

UNITED DISABLED PERSONS OF KENYA

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Our Ref: M/NA/02/19

2nd August, 2019

Hon. Mohamed Yusuf Haji,
The Chairman,
Building Bridges to Unity Taskforce.

Dear Sir,

RE: RESPONSE TO THE PUBLIC INVITATION BY THE BUILDING BRIDGES TO UNITY ADVISORY TASKFORCE BY UDPK AND CDRA

The United Disabled Persons of Kenya (UDPK) is an umbrella organization of national and grassroots associations of persons with disabilities in Kenya. Currently, UDPK has eighty – six member organizations. Caucus on Disability Rights Advocacy (CDRA) is a coalition of organizations of and for persons with disabilities. CDRA seeks to promote the interests of persons with disabilities under the constitution of Kenya and the law.

In pursuit of their mandates, UDPK and CDRA have since 2013 engaged in a number of studies and research to ensure that interests of persons with disabilities are promoted and protected in all laws in Kenya.

The purpose of the Memorandum and proposals contained in it are intended to put the views of persons with disabilities in Kenya on record so as to elicit appropriate implementation action on the same for their sustainable benefit.

The Memorandum has been submitted in accordance with Articles 1, 10, 54 and other relevant provisions of the Constitution of Kenya on Public Participation and the Persons with Disabilities Act, No. 14 of 2003. More specifically, it provides CDRA's and UDPK's proposals on the Building Bridges Initiative (BBI).

We have made concrete proposals by way of a formal memo (copy herein attached) to the Unity Advisory Taskforce hereinafter "BBI" in exercise of its mandate set out in Kenya Gazette, Vol. CXX—No. 64 of 31st May, 2018; Notice No. 5154 dated 24th May, 2018. Paragraph 2 (i) of the Gazette Notice provides that "In the performance of its functions, the Taskforce shall solicit, receive and consider written memoranda or information from the public ..."

It is our humble prayer that you will use your good office to guide the unity task force in prioritizing our memo under reference for the benefit of persons with disabilities in Kenya. We also request for a face to face meeting with your committee to expound further on the proposals highlighted in the Memo.

Yours Sincerely,

Anderson Gitonga, CEO – UDPK
FOR AND ON BEHALF ON UNITED DISABLED PERSONS OF KENYA (UDPK) AND CAUCUS ON DISABILITY RIGHTS ADVOCACY (CDRA)

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UNITED DISABLED PERSONS OF KENYA(UDPK)

&

CAUCUS ON DISABILITY RIGHTS ADVOCACY (CDRA)

MEMORANDUM SUBMITTED TO THE BUILDING BRIDGES TO UNITY ADVISORY TASKFORCE

July 2019

1. Introduction

Purpose

1. The purpose of the Memorandum and proposals contained herein are intended to put the views of Persons with Disabilities in Kenya on record so as to elicit appropriate implementation action on the same for their sustainable benefit. The Memorandum has been submitted in response to the public invitation by the **Building Bridges to Unity Advisory Taskforce** hereinafter “**BBI**” in exercise of its mandate set out in **Kenya Gazette, Vol. CXX— No. 64 of 31st May, 2018; Notice No. 5154 dated 24th May, 2018.** Paragraph 2 (i) of the **Gazette Notice** provides that *“In the performance of its functions, the Taskforce shall solicit, receive and consider written memoranda or information from the public...”*

Basis

2. The Memorandum has been submitted in accordance with Articles 1, 10, 54 and other relevant provisions of the Constitution of Kenya on Public Participation and the Persons with Disabilities Act, No. 14 of 2003.

Organizations

3. This memorandum has been jointly prepared by the United Disabled Persons of Kenya (UDPK) and the Caucus on Disability Rights Advocacy (CDRA). The UDPK is an umbrella organization of National and grassroots associations of persons with disabilities in Kenya. CDRA is a coalition of organisations of and for persons with disabilities. Its overarching goal is to ensure implementation of the Constitution of Kenya (2010) generally and provisions relating and relevant to persons with disabilities in particular. In addition, CDRA seeks to promote the interests and welfare of persons with disabilities under the Constitution and the law through rights advocacy.

Scope

4. Disability cuts across all the nine BBI issues of focus identified in the **‘Building Bridges to a New Kenyan Nation Joint Statement of Intent’** by President Uhuru Kenyatta and former Prime Minister Raila Odinga dated 9th March 2018; namely 1) Ethnic Antagonism and Competition; 2) Lack of National Ethos; 3) Inclusivity; 4) Devolution; 5) Divisive Elections; 6) Safety and Security; 7) Corruption; 8) Shared Prosperity and, 9) Responsibilities and Rights. Thus, on account of the cross-cutting nature of disability, the Memorandum focuses on priority critical issues of concern to persons with disabilities which fall in one or more of the nine areas.

2. General observations and recommendations

Guiding principles in the preparation of final report and recommendations of BBI

5. In spite of constitutional, policy, legislative and administrative measures put in place to ensure inclusion of persons with disabilities in Kenya, they continue to experience exclusion and disproportionate participation in all sectors. Accordingly, the final report and recommendations of the BBI should be guided by the following principles which should apply uniformly across the nine issues of the taskforce: -

- 5.1 *Respect for and upholding of the sovereignty of the people of Kenya* which transcends all the nine BBI issues.
- 5.2 *Equalization of opportunities* which relates to the issues of 'Inclusivity' and 'Shared Prosperity'
- 5.3 *Human rights approach to the disability agenda* which relates to the issues of 'Lack of National Ethos' and 'Inclusivity'
- 5.4 *Mainstreaming* which relates to 'Inclusivity'
- 5.5 *Accessibility* which relates to the issues of 'Inclusivity' and 'Responsibility and Rights. Accessibility is the design of products, devices, services, or environments for ease of access by persons with disabilities.
- 5.6 *Gender* which relates to all the nine issues.
- 5.7 *Respect for inherent dignity* which relates to all the nine issues.

Implementation of reports of previous commissions of inquiry, task forces and committees

6. The establishment of the '***Building Bridges to Unity Advisory Taskforce***' has been informed in part by the painful reality of Kenya's electoral system which, every electoral cycle, precipitates deadly violence which has led to loss of lives, limb, population displacement and destruction of property. It has been the case that all Kenyan elections where there has been a challenger facing an incumbent President have ended in violence. This is true of the 1992, 1997, 2007 and the 2017 elections. The 2007 electoral cycle witnessed the worst form of violence that almost drove the country to the precipice; had it not been for the timely intervention by the international community through the African Union's (AU) Kenya National Dialogue and Reconciliation (KNDR) process which led to the formation of the Grand Coalition Government under the National Accord Act, 2008. Indications are that although there will be no incumbent during the 2022 electoral cycle, the elections will be a high stakes contest in a polarized environment. Persons with disabilities suffer disproportionately in instances of violence which also result in conflict acquired disabilities. In order to address perennial electoral violence, the underlying factors and other historical injustices in a sustainable manner, a number of measures have been put in place, including commissions of inquiry, taskforces and committees. The final report and recommendations of the BBI should address implementation of the following reports: -

- 13.1 The Truth Justice and Reconciliation Commission (TJRC)
- 13.2 The Kriegler Commission on Electoral Reforms
- 13.3 The Ndung'u Land Commission.

3. Specific recommendations

Policy implementation

7. National Policy on Disability which has been undergoing review since 2015 should be improved, finalized and implemented. The improved policy should have additional measures to address emerging challenges impacting negatively on Persons with disabilities especially ethnic antagonism and competition and lack of national ethos; both which contribute to double marginalization and exclusion. The policy should also anchor sustainable attainment of commitments made at various regional and international platforms including the EAC Disability Policy and Global Disability Summit processes.

Enactment of a new and responsive Act on Persons with Disabilities

8. The Persons with Disabilities Act No. 14 of 2003 should be repealed in its entirety and replaced by new responsive one. Since enactment of the Act, a number of developments impacting positively on the rights and entitlements of Persons with disabilities have taken place. Key amongst these is the promulgation of the Constitution of Kenya 2010, which for the first time has explicit provisions entrenching the rights of Persons with disabilities under Article 54 and other related provisions including recognition of Kenya Sign Language (KSL). The other milestone is the ratification of the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) in 2008. The repeal of the Act should be done through wide consultations with stakeholders and be finalized within specified timelines. Repeal of the Act will address some of the challenges identified in the nine BBI issues including Inclusivity, Devolution; Safety and Security; Corruption; Shared Prosperity and Responsibilities and Rights.

Inclusion in the electoral process

9. The BBI has 'Divisive Elections' as the fifth issue of concern. There is acknowledgement that election in Kenya has become a threat to lives and the economy as demonstrated by needless deaths, use of rape as a weapon of war against women, destruction of property; slow investment and economic activities which in turn lead to loss of jobs and increase in the cost of living. It further notes that the election campaigns are not informed by competitive vibrant issues debates but are usually characterized by ethnic polarization and violence which in turn result in situations where personal safety and security cannot be guaranteed. This electoral environment as described is hostile and inhibits participation of Persons with disabilities in the electoral processes on the same footing as others. In view of these observations, we therefore propose that:

- 9.1 The 'Electoral College' model is adopted as a suitable mechanism for nomination of Special Interest Groups including persons with disabilities contemplated under Article 100 of the Constitution. The law to operationalize this model should require that Persons with disabilities have a say in determining who represents them.
- 9.2 The nomination/election of Persons with disabilities and other Special Interest Groups should be a separate primaries election from the main electoral process.
- 9.3 Proportional representation or the Mixed Member Proportional Representation is adopted as the electoral system and anchored in the Constitution and facilitative legislation enacted. This will reduce the tensions brought about by the First-Past-the Post system.
- 9.4 There should be a substantive Act to give effect to Article 100 of the Constitution with regard to representation of Persons with disabilities. This law would then occasion facilitative amendments to other relevant laws. The objects of such legislation should be to:
 - Provide the mechanics of ensuring attainment of set representation targets;
 - Ensure that the general political process is more inclusive and accommodative of persons with disabilities

- Specify clear statutory requirements and promotional and voluntary milestones leading to the full realisation of effective representation for persons with disabilities. Key milestones should include statutorily reserved list seats and measures to promote the election of candidates with disabilities through the first-past-the post electoral system in the absence of proportional representation or mixed member proportional representation
- Provide that at least four of the 12 list seats in the National Assembly established under Article 97 (1) (c) of the Constitution shall be drawn from candidates with disabilities.
- Provide that in the event a nominated person with disability is removed from office, she or he will be replaced by another person with disability.
- Make explicit the guarantee that of the 12 list seats, six shall be occupied by women and six by men. The law therefore must not only require party lists to be prepared using the zipper system but it must provide the IEBC with mechanisms for calibrating lists to ensure this parity of gender representation.
- Provide that legislation should be used to enhance the number of senators with disabilities. Towards this end, the 16 women members elected to the Senate through proportional representation in terms of Article 98 (2) (b) should include at least one woman with a disability. This situation could be achieved if statute provided that contesting political parties shall prioritise a nominee with disability highest or second highest on each of the party lists.
- In light of the 5% quota in the disability Act and the Constitution, to provide that the number of Members of County Assemblies with disabilities in a County Assembly will be calculated so as to ensure that each Assembly membership abides by the five per cent principle. Thus, a County Assembly will not be properly constituted if at least five per cent of its members are not legislators with disabilities.
- Clarify that in terms of the letter and spirit of Articles 97, 98 and 177 of the Constitution, Kenya's various legislatures are constituted through a mixed electoral system, and legislators elected either using the first-past-the-post electoral system or party lists have similar rights, entitlements and responsibilities. Thus, resources ear-marked to be managed or used by legislators should not differentiate between legislators on the mere basis of the manner of their election.
- Require that legislators derived from Article 100 Groups will be accountable to their base constituencies – the groups on whose behalf they were elected. In the case of legislators with disabilities, they will be responsible to electors with disabilities at the national or county levels as appropriate. Regulations will provide mechanisms enabling such legislators to consult with their constituencies.
- Establish mechanisms to ensure that legislators with disabilities in the various legislatures are drawn from diverse disabilities. Such mechanisms may include the following:
 - The sequencing of names on party lists could alternate between eligible groups and in respect of disability such names could also alternate between different types of disabilities; so that if the first candidate with disability on the list is deaf then the next candidate with disability will have a different disability.
 - Requiring that each candidate at the point of inclusion on a party list must be specifically identified as belonging to one or other of the listed groups; and such

- candidate or sponsoring party must not at a later time change the identity of the group associated with the candidate.
- Criminal sanctions will apply against a person who falsely declares herself to have a disability for purposes of inclusion as a candidate in terms of this enabling legislation.
 - Political parties will while nominating candidates to elective offices encourage and facilitate candidates with diverse disabilities to compete with their non-disabled peers. Political parties will be incentivised to do this, for example, through extra monetary apportionment from the Political Parties Fund for each elected legislator with disability.
 - Require reasonable accommodations to be provided for legislators with disabilities to facilitate their representational and legislative effectiveness. Such measures may include communication in accessible formats, structural modifications or adjustments, equipment and aides.
 - The legislation as well as other electoral laws should clarify that Article 90 (2) (a) of the Constitution gives IEBC the proactive role of overseeing party primaries for list candidates and ensuring that the mechanisms which political parties use to identify list candidates are fair and transparent and that they lead to the desired outcome of slates of candidates with disabilities. There should also be statutory requirement for political party primaries to be conducted in an enabling environment free from all forms of violence. Violations of this environment should attract stiff penalties.
 - Article 100 legislation should therefore provide that:
 - Voter registration will capture disability-specific details of those being registered. The Voters Roll will disaggregate data for each voter by recording whether such voter has a disability and the type of such disability.
 - The primary responsibility of determining that a person has a disability for purposes of voting will stay vested with IEBC. But IEBC will use the database of individuals registered as persons with disabilities by the National Council for Persons with Disabilities and other official databases for making this determination.
 - Include mechanisms for facilitating the registration of persons with disabilities who require intensive support, persons who are deaf, persons with psychosocial disabilities and those with intellectual and developmental disabilities.
 - Clarify that people with psychosocial disabilities shall not be refused registration. The law will respond to the fact that all persons with disabilities have legal capacity. In some instances, they may require support measures to enable them to vote as well as safeguards to protect others from abusing their right to vote. The law should provide for these support measures and safeguards.
 - Registration centres should be accessible to persons with disabilities.
 - Mobile registration centres will be deployed to register persons with disabilities who may not otherwise reach registration centres.
 - There will be consultations with and the participation of persons with disabilities when voter registration processes are being designed.
 - For appointive bodies such as the National Cabinet and County Executive Committees, the law will provide that at least one appointee will be a person with disability.
 - At least one member of a County Executive Committee should be a person with disability.

- These figures will also hold true for Principal Secretaries both for the National and County Governments.
- 9.5 The Political Parties Act, 2011 should be amended to provide for ‘Electoral College’ as a mechanism for nominating representatives of Persons with disabilities to party lists for special seats.
- 9.6 The provisions of Section 13 of the Elections Act (No. 24 of 2011), on resolving intra-party disputes following nominations should also be applicable to party list nominations.
- 9.7 Since many qualified candidates with disabilities hesitate to participate in active politics because it is more difficult for them to regain employment once they resign to participate in elections, we propose that:
- In Section 24 (2) (a) of the Elections Act, after the phrase ‘member of Parliament’, insert the phrase ‘provided that this disqualification does not apply to persons with disabilities’.
 - Insert the following new (4): ‘A State officer or other public officer with disability referred to in (2) (a) (as amended) shall take unpaid leave of absence from his or her office while seeking nomination as a member of Parliament and for the duration as appropriate of the campaigns and polls process.’

Safety and security of Persons with disabilities

10. We concur with the BBI that under the issue of ‘Safety and Security’ many Kenyans are affected by various safety and security issues including natural and man-made disasters and calamities like drought, famine, inter-communal conflicts and terrorist attacks. There is therefore need by leaders to take all necessary steps to ensure rejection of violence as a means of settling inter-communal conflict and advancing political, ethnic or religious cause. When disasters, whether natural or man-made strike, Persons with disabilities bear their greatest brunt; especially women and children with disabilities. Other safety concerns for women and girls with disabilities include Sexual Gender Based Violence in conflict situations. It is recommended that humanitarian assistance and response adopt affirmative action towards Persons with disabilities especially women and girls. This will require review of the existing policies on humanitarian assistance and disaster management.

Impact of corruption on Persons with disabilities

11. We share in BBI’s concern that corruption is rampant and constitutes an existential threat to Kenya and her peoples. In this regard it is undermining prosperity. That it is a bad example to the youth who are embracing it as a way of life and quick riches instead of forging their own honest earning and proud living. Corruption impacts disproportionately on Persons with disabilities. It diverts resources which would otherwise be used to improve the wellbeing of Persons with disabilities in the social, political and economic development spheres. We therefore recommended that legislation giving effect to Chapter Six of the Constitution be strengthened to bar culpable individuals from holding State or Public office as well as recovery of public monies and assets acquired through corruption.

Access to shared prosperity by Persons with disabilities

12. We concur with BBI that there is unequal prosperity in Kenya with many in parts of the country doing well compared to others. The lack of shared prosperity is demonstrated by the fact that too many Kenyans lack decent income and further that Kenya is lagging behind countries that have attained shared prosperity. Cognizance is made that the economic system has some blockages and perverse incentives which undermine innovation, growth and job creation. These need to be urgently removed if Kenyans have to be uplifted from debilitating poverty. Persons with disabilities suffer double inequality compared to others. Although measures including AGPO have been put in place to uplift Persons with disabilities from poverty, procedures for accessing such facilities are discouraging. We recommend that the framework for accessing economic opportunities for poverty reduction among Persons with disabilities be reviewed to make them friendly.

4. Background and context

This memorandum has been prepared in the context of the realities discussed briefly in the paragraphs below.

Lack of accurate data on persons with disabilities

13. There is currently no accurate population data disaggregated by gender, category, demographic and geographic distribution of Persons with disabilities in Kenya. The 2009 Population and Household Census estimated the 3.5% of the Kenyan population are persons with disability. The Kenya National Survey for Persons with Disabilities (KNSPWD), a sample domestic survey conducted by the National Coordinating Agency for Population in 2008, estimates that 4.6% of Kenyans experience some form of disability and that more Persons with disabilities reside in rural than in urban areas¹. It is estimated that 15% of the world population are people with disabilities.² When this percentage is extrapolated in the context of Kenya, there is an estimated 7 Million persons with disabilities based on estimated total population of 47 Million. This is a significant segment of society whose views on decisions affecting their wellbeing must be taken into consideration. Hence this Memorandum.

Constitutional, policy and legislative framework

14. In 2010, Kenyans adopted a fairly progressive Constitution which entrenches the rights and entitlements of Persons with disabilities. In spite of this development, Persons with disabilities continue to experience exclusion from the mainstream of public affairs and developmental processes.

15. There is a progressive National Policy on Disability formulated in 2006, but which has not been officially adopted. The policy seeks to eliminate disparities in service provision and to ensure that services are available to all citizens with disabilities on an equal basis with others. The policy has 21 targets which are designed to guide development planning, resource allocation and service delivery.

¹ Kenya National Survey for Persons with Disabilities' report, November 2008, pg. xv

² World Health Organization (WHO), World Disabilities Report, 2011, p 29

16. There is a Persons with Disabilities' Act, No. 14 of 2003. The Act establishes the National Council for Persons with Disabilities and makes provisions on a wide range of Persons with disabilities entitlements. This piece of legislation has been under review since 2009.
17. The Kenya Vision 2030 addresses issues of disability in the Social Pillar.
18. Kenya is State Party to a number of regional and international treaties and conventions. Key ones among these are the African Charter on Human and Peoples Rights and the United Nations Convention on the Rights of Persons with Disabilities.
19. Kenya is party to the Sustainable Development Goals (SDGs). Seven out of the 169 targets make reference to and have indicators on persons with disabilities.

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