

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS**

**GENERAL COMMENTS ON THE DRAFT GUIDELINES ON DEINSTITUTIONALIZATION OF PERSONS WITH DISABILITIES, INCLUDING IN EMERGENCIES**

**PRESENTED TO**

**THE**

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

## 30TH JUNE 2022

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1. **INTRODUCTION**
   1. The Kenya National Commission on Human Rights (“KNCHR” or “National Commission”) is an independent National Human Rights Institution established under Article 59 of the Constitution with a broad mandate to promote a culture of respect for human rights in the Republic of Kenya. The operations of the National Human Rights Commission are guided by the United Nations Paris Principles on the establishment and functioning of Independent National Human Rights Institutions commonly referred to as the 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.
   2. The Commission submits these comments pursuant to its constitutional mandate and special mandate to monitor implementation of the UN Convention on the Rights of Persons with Disabilities (Article 33(2) of the Convention.
2. **GENERAL COMMENTS ON THE DRAFT GUIDELINES ON DEINSTITUTIONALIZATION OF PERSONS WITH DISABILITIES, INCLUDING IN EMERGENCIES**

**Purpose and Process of these Guidelines**

1. The Kenya National Commission on Human Rights (KNCHR), or the National Commission, **welcomes** the development of these comprehensive draft guidelines on deinstitutionalization of persons with disabilities, including in emergencies, by the Committee on the Rights of Persons with Disabilities. These guidelines are firmly in line with Article 19 of the Convention on the Rights of Persons with Disabilities (CRPD) as read with General Comment No. 5 on the right of persons with disabilities to live independently and be included in the society.

1. The National Commission **remains** **concerned** that despite institutionalization being discriminatory and contrary to Articles 12, 14, 15, 16, 17, 19, and 25 of the Convention on the Rights of Persons with Disabilities (CRPD), many State Parties, including Kenya continue to place persons with disabilities in institutions, and even establishing new institutions, thereby denying persons with disabilities a chance to live independently and be meaningfully included in the society.
2. Clarity and specificity of the Guidelines: The National Commission is concerned that the Guidelines are not very clear on the practical steps the States are meant to take. There is generous normative content with some provisions restating already existing General Comments and provisions of CRPD. We urge the Committee to consider annexing a simplified roadmap on practical steps that States can take in effecting deinstitutionalisation including the methodologies and any recorded best practices.

**Duty to end institutionalization**

1. The National Commission lauds the Committee for placing upon the State the responsibility to end all forms of institutionalization and further **recommends** that the Guidelines mandates the States to involve, consult with and sensitise the healthcare workers who are valuable assets in the process of deinstitutionalization. They often offer valuable perspectives on discharge and care planning for people with disabilities, and their participation in the process helps to alleviate any fears they may have about losing their jobs, professional position, or regular work routines.

***Community-based support***

1. The Commission **recommends that** State parties develop policies or legislations that safeguard persons with disabilities right to support in exercising their legal capacity which includes community-based support. The state parties’ policies should include the services that are compliant with the CRPD, its elements and the necessary legal safeguards.

***Allocation of funding and resources***

1. Paragraphs 27 and 28: The Commission recommends the phrasing of the sentence that categorically requires States Parties to stop using public funds for renovating institutions. The Guidelines as phrased appear not to anticipate a transition process during the deinstitutionalisation to community-based living arrangements and in provision of adequate support services. The reality is that transition to fully independent living solutions and community-based services will highly likely be a phased-out plan rather than a one-off incident. We therefore invite the Committee to consider deletion of the prohibition of renovation of existing institutions altogether (which could further violate the rights of those awaiting to transit). In the alternative, consider using words such as ‘discourage’ rather than an absolute ban which could aggravate harm. The Guidelines should make provisions to ensure that the rights of persons with disabilities are respected in the transition period including a clear, effective complaint handling process.
2. The Guidelines should also take into account the role of subnational governments towards this cause (dependent on the country context). As such, budgets by the local governments and other lower levels of government should be monitored to ensure compliance with the Guidelines.

**Deinstitutionalization grounded on a person-centred and differentiated approach**

1. With regard to supporting the families of persons with disabilities, the National Commission **appreciates** national safety net programs such as the Cash Transfer for Persons with Severe Disabilities (PWSD-CT) as in the case of Kenya. However, the Commission **regrets** that registration on the program and similar programs as a beneficiary can be long, tedious and prone to abuse. Also, it can take beneficiaries long to receive the funds, thereby exacerbating an already dire situation. The National Commission **urges** provisions for State Parties to ensure that their safety net programs, are more responsive to the needs of persons with disabilities.
2. The National Commission **recognizes** the importance of intersectionality in ending discrimination against persons with disabilities. This includes looking beyond the disability and considering other traits such as race, age, sex, gender identity, sexual orientation, gender expression, intersex variation, language, religion, ethnic, indigenous or social origin, migrant or refugee status, age, or impairment group, or other status.
3. The National Commission **agrees** with the Committee that women and girls with disabilities are at an even higher risk of exposure to multiple discrimination including stigmatization and gender-based violence. It therefore calls on Kenya, and other State parties, to **increase** efforts towards protection of this vulnerable group through full implementation of administrative, legal and policy steps.
4. The National Commission **supports** the proposal to ensure that children with disabilities grow up in a family setting, type notwithstanding. Therefore, it calls on State Parties, to expedite the release of children with disabilities in “approved schools” and other institutions.

**Enabling legal and policy frameworks**

## *Creating an enabling legal environment*

### ***Right to access to justice***

1. The Guidelines fall short of providing causal links to institutionalization including the contribution of the criminal justice in this.
2. Legal aid remains an important component of access to justice especially for the vulnerable. The practice in some States[[1]](#footnote-1) is such that legal aid is currently being provided only to capital offences. Without legal aid, a lot of persons with intellectual disabilities end up in the criminal justice System as no reasonable accommodations are provided to enable these persons navigate the system: No easy-to-read services, no modified proceedings, no procedural accommodations to support the persons and most legal aid providers lack basic disability rights training. Finally, the fact that legal aid is only provided to those with capital offences means that petty offenders including those with intellectual disabilities will end up institutionalized for a crime that is payable by bail/bond or fine but due to lack of legal aid and reasonable accommodations. As such, the Guidelines need to recognize the role that reasonable accommodations and legal aid can play in deinstitutionalization; as well as in recognising provision of supported decision making to all persons with disabilities in the criminal justice system.
3. Moreover, Criminal laws of some States still contain provisions that allow for mental assessments where a person before court is suspected to be of “unsound mind”.[[2]](#footnote-2) Accused persons are ordered into a psychiatric facility until deemed fit”. The presidential pleasure sentencing for minors and those with mental illness subjects them to forced medication and forced institutionalization for lengthy indeterminate periods which is cruel and degrading treatment.[[3]](#footnote-3) Given these realities, we therefore propose the review of the Draft Guidelines to include criminal justice laws as a conduit towards institutionalization. More specifically, the Guidelines should include a call that legal reform for all laws, including criminal justice laws to deinstitutionalize persons with disabilities from the criminal justice system.

### ***Right to equality and non-discrimination***

1. To give full effect to the realization of the right, the National Commission **recommends** the state to enact affirmative action programmes and policies that prevent the institutionalization of persons with disabilities on the basis of disability, separately or in combination with other grounds as this amounts to a prohibited form of discrimination.

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## Legal Framework and resources

### ***Legislation***

1. The National Commission **recommends** that States amend all legislations concerned with legal capacity, disability laws, family laws, health laws, civil laws, laws governing social care provision for children, adults, and older persons and social protection with the aim of bringing them in conformity with the Convention.
2. The National Commission **agrees** with the need for mapping of existing community-based services and **urges** on the need for states to allocate adequate funding for the purposes of planning to ensure availability, accessibility, affordability, acceptability, and adaptability of the said services.
3. The National Commission recognizes the need for a workforce to provide relevant services and **recommends** the need for States to look into the the feasibility of transformation of the existing workforce to service providers under the direction of persons with disabilities and provide necessary reports before embarking on the deinstitutionalization process.

**Inclusive community support services, systems and networks**

1. Noting that access to support services, assistive technology and income support for persons with disabilities is usually tied to their registration with a national body, and in view of the fact that registration processes are often complicated, tedious and lengthy, the National Commission **recommends** that the Committee includes an obligation for State Parties to facilitate or enable easier registration of persons with disabilities, including homeless persons with disabilities and migrants with disabilities.

**Access to mainstream services on an equal basis with others**

1. The National Commission **agrees** that addressing the root causes of institutionalization, i.e. inaccessible mainstream services is key to ensuring the end of institutionalization. In line with its mandate, the National Commission **reiterates** that the realization of human rights for all, without discrimination is crucial to achieving successful deinstitutionalization.
2. The National Commission also supports the call for families, friends, and other trusted persons to be involved in the development of individualized deinstitutionalization plans in accordance with the will and preferences of the person concerned. The National Commission **recommends** an addition under paragraph 92 for **children with disabilities** to be involved in a **meaningful way** in the development of individualised deinstitutionalization plans, in line with Article 7 (3) of the CRPD and the principle of the best interests of the child. This is in light of the fact that the opinions of children with disabilities about where and how they want to live are often not well considered.[[4]](#footnote-4)
3. The National Commission **supports** the obligation laid down for State Parties to ensure comprehensive health care for persons leaving institutions on an equal basis with others. The National Commission **proposes** that the Guidelines specifically emphasise on mental health care, noting its direct relation to institutionalization. The Committee should obligate State Parties to **adequately fund mental health care**, noting that this sector is grossly underfunded in most States.

**Disaggregated data**

1. The National Commission welcomes the provisions of the Guidelines relating to collection of disaggregated data of persons with disabilities in all kinds of institutions***.*** The National Commission **calls on** the Committee to amend paragraph 126 of the Guidelines to expressly include National Human Rights Institutions among the entities that should be allowed to access collected data on deinstitutionalization.

**Monitoring deinstitutionalization processes**

1. The National Commission recognizes the critical role played by national implementing and monitoring mechanisms under Article 33 of the Convention. We **recommend that** paragraph 132 of the Guidelines includes a provision for State Parties to implement recommendations of monitoring exercises from the designated focal points. In order to effectively protect and promote the rights of persons with disabilities and monitor deinstitutionalization during emergencies, the National Commission **urges** the Committee to recommend that under paragraph 136 of the Guidelines, State Parties should recognize and classify National Human Rights Institutions and their workers as essential service providers. This is from the backdrop that during Covid-19 period, States classified a section of workers and institutions as providing essential services thus allowing them to operate round the clock and were not affected by restriction of movement and curfews.

**International cooperation**

1. The National Commission **recognizes** the importance of international cooperation in achieving deinstitutionalization of persons with disabilities. Therefore, it **urges** provision for State Parties to the CRPD, to regularly engage the Committee in monitoring the deinstitutionalization processes, including inviting the Committee and special mandates for visits to witness and report on the progress made.

…………. END ………

1. In Kenya for example, despite the fact that under the National Legal Aid Act and the Persons with Disabilities Act, 2003, persons with disabilities in conflict with the law are entitled to legal aid in all matters; legal aid is provided to capital offenders. [↑](#footnote-ref-1)
2. For instance, Sections 162-164 of the Criminal Procedure Code (Chapter 75) Laws of Kenya. [↑](#footnote-ref-2)
3. See for instance sections 25 of the Penal Code (Chapter 63) Laws of Kenya and section 166 of the Criminal Procedure Code (Chapter 75) Laws of Kenya. [↑](#footnote-ref-3)
4. United Nations Children’s Fund, “Deinstitutionalization for Children with Disabilities: Technical Guidance for UNICEF’s engagement in national reform efforts,” Hellen Jones (2019), available at <https://www.unicef.org/eca/media/13271/file> page 25 [↑](#footnote-ref-4)