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Women's Leadership Centre

JOINT CIVIL SOCIETY SUBMISSION TO THE 2ND CYCLE UNIVERSAL PERIODIC REVIEW OF NAMIBIA (JAN – FEB 2016)

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Date of submission: 19 June 2015

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INTRODUCTION

This submission has been prepared by five civil society organisations, in consultation with four others, for the Universal Periodic Review (UPR) of Namibia in January - February 2016. The organisations presenting this report include the Southern Africa Litigation Centre (SALC), Namibian Women's Health Network (NWHN), the Legal Assistance Centre (LAC), the Women's Leadership Centre (WLC) and the Southern African Christian Initiative (SACHI).

SALC¹ is a non-governmental organisation established in 2005 and based in Johannesburg, South Africa. It aims to provide support—both technical and financial—to human rights and public interest initiatives undertaken by domestic lawyers and local civil society organisations in southern Africa. SALC works in Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Zambia and Zimbabwe. Its model is to work in conjunction with domestic lawyers and civil society organisations in each jurisdiction who are litigating public interest cases involving human rights or the rule of law.

NWHN² works with women in each of Namibia's 14 regions to provide information, education, skills, and capacity building to improve the health of Namibian women living with HIV and to empower them to become leaders at the local and national level. Its mission is to advocate for women's health rights, provide information, education, skills and capacity building to improve the health of Namibian women and girls including women and girls living with HIV and AIDS. It was established in 2007.

LAC³ is a public interest law centre founded in 1988 that collectively strives to make the law accessible to those with the least access, through education, law reform, research, litigation, legal advice, representation and lobbying, with the ultimate aim of creating and maintaining a human rights culture in Namibia. The LAC has four major units: (1) The Human Rights and Constitutional unit – focusing on access to social justice and the rule of law; (2) The Gender, Research and Advocacy Project; (3) The Land, Environment and Development Project; and (4) The AIDS Law unit. The LAC is based in Windhoek.

WLC⁴ is a women's rights organization established in 2004 and based in Windhoek, Namibia. It works towards building a society in which all women actively engage in shaping the politics, practices and values of both public and private spheres of life. The organisation supports a grassroots development of leadership among Namibian women by promoting the voice, visibility, creativity and transformative leadership of women from the most marginalised sectors of society, supporting them to build solidarity through women's groups and to articulate their experiences, needs and desires through texts, photography and other art forms, informed by a critical feminist consciousness of their human rights as women and as citizens.

SACHI⁵ is a membership organisation established in 2007. It represents a network of Faith Based Organisations and Civil Society Organisations from all over Southern Africa Region with a keen interest in advocating for socio-economic development, democracy and governance, social and economic justice, peace and justice, religious tolerance and interfaith dialogue.

The information contained in this shadow report is based on information obtained by the aforementioned organisations in the course of their work as human rights organisations. In addition, a consultation meeting was held with a total of 11 human rights organisations and institutions in

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Windhoek, Namibia. In this meeting a number of human rights concerns were raised. Further research was carried out in relation to the concerns raised at the meeting and these have been included in this report.

Concerns raised in this report include the continued prevalence of harmful traditional practices; challenges in accessing health care services, particularly for persons with disabilities, sexual minorities and sex workers; failure to take concrete steps to prevent further coerced and forced sterilisations and to provide redress for those who have been previously forcibly sterilised; restrictive laws related to abortion; failure to take steps to align Namibia's national laws and policies with its international obligations regarding persons with disabilities; continued violations of rights in the criminal justice system; as well as steps taken by the Namibian authorities with regard to the Southern Africa Development Community (SADC) Tribunal which impact on the right of access to justice and an effective remedy.

FOLLOW UP TO THE PREVIOUS REVIEW

During its first UPR in January 2011, Namibia received 120 recommendations in total, 90 of which were accepted, 27 it undertook to consider, and 3 it rejected. The recommendations rejected related to abolition of laws against consensual same sex relations between adults; standing invitations to UN special procedures; and ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW). We note that despite the refusal of Namibia to extend standing invitations to the mechanisms, the Special Rapporteurs on the human right to safe drinking water and sanitation; on the rights of indigenous peoples; and on extreme poverty and human rights have carried out official visits to the country since the last UPR.⁶

Namibia agreed to ratify the International Convention for the Protection of All Persons from Enforced Disappearances (CED), the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT) and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR). However, to our knowledge, none of these treaties have been ratified to date.

Namibia appears to have taken some steps towards the improvement of human rights in the country. Positive steps include some provisions in the new National Health Act⁷ and the Correctional Services Act;⁸ the adoption of an inclusive education policy;⁹ as well as a decision by the Namibian Courts,¹⁰ finding that three HIV-positive women were sterilised without their informed consent in violation of their rights under Namibian law.

While there has been some progress, the authorities have failed to fully implement the recommendations accepted in the last UPR, including issuing clear directives to all health officials prohibiting the sterilisation of women living with HIV/AIDS without their informed consent.¹¹ It has also failed, as will be shown in this submission, to fully implement recommendations related to harmful practices,¹² access to health,¹³ persons with disabilities¹⁴ and prison conditions¹⁵ which it accepted.

THE NATIONAL HUMAN RIGHTS FRAMEWORK

The Constitution of Namibia of 1990¹⁶ enshrines a number of human rights. However it still does not reflect some rights Namibia has committed to in the international treaties ratified.¹⁷ It does not provide for the right to highest attainable standard of physical and mental health or the right to an adequate

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standard of living. These are only included as principles of state policy¹⁸ and these principles provide only for the insurance of health and strength of individuals through enactment of legislation;¹⁹ as well as a decent standard of living for senior citizens.²⁰ The newly enacted National Health Act²¹ does state that every person in Namibia has access to state hospital or state health care services and provides for the right to receive treatment or other medical care and to benefit from health services.²² While this is a positive step, it is not the same as the right to the highest attainable standard of physical and mental health.

Namibia has also not yet extended the grounds for non-discrimination in the Constitution.²³ They remain quite restricted and do not include grounds such as sexual orientation or disability. The 1992 Labour Act²⁴ included both sexual orientation and disability as a ground for non-discrimination, but sexual orientation was removed from the 2007 Labour Act.²⁵ Namibia is obliged under the Convention of the Rights of Persons with Disabilities (CRPD), which it has ratified, to prohibit all discrimination on the basis of disability. However, Namibia has not yet passed laws to domesticate provisions of CRPD.

Laws of significance for human rights have been passed the last UPR. In 2012, the Correctional Service Act was passed. It provides for the separation of prisoners into different groups in places of detention.²⁶ It further states that juveniles awaiting trial or the conclusion of the trial should not be held in correctional facilities.²⁷ However, the obligation to separate prisoners extends only, "so far as the correctional facility accommodation renders it practicable."²⁸ The law also provides for the possibility of juveniles to be held in remand in correctional facilities where the court deems it necessary and there are no suitable places of detention.²⁹

On 18 May 2015, the Public and Environmental Health Act³⁰ was promulgated. This law criminalises the wilful and negligent infection of another person with a "sexually transmitted infection." It further criminalises the wilful or negligent conduct or permission of conduct "in a way likely to lead to the infection of another person".³¹ This provision is overly broad, potentially including within its ambit any, otherwise lawful, consensual sexual conduct. The Global Commission on HIV and the Law³² and UNAIDS³³ have warned of human rights concerns and adverse public health impacts in combatting HIV/AIDS inherent in similar legislation. In addition, the Act includes various reporting obligations³⁴ and provisions for the mandatory treatment³⁵ of persons with sexually transmitted diseases. Such provisions could result in arbitrary violations of patients' privacy, physical integrity and rights to give their informed consent to medical treatment.

THE HUMAN RIGHTS SITUATION ON THE GROUND

A number of human rights concerns, raised in Namibia's last UPR, remain a concern, including harmful traditional and cultural practices, access to health, as well as violations of rights in the criminal justice system. In addition, we are concerned about the failure to take adequate steps in respect of forced and coerced sterilisation, to review laws related to abortion, as well as to enact policies and legislation in respect of persons with disabilities, and the decision of Namibia to sign the revised SADC Tribunal protocol which removes individual access to the court and its human rights jurisdiction.

Harmful traditional and cultural practices

We remain concerned about traditional laws and cultural practices which perpetuate gender inequality, gender-based violence and the perception that women are inferior to men or are the property of men. These include initiation practices which involve humiliation and violence against young girls to enforce submission and obedience in preparation for marriage; sexual readiness testing; coerced cutting and

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scarring of young girls' bodies which is believed by some to make them more attractive to men; child marriages; cutting mothers in a misguided attempt to heal children; widow cleansing; as well as other practices which subject women to forced marriages or loss of property. Such practices are common in the Zambezi region, as well as other regions of Namibia.³⁶ Many of the above practices expose girls and women to infection with HIV. Such practices constitute a violation of the rights to non-discrimination, health, property and the right not to be tortured or subjected to cruel, inhuman or degrading treatment, as well as the right to life where the practice results in death.

Although Namibian law requires customary practices to be in line with human rights contained in the Constitution,³⁷ traditional authorities in some communities continue to apply discriminatory laws and practices which violate human rights in the resolution of disputes brought before them. Furthermore, Namibia's constitution states that customary laws in force at the time of independence remain valid to the extent that they do not conflict with the constitution or statutory law.³⁸ Therefore, in many cases, unless customary laws and practices are explicitly stated to conflict with the constitution and to be invalid, and unless people are made aware of this, the laws and practices are seen as valid. During the last UPR, Namibia undertook to take steps to eliminate harmful cultural and traditional practices.³⁹ Civil society in the country has attempted to work with traditional authorities to eradicate such practices.⁴⁰ However, little appears to have been done by the government to educate traditional authorities on the need to ensure decisions in traditional dispute resolution mechanisms do not violate human rights. Nor has there been sufficient public awareness regarding traditional practices which conflict with the constitution and which are thus invalid.

Access to health

The recently promulgated National Health Act provides entitlements for everyone in Namibia with regard to health care.⁴¹ However, access to health remains a concern, particularly for minorities, such as people living with HIV, persons with disabilities, those from the LGBTI community and sex workers. These groups have reported being stigmatised by health care professionals and receiving poor service from them. For many, the negative attitudes of healthcare professionals serves as a disincentive for accessing health. This is a concern that was also raised by the UN Special Rapporteur on extreme poverty and human rights following her visit to Namibia.⁴² Sex workers and those from the LGBTI community, particularly men engaging in same-sex activities, are further dissuaded from accessing health due to the criminalisation of sex work and consensual same-sex sexual acts in Namibia.⁴³ Although these laws do not appear to have been applied in recent years, they are still a source of fear and a disincentive for seeking help in situations that might expose one's profession or sexual orientation.

During Namibia's mid-term implementation assessment, Namibia stated that an investigation into the operations and conditions of health facilities had been carried out in 2012 and a report delivered to the President in 2013. Namibia further stated that the recommendations contained in the report were receiving the Government's attention.⁴⁴ However, the report is not easily accessible and it is therefore difficult to verify whether these recommendations have been implemented. No further information on the recommendations has been made available to the general public or civil society.

We are further concerned about reports that migrants are being charged higher fees for accessing health services.⁴⁵ This is particularly of concern in relation to immigrants on antiretrovirals (ARVs) who are at risk of defaulting on their treatment as they cannot afford to pay the N\$60.00⁴⁶ for the medication, a further N\$60.00 for consultation and the N\$400/day⁴⁷ admission fees where applicable.

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Namibian nationals do not pay any fees at public hospitals. Before 2015, immigrants temporarily in Namibia appear to only have been required to pay a small affordable fee of N\$10. The high increase of fees for migrants is likely to create default, drug resistance and at the same time re-infection. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) provides for the right of migrants to, “receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health.”⁴⁸ While Namibia is not a state party to the CMW, a denial of access to ARVs for migrants - which are indicated to decrease mortality, morbidity and infectiousness - threatens the lives and wellbeing of not only the foreign nationals but also exposes citizens to increased risk of infection with HIV and opportunistic infections. The National Health Act provides for the right of everyone in Namibia to receive treatment and medical care. This is not limited to foreign nationals. While the Act empowers the Minister to prescribe fees and tariffs to be paid for treatment, including different tariffs for different groups of people,⁴⁹ it should be borne in mind that limiting the access of ARVs for migrants by increasing medical related costs is a policy harmful to public health and not a justifiable limitation of the right to life, health, freedom from inhuman and degrading treatment, dignity and equality contained in treaties to which Namibia is party.

Sexual and reproductive rights - Coerced and forced sterilisation and abortion

In 2008, the NWHN and the International Community of Women Living with HIV uncovered cases of almost 40 HIV positive women being subjected to coerced sterilisation in Namibia. In all of the cases, medical personnel failed to obtain the woman's informed consent prior to performing the sterilisation. In some cases, women were asked to sign a stack of papers while they were in labour and on their way to the operating room. In others, women learned of the sterilisation only after their delivery when returning to the clinic to request contraception. Some women discovered that they had undergone forced sterilisation during the 2010 and 2011 court hearings regarding the forced/coerced sterilisation of three women living with HIV. During the hearings these women learned that “BTL” (Bi Tubal Ligation) was written in their health passports to signify they were sterilised. None of these women were provided information on the nature or impact of the sterilisation procedure.

Positive steps were taken with the 2012 and 2014 court decisions,⁵⁰ however women seeking sterilisations from public hospitals are now being required by medical personnel to obtain a police affidavit indicating their desire for the procedure. The Human Rights Committee has indicated that the imposition of such general requirements on women for sterilisation is prejudicial to other rights in the International Covenant on Civil and Political Rights (ICCPR), such as the rights to life and not to be subjected to torture, cruel, inhuman and degrading treatment or punishment.⁵¹

The authorities have indicated that steps are being taken to prevent further coerced or forced sterilisation. However we are concerned that they have failed to review outdated laws impacting on informed consent and sterilisation, such as the Abortion and Sterilisation Act,⁵² which does not explicitly mention the need for informed consent for both sterilisation and abortion procedures. Furthermore, information has not been made publicly available regarding steps being taken, if any, to develop guidelines aligned to the International Federation of Gynaecology and Obstetrics (FIGO) guidelines on female contraceptive sterilisation.⁵³ Civil society organisations and women living with HIV have not been consulted in the development of any policies and guidelines relevant to informed consent and sterilisation. In addition the authorities have failed to take steps to ensure redress – including reversal of sterilisation where possible - to those women who have been subjected to coerced sterilisation.

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We are also concerned about the restrictive laws related to abortion. The Abortion & Sterilisation Act⁵⁴ permits abortion in certain circumstances, but places limitations on providers and facilities permitted to perform abortion services. This creates unnecessary barriers to access, particularly for poor and rural women. The World Health Organisation has indicated that abortion care may be safely provided where there is good-quality primary care and outpatient services and may be safely provided by any properly trained healthcare provider. This includes trained non-physician clinicians such as midwives, nurse practitioners, clinical officers, physician assistants, family welfare visitors, and others.⁵⁵ The Abortion and Sterilisation Act further requires judicial authorisation for termination of a pregnancy resulting from unlawful intercourse. This can lead to further victimisation of victims and drives victims of sexual violence to unsafe abortions. The WHO recommends that standards and guidelines for provision of abortion following unlawful intercourse should not impose unnecessary administrative or judicial procedures.⁵⁶

Persons with disabilities

Namibia has ratified the CRPD, but has not submitted a report to the Committee on the Rights of Persons with Disabilities since its ratification. A positive step was taken by Namibia in 2013 when it adopted a policy of inclusive education,⁵⁷ which seeks to include children with disabilities in the education system. However, access to education for children with disabilities remains a concern. There are still only a few schools in the country which accept persons with disabilities in practice⁵⁸ and many of these schools lack the necessary infrastructure and facilities to make schools, among other things, physically accessible to them. Nor are the schools required by law or policy to have such infrastructure.

This concern also extends to adults with disabilities. Workplaces are legally required to make reasonable efforts to accommodate, physically or otherwise, persons with disabilities,⁵⁹ but progress by the authorities in eliminating obstacles and barriers to accessibility, including to schools, housing, medical facilities, workplaces and other indoor and outdoor facilities, as required by the CRPD,⁶⁰ has been slow.

Namibia has also made grants available to persons with disabilities. However, in her report, the Special Rapporteur on extreme poverty and human rights expressed concern regarding the barriers to accessing these grants such as, "lack of information, geographical distance from registration offices or distribution centres and administrative barriers."⁶¹ These concerns persist. Many persons with disabilities are unaware of these grants. There have also been reports of health and social workers discouraging them from obtaining such grants even in situations where they are eligible.

Criminal justice system

Despite the passing of the Correctional Services Act in 2012, concerns remain about the failure to separate children from adults in places of detention. In its mid-term implementation assessment, Namibia stated that it had opened a new Prison, Elizabeth Nepembe Rehabilitation Centre with juvenile facilities in 2012.⁶² This prison is in the Kavango East region of Namibia, other regions do not appear to have such facilities. In most cases young offenders are still being held in the same cells as adults. Many of these young offenders are arrested and detained under petty offences related to vagrancy and idleness,⁶³ littering and swearing.⁶⁴ This has contributed to the overcrowding in places of detention and to the poor prison conditions. International human rights standards call for the decriminalisation of petty offences such as being a rogue and vagabond, and loitering, as a strategy for reducing prison population.⁶⁵

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We are further concerned about women being detained with minor children in the same cells as other prisoners. Namibian law permits detained mothers to stay with their infant child when held in a place of detention.⁶⁶ The state is responsible for providing such an infant with clothing and other necessities. The law requires the state, taking into account the best interest of the child, to place a child older than two years of age with a relative or family friend able and willing to support the child, or with an appropriate child welfare authority.⁶⁷ However, children older than two years of age are also detained with their mothers. The LAC is litigating a case against the state related to a four-year-old toddler, Futuna Pehete, killed in the Wanaheda police holding cells where he was being held with his mother. The toddler had reportedly been grabbed by the feet and had his head slammed against the cell floor twice by another detainee after an altercation with the boy's mother over tea. The mother was being held in remand on suspicion of shoplifting and was unable to pay the bail. In 2014, the Ombudsman launched a report related to this case in which he found a violation of the right to bail which he said is included in the right to a fair trial; as well as a failure to take into account the best interest of the child due to the lack of co-operation between the police and social workers.⁶⁸

SADC Tribunal – independence of the judiciary and access to justice

In August 2014, Namibia signed the amended Protocol on the Tribunal in the Southern Africa Development Community (SADC) which removes individual access to the court as well as the human rights jurisdiction of the court. This protocol, if duly ratified by the requisite 10 out of 15 SADC countries, will deprive individuals in the SADC region of a competent tribunal for attaining an effective remedy against the violation of their human rights where their national courts are unable or unwilling. This constitutes a retrogressive step for, if not a violation of, the right of access to justice and an effective remedy guaranteed by Namibia's national and international human rights laws.⁶⁹

The Universal Declaration on Human Rights, which has developed the capacity of international customary law provides for the right of everyone to recognition everywhere as a person before the law.⁷⁰ In addition, a number of regional courts provide for the right of access to justice for individuals and this right has become a principle of international customary law.⁷¹

We are further concerned that the continued suspension of the SADC Tribunal and the events which led to this amount to undue interference with the independence of the judiciary and the doctrine of separation of powers. The UN Special Rapporteur on Independence of Judges and Lawyers, in a letter to the SADC Executive Secretary of 29 December 2011, stated that the SADC Summit acted ultra vires when it failed to renew the terms of judges or appoint new judges.⁷² The suspension of the judges and failure to renew their terms or appoint others has also had implications for the security of tenure of the judges. The UN Basic Principles on the Independence of the Judiciary requires that the terms of office of judges and their independence be adequately secured by the law. The Human Rights Committee has further extended the requirement of independence of the judiciary to include the procedures for the appointment of judges and conditions governing suspension and cessation of their functions. Although the SADC Tribunal Protocol provides security of tenure for judges, the SADC Summit – and Namibia as part of the SADC Summit - effectively undermined independence of the judiciary by failing to follow the proper procedures with regard to appointment of judges. The Tribunal continues without judges and has not been operational since August 2010.

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RECOMMENDATIONS FOR ACTION BY THE STATE UNDER REVIEW

SALC, LAC, NWHN and WLC call on the government of Namibia to:

International human rights treaties

- ratify international treaties which it undertook to ratify during the last UPR, specifically the International Convention for the Protection of All Persons from Enforced Disappearances (CED), the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT) and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR)
- ratify all other outstanding international human rights treaties, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW)
- Submit all outstanding report to UN bodies, including the Committee on the Rights of Persons with Disabilities

The national human rights framework

- incorporate into national laws the provisions of treaties already ratified by Namibia, including the Convention on the Rights of Persons with Disabilities (CRPD)
- incorporate into the constitution and national legislation, the right to highest attainable standard of physical and mental health, as well as the right to an adequate standard of living
- extend the grounds for non-discrimination in the Constitution to include sexual orientation, disability and other grounds
- repeal provisions of the Public and Environmental Health Act which criminalise willful and negligent infection of another person with a “sexually transmitted infection” as reliance on existing criminal laws should be sufficient to cover instances of intentional or willful transmission where applicable
- abolish laws which effectively criminalise sex work and consensual same sex acts in the country
- in line with international human rights standards, decriminalise petty offences and other laws which criminalise poverty thus contributing to overcrowding in prisons

Harmful traditional and cultural practices

- abolish all harmful and discriminatory customary laws and practices which expose girls and women to all forms of violence and HIV, violate their rights and perpetuate the perception of their inferior status to boys and men
- implement awareness raising campaigns aimed at educating individuals and traditional authorities, particularly those deciding cases in customary courts and others involved in traditional dispute resolution mechanisms, on the rights violated by harmful and discriminatory customary practices, as well as the duty to ensure that customary laws and practices do not violate the rights of women

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Access to health

- take measures to eliminate negative attitudes and discriminatory practices and barriers in the area of health and social services, particularly towards those living with HIV, persons with disabilities, LGBTI persons and sex workers, including through formal human rights training and sensitization of health workers and other public officials; improving the working conditions of such workers; and holding them accountable through disciplinary procedures and criminal procedures, where applicable
- ensure access to ARVs for migrants, including by reducing health related costs in accessing ARVs so as to prevent defaulting and the spread of HIV

Sexual and reproductive rights – coerced and forced sterilisation and abortion

- investigate cases of coerced sterilisation and provide redress, including reversal of the procedure where possible, to all women who have been subjected to this, including for those whose cases have prescribed
- take measures to ensure health practitioners are aware of the options available to women living with HIV in reducing the risk of mother-to-child transmission and ensure these options are made available to women living with HIV
- ensure civil society organisations and women living with HIV are consulted in the development of policies and guidelines relevant to informed consent and sterilisation in line with the FIGO guidelines
- review the Abortion and Sterilisation Act with a view to eliminating barriers to safe abortion, including limitations on providers and facilities permitted to perform abortion services, as well as unnecessary administrative or judicial procedures following unlawful intercourse

Persons living with disabilities

- continue efforts in the protection of the rights of persons with disabilities by reviewing laws and policies to bring them fully in line with provisions of the CRPD
- take steps to eliminate obstacles and barriers to accessibility, including to schools, housing, medical facilities, workplaces and other indoor and outdoor facilities for persons with disabilities
- take steps to eliminate administrative and other barriers to accessing grants for persons with disabilities

Criminal justice system

- ensure children are always held separately from adults in places of detention, as well as the separation of different categories of persons in all places of detention at all times
- ensure detention is used only in exceptional circumstances, including through the provision of bail and use of noncustodial sentences

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- where, in the given circumstances, alternatives to the detention of mothers along with their children are not possible, ensure mothers with children are held separately from other detainees and prisoners

SADC Tribunal – independence of the judiciary and access to justice

- refrain from violating the right of access to justice and an effective remedy by ensuring it does not ratify the SADC Tribunal Protocol removing individual access and the human rights jurisdiction of the Tribunal
- use its influence to contribute to the restoration of the SADC Tribunal with human rights jurisdiction and individual access

¹ SALC <http://www.southernafricalitigationcentre.org/>

² NWHN <https://nwhn.wordpress.com/>

³ LAC <http://www.lac.org.na/>

⁴ WLC <http://www.wlc-namibia.org/>

⁵ SACHI, <http://sachi-sadc.org/>

⁶ Special Rapporteur on the human right to safe drinking water and sanitation from 4 to 11 July 2011; Special Rapporteur on the rights of indigenous peoples from 20 to 28 September 2012; and Special Rapporteur on extreme poverty and human rights from 1 to 8 October 2012.

⁷ National Health Act, 2 of 2015. Provisions for the right to receive treatment or other medical care and to benefit from health services. See section on national human rights framework below

⁸ Correctional Service Act 9 of 2012. Provisions for the separation of prisoners into different groups in places of detention and providing an assumption against holding of minors in places of detention. See section on national human rights framework below.

⁹ Republic of Namibia, Ministry of Education, Sector Policy on Inclusive Education, adopted 2013, http://www.unicef.org/namibia/na_Namibia_-_MoE_Sector_Policy_on_Inclusive_Education_%282013%29.pdf (accessed 11 June 2015). See section on persons with disabilities below.

¹⁰ LM and Others v. the Government of the Republic of Namibia (I 1603/2008, I 3518/2008, I 3007/2008) [2012] NAHC 211 (30 July 2012) <http://www.saflii.org/na/cases/NAHC/2012/211.html> and Government of the Republic of Namibia v LM and Others (SA 49/2012) [2014] NASC 19 (3 November 2014) <http://www.saflii.org/na/cases/NASC/2014/19.html>

¹¹ Recommendation by Canada. See also recommendation by UK to investigate cases of sterilisation and educated women about the effects of sterilisation and options available to them.

¹² Recommendations by Azerbaijan, Angola and Canada to eliminate harmful traditional practices.

¹³ Recommendations to ensure access to adequate health facilities and services to women and other groups, as well as to prioritise health sector in development plans and to improve enjoyment of the right to health made by Germany, Slovenia, Singapore, Cuba and Zimbabwe.

¹⁴ Recommendation by Spain for Namibia to ensure national legislation is in line with the obligations of the CRPD

¹⁵ Recommendations by Norway and Sweden to improve prison conditions, improve human rights of prisoners and separate juveniles from adults in places of detention.

¹⁶ The Constitution of the Republic of Namibia, Act 1 of 1990.

¹⁷ These include the International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Civil and Political Rights and its optional protocols; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Discrimination against Women and its optional protocol; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child and its optional protocols; as well as Convention on the Rights of Persons with Disabilities and its optional protocol

¹⁸ Chapter 11 of the Constitution

¹⁹ Article 95(b), "The State shall actively promote and maintain the welfare of the people by adopting inter alia, policies aimed at the following ... (b) enactment of legislation to ensure that the health and strength of the workers,

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men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age and strength.”

²⁰ Article 95(f), “The State shall actively promote and maintain the welfare of the people by adopting inter alia, policies aimed at the following. . . (f) ensurance that senior citizens are entitled to and do receive a regular pension adequate for the maintenance of a decent standard of living and the enjoyment of social and cultural opportunities;”

²¹ National Health Act, 2 of 2015.

²² Article 40 (1) “Every person in Namibia has access to a state hospital or a state health service and is entitled, subject to this Act and to such hospital rules as may be made as contemplated in section 34(2)(b), to - (a) receive treatment or other medical care; and (b) benefit from any of the health services established under this Act”

²³ Article 10(2), “No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.”

²⁴ Part XII of the Labour Act, 6 of 1992 which deals with affirmative action and complaints in relation to unfair discrimination or harassment.

²⁵ Section 5(2)(e) of the Labour Act, 11 of 2007 which deals with prohibition of discrimination and sexual harassment

²⁶ Correctional Service Act 9 of 2012, section 17 and 64, <http://www.lac.org.na/laws/2012/5008.pdf> (accessed 12 June 2015)

²⁷ Ibid, section 69

²⁸ Ibid, section 64

²⁹ Ibid, section 69

³⁰ Act 1 of 2015, promulgated on 18 May 2015,

³¹ Section 37 of the Act provides for punishment of a fine not exceeding N\$100 000 or imprisonment for a period not exceeding 10 years, or both.

³² See, for example, Wait, M, “Criminalisation of HIV Exposure and Transmission Review”, Global Commission on HIV and the Law Working Paper, 7-9 July 2011, Available at: <http://www.hivlawcommission.org/index.php/working-papers?task=document.viewdoc&id=90>, accessed 9 June 2015.

³³ See, for example, UNAIDS, “Ending overly broad criminalization of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations”, Guidance Note, 2013, Available at: http://www.unaids.org/sites/default/files/media_asset/20130530_Guidance_Ending_Criminalisation_0.pdf, accessed 9 June 2015.

³⁴ See section 35.

³⁵ See sections 36 and 39.

³⁶ Women's Leadership Centre (WLC), “Violence is not our culture: Women claiming their rights in Caprivi region.” http://www.wlc-namibia.org/images/downloads/violence_is_not_our_culture_eng.pdf

³⁷ Section 14(a) of the Traditional Authorities Act 25 of 2000 states, “In the exercise of the powers or the performance of the duties and functions referred to in section 3 by a traditional authority or a member thereof- (a) any custom, tradition, practice, or usage which is discriminatory or which detracts from or violates the rights of any person as guaranteed by the Namibian Constitution or any other statutory law, or which prejudices the national interest, shall cease to apply” ; The Community Courts Act 10 of 2003 defines customary law as “the customary law, norms, rules of procedure, traditions and usages of a traditional community in so far as they do not conflict with the provisions of the Namibian Constitution or any other statutory law applicable in Namibia”; and Article 66(1) of Namibia's Constitution states, “Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.”

³⁸ Article 66(1) of Namibia's Constitution.

³⁹ Recommendations made by Angola, Azerbaijan and Canada.

⁴⁰ Initiatives include work done by WLC and the Traditional Authorities Project of the LAC funded by the UNDP which sought to get by-in from Traditional Authorities in the process of removing practices that make women and girls susceptible to HIV/AIDS. See

<http://www.na.undp.org/content/namibia/en/home/presscenter/articles/2013/07/25/the-traditional-authorities-project.html> (accessed 17 June 2015)

⁴¹ Article 40 of the National Health Act, supra at 7.

⁴² Report of the Special Rapporteur on extreme poverty and human rights, Ms. Magdalena Sepúlveda Carmona, Mission to Namibia (1 to 8 October 2012), 17 May 2013,

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http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-36-Add1_en.pdf (accessed 11 June 2015), paragraphs 49, 51 and 52.

⁴³ Both are criminalised in terms of the Combating of Immoral Practices Act 21 of 1980 which prohibits acts such as procurement of any woman to have unlawful sexual intercourse (section 5); assistance for purposes of unlawful carnal intercourse (section 6); enticing to commission of immoral acts (section 7); committing of immoral acts (section 8); living on earnings of prostitution and assistance in relation to commission of immoral acts (section 10); detention for purposes of unlawful carnal intercourse (section 13); and the manufacture, sale or supply or article intended to be used to perform unnatural sexual act (section 17).

⁴⁴ Namibia: Mid-term Implementation Assessment, page 9, http://www.upr-info.org/sites/default/files/document/namibia/session_10_-_january_2011/mia-namibia.pdf

⁴⁵ This has been reported to NWHN in the course of carrying out its work by migrants in the country.

⁴⁶ Approximately US\$5.00.

⁴⁷ Approximately US\$33.00/day.

⁴⁸ Article 28 states, "Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment."

⁴⁹ National Health Act, section 48.

⁵⁰ Government of the Republic of Namibia v LM and Others, Ibid at iv

⁵¹ Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), paragraph 20

⁵² The Abortion & Sterilisation Act, 48 of 1982

⁵³ FIGO, Female Contraceptive Sterilisation, adopted June 2011,

http://www.womenenabled.org/pdfs/International_Federation_of_Gynecology_and_Obstetrics_Sterilization_Guide_lines_FIGO_2011.pdf?attredirects=0 (accessed 11 June 2015)

⁵⁴ The Abortion and Sterilisation Act of 1975, as amended by Act 48 of 1982.

⁵⁵ See World Health Organisation, Safe abortion: technical and policy guidance for health systems, http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf?ua=1 (accessed 12 June 2015)

⁵⁶ Ibid, page 68, 85, 86 and 90 - 94

⁵⁷ Republic of Namibia, Ministry of Education, Sector Policy on Inclusive Education, adopted 2013, http://www.unicef.org/namibia/na_Namibia_-_MoE_Sector_Policy_on_Inclusive_Education_%282013%29.pdf (accessed 11 June 2015)

⁵⁸ Only nine schools, seven of which are in Windhoek, according to the report of the Special Rapporteur on extreme poverty and human rights, Ibid, paragraph 44

⁵⁹ Section 17(2) (b) of the Affirmative Action (Employment) Act, 29 of 1998.

⁶⁰ Article 9 of the CRPD

⁶¹ Report of the Special Rapporteur on extreme poverty and human rights, Ibid, paragraph 80

⁶² Namibia: Mid-term Implementation Assessment, page 27 and 28, http://www.upr-info.org/sites/default/files/document/namibia/session_10_-_january_2011/mia-namibia.pdf

⁶³ Vagrancy Proclamation 25 of 1920 as amended by Proc. 32/1927 and Ord. 3/1962 directed at suppressing trespass, idleness and vagrancy.

⁶⁴ Police Offences Proclamation 27 of 1920 as amended by Ord. 3/1962, Ord. 15/1962, Act 21/1980 and the RSA Prohibition of Disguises Act 16 of 1969. This Proclamation criminalises a miscellany of activities, primarily nuisances such as littering and swearing.

⁶⁵ The UN Guiding Principles on Extreme Poverty and Human Rights call for the decriminalisation of laws which criminalise poverty,

http://www.ohchr.org/Documents/Publications/OHCHR_ExtremePovertyandHumanRights_EN.pdf, The African Commission Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa

⁶⁶ Ibid, section 62

⁶⁷ Ibid

⁶⁸ "A Report by the Ombudsman on the Circumstances which Led to the Detention of A Four Year Old Boy With His Mother in the Wanaheda Police Cells", 15 May 2014,

<http://www.ombudsman.org.na/reports/investigation-reports> (accessed 15 June 2015)

⁶⁹ Article 5 of the Constitution of Namibia provides for the enforcement by the courts of rights contained in the Constitution. Furthermore, Article 12 provides for access to courts for the determination of civil rights and

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obligations, as well as any criminal charge against them. Furthermore, Article 2(3)(a) of the International Covenant on Civil and Political Rights (ICCPR) and article 8 of the Universal Declaration of Human Rights provide for the right of access to justice and an effective remedy.

⁷⁰ Article 6 of the Universal Declaration of Human Rights

⁷¹ As stated by Judge Antonio Cassese in the Special Tribunal for Lebanon, In the Matter of El Sayed at paragraph 20, "The right of access to justice (and the consequential right to be afforded judicial remedy) for the protection of one's rights is part of international customary law, as evidenced by international instruments, as well as by case law and pronouncements of States and international tribunals." file:///C:/Users/MulukaM/Desktop/20100415_CH-PRES-2010-01_Order_Assigning_Matter_to_Pre-Trial_Judge_EN.pdf. See also Golder v. United Kingdom, paragraph 35, "[t]he principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognised" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice" ([http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57496#{"itemid":\["001-57496"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57496#{))

⁷² Letter of the UN Special Rapporteur on Independence of Judges and Lawyers to the SADC Executive Secretary, 29 December 2011, Ref: AL G/SO 214 (3-3-16), https://spdb.ohchr.org/hrdb/20th/AL_Other_SADC_29.12.11_%286.2011%29.pdf