



## UNITED NATIONS HUMAN RIGHTS COMMITTEE

138<sup>th</sup> Session of the UN Human Rights Committee  
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### JOINT SUBMISSION TO THE UN HUMAN RIGHTS COMMITTEE IN VIEW OF THE COMMITTEE'S EXAMINATION OF LESOTHO'S SECOND PERIODIC REPORT UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Submitted by the International Commission of Jurists (ICJ) on 29 May 2023 on behalf of ICJ, The People's Matrix (PM), Seinoli Legal Centre (SLC) and the Lesotho National Federation of Organizations of the Disabled (LNFOD).

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*The People's Matrix Association is dedicated to advancing human rights in Lesotho, with a particular focus on sex, sexual orientation, gender identity and gender expression. Its vision is to ensure that Lesotho is a country where there is justice and freedom for all regardless of sexual orientations, gender identities and gender expressions.*

*The Seinoli Legal Centre leverages the Rule of Law as a tool for protecting, restoring, and enhancing the sustainable livelihoods of local communities. Its mission is to provide communities affected by large infrastructure development projects with sustained, comprehensive access to the law to safeguard social, economic and environmental rights through strategic litigation, advocacy and capacity strengthening.*

*The Lesotho National Federation of Organisations of the Disabled (LNFOD) is an umbrella body of organisations dealing with disability in Lesotho. Its mission is to advocate for, promote, and defend the rights of people with disabilities and their families.*

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## A. INTRODUCTION

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1. During its 138<sup>th</sup> session, from 26 June to 28 July 2023, the Human Rights Committee (“the Committee”) will examine Lesotho’s implementation of and compliance with the provisions of the International Covenant on Civil and Political Rights (“ICCPR” or “Covenant”), in light of Lesotho’s second periodic report<sup>1</sup> under article 40 of the ICCPR and its replies to the Committee’s List of Issues in relation to the second periodic report of Lesotho.
2. The International Commission of Jurists (ICJ), The People’s Matrix (PM), Seinoli Legal Centre (SLC) and the Lesotho National Federation of Organizations of the Disabled (LNFOD) wish to draw the Committee’s attention to significant concerns arising from Lesotho’s failure to comply with its obligations under the ICCPR, and to highlight, in turn, the consequences of such a failure for the protection of certain Covenant rights. In particular, this submission addresses:
  - (a) the right to non-discrimination on the basis of sex, sexual orientation, gender identity and expression and disability (articles 2, 26);
  - (b) the right to equality between men and women (article 3);
  - (c) the right to equality before the law (article 26), access to justice (article 2) and the right to a fair trial (article 14),
  - (d) the right to equal recognition before the law (article 16);
  - (e) the right to privacy (article 17);
  - (f) the right to not be subjected to torture other cruel, inhuman or degrading treatment or punishment (article 7);
  - (g) the right to liberty and security of persons (article 9);
  - (h) the right to human dignity (article 10);
  - (i) the right of peaceful assembly (article 21);
  - (j) the right to freedom of expression (article 19);
  - (k) the right of children to protection measures (article 24); and
  - (l) the right to take part in the conduct of public affairs (article 25).

## B. SEXUAL ORIENTATION AND GENDER IDENTITY

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- a. The Right to Non-discrimination and Equality before the Law
3. Lesotho’s second periodic report submitted to the Human Rights Committee makes no mention of legal or policy developments in relation to the protection of the human rights of lesbian, gay,

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<sup>1</sup> UN Human Rights Committee, [Second periodic report submitted by Lesotho under Article 40 of the Covenant pursuant to the optional reporting procedure](#), UN Doc. CCPR/C/LSO/2, 22 April 2020.

bisexual, transgender, queer and intersex (LGBTQI+) persons.<sup>2</sup> This is regrettable since the Committee's list of issues specifically requests Lesotho to broadly identify measures it has taken to combat discrimination, including discrimination based on "sexual orientation" and "gender identity",<sup>3</sup> as well as requesting Lesotho to "provide clarification on the current legal status of sexual acts between consenting adults of the same sex".<sup>4</sup> This latter request was a follow up on a previous recommendation made by the Committee to Lesotho in its concluding observations issued in 1999.<sup>5</sup>

2. Section 4 of the country's Constitution guarantees to "every person" "fundamental rights and freedoms", including the rights to: "equality before the law and the equal protection of the law" and "freedom from discrimination". Section 18 of Lesotho's Constitution prohibits discrimination based on a range of grounds, which include "sex" and "other status".
3. As a State party to the ICCPR, Lesotho must ensure that its laws are consistent with articles 2 and 26 of the ICCPR on non-discrimination.<sup>6</sup> In applying the prohibition against discrimination in the Lesotho Constitution, Lesotho courts have explicitly acknowledged their obligation to draw on international law sources. In the context of these specific provisions of the ICCPR, in *Thabo Fuma*, the High Court found that the grounds upon which discrimination is prohibited in the ICCPR are a "reverberation of the grounds which are in the contemplation of Sec 18 (3) in the Constitution".<sup>7</sup> In its second periodic report, the government openly accepts "the important role that international law plays in domestic law" in Lesotho.<sup>8</sup>
4. Article 2(1) of the ICCPR states that each State party must guarantee to all individuals within its territory and subject to its jurisdiction the rights under the Covenant without any distinction, such as on the basis of "sex" or "other status".
5. This Committee has found "the reference to 'sex' in articles 2, paragraph 1, and 26 [of the Covenant] is to be taken as including sexual orientation."<sup>9</sup> The Committee has also affirmed that States must ensure that laws and their interpretation and application do not result in discrimination in the enjoyment of Covenant rights, for example, "on the basis of [...] sexual orientation or gender identity, or other status".<sup>10</sup>

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<sup>2</sup> See *supra* note 1: the single oblique reference is the following at paragraph 52. "Sexual Offences Act 2003 covers all offences relating to sexual acts although it does not specifically repeal the common law offence of sodomy. Where there is consent between adults, there is no sexual offence and the Act is silent on the 'gender' of the adults and thus it would be difficult to go against them. Further, the Marriage Act 1974 does not recognize marriage of same sex."

<sup>3</sup> UN Human Rights Committee, [List of issues prior to submission of the second periodic report of Lesotho](#), UN Doc. CCPR/C/LSO/QPR/2, 2 April 2019, at para. 7.

<sup>4</sup> *Supra* note 3.

<sup>5</sup> Human Rights Committee, [Concluding Observations of the UN Human Rights Committee](#), CCPR/C/79/Add. 106, 6 April 1999.

<sup>6</sup> ICCPR, art. 26 states that, "In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

<sup>7</sup> *Thabo Fuma v Commander LDF & Others* CC/8/2011[2013](10 October 2013), para 56, <https://www.rodra.co.za/images/countries/lesotho/cases/Thabo%20Fuma%20v%20The%20Commander%20LDF%20and%20Others.pdf>

<sup>8</sup> See *Supra* note 1, paras. 5-6.

<sup>9</sup> *Toonen v. Australia, Communication No. 488/1992*, UN Doc. CCPR/C/50/D/488/1992 (31 March 1994), para 8.7.

<sup>10</sup> See, for example, among others, UN Human Rights Committee, General comment No. 37 (2020) on the right of peaceful assembly (article 21)\*, 17 September 2020, CCPR/C/GC/37, para. 25.

6. During its last Universal Periodic Review process at the Human Rights Council, Lesotho accepted recommendations relating to sexual orientation, including:
  - The recommendation of Argentina, that Lesotho should adopt norms that will guarantee to LGBTI+ persons “the full enjoyment of their rights on the basis of equality in all spheres, combatting discrimination and negative stereotypes that still exists in the society”.<sup>11</sup>
  - The recommendation of Costa Rica that Lesotho take the necessary steps “to combat discrimination on grounds of sexual orientation and gender identity...”.<sup>12</sup>
7. Cognizant of the need for a more inclusive society in Lesotho, the Chief Justice of Lesotho has recently and publicly called for the “cultivation of an LGBTQI+ sensitive culture” in Lesotho. Noting that there is “no local jurisprudence yet” on what constitutional rights such as “the right to respect for private and family life (in section 11) and freedom from discrimination (in section 18)” “mean for the LGBTQI+ community”, the Chief Justice observed that in other countries, and according to international law, prohibitions based on “sex” and “other status” cover discrimination based on sexual orientation.<sup>13</sup>
8. Given the above it is important, as a general matter, that the Lesotho government not only acknowledge and affirm the constitutional protections afforded to LGBTQI+ persons, but also that it commits to a review of all relevant law and policy in the country to clarify their non-discriminatory content and application. This process should be undertaken in full consultation with civil society organizations and representatives of the LGBTQI+ community and informed by existing research of this nature.<sup>14</sup>

## Recommendations

**In light of the foregoing, the Human Rights Committee should recommend that the Government of Lesotho:**

- i. **Amend the Constitution of Lesotho so that sexual orientation be explicitly included as prohibited ground of discrimination in addition to those grounds currently listed under Section 18 of the Constitution.**
- ii. **Conduct a comprehensive review of all laws and policies in Lesotho to ensure that Lesotho’s laws and policies do not discriminate against or have a discriminatory impact on LGBTQI+**

<sup>11</sup>[UPR of Lesotho \(3<sup>rd</sup> Cycle- 35<sup>th</sup> session\) Thematic List of Recommendations](#), 22 January 2020 at p.9: “Adopt norms that will guarantee to lesbian, gay, bisexual, transgender and intersex persons the full enjoyment of their rights on the basis of equality in all spheres, combating discrimination and negative stereotypes that still exist in the society.”

<sup>12</sup> See *supra* note 11, “Take the necessary steps to combat discrimination on grounds of sexual orientation and gender identity and discrimination against persons with disabilities”.

<sup>13</sup> *Lesotho: Chief Justice Sakoane Sakoane calls for the “cultivation of an LGBTIQ sensitive culture” in Lesotho*, INT’L COMM’N OF JURISTS, 18 Oct. 2022, <https://www.icj.org/lesotho-chief-justice-sakoane-sakoane-calls-for-the-cultivation-of-an-lgbtiq-sensitive-culture-in-lesotho/>

<sup>14</sup> See as examples: SALC, *Legal Gender Recognition in Lesotho: An analysis of law and policy in the context of international best practices*, <https://www.southernafricalitigationcentre.org/wp-content/uploads/2020/11/Lesotho-Gender-Marker-report.pdf>; The Other Foundation, *Canaries in the Coal Mine: An analysis of spaces for LGBTI activism in Lesotho*, Country Report, [http://theotherfoundation.org/wp-content/uploads/2017/03/Canaries\\_Lesotho.pdf](http://theotherfoundation.org/wp-content/uploads/2017/03/Canaries_Lesotho.pdf); Lesotho Civil Society Submission to the APRM, <https://saiia.org.za/wp-content/uploads/2022/06/LESOTHO-CSOS-SUBMISSIONS-REPORT.pdf>; Logie CH, Alschech J, Guta A, Ghabrial MA, Mothopeng T, Ranotsi A, Baral SD. Experiences and perceptions of social constraints and social change among lesbian, gay, bisexual and transgender persons in Lesotho. *Cult Health Sex.* 2019 May;21(5):559-574. doi: 10.1080/13691058.2018.1498539. Epub 2018 Oct 3. PMID: 30280958; PMCID: PMC6447462, [https://static1.squarespace.com/static/55098723e4b011797c300d41/t/5d4ec5cee2f56e00014c7592/1565443539306/SOGIEan\\_dwellbeing\\_05\\_Lesotho.pdf](https://static1.squarespace.com/static/55098723e4b011797c300d41/t/5d4ec5cee2f56e00014c7592/1565443539306/SOGIEan_dwellbeing_05_Lesotho.pdf)

persons. In conducting this review, the authorities should ensure that all necessary processes:

- a. Fully and meaningfully include the participation of civil society organizations and LGBTQI+ persons in all such processes.
- b. Fully and meaningfully consider existing research and allow evidence to guide such processes.

## **b. The criminalization of consensual same-sex sexual activity**

9. While the Sexual Offences Act 2003<sup>15</sup> does not make consensual same-sex sexual activity a crime, as Lesotho concedes in its report, nor does it specifically repeal the common law offence of sodomy.<sup>16</sup>
10. In addition, Schedule 1, Part II of the Criminal Procedure and Evidence Act 1981<sup>17</sup> lists sodomy as an offence under which an arrest may be made without a warrant. In the context of prevailing social stigma and discrimination against LGBTQI+ persons, there remains a high risk of the discriminatory application and implementation of the common law proscription of sodomy with a disproportionate impact on LGBTQI+ persons and their human rights.
11. It is therefore insufficient for the Sexual Offences Act to merely omit reference to sodomy since it continues continued to be a common law offence. The criminalization of sexual practices between consenting adults of the same or opposite sex breaches international human rights law and standards, including with respect to the rights to privacy and freedom from discrimination.<sup>18</sup>

## **Recommendations**

**In light of the foregoing, the Human Rights Committee should recommend that the Government of Lesotho:**

- i. **Harmonize the provisions of the law relating to consensual same-sex sexual activity by repealing the provision as contained in Schedule I, Part II of the Criminal Procedure and Evidence Act 1981 which makes sodomy an arrestable offence not requiring a warrant, to make it consistent with the Sexual Offences Act 2003, which does not criminalize consensual same-sex sexual activity.**
- ii. **Amend section 37 of the Sexual Offences Act to include a provision which expressly repeals the common law offence of sodomy.**

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<sup>15</sup> Sexual Offences Act (No. 3 of 2003), <https://gender.gov.ls/wp-content/uploads/2020/11/Lesotho-Sexual-Violence-Act-2003.pdf>.

<sup>16</sup> See *supra* note 1, para 52.

<sup>17</sup> Criminal Procedure and Evidence Act (No. 9 of 1981), <https://media.lesotholii.org/files/legislation/akn-ls-act-1981-9-eng-1600-01-01.pdf>.

<sup>18</sup> *March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty*, INT'L COMM'N OF JURISTS, 8 March 2023, available at: [https://icj2.wpenginepowered.com/wp-content/uploads/2023/03/8-March-Principles-Report\\_final\\_print-version.pdf](https://icj2.wpenginepowered.com/wp-content/uploads/2023/03/8-March-Principles-Report_final_print-version.pdf). See also: UN Human Rights Office of the High Commissioner, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, HR/PUB/12/06, at p.36.

### c. Right to Legal Gender/Sex Recognition in Lesotho

12. The UN Independent Expert on Sexual Orientation and Gender Identity (“Independent Expert”) has strongly promoted the “depathologization” of gender and attempted to give meaning to the “full scope of the duty of the State to respect and promote respect of gender recognition as a component of identity.”<sup>19</sup>
13. Explicitly linking the right to legal gender recognition to, among others, Article 16 of the ICCPR, the Independent Expert<sup>20</sup> has affirmed that “self-determined gender is a fundamental part of a person’s free and autonomous choice in relation to roles, feelings, forms of expression and behaviours, and a cornerstone of the person’s identity”.<sup>21</sup> Citing various concluding observations of this Committee and other UN treaty bodies, the Independent Expert has, therefore, concluded that there is an obligation on States “to provide access to gender recognition in a manner consistent with the rights to freedom from discrimination, equal protection of the law, privacy, identity and freedom of expression”.<sup>22</sup>
14. Despite these obligations, the majority of gender-diverse persons across the world continue to “live in a legal vacuum”, which often has the result of existing “stigma and prejudice... creat[ing] a climate that tacitly permits, encourages and rewards with impunity the acts of violence and discrimination against them, and leads to a situation of de facto criminalization”.<sup>23</sup> Any delays in the process of legal recognition may have significant consequences for individuals as this Committee has noted in its Concluding Observations to Australia.<sup>24</sup>
15. The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity<sup>25</sup> capture States legal obligations to “take all necessary legislative, administrative and other measures to fully respect and legally recognise each person’s self-defined gender identity” and “take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person’s gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person’s profound self-defined gender identity”.<sup>26</sup> The Yogyakarta Principles Plus 10 expand on this, by, for example indicating that States are required to ensure a “quick, transparent, and accessible mechanism that legally recognises and affirms each person’s self-defined gender identity”.<sup>27</sup> Eligibility criteria for such legal gender recognition are prohibited.<sup>28</sup>
16. Moreover, in its updated report to the UN Human Rights Council, the Office of the High Commissioner for Human Rights has recommended that States should “issu[e] legal identity

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<sup>19</sup> United Nations General Assembly, [Protection Against Violence and discrimination based on sexual orientation and gender identity: Note by the Secretariat](#), A/73/152, 12 July 2018, para 8.

<sup>20</sup> *Ibid*, para 20.

<sup>21</sup> *Ibid*.

<sup>22</sup> *Ibid*, para 21.

<sup>23</sup> *Ibid*, para. 25.

<sup>24</sup> UN Human Rights Committee, [Concluding observations on the sixth periodic report of Australia](#), UN Doc. CCPR/C/AUS/CO/6, CCPR/C/AUS/CO/0, 1 December 2017, paras. 27-28.

<sup>25</sup> *The Yogyakarta Principles*, 10 November 2017, <https://www.refworld.org/pdfid/48244e602.pdf>.

<sup>26</sup> *Ibid*, principle 3(B)-(C).

<sup>27</sup> *Ibid*, principle. 32(C)(i).

<sup>28</sup> *Ibid*, principle 32(C)iii.

documents, upon request, that reflect preferred gender, eliminating abusive preconditions, such as sterilization, forced treatment and divorce”.<sup>29</sup> Such legal documents are typically needed by all individuals to access to range of social and other services. When individuals do not have access to documentation in which their stated gender/sex matches with the expectation of their physical appearance they are often confronted with discrimination and/or denied access to services. That being the case in Lesotho, as it is elsewhere in the world,<sup>30</sup> is well-documented.<sup>31</sup>

17. The current legal framework in Lesotho restricts the right of LGBTQI+ persons to change or alter their sex assigned at birth and/or their gender in contravention of Lesotho’s Covenant obligations, including in particular, under articles 2, 3, 16, 17 and 26. The failure to amend the legal framework so as to allow for non-discriminatory legal gender recognition has been well-documented and is the result of widespread discrimination against and harm to LGBTQI+ individuals.<sup>32</sup> The applicable laws at present include the Constitution; The Registration of Births and Deaths Act No. 22 of 1973; The National Identity Cards Act No. 9 of 2011; The Lesotho Passports and Travel Documents Act No. 5 of 2018; The Data Protection Act No. 5 of 2012; The Children’s Protection and Welfare Act No. 7 of 2011, Charter on the Rights and Welfare of the Child; The Education Act No. 3 of 2010; The Sexual Offences Act No. 3 of 2003.

18. In addition to the provisions analyzed above, Section 11(1) of the Constitution of Lesotho<sup>33</sup> prescribes that every person shall be entitled to respect for his private and family life and his home. As a State party to the ICCPR, Lesotho has a concomitant obligation under Article 17,<sup>34</sup> which protects against unlawful interference with a person’s privacy.

19. The paragraphs below focus on the Data Protection Act, the Registration of Births and Deaths Act and the National Identity Cards Act.

- Registration of Births and Deaths Act

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<sup>29</sup> UN Human Rights Council Report, *Discrimination and Violence Against Individuals Based on their Sexual Orientation and Gender Identity*, A/HRC/29/23, para. 79(i)

<sup>30</sup> See for example: ICJ, *Living with Dignity: Sexual Orientation and Gender Identity- Based Human Rights Violations in Housing, Work, and Public Spaces in India*, June 2019, <https://www.icj.org/wp-content/uploads/2019/06/India-Living-with-dignity-Publications-Reports-thematic-report-2019-ENG.pdf>; ICJ, *Pakistan: Transgender Persons (Protection of Rights) Act, 2018*, A Briefing Paper, March 2020, <https://icj2.wpenginepowered.com/wp-content/uploads/2020/03/Pakistan-Transgender-Advocacy-Analysis-brief-2020-ENG.pdf>; ICJ, *Invisible, Isolated and Ignored, Human Rights Abuses Based on Sexual Orientation and Gender Identity/ Expression in Colombia, South Africa and Malaysia*, <https://icj2.wpenginepowered.com/wp-content/uploads/2021/03/Colombia-SouthAfrica-Malaysia-SOGIE-Publications-Reports-Thematic-reports-2021-ENG.pdf>; *In the Shadows: Systemic injustice based on sexual orientation and gender identity/ expression in Myanmar*, <https://icj2.wpenginepowered.com/wp-content/uploads/2019/11/Myanmar-In-The-Shadows-Advocacy-Report-2019-ENG.pdf>;

<sup>31</sup> SALC, *Legal Recognition in Lesotho: An analysis of law and policy in the context of international best practice*, p 5-11, <https://www.southernafricalitigationcentre.org/wp-content/uploads/2020/11/Lesotho-Gender-Marker-report.pdf>.

<sup>32</sup> Alex Müller, Kristen Daskilewicz, and the Southern and East African Research Collective on Health (2019), *Are we doing alright? Realities of violence, mental health and access to healthcare related to sexual orientation and gender identity and expression in Lesotho*, [file:///C:/Users/kales/Downloads/SOGIEandwellbeing\\_05\\_Lesotho.pdf](file:///C:/Users/kales/Downloads/SOGIEandwellbeing_05_Lesotho.pdf); SALC, *Legal Gender Recognition in Lesotho, An analysis of law and policy in the context of international best practice*, <https://www.southernafricalitigationcentre.org/wp-content/uploads/2020/11/Lesotho-Gender-Marker-report.pdf>.

<sup>33</sup> Constitution of Lesotho, sec 11(1) enunciates that “Every person shall be entitled to respect for his private life and family life and his home”.

<sup>34</sup> ICCPR, art. 17 states that “(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.”.



20. Section 22 of the Registration of Births and Deaths Act (Registration Act) provides for the change of sex of a child in the following terms:<sup>35</sup>

“in the event of a child, after being registered, either by operation or otherwise, changing from a female to male or male to female and such change is certified by a registered medical practitioner, the district registrar of the district in which the birth is registered shall, with the approval of the registrar and on the application of the parent or guardian of that child, alter the particulars of that child which appears in the birth register”.

21. This legislative provision defines “child” as a person under the age of 21 years not being a married person.<sup>36</sup> The Registration Act does not permit adults (i.e., persons over the age of 21 years) from exercising their right to change their sex assigned at birth as well as gender markers. The Act allows for a change of sex “by operation or otherwise”.

22. Since the Act predates the Constitution, it is arguable that it is predicated on “outdated” understandings of “sex” and “gender”, and that it should be interpreted and applied consistently with Lesotho’s international and domestic human rights obligations to “to provide for gender affirmation” and legal recognition.<sup>37</sup> While the Act does not specifically provide for a change of “gender” markers, if section 22 is incapable of such a reading, then it requires amendment to ensure consistency with Lesotho’s human rights obligations. Similarly, the Act should either be interpreted or amended to confirm its application to adults.<sup>38</sup> Absent such clarifying amendments, it is advisable that the Lesotho authorities issue guidelines or directives on the interpretation of the Act in the context of gender and sex markers an/or permissible legal changes to such markers.<sup>39</sup>

- National Identity Card Act

23. Section 12 of the National Identity Cards Act indicates that an identity card should carry information on the “sex of bearer” of such a card.<sup>40</sup> However, when it comes to the inclusion of information on the National Identity Register, section 4 of the Act indicates that information on the “gender” of individuals should be included and is silent in relation to sex.<sup>41</sup> No definition is provided for either sex or gender. The Act therefore appears to use the words “sex” and “gender” either in a manner which causes an internal contradiction in the legislation or in manner which incorrectly considers the terms to be interchangeable.<sup>42</sup> This creates a confusion for those tasked with interpreting and administering the Act. The Act should be interpreted and applied consistently with Lesotho’s international and domestic human rights obligations to read both references to sex and gender as including both sex and gender.<sup>43</sup> If such an interpretation is not explicitly preferred and applied by the authorities, it should be amended to ensure consistency with Lesotho’s human rights obligations.

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<sup>35</sup> Registration of Births and Deaths Act (No. 22 of 1973) 1973, <http://citizenshiprightsafrika.org/wp-content/uploads/2020/05/Lesotho-Births-and-Deaths-Registration-Act-1973.pdf>.

<sup>36</sup> Section 2 of the Registration of Births and Deaths Act.

<sup>37</sup> See *supra* note 31, p22.

<sup>38</sup> *Supra* note 31, p23.

<sup>39</sup> *Supra* note 31.

<sup>40</sup> National Identity Cards Act, s.12(1)(d).

<sup>41</sup> *Ibid*, s.4(6)(f).

<sup>42</sup> *Supra* note 31, p23.

<sup>43</sup> *Supra* note 31, p22.

24. Furthermore, the Act requires the responsible authority “to ensure that personal information entered in the Register is complete, accurate and updated where necessary”.<sup>44</sup> It permits individuals to request that the responsible authority to “correct inaccurate or outdated information”,<sup>45</sup> and upon such request requires the requester to provide “credible evidence of the updated information which shall be verified” by the responsible authority.

25. In the absence of further guidance to the data controller in relation to how, when and why to consider information relating to a person’s sex or gender, this provision places a substantial procedural hurdle on the requester, in this instance a LGBTQI+ individual, in ensuring their own legal gender and sex recognition is reflected in accordance with their own self-identity and expression. Particularly in the context of pervasive discrimination, it places weighty burden on already marginalized individuals and is therefore likely to be applied in a manner that is discriminatory in its impact.

- **Data Protection Act**

26. Section 27(1) of the Data Protection Act, stipulates that an individual (“data subject”) has a right to challenge the correctness of information by requesting that the data controller<sup>46</sup> of data control or delete personal data that is inaccurate.<sup>47</sup> However, the data is only corrected if the controller investigates the challenge lodged and decides to correct the information.<sup>48</sup> The Act provides for a process by which the data controller may then either “correct, destroy or delete the information” or “provide the data subject, with credible evidence in support of the correctness of the information”, after which it permits the data subject to “apply to the Commission to investigate the disputed information”.

27. In the absence of further guidance to the data controller in relation to how, when and why to consider information relating to a person’s sex or gender, this provision places a substantial procedural hurdle on the data subject, in this instance a LGBTQI+ individual, in ensuring their own legal gender and sex recognition is reflected in accordance with their own self-identity and expression. Particularly in the context of pervasive discrimination, it places weighty burden on already marginalized individuals and is therefore likely to be applied in such a manner that is discriminatory in its impact.

## **Recommendations:**

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<sup>44</sup> *Supra* note 40, s.8(1).

<sup>45</sup> *Supra* note 40, s.6(5).

<sup>46</sup> Data Protection Act (No. 5 of 2021), s.2: “data controller” means “a public or private body or any other person which or who, alone or together with others, determines the purpose of and means for processing personal information, regardless of whether or not such data is processed by that party or by an agent on its behalf”.

<sup>47</sup> Data Protection Act (No. 5 of 2012), s.27 states that, “A data subject shall free of charge have a right to challenge the correctness of information that requesting that a data controller (a) correct or delete personal information about the data subject in its possession or under its control that is inaccurate or irrelevant, excessive, out of date, incomplete, misleading or obtained unlawfully; or (b) destroy or delete a record of personal information about the data subject that the data controller is no longer authorized to retain”.

<sup>48</sup> *Ibid.* s.27(2).

In light of the foregoing, the Human Rights Committee should recommend that the Government of Lesotho:

Registration of Births and Deaths Act

- i. Amend section 22 of the Registration of Births and Deaths Act to:
  - Explicitly clarify that this provision includes the legal gender recognition in addition to sex reassignment. Gender recognition should not be predicated on sex reassignment and should not require surgery.
  - Explicitly allow for adults, as defined by the Act, to change their assigned sex at birth as well as their gender markers in the Registry.

National Identity Cards Act

- i. Amend the National Identity Cards Act to ensure its compliance with Lesotho's human rights obligations by:
  - Including in section 2 of the Act a definition of "sex" and "gender".
  - Ensuring consistent application of these terms throughout the Act.
- ii. Through the amendment of the National Identity Cards Act and/or the provision of further guidelines, provide clear direction to responsible officials tasked with implementing the Act to ensure that the processes in sections 6 and 8 of the Act are not applied in a discriminatory manner.

Data Protection Act

- i. Through the amendment of section 27 of the Data Protection Act and/or the provision of further guidelines, provide clear direction to responsible officials tasked with implementing the Act to ensure that the processes in sections 27 of the Act are not applied in a discriminatory manner.

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## C. ADMINISTRATION OF JUSTICE

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### a. The Right to Equality Before the Law

28. Section 12 of Lesotho Constitution entrenches the right to a fair trial, including a right to legal representation, affirming that every person charged with a criminal offence "shall be permitted to defend himself before the court in person or by a legal representative of his own choice".<sup>49</sup> It therefore does not consider access to free legal services provided by the State in the context of either civil or criminal proceedings. On the face of it, this amounts to a failure of the Lesotho Constitution to provide for the fair trial guarantees provided under article 14 of the Covenant, including in criminal justice context, the right to have legal assistance ensured by the State "in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it".<sup>50</sup>

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<sup>49</sup> Constitution of Lesotho, sec. 12 (2)(c) and (d) provides that, "Every person who is charged with a criminal offence- c. shall be given adequate time and facilities for the preparation of his defence; d. shall be permitted to defend himself before the court in person or by a legal representative of his own choice."

<sup>50</sup> ICCPR, art.14(3)(d).

29. In its General Comment 32, the UN Human Rights Committee has clarified the critical importance of the provision of legal aid by stating that “the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way”.<sup>51</sup> It has therefore clarified that States are encouraged, and in some cases may be obliged to provide legal aid in either civil or criminal cases, where the interests of justice so require.

30. Clarity on how to determine the “interest of justice” has been provided by the African Commission on Human and People’s Rights (ACHPR) in its *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* in respect of both criminal and civil cases. In criminal matters the ACHPR indicates that “the seriousness of the offence” and the “severity of the sentence” should be considered, whereas, in civil cases, the “complexity of the case”, the “rights that are affected” and the “likely impact of outcome of the case on the wider community” are to be considered.<sup>52</sup> Finally, the ACHPR is explicit that “non-governmental organizations should be encouraged to establish legal assistance programmes and to train para-legals”<sup>53</sup> in order to supplement State efforts at the provision of legal aid.

- Legal Aid Provided by the State

31. As early as 1978, Lesotho enacted the Legal Aid Act,<sup>54</sup> thereby providing for “granting of legal aid to poor persons; and for connected purposes”.<sup>55</sup> The Act provides for the appointment of a Chief Aid Legal Counsel and as “many legal aid counsel as may from time to time ... be required for the purposes of this Act”.<sup>56</sup> Section 4 of the Act provides for legal aid in the context of criminal matters in circumstances in which “it is interest of justice” and “such person has insufficient means”.<sup>57</sup> Section 7 of the Act provides for legal aid in the context of civil matters in circumstances in which, on that person’s application, it is determined that: there are “reasonable grounds” for the position the applicant wishes to take; it is “in the interests of justice” to provide legal aid; and the applicant is of “insufficient means”.<sup>58</sup>

32. Despite this laudable and broad legislative provision on the provision of legal aid by the State the reality faced by litigants in accessing such legal assistance remains challenging for various reasons. For instance, the Legal Aid Office in Lesotho is centralized, and its offices are situated only in the capital city, Maseru. This leaves a vast majority of marginalized groups in rural areas in particular without any access to legal aid.<sup>59</sup> Lack of human and financial resources within Legal Aid Office,<sup>60</sup>

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<sup>51</sup> UN Human Rights Committee (HRC), [General comment no. 32](#), Article 14: The right to equality before courts and tribunals and to fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007 (General Comment 35), para. 10.

<sup>52</sup> African Commission on Human and People’s Rights, *Principles And Guidelines On The Right To A Fair Trial And Legal Assistance In Africa*, (2003), principle H(a)-H(b), [http://hrlibrary.umn.edu/research/ZIM%20Principles\\_And\\_G.pdf](http://hrlibrary.umn.edu/research/ZIM%20Principles_And_G.pdf). See also: “Practitioner’s Guide No 2: The Right to a Remedy and Reparation for Gross Human Rights Violations”, INT’L COMM’N OF JURISTS (2018), <https://www.icj.org/wpcontent/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides2018-ENG.pdf>.

<sup>53</sup> *Ibid.* prin. H(j).

<sup>54</sup> Act No. 10 of 1978, [https://drive.google.com/drive/folders/1UarvDmO40oiUmkFemWq\\_XWAz63RH1qLR?usp=sharing](https://drive.google.com/drive/folders/1UarvDmO40oiUmkFemWq_XWAz63RH1qLR?usp=sharing).

<sup>55</sup> *Ibid.* Preamble.

<sup>56</sup> *Ibid.*, s.3.

<sup>57</sup> *Ibid.*, s.4(1)(a)-(b).

<sup>58</sup> *Ibid.* s.7(1)-(2).

<sup>59</sup> Case Study, Strengthening the Rule of Law in Lesotho, <https://ylab.wales/strengthening-rule-law-lesotho>.

<sup>60</sup> U.S. Department of State, Bureau of Democracy, Human Rights and Labor, *2022 Country Reports on Human Rights Practices: Lesotho*, [https://www.state.gov/wp-content/uploads/2022/02/313615\\_LESOTHO-2021-HUMAN-RIGHTS-REPORT.pdf](https://www.state.gov/wp-content/uploads/2022/02/313615_LESOTHO-2021-HUMAN-RIGHTS-REPORT.pdf).

due to inadequate support from the government, further exacerbates its ability to execute its mandate.

33. Lesotho concedes these problems in its second periodic report currently under consideration by the Committee. The State party notes that, “efforts are under way to effectively decentralise the Legal Aid”.<sup>61</sup> Lesotho’s National Strategic Development Plan II<sup>62</sup> therefore included the need to “strengthen the legal aid system and decentralise to district level” as a proposed outcome. However, there has been government inaction in this regard, despite its indication that efforts are underway to decentralize the Legal Aid.<sup>63</sup> In respect of resourcing, Lesotho notes that “Legal Aid does not have the adequate capacity in terms of human and financial resources and decentralisation thus limited number of accused persons are provided with its services”,<sup>64</sup> but does not provide a proposed resolution.

34. Given these acknowledgments, it is unsurprising that a large backlog of cases is a commonly noted problem with the legal aid system, as is the fact that “vulnerable groups do not have adequate access to the justice system due to the low capacity of the legal aid system and its inability to deal with cases involving disabled people and juveniles.”<sup>65</sup> These factors have created an unfortunate state of affairs in Lesotho where only a limited number of accused persons are provided with its services.<sup>66</sup>

- Legal Aid provided by NGOs

35. In order to fill the gap left by the failures to fully implement the Legal Aid Act, there are some Non-Governmental Organizations (“NGOs”) in Lesotho providing legal aid to poor and marginalized groups.<sup>67</sup> However, the specific mandate of these NGOs dictates the scope of the legal aid that these organizations provide, and so they are only able to provide legal assistance in a limited number of cases on a specific range of issues.<sup>68</sup>

36. In addition, reports received from civil society at an NGO consultation co-run by Seinoli Legal Centre and the International Commission of Jurists in April 2023 also emphasize a further obstacle to NGOs seeking to provide legal assistance free of charge. The Law Society Act<sup>69</sup> provides for the maintenance and advancement of sound legal learning and correct and uniform practice and discipline among the members of the profession of attorney, notaries and conveyancers of the Court of Lesotho. One of the fundamental objects of the Law Society, as set out in section 4(a) of the Act is to, “to assist in the administration of justice; and to effect improvements in administration or practice of law”.

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<sup>61</sup> *Supra* note 1, para. 155.

<sup>62</sup> The Government of Lesotho, *National Strategic Development Plan II 2018/19- 2022/23*, <https://www.undp.org/sites/g/files/zskgke326/files/2022-10/national-strategic-development-plan-ii-2018-19-2022-23.pdf>.

Under the Strategic Objectives and Interventions, Strategic Objective 1, entitled “Improve Access to Justice”, the Government of Lesotho has listed that one of the necessary interventions entails strengthening the legal aid system and decentralize to district level.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*, para 17.

<sup>65</sup> *Supra* note 62.

<sup>66</sup> *Supra* note 1.

<sup>67</sup> Itumeleng Shale, *UPDATE: The Law and Legal Research in Lesotho*, [https://nyulawglobal.org/globalex/Lesotho1.html#\\_Civil\\_and\\_criminal](https://nyulawglobal.org/globalex/Lesotho1.html#_Civil_and_criminal)

<sup>68</sup> *Ibid.*

<sup>69</sup> Act 13 of 1983, [https://drive.google.com/file/d/1qISJs-wCpO5SI1RZaIcI5TxSh3G1P\\_xi/view?usp=sharing](https://drive.google.com/file/d/1qISJs-wCpO5SI1RZaIcI5TxSh3G1P_xi/view?usp=sharing).

37. Section 7 of the Act provides for the application as a member of the society of individuals only, through individualized applications.<sup>70</sup> Section 7(1) which deals with membership therefore does not specifically provide for the registration of not-for-profit legal centres or law clinics.<sup>71</sup> This provision explicitly allows for members who “though they are not resident nor maintain chambers or offices in Lesotho in the opinion of the Council practice their profession on a regular basis in Lesotho, participating actively in the administration of justice in Lesotho”.<sup>72</sup>
38. Some NGOs have therefore had difficulty navigating such applications, many of which have been subject to lengthy delays thus preventing them from providing free legal assistance to marginalized individuals and groups and thereby assisting Lesotho in the fulfilling its international and domestic human rights obligation with respect to the provision of legal aid. Moreover, and despite the clear text of section 7(2)(c), the Law Society appears to take the position that individual accreditation for individual legal practitioners is contingent on such lawyers being members of a registered “chambers”.

- **Recommendations**

**In light of the foregoing, the Human Rights Committee should recommend that the Government of Lesotho:**

**Legal Aid Provided by the State**

- i. **Produce, publicize and implement a timebound plan for the decentralization of the services of the Legal Aid Office.**
- ii. **Commit to increasing the human and financial resources provided to Legal Aid to ensure the full implementation of the Legal Aid Act in relation to both criminal and civil matters.**

**Legal Aid Provided by NGOs**

- i. **Amend section 7 of the Law Society Act, which deals with members, to enable NGOs and privately operated legal aid clinics to register for membership organizationally as not-for-profit legal centres so that these entities may be allowed to provide legal aid services to the people of Lesotho.**

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<sup>70</sup> *Ibid*, s.7(5).

<sup>71</sup> Section 7 of the Act reads in full:

“(1) Membership of the Society is open to all legal practitioners duly admitted by the High Court of Lesotho to practise as advocates, attorneys, notaries or conveyancers hereinafter referred to as “members”, and shall consist of the following classes:

- (a) Practising members; and
- (b) Non-practising members

(2) Practising members shall comprise of those members who-

- (a) are resident and maintain chambers or offices in Lesotho;
- (b) though not resident in Lesotho, participate actively in the administration of justice by reason of their having established chambers or offices in Lesotho, which are fully services and are under the constant supervision of such members;
- (c) though they are not resident nor maintain chambers or offices in Lesotho in the opinion of the Council practice their profession on a regular basis in Lesotho, participating actively in the administration of justice in Lesotho.”

<sup>72</sup> *Ibid*, s. 7(2)(c).

- ii. **Ensure that the process for registration of not-for-profit legal centres and/or appropriately qualified individual lawyers working for NGOs is undertaken expeditiously and without unnecessary procedural hurdles and delays.**
- iii. **The Law Society should affirm and ensure the application of section 7(2)(c) of the Law Society Act and desist from applying any procedure or process that insists that lawyers attempting to provide *pro-bono* legal services be members of chambers in order received accreditation.**

## D. The Right to Freedom Expression and Peaceful Assembly

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39. Articles 19 and 21 of the ICCPR protect the rights to freedom of expression and peaceful assembly respectively.<sup>73</sup> The Lesotho Constitution protects a range of similar rights, including most directly the right to freedom of expression (section 14)<sup>74</sup> and the right to freedom of assembly (section 15).<sup>75</sup> In its concluding observations to Lesotho in 1999, this Committee expressed the follow concern in regard to these constitutional protections:

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<sup>73</sup> ICCPR, *arts. 19, 21*.

<sup>74</sup> Art. 14 reads:

“1. Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of, freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

2. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

- a. in the interests of defence, public safety, public order, public morality or public health; or
- b. for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or
- c. for the purpose of imposing restrictions upon public officers.

3. A person shall not be permitted to rely in any judicial proceedings upon such a provision of law as is referred to in subsection (2) except to the extent to which he satisfies the court that that provision or, as the case may be, the thing done under the authority thereof does not abridge the freedom guaranteed by subsection (1) to a greater extent than is necessary in a practical sense in a democratic society in the interests of any of the matters specified in subsection (2)(a) or for any of the purposes specified in subsection (2)(b) or (c).

4. Any person who feels aggrieved by statements or ideas disseminated to the public in general by a medium of communication has the right to reply or to require a correction to be made using the same medium, under such conditions as the law may establish.”

<sup>75</sup> Article 15 reads:

“15. Freedom of peaceful assembly

1. Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of freedom of peaceful assembly, without arms, that is to say, freedom to assemble with other persons.

2. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-- a. in the interests of defence, public safety, public order, public morality or public health; b. for the purpose of protecting the rights and freedoms of other persons; or c. for the purpose of imposing restrictions upon public officers.

3. A person shall not be permitted to rely in any judicial proceedings upon such a provision of law as is referred to in subsection (2) except to the extent to which he satisfies the court that that provision or, as the case may be, the thing done under the authority thereof does not abridge the rights and freedoms guaranteed by subsection (1) to a greater

“The Committee is also concerned that sections 7 (3) (f) and (6); 14 (2) (c); 15 (2) (c); and 16 (2) (c) of the Constitution allow for the imposition of restrictions on the rights protected by articles 12 (freedom of movement), 19 (freedom of expression), 21 (peaceful assembly) and 22 (freedom of association) which exceed those permitted by the Covenant.”<sup>76</sup>

40. No information is provided in the State party second periodic report on how this recommendation has been implemented, and the breadth of restrictions on ICCPR rights permitted by the Lesotho Constitution remains a serious cause for concern. Indeed, Lesotho has at least partially accepted as much, including recommendations during its Universal Periodic Review to the effect that it should “bring national legal provisions into line with international standards on freedom of expression under the International Covenant on Civil and Political Rights”.<sup>77</sup>
41. Despite this, civil society complaints in relation to suppression of these rights continue to proliferate. In addition to the 2017 protests referred to in the Committee’s list of issues,<sup>78</sup> the submissions of the Southern African Litigation Centre to this Committee cite a range of examples, concluding that: “in practice, the right to freedom of expression, association and peaceful assembly has increasingly been under attack in Lesotho”.<sup>79</sup>
42. This conclusion is consistent with the information the International Commission of Jurists has received from local partners in Lesotho over recent years.
  - a. Lesotho Highlands Water Project (LHWP)
43. For present purposes, the ICJ, the PM, SLC and LNFOD wish to draw the Committee’s attention, in particular, to reported violations of the right to freedom of expression and peaceful assembly suffered by human rights defenders conducting advocacy in connection with the Lesotho Highlands Water Project (“Project”). The Project is an ongoing bilateral arrangement between the governments of Lesotho and South Africa.<sup>80</sup> It accounts for a significant proportion of Lesotho’s GDP,<sup>81</sup> and has a wide-ranging impact on a large number of communities in Lesotho.<sup>82</sup> However, there appear to be no clear plans by the Lesotho Highlands Development Authority (LHDA) regarding how the plight of these communities will be ameliorated.<sup>83</sup>
44. Reports indicate that, on the 10 May 2022, 40 members of the Seshote community affected by Phase 2 of the Project were brutally beaten up by police officers for protesting and expressing their dissatisfaction for the damage to property the community suffered as a result of blasting

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extent than is necessary in a practical sense in a democratic society in the interests of any of the matters specified in subsection (2)(a) or for any of the purposes specified in subsection (2)(b) or (c).”

<sup>76</sup> *Supra* note 5, para 7.

<sup>77</sup> [Matrix of Recommendations](#), 110, 21, recommendation by Netherlands.

<sup>78</sup> *Supra* note 3.

<sup>79</sup> South African Litigation Council (SALC), The Kingdom of Lesotho’s Compliance with the International Covenant on Civil and Political Rights (ICCPR), 29 May 2023, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCCPR%2FCSS%2FLSO%2F52864&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCCPR%2FCSS%2FLSO%2F52864&Lang=en).

<sup>80</sup> For more information, see: <https://www.lhda.org.ls/lhdaweb>.

<sup>81</sup> Daily Maverick, *Report raises alarm over mines’ pollution of rivers critical to Lesotho Highlands Water Project*, 9 January 2023, <https://www.dailymaverick.co.za/article/2023-01-09-report-raises-alarm-over-lesotho-mines-pollution-of-critical-rivers/>.

<sup>82</sup> SALC Shadow Report – Lesotho’s 3<sup>rd</sup> Universal Periodic Review 35<sup>th</sup> Session (Jan-Feb 2020), <https://www.southernafricalitigationcentre.org/2019/07/03/salc-shadow-report-lesothos-3rd-universal-periodic-review-35th-session-jan-feb-2020/>.

<sup>83</sup> *Ibid.*



activities. Houses were damaged, animals died, while electricity supply was cut off for three to four weeks and several villagers were nearly hit by rock debris from the blasting.<sup>84</sup>

45. As a result of the Polihali Dam construction, nearly 8,000 people are facing loss of their homes or livelihoods. In this regard, Amnesty International (AI) has called on authorities to “to halt construction of the Polihali Dam, which will supply water to South Africa, until affected communities, in Mokhotlong district, have been properly consulted and compensated.”<sup>85</sup> AI has also noted that those individuals who were provided any form of compensation were given “just over \$1 US Dollar as compensation for being resettled around Mokhotlong – far from their current homes – to make way for the project.”<sup>86</sup>
46. During the official launch of Phase II of the Lesotho Highlands Water Project Phase on 23 May 2023, human rights defenders in Lesotho staged a protest. The protests were met with “acts of harassment and intimidation” by the Lesotho Defence Force (LDF).<sup>87</sup> In their joint statement, the Southern Defenders and the Seinoli Legal Centre noted that “the LDF has no legal authority to confiscate placards that are not threatening or disruptive.”<sup>88</sup> On the same day, residents of Polihali, Mokhotlong, whose fields were expropriated to pave way for the project, staged a demonstration by blocking the road over unpaid compensation over such fields. Local media document that police officers suppressed the demonstration and detained the protestors, in violation of their rights to freedom of expression and assembly.<sup>89</sup> Residents in impoverished communities affected by the Project have lost their most productive arable lands, which are their main source of livelihood, and the Government of Lesotho has not consulted them regarding compensation for losses suffered.<sup>90</sup>
47. More recently, on 19 May 2023, four human rights NGOs in Lesotho have called on South African President, Cyril Ramaphosa, whose government is funding the Project, to meet with the members of the afflicted communities, hear their grievances and ensure that their livelihoods be restored.<sup>91</sup> The letter sought to remind President Ramaphosa of the undertaking made under the Treaty on the Lesotho Highlands Water Project<sup>92</sup> to “take all reasonable measures to ensure that the implementation, operation and maintenance of the Project are compatible with the protection of the existing quality of the environment and, in particular, shall pay due regard to the maintenance of the welfare of persons and communities immediately affected by the project”.<sup>93</sup>

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<sup>84</sup> *LHDA caught in the crossfire*, <https://www.africa-press.net/lesotho/all-news/lhda-caught-in-the-crossfire>.

<sup>85</sup> Amnesty International, *Lesotho: Polihali Dam construction puts nearly 8,000 people at risk of displacement*, 6 February 2020, <https://www.amnesty.org/en/latest/news/2020/02/lesotho-polihali-dam-construction-puts-nearly-8000-people-at-risk-of-displacement/>

<sup>86</sup> *Ibid.*

<sup>87</sup> Southern Defenders, *Southern Defenders and Seinoli Legal Centre Condemn Harassment and Intimidation of HRDs and urges Lesotho authorities to protect fundamental freedoms*, 31 May 2023, <https://southerndefenders.africa/2023/05/31/of-hrds-lesotho-authorities-to-protect-fundamental-freedoms/>.

<sup>88</sup> *Ibid.*

<sup>89</sup> Lesotho Tribune, *Outrageous Suppression of Peaceful Protests: LDF Violates Democratic Principles*, 29 May 2023, [https://lesothotribune.co.ls/lesotho-latest-updates-outrageous-suppression-of-peaceful-protests-ldf-violates-democratic-rights/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=lesotho-latest-updates-outrageous-suppression-of-peaceful-protests-ldf-violates-democratic-rights](https://lesothotribune.co.ls/lesotho-latest-updates-outrageous-suppression-of-peaceful-protests-ldf-violates-democratic-rights/?utm_source=rss&utm_medium=rss&utm_campaign=lesotho-latest-updates-outrageous-suppression-of-peaceful-protests-ldf-violates-democratic-rights).

<sup>90</sup> Sunday Express, *Rights groups confront Ramaphosa over Polihali dam*, 21-27 May 2023, Vol. 15 Issue 7, p.2.

<sup>91</sup> *Supra* at note 82, p.2.

<sup>92</sup> The Treaty on the Lesotho Highlands Water Project between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa, [https://www.lhda.org.ls/lhdaweb/uploads/documents/governance/lhwp\\_treaty.pdf](https://www.lhda.org.ls/lhdaweb/uploads/documents/governance/lhwp_treaty.pdf).

<sup>93</sup> Art. 6(10).

## b. NUL protests in June 2022

48. The Lesotho Mounted Police Service (LMPS) has a record of using unnecessary force and violence against protestors. In 16 June 2022, students of the National University of Lesotho (NUL) protested against slashed monthly stipends, which the students were contractually entitled to receive. One student was shot and killed during a protest.<sup>94</sup> The Lesotho Ombudsman's<sup>95</sup> report on the incident states that the LMPS's use of force was "unlawful", "excessive" and made several other systemic recommendations to improve LMPS's operation in order to "avoid similar incidents from occurring in the future".<sup>96</sup> Based on the Ombud's report, the LMPS's actions appear to have also been in violation of students' rights to expression and assembly under international human rights law.<sup>97</sup>

- **Recommendations**

**In light of the foregoing, the Human Rights Committee should recommend that the Government of Lesotho:**

- i. **Amend its Constitution to ensure that restrictions placed on the rights to freedom of expression and peaceful assembly that are inconsistent with the Covenant be removed.**
- ii. **Respect the rights of all persons to peacefully assemble and demonstrate, including those whose protests and demonstrations relate to the Lesotho Highlands Water Project (LHWP). In particular, in regard the to the LHWP, Lesotho should take steps to ensure:**
  - **Continuous dialogue with community members, human rights defenders and civil society organizations in relation to their grievances.**
  - **Consistent and meaningful participation of community members, human rights defenders and civil society organizations in all decisions relating to the LHWP and capable of effecting individuals' or communities' rights.**
- iii. **Take all necessary actions to implement the recommendations of the Ombudsman's report relating the NUL protests in June 2022.**
- iv. **Provide all necessary training to all LMPS officers to ensure that they understand fully:**
  - **the rights of all individuals in Lesotho to peacefully assemble and protest; and**
  - **the legal limits on the use of force under international and domestic human rights law and standards.**

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## E. Women's Equality

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<sup>94</sup> Transformation Resource Center (TRC), International Commission of Jurists and South African Litigation Centre (SALC), *Lesotho: Police must be held accountable for unnecessary use of force against protestors*, <https://www.southernafricalitigationcentre.org/2022/07/15/lesotho-law-enforcement-officials-must-be-held-accountable-for-disproportionate-and-unnecessary-use-of-force-against-protestors/>.

<sup>95</sup> See: <https://www.govpage.co.za/office-of-the-ombudsman.html>. The Ombudsman's powers are set out in the Ombudsman Act 9 of 1996, [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=45798&p\\_classification=01](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=45798&p_classification=01).

<sup>96</sup> Office of the Ombudsman, Report on an own-motion investigation into the strike by the National University of Lesotho (NUL) Students against the National Manpower Secretariat (NMDS) and violent action by the Lesotho Mounted Police Service (LMPS) of 16<sup>th</sup> June 2022, p.11, [Ombudsman Report on NUL Strike of 16 June 2022.pdf](#).

<sup>97</sup> UN Human Rights Committee, [General Comment No. 37](#) on the right to peaceful assembly, UN Doc. CCPR/C/GC/37, 17 September 2020, para.6.

49. The commencement of phase II of the Implementation of the Lesotho Highlands Water Project (LHWP) has resulted in the loss of assets for residents in the area where construction of the project is to take place as well as resettlement of affected households and livelihood restoration.<sup>98</sup> To compensate displaced residents, the LHWP Compensation Policy has been instituted. However, this government initiative has exposed the discrimination faced by women in Lesotho.<sup>99</sup>
50. Lesotho's Legal Capacity of Married Persons Act 2006 and the Land Act 2010 give married women the same legal rights as men.<sup>100</sup> Section 3(1) of the Legal Capacity of Married Persons Act<sup>101</sup> stipulates that "the common law, customary law and any other marriage rules in terms of which a husband acquires the marital power over the person and property of the wife are repealed". Additionally, section 56 of the Land Act establishes that persons deprived of property as a result of compulsory acquisition "shall be entitled to compensation at market".<sup>102</sup> The State Party report submitted by Lesotho states that the Land Act 2010 provides that women can hold title to land in their own right.<sup>103</sup>
51. The CEDAW Committee has, in its concluding observations to Lesotho in 2011, recommended that Lesotho amend its laws to ensure equal access to "inheritance rights, property and land rights" for women.<sup>104</sup>
52. Despite this, and even though the Compensation Regulations<sup>105</sup> themselves require strict compliance with the Lesotho's Legal Capacity of Married Persons Act 2006 and the Land Act 2010, in practice the disbursement of compensation under the LHWP is done without special consideration to the needs and rights of women. The result is that "the compensation policy of the LHWP [has] reinforced and exacerbated existing gender inequalities, and negatively affected women's ability to secure food for their household".<sup>106</sup> In practice, as men are perceived as heads of households, compensation is sent to their bank accounts and "women [do] not have much, if any, access to that money."<sup>107</sup>
53. As a State party to the ICCPR, Lesotho has an obligation under Articles 3 to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant". As this Committee has affirmed in its General Comment 28, ICCPR rights are to be enjoyed by all persons in their totality, and this requires Lesotho to take "positive measures in all areas so as to achieve the effective and equal empowerment of women".<sup>108</sup>

<sup>98</sup> Infrastructure News, *Lesotho Highlands Water Project – Phase II: An update*, 21 July 2022, <https://infrastructurenews.co.za/2022/07/21/lesotho-highlands-water-project-phase-ii-an-update/>.

<sup>99</sup> See Yvonne A. Braun, *Gender, large-scale development, and food insecurity in Lesotho: An analysis of the impact of Lesotho Highland Water Project*, <https://www.jstor.org/stable/25758924>.

<sup>100</sup> *Supra* note 80.

<sup>101</sup> Legal Capacity of Married Persons Act 2006 (Act no. 9 of 2006), <http://www.osall.org.za/docs/2011/03/Lesotho-Legal-Capacity-of-Married-Persons-Act-9-of-2006.pdf>

<sup>102</sup> Land Act 2010 (Act no. 8 of 2010), <https://media.lesotholii.org/files/legislation/akn-ls-act-2010-8-eng-2010-06-14.pdf>

<sup>103</sup> See *supra* note 1, para 57.

<sup>104</sup> Committee on the Elimination and Discrimination Against Women, [Concluding observations of the Committee on the Elimination of Discrimination Against Women: Lesotho](#), UN Doc. CEDAW/C/LSO/CO/1-4, 8 November 2011, para 39.

<sup>105</sup> Lesotho Highlands Water Project Compensation Regulations, 2017, <https://www.lhda.org.ls/lhdaweb/Uploads/documents/Governance/LHWP%20Compensation%20Regulations%202017.pdf>

<sup>106</sup> See *supra* note 98, p 454.

<sup>107</sup> *Ibid*, p 457-8.

<sup>108</sup> UN Human Rights Committee, [General Comment No. 28](#) Article 14: The Equality of Rights Between Men and Women), U.N. Doc CCPR/C/21/Rev.1/Add.10 (2000), para 3.

54. Despite Lesotho's legal obligations under the ICCPR and the CEDAW Convention, Lesotho's Constitution still fails to adequately protect women from discrimination. Whilst section 18 of the Constitution prohibits discrimination on the ground of "sex", section 18(4) of the Constitution cuts back on this prohibition by indicating the prohibition "shall not apply" with respect to "adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description" or in "the application of the customary law of Lesotho". In this regard, the CEDAW Committee has explicitly urged Lesotho to amend the Constitution to eliminate these limitations to prohibition on discrimination.<sup>109</sup>

- **Recommendations**

**In light of the foregoing, the Human Rights Committee should recommend that the Government of Lesotho:**

- i. **Amend its Constitution to ensure that the prohibition on sex discrimination is not limited in its application at all, including in relation customary law, personal law and family law.**
- ii. **Ensure the comprehensive review and revision of the LHWP Compensation Policy itself as well as its implementation and impact, to ensure that it is applied consistently with Lesotho's international obligations, the Legal Capacity of Married Persons Act and the Land Act.**
- iii. **The review and amendment processes in (i) and (ii) above, should:**
  - **Fully and meaningfully include the participation of civil society organizations and women.**
  - **Fully and meaningfully consider existing research on the discriminatory impact and application of the Compensation Policy and be evidence-informed.**

## **F. THE RIGHTS OF PERSONS WITH DISABILITIES**

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55. This section underlines a range of violations of the human rights of persons with disabilities in Lesotho.

56. Under the ICCPR, for present purposes the relevant provisions include article 2; article 25; article 7; article 9; article 14; and article 26. Similar protections of these rights exist in the Lesotho Constitution.<sup>110</sup> These guarantees set out in the ICCPR should, in the specific context of persons with disabilities, be understood consistent with provisions of the Convention on the Rights of Persons with Disabilities (CRPD) and the jurisprudence on the CRPD Committee referenced through this section.

- a. **Implementation of the Disability Equity Act**

57. Persons with disabilities are among the most disadvantaged and marginalized groups in Lesotho's society. Lesotho's report to this Committee reports on measures taken to protect the rights of persons with disabilities very sparsely. The report is also out of date in relation to specific critical

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<sup>109</sup> Committee on the Elimination of Discrimination Against Women, [Concluding Observations of the Committee on the Elimination of Discrimination Against Women](#), UN Doc. CEDAW /C/LSO/CO/1-4, 21 October 2011, para 13.

<sup>110</sup> See: sec.6 (right to personal liberty); sec. 8 (freedom from inhuman treatment); sec.18 (freedom from discrimination); sec.19 (right to equality before the law and equal protection of the law); sec.21 (derogation from fundamental rights and freedoms).

issues. For instance, the report notes that a Bill to protect persons with disabilities from discrimination “has been tabled before Parliament and is currently in the Parliamentary Social Cluster Committee”.<sup>111</sup> In its list of issues, this Committee explicitly requested “an update about the status of the National Disability Bill”.<sup>112</sup>

58. In fact, the Persons with Disability Equity Act was enacted in 2021.<sup>113</sup> The Act itself, which domesticates Lesotho’s treaty obligations under the CRPD,<sup>114</sup> is aimed primarily to “establish the Persons with Disability Advisory Council” (Council) and “provide for equal opportunities and recognition of rights of persons with disabilities”.<sup>115</sup>

- **Establishment of the Persons with Disability Advisory Council**

59. The establishment of the Council, an autonomous body, is central to driving the implementation of the Act.<sup>116</sup> The Act sets out a wide range of functions for the Council spanning the full range of its provisions and a comprehensive scope in relation to the protection and promotion of the rights of persons with disabilities.<sup>117</sup> The composition of Council includes, among others, governmental, legal profession, private sector and civil society representatives. Crucially, it consists, in particular, of “one representative of each category of the disabled people”, who shall be nominated by the Lesotho National Federation Organisations of the Disabled.<sup>118</sup>

60. Notwithstanding the enactment of the Disability Equity Act in 2021, to date, the Council has not yet been established. The failure of the government of Lesotho to establish the Disability Advisory Council has deprived people with disabilities in Lesotho of their human rights as guaranteed under article 25. LNFOD therefore reports that “the absence of the Persons with Disability advisory council means that the rights of persons with disabilities are not properly monitored, accessibility issues for the movement of persons with disabilities are not promoted, access to information is compromised and any other right enshrined in the Act is under threat due to the absence of the monitoring body”.<sup>119</sup> LNFOD has also noted that despite pledges from the Lesotho Prime Minister and government ministers to budget for the establishment of the Council they have failed to do so.<sup>120</sup>

- **Recommendations**

**In light of the foregoing, the Human Rights Committee should recommend that the Government of Lesotho:**

- i. Expeditiously, and in full and meaningful consultation with civil society organizations and persons with disabilities, take all necessary measures to establish and ensure the full**

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<sup>111</sup> *Supra* note 1, para 53.

<sup>112</sup> *Supra* note 3, para 17.

<sup>113</sup> Act 2 of 2021, <https://media.lesotholii.org/files/legislation/akn-ls-act-2021-2-eng-2021-03-12.pdf>.

<sup>114</sup> Lesotho Times “Govt implementing programmes to promote disabled persons’ rights: Minister Doti” (19 July 2021), <https://lestimes.com/govt-implementing-programmes-to-promote-disabled-persons-rights-minister-doti/>.

<sup>115</sup> *Ibid.*

<sup>116</sup> s.4.

<sup>117</sup> s.6.

<sup>118</sup> s.5(1)(c).

<sup>119</sup> LNFOD, *Disability e-Newsletter*, August 2022, Vol. 5, Issue 9, p.4,

[http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability\\_e-newsletter\\_aug.2022.pdf](http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_e-newsletter_aug.2022.pdf)

<sup>120</sup> *Ibid*, p 4.

**operation of the Persons with Disability Advisory Council in terms of section 4 of the Disability Equity Act.**

- ii. **Design and implement a full-fledged programme that promotes understanding disability as a human rights issue and to sensitize policymakers to combat discrimination on the basis of disability.**

- **Implementation of section 32 of the Act: Rules on Access to Justice**

61. Section 32 of the Act obliges the Chief Just of Lesotho to “make rules for the provision of accessible format methods and any other legal services and procedures which take into account the needs of a person with disability who attends court proceedings”.<sup>121</sup> After submissions from LNFOD and the ICJ, on 26 May 2023, these rules were officially enacted as the “Disability and Equity (Procedure) Rules, 2023”.<sup>122</sup>
62. The Rules, if implemented fully, could make a significant improvement in the access to justice of persons with disabilities in Lesotho. The Rules explicitly seek to ensure compliance with Lesotho’s international obligations under the CRPD,<sup>123</sup> and aim to depart from a perspective through which “the provision of procedural ... accommodations” will facilitate the effective participation of persons with disabilities in the justice system.<sup>124</sup>
63. Implementing the Rules effectively will require the government to provide resources – human, financial and other – to the full range of justice actors, including judicial officers, to provide such accommodations. For example, the Rules contemplate an extensive role for “intermediaries”, who are essential in providing various supports for persons with disabilities’ participation, positions which the government will have to create, define and budget for.<sup>125</sup>
64. Such implementation of the Rules and provision for access to justice for persons with disabilities is required by, among others, articles 2, 14, and 26 of the Covenant. The failure to provide reasonable accommodations to persons with disabilities is more generally considered to amount to “discrimination on the basis of disability” under article 2 of the CRPD. The UN Special Rapporteur on the Rights of Persons with Disabilities has given further content to States’ obligations in respect of these rights in her *International Principles and Guidelines on Access to Justice for Persons with Disabilities*.<sup>126</sup>

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<sup>121</sup> Section 32 reads in full:

**“32. Access to justice**

- (1) The Chief Justice shall make rules for the provision of accessible format methods and any other legal services and procedures which take into account the needs of a person with disability who attends court proceedings.
- (2) A person with disability, who is denied bail shall be held in custody in a facility which is modified in accordance with the rules made by the Chief Justice or any other relevant law.
- (3) A person with disability shall be competent and compellable to give evidence in a criminal and civil case in any court in Lesotho or before a magistrate on a preparatory examination.
- (4) A person with disability shall be assisted in every possible manner to effectively, directly and indirectly participate in all legal proceedings and other preliminary stages of administration of the judicial justice process.

<sup>122</sup> Legal Notice No. 55 of 2023, [https://drive.google.com/file/d/1ZHGqOPhun7TMEvFLzTITQITZvHkp5w\\_R/view?usp=sharing](https://drive.google.com/file/d/1ZHGqOPhun7TMEvFLzTITQITZvHkp5w_R/view?usp=sharing).

<sup>123</sup> Rule 2(b).

<sup>124</sup> Rule 2(a).

<sup>125</sup> See, as examples, Rules 7, 8 and 12.

<sup>126</sup> United Nations Human Rights Special Procedures, *International Principles and Guidelines on Access to Justice for Persons with Disabilities*, August 2020, <https://www.ohchr.org/en/special-procedures/sr-disability/international-principles-and-guidelines-access-justice-persons->

- **Recommendations**

In light of the foregoing, the Human Rights Committee should recommend that the Government of Lesotho:

i. **Take all necessary measures, in consultation with the judiciary, other justice actors, civil society organizations and persons with disabilities to ensure that the judiciary and all justice actors are fully equipped to implement the Disability and Equity (Procedure) Rules. Such measures should include, among others:**

- **Budgetary measures to ensure the provision of funds necessary to ensure the full implementation of the Disability and Equity (Procedure) Rules; and**
- **Provision for and of human resources necessary to ensure the full implementation of the Disability and Equity (Procedure) Rules.**
- **Measures such as workshops and seminars for all court personnel, designed in full consultation with the judiciary, on the CRPD, the Disability Equity Act and the Disability and Equity (Procedure) Rules.**

- **Amendment of the Criminal Procedure and Evidence Act (s 219)**

65. The full and effective implementation of the Rules will also requires Lesotho to consider and revise its legal framework regarding access to justice for persons with disabilities comprehensively. For example, section 219 of the Criminal Procedure and Evidence Act<sup>127</sup> states that, “no person appearing or proved to be afflicted with idiocy, lunacy or inability or labouring under any imbecility of mind arising from intoxication or otherwise whereby he is deprived of the proper use of reason, shall be competent to give evidence while so afflicted or disabled.”<sup>128</sup>

66. In *Koali Moshoeshoe and Others v The DPP and Other* (CC 14/2017), the High Court (Constitutional Division)<sup>129</sup> of Lesotho declared this specific provision of the Act unconstitutional to the effect that it prevented persons with disabilities from testifying as witnesses in court. It concluded that:

“The effect of section 219 of the Criminal Procedure and Evidence Act is to render a victim of abuse, exploitation, humiliation and exploitation to all kinds of vulnerable treatment the worst kinds being sexual, financial and through other obnoxious methods. The victims of all these are human beings and deserve all protection and equality under law. Even if the insolent or disrespectful words are removed from section 219, the negative effect to the disabled remains poignant and this is quite obnoxious and must be removed from our statute books”.

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[disabilities#:~:text=The%20International%20Principles%20and%20Guidelines,with%20international%20human%20rights%20standards.](#)

<sup>127</sup> Act 9 of 1981, <https://media.lesotholii.org/files/legislation/akn-ls-act-1981-9-eng-1600-01-01.pdf>.

<sup>128</sup> Ibid, s.219.

<sup>129</sup>*Koali Moshoeshoe and Others v The DPP and Other* (CC 14/2017), <https://drive.google.com/drive/folders/1f6ddpbh4dPO8hQix7EopmEySiL9LUSDZ>.

67. The Court therefore declared the provision “null and void”. Despite this declaration, six years later the Act has not been amended,<sup>130</sup> and many of the same difficulties persist in practice. There is a need both to repeal this provision and to enact a new provision, consistent with Lesotho’s constitutional and international obligations and the recently produced rules, to ensure that persons with disabilities may be considered competent to give evidence.

- **Recommendations**

**In light of the foregoing, the Human Rights Committee should recommend that the Government of Lesotho:**

- i. **Expediently repeal section 219 of the Criminal Procedure and Evidence Act declared unconstitutional in the High Court’s judgment in *Koali Moshoeshe and Others v The DPP and Other* (CC 14/2017).**
- ii. **Initiate an amendment of the Criminal Procedure and Evidence Act that ensures that persons with disabilities be recognized to be fully and equally competent to give evidence in all legal processes:**
  - **through a process which includes the full and meaningful participation of the judiciary, other justice actors, civil society organizations and persons with disabilities; and**
  - **in full compliance with standards set out in the CRPD, including the requirement that procedural and other accommodations be provided to ensure supported decision-making.**

- **Amendment of the Criminal Procedure and Evidence Act (s 172)**

68. The full and effective implementation of the Rules will also require the amendment of section 172 of the Criminal Procedure and Evidence Act (headed “trial of an insane person”) pertaining to what is commonly referred to as institutionalization at “the King’s pleasure”.<sup>131</sup> Section 172(2) reads:

“If the court finds the person charged with an offence insane or mentally incapacitated pursuant to sub-section (1), the judicial officer presiding at the trial or preparatory examination shall record such verdict or finding and shall issue an order committing such person to some prison pending the satisfaction of the King’s pleasure or the court may make any order which it deems fit.”

69. Section 172 of the Act has had the effect of keeping persons who are determined to be “insane” or “mentally incapacitated” indefinitely institutionalized. Moreover, it departs from a different starting point of the Rules, which, as mentioned above, seek to ensure support and accommodations be provided to persons with disabilities to ensure their full and effective participation in court processes. In contrast, the approach of section 172 favours both forced institutionalization and determinations of incapacity instead of the determination and provision of necessary supports required by persons with disabilities to participate on an equal basis. In

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<sup>130</sup> International Commission of Jurists, *Lesotho: ICJ and LNFOD hold judicial workshop to promote access to justice for persons with disabilities*, 10 March 2019, [http://www.infod.org.ls/uploads/1/2/2/5/12251792/terms\\_of\\_reference-training\\_for\\_accommodation\\_providers.pdf](http://www.infod.org.ls/uploads/1/2/2/5/12251792/terms_of_reference-training_for_accommodation_providers.pdf).

<sup>131</sup> s.172(2).



practice, individuals are routinely institutionalized in poor and overcrowded conditions at Mohlomi Mental Hospital for long periods of time while awaiting the “King’s Pleasure”.<sup>132</sup>

70. The CRPD Committee has made it clear in its *Guidelines on deinstitutionalization, including in emergencies*<sup>133</sup> that “States parties should abolish all forms of institutionalization, end new placements in institutions and refrain from investing in institutions”<sup>134</sup> and that “there is no justification to perpetuate institutionalization”. In parallel with the deinstitutionalization process, States are required to “reform legislation on legal capacity”,<sup>135</sup> and “all legislative provisions that authorize the deprivation of liberty or other restrictions on liberty and security of person based on impairment, including involuntary commitment or treatment based on ‘mental illness or disorder’, should be repealed.”<sup>136</sup>

71. Section 172 of the Act is inconsistent with a range of CRPD and ICCPR provisions, including with respect to the rights of persons with disabilities to: access to justice; freedom from discrimination; equality before the law and equal protection of the law without discrimination; recognition everywhere as a person before the law; a fair trial; liberty and security of person; and freedom from torture or other cruel, inhuman or degrading treatment or punishment.

- **Recommendations**

**In light of the foregoing, the Human Rights Committee should recommend that the Government of Lesotho:**

- Expediently repeal section 172 of the Criminal Procedure and Evidence Act in its entirety.**
- Conduct a comprehensive and independent inquiry into the conditions at Mohlomi Mental Hospital and act on the findings of such an inquiry in order improve the conditions faced by those who are treated at the hospital.**
- Conduct a comprehensive review of all laws and policies to ensure compliance with the CRPD’s and ICCPR’s requirements in relation to legal capacity and Lesotho’s obligation to abolish all forms of institutionalization.**

- **Implementation of provisions relating to inclusive education**

72. The Disability Equity Act protects a wide range of rights of persons with disabilities, including the right to “inclusive education”.<sup>137</sup> Section 23 of the Act headed “education” fortifies this right and contemplates an extensive role for the Disability Advisory Council in the provision and roll out of inclusive education.<sup>138</sup> The failure to establish the Council therefore impacts on the discrimination that is well-documented in Lesotho’s education system.

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<sup>132</sup> Public Eye, *Inside the anguished mind of a mental health sufferer*, <https://publiceyenews.com/inside-the-anguished-mind-of-mental-health-sufferer/>.

<sup>133</sup> Committee on the Rights of Persons with Disabilities, *Guidelines on deinstitutionalization, including in emergencies*, UN Doc. CRPD/C/5, 10 October 2022.

<sup>134</sup> *Ibid*, para 8.

<sup>135</sup> *Ibid*, para 55.

<sup>136</sup> *Ibid*, para 58.

<sup>137</sup> Inclusive education is defined by the Act to mean that:

“the general education system which provides age appropriate accessible instruction, assessment, intervention, accommodation, modification, support service, adaptation, physical learning environment and any other relevant additional resources to a learner with disability, in order to help them realize their full potential on an equal basis with other”.

<sup>138</sup> See also s.24.

73. Research launched by the ICJ in April 2023<sup>139</sup> documents a range of discriminatory aspects of the current education system, including the continued segregation of children with disabilities into special schools and the dramatically inadequate financial and human resourcing provided by the government for the execution of its international and domestic legal obligations.<sup>140</sup> Such segregation is also perpetuated by provisions of the Education Act,<sup>141</sup> which appear to permit a learner's non-enrolment in school, or discontinuation of their attendance at school, on the basis of a disability.<sup>142</sup>
74. The failure to ensure inclusive education for children with disabilities violates their right under article 24 of the Covenant to protection measures, and their rights to non-discrimination and equality before the law and equal protection of the law without discrimination, as well as a range of CRPD rights.<sup>143</sup>

- **Recommendations**

**In light of the foregoing, the Human Rights Committee should recommend that the Government of Lesotho:**

- i. **Take all necessary measures to ensure equal access to quality, inclusive education to all children with disabilities. This requires, among others, measures to:**
  - **Desegregate the education system in Lesotho to ensure that children with disabilities can attend schools in the general education system, in and the communities in which they live;**
  - **Expediently repeal section 6(3)(c) of the Education Act;**
  - **Plan for and provide human, financial, and other resources necessary for the implementation of Lesotho's Inclusive Education Policy; and**
  - **Ensure the establishment and functioning of the Disability Advisory Council to perform all of its contemplated functions in respect of education as set out in section 23 of the Disability Equity Act.**

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<sup>139</sup> *Lesotho: Children with disabilities excluded from equal access to education*: Briefing Paper, INT'L COMM'N OF JURISTS, 20 April 2023, <https://www.icj.org/lesotho-children-with-disabilities-excluded-from-equal-access-to-education-new-icj-briefing-paper/>.

<sup>140</sup> CRPD, art.24. See also, Lesotho's Inclusive Education Policy (2018), <https://planipolis.iiep.unesco.org/sites/default/files/ressources/approved-inclusive-education-policy-2018.pdf>.

<sup>141</sup> Act 3 of 2010, [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=110075&p\\_count=2&p\\_classification=09#:~:text=Name%3A-,Education%20Act%20\(No,3%20of%202010\).&text=the%20administration%20of%20education,.,%22%20\(Article%206\)](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=110075&p_count=2&p_classification=09#:~:text=Name%3A-,Education%20Act%20(No,3%20of%202010).&text=the%20administration%20of%20education,.,%22%20(Article%206).).

<sup>142</sup> See *supra* note 138, p 43. Section 6(3)(c) of the Education Act states that the provision under section 6(2) of the Act which states that "where a learner is enrolled at a school, the learner shall attend that school on each day, and for such parts of each day, as instruction is provided at the school for the learner" does not apply to a learner "suffering from a disability or disease which prevents him or her from attending."

<sup>143</sup> Including: Articles 24 (education) and 5 (non-discrimination). The CRPD Committee has set out in significant detail States' obligation in terms of the right to inclusive education in its General Comment 4. UN COMM. ON RIGHTS OF PERSONS WITH DISABILITIES, [General Comment No.4 \(2016\) on Article 24- the right to inclusive education](#), UN Doc. CPRD/C/GC/4, 25 November 2016, para 38-40.

## b. Disability Discrimination in relation to Sexual and Reproductive Autonomy

75. The Sexual Offences Act was enacted in 2003,<sup>144</sup> prior to the enactment of the Disability Equity Act and Lesotho's ratification of the CRPD. Lesotho's report to this Committee repeatedly refers to the Act, and in one instance notes that the Act "protects people with disabilities from sexual abuse".<sup>145</sup> Despite this, no mention is made of the various discriminatory provisions and impact of the Act on persons with disabilities.

### • Definition of Disability and Persons with Disability

76. Section 2(f)(i) of the Act defines under the ambit of "coercive circumstances" disability to include "physical disability, mental incapacity, sensory disability, medical disability, intellectual disability or other disability, whether permanent or temporary." This definition is inconsistent with both the definition of disability provided in the Disability Equity Act<sup>146</sup> and the CRPD,<sup>147</sup> which both define disability as a combination of factors relating to an individual's impairment and a range of environmental, attitudinal, and other barriers.

77. The restrictive, narrow and outdated definition provided in section 2(f)(i) relies on a medical model of disability<sup>148</sup> and should be replaced with a definition consistent with the Disability Equity Act and the CRPD.

### • Sexual autonomy of Persons with Disabilities

78. Section 15 of the Sexual Offences Act deals directly with "sexual offences against disabled persons". This provision prohibits any person from committing a "sexual act" either "in relation to" or "in the presence of" a person with a disability.<sup>149</sup> It also further criminalizes committing "an 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"<sup>150</sup>.

79. This formulation is repeated in the much more recently enacted Counter Domestic Violence Act enacted in 2022.<sup>151</sup> The Act includes within its definition of domestic violence "abuse perpetrated by virtue of ... disability",<sup>152</sup> but then also defines "sexual abuse in marriage, relationship or otherwise" as including engaging in a sexual act with a "victim" who is "affected by physical

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<sup>144</sup> Act 3 of 2003, <https://gender.gov.ls/wp-content/uploads/2020/11/Lesotho-Sexual-Violence-Act-2003.pdf>.

<sup>145</sup> *Supra* note 1, para 43.

<sup>146</sup> The Disability Equity Act defines disability as "the result of an interaction between a person with an impairment and the environment with various barriers which hinder a person with the impairment to participate in societal activities on an equal basis with other persons".

<sup>147</sup> The CRPD defines disability as "an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others".

<sup>148</sup> UN COMM. ON RIGHTS OF PERSONS WITH DISABILITIES, [General Comment No. 6 \(2018\) on equality and non-discrimination](#), U.N. Doc. CRPD/C/GC/6, Apr. 26, 2018, para 2.

<sup>149</sup> s.15(1).

<sup>150</sup> s.15(2).

<sup>151</sup> Act 14 of 2022, <https://www.webbernew.com/uploads/GG%20No.%2072%20of%202022.pdf>.

<sup>152</sup> *Ibid*, s.3(j).

disability, mental incapacity, sensory disability, intellectual disability or any other disability whether permanent or temporary.”<sup>153</sup>

80. Both provisions of the respective Acts, therefore, appear to render any sexual act with a person with a disability automatically unlawful, irrespective of whether that person has consented to such an act.<sup>154</sup> This is discriminatory, in a clear violation of a wide range of Covenant rights and strips persons with disabilities of sexual autonomy almost entirely.

- **Complainants who are Persons with Disabilities**

81. The Sexual Offences Act does not make any provision for procedural or other accommodations for persons with disabilities who are complainants in cases relating to sexual offences. The amendment of the Act to require for such accommodations is necessary for its consistency with the Disability Equity Act, the CRPD and Rules detailed above. The Counter Domestic Violence Act similarly does not make any provision for procedural or other accommodations for persons with disabilities who are complainants in cases relating to domestic violence.<sup>155</sup>

82. This failure to provide for reasonable accommodations for complainants with disabilities is clearly in violation of the prohibitions on discrimination under the Covenant, as well as under the CRPD under Articles 2 (definitions) read with Article 5 (non-discrimination).<sup>156</sup>

- **Recommendations**

**In light of the foregoing, the Human Rights Committee should recommend that the Government of Lesotho:**

**i. Amend the Sexual Offences Act to ensure that:**

- **The definition of “disability” provided in section 2(f)(i) of the act is removed and replaced with a definition that is consistent with the ICCPR, the CRPD and the Disability Equity Act.**
- **Section 15 of the Act titled “sexual offences against disabled persons” is removed in its entirety.**
- **A section is added to the Act to provide for reasonable accommodations for persons with disabilities in all processes set out in the Act, including those relating to complainants who are persons with disabilities.**

**ii. Amend the Counter Domestic Violence Act to ensure that:**

- **A definition of “disability” that is consistent with the ICCPR, the CRPD and the Disability Equity Act is inserted.**
- **The definition of “sexual abuse in marriage, relationship or otherwise” in section 2 of the Act is amended to remove item (c) in its entirety.**

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<sup>153</sup> s.2.

<sup>154</sup> See: UN COMM. ON RIGHTS OF PERSONS WITH DISABILITIES, [General Comment No. 1 \(2014\) on Article 12: Equal recognition before the law](#), UN Doc. CRPD/C/GC/1, 19 May 2014, paras 4, 33.

<sup>155</sup> Act 14 of 2022, <https://www.webbernew.com/uploads/GG%20No.%2072%20of%202022.pdf>.

<sup>156</sup> See also generally: [General comment No. 6 on equality and discrimination](#); UN COMM. ON RIGHTS OF PERSONS WITH DISABILITIES, [General comment No. 3\(2016\) on women and girls with disabilities](#), UN Doc. CRPD/C/GC/3, 25 November 2016.

- **A section is added to the Act to provide for reasonable accommodations for persons with disabilities in all processes set out in the Act, including those relating to complainants who are persons with disabilities.**

### **c. Disability discrimination in the Electoral System**

83. Section 5 of Lesotho's National Assembly Electoral Act<sup>157</sup> specifically excludes a person who "is declared to be of unsound mind"<sup>158</sup> from those individuals who qualify to register to vote and, therefore, denies such individuals the right to vote.

84. This provision is clearly discriminatory and in contravention of the ICCPR and the CRPD; it falls short of article 25 of the ICCPR and the political rights entrenched in the CRPD in Article 29. It also strips persons with disabilities of the right to "enjoy legal capacity on an equal basis with others in all aspects of life", protected in terms of Article 12 of the CRPD.

- **Recommendations**

**In light of the foregoing, the Human Rights Committee should recommend that the Government of Lesotho:**

- i. Expeditiously amend section 5 of the National Assembly Electoral Act to remove section 5(2)(d) of the Act in its entirety.**
- ii. Amend the National Assembly Electoral Act to provide for reasonable accommodation for persons with disabilities so to enable them to fully exercise their right to participation in all electoral processes.**

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<sup>157</sup> Act 14 of 2011, <https://aceproject.org/ero-en/regions/africa/LS/lesotho-national-assembly-electoral-act-2011/view>.

<sup>158</sup> *Ibid*, s. 5(2)(d).