

REGIONAL DEVELOPMENTS

LEVERAGING THE INTERNATIONAL HUMAN RIGHTS SYSTEM TO ADVANCE LOCAL CHANGE FOR SOUTH AFRICAN WOMEN WITH DISABILITIES

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1 Introduction

Forty-nine African countries have to date ratified the Convention on the Rights of Persons with Disabilities (CRPD).¹ While the high rate of ratification is something to be celebrated, holding each state to account for their obligations under the treaty requires engagement and diligence on the part of civil society. The United Nations (UN) treaty monitoring body system is an essential mechanism to hold states to account for their duties under the treaties each state has ratified.

Every state that has ratified a human rights treaty periodically undergoes a 'review' by the treaty-monitoring body to assess whether it is complying with its obligations under the treaty, which results in recommendations² (called 'concluding observations') on what the state should do to better implement the treaty. Civil society has an important role to play in this process: every UN treaty body provides space for civil

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1 Convention on the Rights of Persons with Disabilities GA Res 61/106 A/RES/61/106 (13 December 2006) (CRPD); Office of the High Commissioner for Human Rights (OHCHR) 'UN Treaty body database' https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=167&Lang=EN (accessed 15 November 2019).

2 See art 36(1) CRPD.

society to submit written information – often colloquially referred to as ‘shadow reports’ – to supplement the information shared by the government.³ Providing this supplemental information is crucial to fill in any gaps or to correct misinformation in the state’s own report, as treaty-body experts seldom have the capacity to do any independent research on an issue.

Engagement in the shadow-reporting process is one of the most important tools for civil society to use to push for the implementation of international human rights law in a way that is responsive to the specific human rights concerns of a given community, such as women with disabilities. Women with disabilities make up one in five women globally.⁴ Across the world women with diverse disabilities face increased rates of violence,⁵ routine violations of their sexual and reproductive health and rights,⁶ and enduring poverty.⁷ Yet, the majority of human rights treaties do not include articles addressing disability or gender and most state reports to treaty bodies overlook women with disabilities when discussing the country’s human rights situation. Thus, utilising the shadow-reporting system to inform the treaty bodies about the lived experiences of women

- 3 The Committee on the Rights of Persons with Disabilities (CRPD Committee) makes provision for the participation of civil society organisations in its consideration of state reports: see generally CRPD Committee ‘Guidelines on the participation of disabled persons’ organisations and civil society organisations in the work of the Committee’ CRPD/C/11/2 (14 May 2014) Annex II (Guidelines Civil Society).
- 4 World Health Organisation and World Bank *World report on disability* (2011) 28.
- 5 Women Enabled International ‘Women Enabled International Facts – The right of women and girls with disabilities to be free from gender-based violence’ (undated) <https://www.womenenabled.org/pdfs/Women%20Enabled%20International%20Fact%20-%20The%20Right%20of%20Women%20and%20Girls%20with%20Disabilities%20to%20be%20Free%20from%20Gender-Based%20Violence%20-%20ENGLISH%20-%20FINAL.pdf?pdf=GBVEnglish> (accessed 20 November 2019). See eg D Šimonović (Special Rapporteur on violence against women, its causes and consequences) ‘Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to South Africa’ UN Doc A/HRC/32/42/Add.2 (14 June 2016) paras 9-10; Management Sciences for Health & UNFPA ‘We Decide – Young persons with disabilities: Equal rights and a life free of violence’ (May 2016); T Meer & H Combrinck ‘Invisible intersections: Understanding the complex stigmatisation of women with intellectual disabilities in their vulnerability to gender-based violence’ (2015) 29 *Agenda* 29; E Naidu et al ‘On the margins: Violence against women with disabilities’ Centre for the Study of Violence and Reconciliation 35 (2005) http://www.iiv.nl/epublications/2005/On_the_Margins.Pdf (accessed 20 November 2019).
- 6 Women Enabled International ‘Women Enabled International Facts – Sexual and reproductive health and rights of women and girls with disabilities’ (undated) <https://www.womenenabled.org/pdfs/Women%20Enabled%20International%20Facts%20-%20Sexual%20and%20Reproductive%20Health%20and%20Rights%20of%20Women%20and%20Girls%20with%20Disabilities%20-%20ENGLISH%20-%20FINAL.pdf?pdf=SRHREasyRead> (accessed 20 November 2019). See eg P Chappell ‘(Re)thinking sexual access for adolescents with disabilities in South Africa: Balancing rights and protection’ (2016) 4 *African Disability Rights Yearbook* 124; DisAbled Women’s Network of Canada / Réseau d’actions des femmes handicapées du Canada (DAWN Canada) ‘More than a footnote: A research report on women and girls with disabilities in Canada’ February 2019; W Holness ‘Informed consent for sterilisation of women and girls with disabilities in the light of the Convention on the Rights of Persons with Disabilities’ (2013) 27 *Agenda* at 35.
- 7 CRPD Committee General Comment 3: Women and girls with disabilities (2016) UN Doc CRPD/C/GC/3 dated 2 September 2016 para 59.

with disabilities is an essential mechanism to ensure concluding observations issued by the treaty bodies address issues of concern for women with disabilities. Doing so is a vitally important means of building both legal and cultural norms at the international and domestic levels that include women with disabilities and their issues.

This commentary will provide insight into effective civil society engagement in this process using the experience of a coalition of civil society organisations in the 2018 country review of South Africa by the Committee on the Rights of Persons with Disabilities (CRPD Committee), the expert body charged with monitoring compliance with this treaty. Using Women Enabled International's experience working with a coalition of South African disability and human rights organisations to illuminate the process, this commentary will further examine the strategic considerations during the shadow reporting process and address the importance of drawing on successful results to support domestic advocacy.⁸

2 South African shadow reports to the CRPD Committee

2.1 Background

South Africa ratified the CRPD in 2007.⁹ Accordingly in 2018 South Africa came up for its first periodic review before the CRPD Committee,¹⁰ to assess how well it was complying with its obligations under the CRPD.¹¹ Seeking to leverage this opportunity to address the pervasive

8 Further, more detailed information on the treaty body state reporting process and other UN human rights mechanisms can be found in the following publication: Women Enabled International 'accountABILITY toolkit: A guide to using UN human rights mechanisms to advance the rights of women and girls with disabilities' (2017) <https://www.womenenabled.org/atk.html> (accessed 15 November 2019).

9 Office of the High Commissioner for Human Rights 'Status of ratifications: South Africa' <http://indicators.ohchr.org/> (accessed 15 November 2019).

10 As parties to the CRPD, states are required under article 35 to submit a comprehensive report to the CRPD Committee on measures taken by the state to fulfill its obligations under the Convention. States must submit their first report within two years of ratification and at least every four years thereafter. Art 35(1)-(2) CRPD. Unfortunately, there is currently a backlog in the Committee's review of state reports which is why South Africa was only scheduled for review in 2018. This delay is due to a number of factors, including states submitting late reports, budget constraints of the Committee, and the volume of material to review.

11 The CRPD Committee, like other treaty bodies, lists their calendar of upcoming sessions on their website, along with guidelines for civil society to submit written information. If an organisation wishes to submit a shadow report, it should periodically monitor the treaty-body websites to determine when a country is coming up for review and should read the informative notes for civil society for essential information including deadlines, word-count requirements and templates for submissions <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> (accessed 15 November 2019).

intersectional discrimination facing women and girls with disabilities¹² in South Africa, local civil society organisations Cape Mental Health, the Centre for Human Rights at the University of Pretoria, Epilepsy South Africa, Khuluma Family Counselling, Lawyers for Human Rights, Port Elizabeth Mental Health, SA Federation for Mental Health, the Teddy Bear Clinic for Abused Children and Professor Helene Combrinck from North-West University,¹³ with support from international human rights organisation Women Enabled International, decided to engage in the shadow-reporting process. Through this engagement we aimed to bring to the CRPD Committee's attention the experiences of South African women with disabilities and South Africa's failure to fulfil its duties towards them under the CRPD.

Similar to women with disabilities around the world, South African women with disabilities are discriminated against and subjected to harmful stereotypes based on both their gender and disability. South African women with disabilities, particularly black women, women in rural areas, and women with intellectual or psychosocial disabilities are regularly discriminated against and denied access to justice or essential support, services, and accommodations necessary to uphold their rights and live independent lives free from discrimination and violence.¹⁴ All women in South Africa face an extremely high risk of gender-based violence¹⁵ and for women with disabilities the risk of violence is even greater, particularly the risk of sexual violence.¹⁶ South African women with disabilities also face unique forms of discrimination in healthcare settings, especially when accessing sexual and reproductive health information and services,

12 This commentary and the CRPD Committee submissions address the situation of South African women with disabilities throughout their life cycle. Any reference to 'women with disabilities' should be interpreted to include girls with disabilities unless otherwise indicated.

13 Helene Combrinck's contributions to the submissions were made in her personal capacity and as such do not represent the views of the Faculty of Law or the North-West University.

14 See C Capri et al 'Intellectual disability rights and inclusive citizenship in South Africa: What can a scoping review tell us?' (2018) 7 *African Journal of Disability* 1 5 <https://doi.org/10.4102/ajod.v7i0.396> (accessed 15 November 2019); T Meer & H Combrinck 'Help, harm or hinder? Nongovernmental service providers' perspectives on families and gender-based violence against women with intellectual disabilities in South Africa' (2017) 32 *Disability & Society* 37; T Meer & H Combrinck 'Invisible intersections: Understanding the complex stigmatisation of women with intellectual disabilities in their vulnerability to gender-based violence' (2015) 29 *Agenda* at 14; Naidu et al (n 5 above) 35.

15 See eg Šimonović (n 5 above) paras 9-10.

16 Reasons predicted for this heightened risk for women with disabilities include: their social isolation and dependence on others, a lack of knowledge about their rights and the obstacles faced in accessing social support services and justice mechanisms. See Šimonović (n 5 above) para 30; Meer & Combrinck (n 14 above) at 38. See also General Comment 3 (n 7 above) para 33.

frequently finding that these services are unavailable, unaffordable, inaccessible, or discriminatory.¹⁷

Our coalition submitted two shadow reports to the CRPD Committee throughout the review process – one submission to the Committee’s pre-sessional working group¹⁸ to inform the list of issues¹⁹ and one in advance of the session in which the state report was reviewed.²⁰ Given the severe challenges faced by South African women with disabilities, and based on the expertise of coalition members in these areas, the coalition agreed to focus the shadow reports on the ways in which these issues play out in violation of South Africa’s obligations to respect, protect, and fulfil the rights protected under the CRPD. Both reports contained three categories of information: factual information pertaining to key issues facing women with disabilities (for example global and local statistics, domestic laws and policies, case studies); analysis of relevant international human rights legal standards; and suggested questions and recommendations.

Each report addressed the following key issues: first, how South Africa fails to fully recognise and take action to address the multiple forms of discrimination that women with disabilities experience in South Africa in violation of its obligations under article 6 of the CRPD (women with disabilities).²¹ Second, the ways in which South African women with disabilities cannot access justice on an equal basis with others due to a range of barriers, both physical and legislative, in violation of article 13 of the CRPD (access to justice).²² Third, South Africa’s failure to address the exceedingly high levels of gender-based violence experienced by women with disabilities through exercising due diligence to prevent, protect against, investigate, prosecute, and punish gender-based violence, while ensuring that women and girls have access to appropriate support services when they experience such violence, in violation of articles 15 (freedom from torture or cruel, inhuman or degrading treatment or punishment) and

17 See R Johns & C Adnams ‘My right to know: Developing sexuality education resources for learners with intellectual disabilities in the Western Cape, South Africa’ (2016) 4 *African Disability Rights Yearbook* 114; Chappell (n 6 above) 134-138; Holness (n 6 above) 36; VN Mgwili & B Watermeyer ‘Physically disabled women and discrimination in reproductive health care: Psychoanalytic reflections’ in B Watermeyer et al (eds) *Disability and social change: A South African agenda* (2006) 262-266.

18 Rule 5 of the Committee’s Rules of Procedure (2016) file:///Users/alr/Downloads/G1622964.pdf (accessed 15 November 2019), which sets out the role of the pre-sessional working group.

19 The first report to inform the List of Issues can be found on the OHCHR UN Treaty body database website at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCO%2fZAF%2f30268&Lang=en (accessed 15 November 2019).

20 The second report to inform the review can also be found at the OHCHR website at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fZAF%2f31996&Lang=en (accessed 15 November 2019).

21 Art 6 CRPD.

22 Art 13 CRPD.

16 (freedom from exploitation, violence and abuse) of the CRPD.²³ Fourth, South Africa's failure to fulfil its duties under both articles 23 (respect for home and the family) and 25 (health),²⁴ as South African women with disabilities do not receive sufficient sexual and reproductive health and rights education and information; lack access to accessible health facilities; and face discrimination in the healthcare settings where they do have access.²⁵ Lastly, the reports addressed the lack of data collection disaggregated by disability and gender in violation of South Africa's obligations under article 31 (statistics and data).²⁶

2.2 Selecting a coalition

A key strategic consideration in submitting written information to a treaty body will be whether an organisation wants to submit information alone or in coalition with other organisations, and will depend on a range of factors, including each coalition member's mandate and the issues to be raised. Coalition shadow reports can be effective in demonstrating that the content of the report is not just the position of one organisation, but that of several, lending greater authority to the information presented. In addition, because treaty-body experts are often inundated with a large amount of information during the session, coalition shadow reports have the benefit of reducing the number of reports the committee members receive, allowing them to focus more on the content of each report.

Moreover, coalition reports allow each non-governmental organisation (NGO) to contribute according to its specific expertise, strengthening the overall impact of the advocacy. For the South Africa CRPD Committee reports, our coalition was formed to reflect members of civil society across both the disability rights and mainstream human rights fields in South Africa. Each person brought expertise in different aspects of the lived experience of South African women with diverse disabilities and was able to contribute research or anecdotal evidence from their practices into the reports. Women Enabled International, as an international NGO, provided the expertise on the international human rights treaty body processes, international law, and issues facing women with disabilities generally. By working together, we were able to emphasise to the CRPD Committee the particularly acute situation of women with disabilities in South Africa.

23 Arts 15 & 16 CRPD.

24 Arts 23 & 25 CRPD.

25 See Johns & Adnams (n 17 above) 114-118; Chappell (n 6 above) 124; Holness (n 6 above) 36; Mgwili & Watermeyer (n 16 above) 262-266.

26 Art 31 CRPD.

2.3 Engagement in the list of issues process: Setting the agenda

There are typically two stages during a treaty body's review of a state when civil society can submit a shadow report to inform the process. Treaty bodies typically send states a List of Issues, either before or after a state has submitted its report to the treaty body.²⁷ The List of Issues focuses the agenda for the state review, indicating the topics that the treaty body is most interested to focus on during the in-person dialogue. Civil society generally has the opportunity to submit information to inform the topics on the List of Issues (stage 1). States will then reply to the List of Issues, and civil society has another opportunity to provide information following the state's response (stage 2).

Choosing to submit a report at the List of Issues stage is often crucial to ensuring that the treaty body addresses one's priority issues, as the List of Issues determines in large part the focus of the dialogue²⁸ during the state's review. By submitting a shadow report to inform the development of the List of Issues, civil society can be more successful at influencing the treaty body to address their issues in the dialogue between the treaty body and the state and in the concluding observations. Failure to have one's issues included on the List of Issues does not preclude one from including those issues in subsequent shadow reports, but it can make it more of a challenge to obtain concluding observations on that issue.

To ensure that the CRPD Committee considered the unique issues facing South African women with disabilities as they related not only to article 6 (women with disabilities), but other CRPD articles as well, our coalition submitted a shadow report to the CRPD Committee pre-sessional working group for South Africa that was developing the List of Issues. Our report addressed the key issues affecting South African women with disabilities and was primarily based on published statistics and research. Successful reports are tailored to include information and questions based on one's ultimate advocacy goals. At this stage of the review process, the objective is to encourage the treaty body to interrogate what the state is doing to address the issues raised in the submission; accordingly, our coalition's submission included suggested questions for the List of Issues. For instance, 'What steps is South Africa taking to ensure the expansion of current gender-based violence services to include women with disabilities (for example, Thuthuzela Care Centres)?'

This strategy proved effective, as the CRPD Committee's List of Issues for South Africa contained 15 out of the 37 questions pertaining to women with disabilities or a related issue highlighted in our coalition's

27 Rule 48bis of the Committee's Rules of Procedure (2016) file:///Users/alr/Downloads/G1622964.pdf (accessed 15 November 2019).

28 Working Methods of Committee (2011) Part I para A file:///Users/alr/Downloads/G1145155.pdf (accessed 15 November 2019).

report.²⁹ The majority of our coalition's questions were reflected in one way or another in the List of Issues, including some specific questions about services and trainings relating to gender-based violence. For example:

Please provide information about: ... (b) Access by women and girls with disabilities to the Thuthuzela Care Centres, which provide support services for survivors of sexual offences and domestic violence, and to programmes providing psychosocial redress and legal aid for women with disabilities who are exposed to gender-based violence.³⁰

2.4 Engagement in the state party review: Session shadow report

After the state replies to the List of Issues, and before the session at which the treaty body will have a dialogue with the state party, there is the second opportunity for civil society to submit additional information or submit an initial report. Strategically if an NGO submitted information for the List of Issues, this stage presents an opportunity for civil society to provide new, updated, or expanded information pertaining to the List of Issues and responding to the state's report. It is advisable to avoid repetition of information contained in the first report unless necessary to emphasise an important point.

Accordingly, our coalition used this second opportunity to expand the coalition to include other South African disability-service providers who could provide further information about the lived experiences of South African women with disabilities. As a result, the second report contained anecdotal reports and information from mental health service providers in several provinces across South Africa and additional research to respond to the specific List of Issues released by the CRPD Committee as well as South Africa's state report. Moreover, where the objective of the first report was to inform the List of Issues, this second report sought to inform the specific recommendations the CRPD Committee would make in its concluding observations. Accordingly, the second report contained suggested questions for CRPD Committee members to pose to South Africa during their in-person dialogue and offered specific recommendations for concluding observations. Given the demands on committee members' time, providing advance questions and suggested language can be useful for committee members and an effective strategy for ensuring one's issues are addressed.

29 See CRPD Committee List of issues in relation to the initial report of South Africa CRPD/C/ZAF/Q/1 (25 April 2018).

30 CRPD Committee (n 29) para 17(b).

For example, our coalition's second report encouraged the CRPD Committee to ask South Africa what steps it was taking to respect the legal capacity of women with disabilities. We also requested that the Committee specifically recommend the amendment of a South African law that allowed third-parties to consent to sterilisation and abortion on behalf of a woman with a disability. This again proved to be a successful technique as this recommendation was reflected in the CRPD Committee's concluding observations. Specifically, the Committee called on South Africa to:

Revise the Sterilization Act (1998) and Choice on Termination of Pregnancy Act (1996), and remove provisions allowing for sterilization and termination of pregnancy under a substitute decision-making regime, and bring them into line with general comment No 1.³¹

2.5 In-person session advocacy

Following the shadow-reporting process, the treaty body will engage in an interactive, in-person dialogue with the state party's delegation informed by the state report and any civil society reports received. There is an opportunity during this in-person session in Geneva, Switzerland for civil society to engage further in both formal and informal ways. Many treaty bodies have formalised opportunities for civil society to brief them either before or during the session through country briefings open to civil society.³² It is advisable (and often required) that organisations contact the secretariat of the treaty body prior to the session to indicate a desire to participate in a country briefing.

In addition to the country briefings, civil society present in Geneva can engage in informal conversations with individual treaty-body experts during breaks in the session. These sessions may also present advocates with the opportunity to communicate directly with the state delegation, which can be useful for subsequent advocacy to ensure implementation of the concluding observations. It is especially helpful to seek out the expert(s) who have been assigned as rapporteur³³ for the country in question and/or the expert(s) who are asking questions around the relevant treaty provisions. Other advocacy strategies to consider are requesting the opportunity to hold a private thematic briefing with the treaty body during its session or holding a 'side event' during the session to raise key issues informally.

31 Concluding Observations on the initial report of South Africa, CRPD Committee (23 October 2018) UN Doc CRPD/C/ZAF/CO/1 (2018) para 33(a).

32 Working Methods of Committee (2011) Part II para E file:///Users/alr/Downloads/G1145155.pdf (accessed 15 November 2019).

33 Working Methods of Committee (2011) Part I para E file:///Users/alr/Downloads/G1145155.pdf (accessed 15 November 2019).

Following submission of our coalition's shadow reports, Women Enabled International sent an email to key CRPD Committee members notifying them of the reports and highlighting important issues. Furthermore, while no coalition members were able to be present for the treaty-body session when South Africa was being reviewed, Women Enabled International was present during another country review during the same session and had the opportunity to meet informally with the rapporteur for South Africa and advocate for the five key issues highlighted in our coalition's reports.

3 Concluding observations

The CRPD Committee published its concluding observations on the initial report of South Africa on 23 October 2018.³⁴ The principal areas of concern and recommendations to South Africa included 33 references to women with disabilities or gender.

Every issue raised in our coalition's reports was reflected in some manner in the concluding observations. Each of the five key issues that our coalition highlighted in the reports – multiple and intersecting discrimination faced by South African women with disabilities; access to justice; gender-based violence; sexual and reproductive health and rights, including forced sterilisation and forced abortion; and the lack of disaggregated data – was reflected in the final concluding observations. This success underscores that strategic engagement in the state-reporting process can play an important role in translating the often opaque language of international human rights treaties into concrete suggestions for strengthening human rights at the domestic level.

4 Conclusion

The shadow-reporting process is a critical component of the international human rights system and necessary to ensure that the rights enumerated in international human rights treaties like the CRPD lead to long-term change for individuals living in the countries that have ratified treaties.

It is incumbent on anyone who engages in the shadow reporting process to commit to advocacy aimed at ensuring implementation of the concluding observations at the country level. Implementation will vary on the country context and is most effective when considered as part of initial shadow-reporting strategy. When contemplating implementation strategies effective starting points can include developing or growing a coalition to coordinate implementation advocacy based on the concluding

34 CRPD Committee (n 30 above).

observations; engaging with local and national government, especially those officials who were engaged with the review process; and raising awareness through media strategies. Regardless of the strategy chosen, engagement of people with disabilities is essential for both long-term change and realisation of the promise made by the CRPD.

Particularly for marginalised groups, such as women with disabilities, using the international human rights system to raise awareness about priority issues and increase pressure on one's government to intensify its capacity and fulfil its obligations towards marginalised groups can be an especially effective technique. Following our successful engagement with the CRPD Committee's review of South Africa, our South African coalition members are now taking stock of how best to promote the concluding observations to effect long-term change for women with disabilities in South Africa.