Committee notes that State parties can promote employment of persons with disabilities through tendering processes that are reserved to enterprises owned by persons with disabilities. The Commission notes that promoting participation of persons with disabilities through public procurement is key in implementing state party obligations under article 27 of the CRPD. However, the Commission notes the need for the General Comment to emphasize the need to monitor the actual value of procurement tenders given to persons with disabilities to ensure real benefits accrue to persons with disabilities. Within the Kenyan context, the Access to Government Procurement Opportunities Program provided for under the Public Procurement and Asset Disposal Act, requires all government entities to reserve 30% of procurement opportunities for women, youth and persons with disabilities. Whereas the program has been lauded for the benefit accruing to persons with disabilities, persons with disabilities have consistently received the lowest amount in total value of procurement opportunities in comparison women and the youth. As of April 2019, beneficiaries has received Kshs 32.2. Billion (USD 319,549,580) since inception. Youth received 6,048 contracts translating to Kshs. 8,021,293,162.68 (USD 8,000,000), followed by women who received the highest share contract 7,788 but translating to Kshs. 6,647,437,849.46 (USD6,666,000) while persons with disabilities received the least at 901 contracts translating to Kshs.1,245,028,466.34 (USD 1,000,000).[[5]](#footnote-5) It is essential that state parties evaluate not only the number of beneficiaries/contract awarded to individuals but also the value of contracts awarded. Furthermore, the General Comment ought to clarify whether there is need to ring fence the quota for persons with disabilities under procurement opportunities noting the inter-sectionality of rights

1. **Obligation to provide reasonable accommodation in the workplace.**

The Commission recommends the need to require state parties to monitor and report on institutional compliance. This is critical in assessing compliance with the requirements under article 27 of the CRPD.

1. **The duty of state to respect, protect and fulfil the right under article 27 of the CRPD.**

The Commission notes that the right to work for persons with disabilities is often violated by private actors. It is important for the general comment to clarify that the responsibility to protect rights extends to the obligation of state parties to prevent such discrimination.

# In conclusion, the Commission calls upon the Committee to ensure strong reference to the sustainable development goals in the general comment specifically target 8.5 where States are required by 2030 to achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value.

1. UN Committee on the Rights of Persons with Disabilities, ‘Concluding Observations on Lithuania’, (10 May 2016) UN Doc CRPD/C/LTU/CO/1, paragraphs 51-52 (CRPD/C/LTU/CO/1). See also UN Committee on the Rights of Persons with Disabilities, ‘Concluding Observations on Turkmenistan’, (13 May 2015) UN Doc CRPD/C/TKM/CO/1, paragraphs 45-46 (CRPD/C/TKM/CO/1). [↑](#footnote-ref-1)
2. UN Committee on the Rights of Persons with Disabilities, ‘Concluding Observations on Jordan’, (15 May 2017) UN Doc CRPD/C/JOR/CO/1, paragraphs 49-50 (CRPD/C/JOR/CO/1). [↑](#footnote-ref-2)
3. Kenya National Commission on Human Rights and Open Society Initiative for Eastern Africa ‘How to Implement article 12 of the Convention on the Rights of Persons with Disabilities regarding Legal Capacity in Kenya: A Briefing Paper’ available at <https://www.knchr.org/Portals/0/GroupRightsReports/Briefing%20Paper%20on%20Legal%20Capacity-Disability%20Rightspdf> page 58 [↑](#footnote-ref-3)
4. Ibid [↑](#footnote-ref-4)
5. Public Procurement Regulatory Authority ‘Annual Report 2017-2018’ (Nairobi, 2018) available at

[http://ppra.go.ke/annual-reports/#](http://ppra.go.ke/annual-reports/) page 47 [↑](#footnote-ref-5)