

**THE INVISIBLE VICTIMS: A COMPARATIVE ANALYSIS OF  
PROTECTION FOR VULNERABLE ADULTS WITH INTELLECTUAL  
DISABILITIES IN THE KENYAN LEGAL FRAMEWORK AND  
BEYOND**

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By

REBEKAH NDUKU MUTETI

[134235]

Prepared under the supervision of

[EVA NYAMBURA MAINA]

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## DECLARATION

I, REBEKAH NDUKU MUTETI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: ..... *Rebekah Muteti* .....

Date: .....27/02/24.....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: ..... *Eva Nyambura Maina* .....

Eva Nyambura Maina

## **ABSTRACT**

This study explores the legal dimensions of Online Sexual Exploitation and Abuse (OSEA) concerning persons with intellectual disabilities (PwIDs) in Kenya. As the digital landscape rapidly expands, existing laws primarily focus on protecting minors, leaving a gap in safeguarding vulnerable adults with intellectual disabilities. The research aims to expose the nature of Online Sexual Exploitation and Abuse and its threat to persons with intellectual disabilities, assess the significance of specialized legal protection, and draw insights from Australia's best approaches to protect persons with intellectual disabilities from online abuse. This study through its hypothesis posits that recognizing the unique experiences of disability is pivotal for comprehensive protection of vulnerable adults. The justification underscores the timeliness of adopting a human rights approach, grounded in the inherent dignity of persons with intellectual disabilities and the study is hinged on evaluating legal provisions through the lens of the inherent dignity principle.

This study highlights the inadequacies in current legal definitions, structural disparities contributing to online violence, and the evolving paradigm from a charity-based to a human rights-based approach. It sheds light on the heightened vulnerability of PwIDs to technology-facilitated abuse, urging legal reforms. This study employs a qualitative analysis of primary legal sources and a comparative analysis with best approaches Australia has adopted to protect persons with intellectual disabilities from online abuse. The conclusion emphasizes the imperative of a cohesive effort to establish a digitally safer environment for PwIDs in Kenya.

## **LIST OF ABBREVIATIONS**

**CSAM-** Child Sexual Abuse Material.

**DPOs** - Disabled People's Organizations.

**ICT-** Information and Communication Technology.

**ID-** Intellectual Disability.

**IDD** - Intellectual or developmental disabilities.

**NDIS-** National Disability Insurance Scheme.

**NDS-** National Disability Strategy.

**OCSEA-** Online Child Sexual Exploitation and Abuse.

**OSEA-** Online Sexual Exploitation and Abuse.

**PwDs** - Persons with Disabilities.

**PwIDs-** Persons with Intellectual Disabilities.

**SEA-** Sexual Exploitation and Abuse.

**UDPK** - United Disabled Persons of Kenya.

**UN-** United Nations.

**UNCRPD-** United Nations Convention on the Rights of Persons with Disabilities.

## **LIST OF STATUTES**

*Computer Misuse and Cybercrimes Act* (No. 5 of 2018)

*Constitution of Kenya* (2010)

*Mental Health Act* (2012)

*National Disability Insurance Scheme Act* (2013)

*Online Safety Act* (No 76 of 2021)

*Persons with Disabilities Act* (No 11 of 2017)

*The Sexual Offences Act* (No. 3 of 2006)

Childrens' Act

## **LIST OF CASES**

*Evers v Germany*, ECtHR 356 Judgement of 28 May 2020.

# CHAPTER ONE

## 1.0 Background

The United Nations (UN) has described sexual exploitation as ‘Any actual or attempted abuse of position of vulnerability, differential power or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another’.<sup>1</sup>

Online Sexual Exploitation and Abuse (OSEA) is a term used to encompass different sexual behaviours that are facilitated online through the use of digital technology.<sup>2</sup> The forms of OSEA include online grooming, live-streaming of sexual exploitation and abuse, child sexual abuse material (CSAM), online sexual coercion and extortion, online sex trafficking, and image-based sexual abuse.

The online world is evolving rapidly. A Kepios analysis indicates that internet users in Kenya increased by 1.6 million between 2021 and 2022.<sup>3</sup> In 2020, Kenya recorded the highest internet penetration rate in Africa.<sup>4</sup> This indicates that Kenyans have embraced the new digital era and adopted internet use in their lives.<sup>4</sup> In Kenya, the Chapter 4 of the Constitution provides for the Bill of Rights which provides for a basic outline of all rights and freedoms.<sup>5</sup> This includes freedom from discrimination and the right to human dignity.<sup>6</sup>

The Sexual Offences Act, 2006 prohibits some conduct associated with OSEA. Specifically, it prohibits child pornography<sup>7</sup> which is child sexual abuse material (CSAM)-a form of OSEA. Additionally, the Computer Misuse and Cybercrimes Act, 2018 can be interpreted to criminalize behaviour that constitutes CSAM. Specifically, it penalizes the producing or possessing CSAM on or through a computer system and it criminalizes public display of media

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<sup>1</sup> United Nations, Glossary on Sexual Exploitation and Abuse: Thematic Glossary of current terminology related to Sexual Exploitation and Abuse (SEA) in the context of the United Nations, 2017, 6.

<sup>2</sup> Equality Now, ‘Ending Online Sexual Exploitation and Abuse of Women and Girls: A Call for International Standards’, 2021, 6.

<sup>3</sup> Datareportal, Digital 2022: Kenya, [Digital 2022: Kenya — DataReportal – Global Digital Insights](#) on 3<sup>rd</sup> January 2023.

<sup>4</sup> Sang A, ‘Africa: Kenya Tops Continent by a Mile in Internet Penetration’ Daily Nation, 22 Jan 2021, <https://allafrica.com/stories/202101220350.html> on 2nd January 2023

<sup>5</sup> Chapter 4, *Constitution of Kenya* (2010).

<sup>6</sup> Articles 27(5), *Constitution of Kenya* (2010).

<sup>7</sup> Section 16, *Sexual Offences Act* (No. 3 of 2006).

depicting a child.<sup>8</sup> The Act also criminalizes cyber harassment<sup>9</sup> which is broad. It does not explicitly provide for cyber bullying and grooming and solicitation, cyber enticement. The Children's Act, 2022 boasts the most inclusive protection from OSEA. Interestingly and for the first time, online abuse is provided to include cyber bullying, grooming and solicitation, cyber enticement, cyber harassment, and cyber stalking.<sup>10</sup> However, the protection is in relation to children which this Act defines as 'an individual who has not attained the age of 18 years.

As established above, Kenya has some fragmented laws on OSEA in place however, the lack of consistent legislation has introduced a challenge.<sup>11</sup> The current laws allude to online abuse that targets minors in particular, most notably CSAM.<sup>12</sup> The same applies for international laws, most focus on the protection of children from sexual exploitation and abuse<sup>13</sup>. There is no single internationally binding instrument that entirely defines and addresses OSEA and its forms.<sup>14</sup>

While the protection of children from OSEA is necessary, most laws fail to account that child abuse and exploitation may extend into adulthood<sup>15</sup>. Additionally, while sexual exploitation is any actual or attempted abuse of position of vulnerability<sup>16</sup>, little protection in law is given to vulnerable adults<sup>17</sup> and women.<sup>18</sup> Vulnerable adults include people who suffer from any mental

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<sup>8</sup> Section 24, Computer Misuse and Cyber Crimes Act (2018).

<sup>9</sup> Section 27, Computer Misuse and Cyber Crimes Act (2018).

<sup>10</sup> Section 22(4), Children's Act (2022).

<sup>11</sup> Bruhan Makong, 'Kenya: New Report Shows Kenya Lacks Online Sexual Protection Laws, All Africa, 16<sup>th</sup> November 2021, [Kenya: New Report Shows Kenya Lacks Online Sexual Protection Laws - allAfrica.com](https://allafrica.com/stories/202301040001.html) on 4<sup>th</sup> January 2023.

<sup>12</sup> Equality Now, 'Ending Online Sexual Exploitation and Abuse of Women and Girls: A Call for International Standards' 2021, 14.

<sup>13</sup> Convention on the Rights of the Child (1989). See also, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000), UN High Commissioner for Refugees (UNHCR), Yokohama Global Commitment. <https://www.refworld.org/docid/3f9fe2bd4.html> (2001)

<sup>14</sup> Equality Now, 'Ending Online Sexual Exploitation and Abuse of Women and Girls: A Call for International Standards' 2021, 14.

<sup>15</sup> [The Impact of Child Abuse Extends Well Into Adulthood | PROGRESSIVE IMPACT](https://www.progressiveimpact.org/2023/01/08/the-impact-of-child-abuse-extends-well-into-adulthood/) on 8<sup>th</sup> January 2023.

<sup>16</sup> United Nations, Glossary on Sexual Exploitation and Abuse: Thematic Glossary of current terminology related to Sexual Exploitation and Abuse (SEA) in the context of the United Nations, 2017, 6.

<sup>17</sup> Vulnerable Adults are victims of Sexual Abuse, [Abuse and neglect of vulnerable adults \(safeguarding\) - NHS \(www.nhs.uk\)](https://www.nhs.uk/news/2023/01/08/vulnerable-adults-safeguarding/) on 8<sup>th</sup> January 2023.

<sup>18</sup> Equality Now, 'Ending Online Sexual Exploitation and Abuse of Women and Girls: A Call for International Standards', 2021, 19.

incapacity.<sup>19</sup> Persons with intellectual disabilities have been proven in the past to have been victims of OSEA.<sup>20</sup> For various reasons, such as stigma and omissions made during the translation of questionnaires into local languages, the statistics of the people with a disability are significantly marked down<sup>21</sup>. This leads to the conclusion that the statistical evidence supporting the present population of people with intellectual disabilities is either limited or insufficient.

Another report found that many people with intellectual disabilities failed to recognize online abuse while it was happening to them or to look for options to help them.<sup>22</sup> Kenya has ratified<sup>23</sup> the UN Convention on the Rights of Persons with Disabilities (UNCRPD) however, the Persons with Disabilities Act<sup>24</sup> has no mention of these rights especially the protection from sexual abuse and exploitation.

This results in the problems that PwIDs face being scaled down, allowing the State to give them less weight in their political agenda. This has an impact on how appropriate laws and policies are created to help and PwIDs<sup>25</sup>. Currently, the Mental Health Act provides the right to protection from sexual exploitation for people with mental illnesses.<sup>26</sup> Given the findings<sup>27</sup> that people with intellectual disabilities are seven times more likely to be sexually abused, the Mental Health Act falls short in providing comprehensive safeguards against online sexual exploitation and abuse (OSEA), mainly due to its lack of recent amendments similar to those introduced in the Children's Act of 2022.

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<sup>19</sup>< [Vulnerable Adults: How Caregivers Can Protect and Care For Them \(theasianparent.com\)](#)> on 11<sup>th</sup> January 2023.

<sup>20</sup> Jane Deith, 'People with Learning Disabilities targeted by groomers', BBC, 5<sup>th</sup> May 2015, [People with learning disabilities 'targeted by groomers' - BBC News](#) on 11<sup>th</sup> January 2023. See also, Kwakha Indvodza, 'Sexual grooming of persons with disabilities', The Times of Swaziland, 10<sup>th</sup> October 2019 [Times Of Swaziland](#) on 11<sup>th</sup> January 2023.

<sup>21</sup> Status of Disability in Kenya: Statistics from the 2019 Census,' Development Initiatives, Background paper, on May 6 2020 [Status-of-disability-in-Kenya\\_IF.pdf \(devinit.org\)](#) on 6<sup>th</sup> February 2023.

<sup>22</sup> esafety Commissioner, 'How bad should it be before I tell someone?', 2022, 7.

<sup>23</sup> <[UNTC](#)> on 13<sup>th</sup> January 2023.

<sup>24</sup> Persons with Disabilities Act (2003).

<sup>25</sup> 'Status of Disability in Kenya: Statistics from the 2019 Census' Development Initiatives on 6<sup>th</sup> February 2023.

<sup>26</sup> Section 3E(1), Mental Health Amendment Act (2018).

<sup>27</sup> Joseph Shapiro, 'Kenya: She can't tell us what's wrong', NPR, 10<sup>th</sup> January 2018, [People With Intellectual Disabilities Are Vulnerable To Sexual Assault, Many Can't Speak To Report : NPR](#) on 9<sup>th</sup> January 2023.

## 1.2 Problem Statement

The Mental Health Act Section 3E (1)<sup>28</sup> provides the right to protection from sexual exploitation for people with mental illnesses. The Persons with Disabilities Act<sup>29</sup> does not mention any protection from sexual abuse and exploitation for persons with disabilities. Part 3 of the Constitution of Kenya categorises people with disabilities, (including PwIDs) as a vulnerable group that is entitled to the specific application of rights.<sup>30</sup> Given the findings<sup>31</sup> that people with intellectual disabilities are seven times more likely to be sexually abused, it is noteworthy to observe the lack of clarity in the Mental Health Act and the absence of explicit provisions in the Persons with Disabilities Act pertaining to the protection of persons with intellectual disabilities from Online Sexual Exploitation and Abuse. Given the vulnerable position of the victim, the current legal framework leaves them with no recourse after online abuse. This study will investigate how protection from OSEA should be given to vulnerable adults suffering from intellectual disabilities in the Kenyan legal framework.

## 1.3 Research Questions

1. What is OSEA and how does it pose a danger to PwIDs in Kenya?
2. Why is it important for the law to protect PwIDs in a special way and the way the law currently does that?
3. What approaches has Australia taken to protect PwIDs from online abuse?

## 1.4 Research Objectives

1. To determine what OSEA is and how it poses a danger to PwIDs in Kenya.
2. To examine the importance of special protection for persons with intellectual disabilities in the law and to evaluate the current legal measures in place to provide such protection.
3. To conduct a comparative analysis between Kenya and Australia to determine what best approaches Australia has adopted to protect PwIDs from online abuse.

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<sup>28</sup> Section 3E(1), Mental Health Amendment Act (2018).

<sup>29</sup> Persons with Disabilities Act (2003).

<sup>30</sup> Article 54, Constitution of Kenya (2010).

<sup>31</sup> Joseph Shapiro, 'Kenya: She can't tell us what's wrong', NPR, 10<sup>th</sup> January 2018, [People With Intellectual Disabilities Are Vulnerable To Sexual Assault, Many Can't Speak To Report : NPR](#) on 9<sup>th</sup> January 2023.

## 1.5 Hypothesis

Protection from Online Sexual Abuse and Exploitation should be given to vulnerable adults through recognizing the individual as experiencing their disability rather than being located within the individual. This standpoint will inspire the provision of comprehensive protection measures and the creation of extensive laws and policies that are responsive to the needs of adults suffering from intellectual disabilities in the context of an evolving digital world. These protection measures can therefore effectively mitigate the risk of online sexual exploitation among individuals with intellectual disabilities and provide national leadership towards greater inclusion of people with disability.

## 1.6 Justification

Despite the fact that the internet is a vital resource for individuals with disabilities, research has shown that they are very susceptible to being the victims of cyberbullying.<sup>32</sup> It is estimated that between 61% and 83% of women and between 25% and 32% of men with an intellectual disability report having been victims of sexual abuse.<sup>33</sup> Despite being recognized as a vulnerable group by the Constitution, adults with intellectual disabilities are still invisible within the Kenyan legal framework. Despite their precarious position, their protection in law is subpar. In a fast-paced world where technology reigns and changes daily, individuals with intellectual disabilities in Kenya are barely protected from the various forms of Online Exploitation and Abuse.

This study will be useful in addressing this problem by highlighting how these individuals fall prey to disability-based targeting where the perpetrators specifically target their impairments in their online abuse tactics. As intellectual impairments are a marginalised area of concern in Kenya, the results of this study will help policy makers to better understand the challenges these individuals go through and to create policies that accommodate these individuals. It will also be useful for lawmakers by acting as a guiding light on how they can amend the current laws to better accommodate PwIDs and offer them an extensive protection from online exploitation and abuse.

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<sup>32</sup> Heiman T & Olenik-Shemesh, D, 'Cyberbullying Experience and Gender Differences Among Adolescents in Different Educational Settings', 48 *Journal of learning disabilities* 2, 2015, 146.

<sup>33</sup> McCarthy M et al, 'A prevalence study of sexual abuse of adults with intellectual disabilities referred for sex education' 10 *Journal of Applied Research in Intellectual Disabilities* 2, 1997, 108.

## 1.7 Conceptual Framework

### *The Inherent Dignity of Persons with Disabilities*

The inherent dignity of persons with disabilities refers to the fundamental value and worth each individual possesses simply by being human, regardless of their abilities or limitations. This concept is grounded in the Universal Declaration of Human Rights, which recognizes that “all human beings are born free and equal in dignity and rights.”<sup>34</sup> The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) affirms the same position that persons with disabilities have the same inherent dignity and worth as all human beings and should be treated with respect and without discrimination.<sup>35</sup>

The UNCRPD further recognizes that persons with disabilities are entitled to the full enjoyment of their human rights and freedoms on an equal basis with others.<sup>36</sup>

In Kenya, this notion is firmly embedded in the country's constitution, notably within Article 28.<sup>37</sup> This constitutional provision explicitly asserts the inherent dignity of every individual, explicitly extending this right to persons with disabilities. This constitutional commitment mirrors the global perspective on disability rights, aligning with the principles outlined in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

In *Evers v. Germany*, 2020, the Court found the right of vulnerable individuals with mental disorders to self-determination and the dignity and the need for the State to protect and safeguard their interests.<sup>38</sup> The inherent dignity of persons with disabilities is a foundational principle of human rights law that recognizes the equal value and worth of all individuals, regardless of their abilities or limitations. It underscores the need for society to respect and protect the rights of persons with disabilities, and to ensure that they are able to fully participate in all aspects of life on an equal basis with others. There is need for a more nuanced understanding of the inherent dignity of persons with disabilities that recognizes their agency, autonomy, and rights. It is therefore important that the inherent dignity of persons with

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<sup>34</sup> Article 1, UNGA, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>35</sup> Article 1, *United Nations Convention on the Rights of Persons with Disabilities*, 10 January 2007, A/RES/61/106.

<sup>36</sup> Article 3, *United Nations Convention on the Rights of Persons with Disabilities*, 10 January 2007, A/RES/61/106.

<sup>37</sup> Article 28, Constitution of Kenya (2010).

<sup>38</sup> *Evers v Germany*, ECtHR Judgement of 28 May 2020, para 82.

disabilities remains a foundational concept in the promotion disability rights and inclusion and key principle of human rights law.

Despite the different opinions on the dignity of these individuals, it is clear that any situation that places people with disabilities in a position where they have little to no choice and no control is an indignity and is unfair.<sup>39</sup>

The concept of inherent dignity of persons with disabilities will be used to assess the laws in Kenya as regards to protection from Online Sexual Abuse and Exploitation. It will be used to gauge whether the current laws protecting persons with intellectual disabilities recognise the inherent dignity of these individuals and encourages them to live with dignity within the community. It will affirm the need for special protections required for these individuals as regards to Online Sexual Abuse and Exploitation.

### **1.8 Literature Review**

The Constitution's definition of "disability" is woefully inadequate. The phrase "intellectual disability" isn't defined expressly in our Constitution or other pertinent Kenyan laws, and when it is, it's used derogatorily<sup>40</sup> Some laws like the Mental Health Act, the Persons with Disabilities Act use derogatory terms like 'mentally retarded,' 'people of unsound mind' or 'people suffering from mental disorders' when it comes to referring to PwIDs<sup>41</sup>.

Discourse around Online Exploitation and Abuse in Kenya has been diverse. The structural disparities between men and women are the root cause of sexual violence in Kenya and this has been translated into the online space<sup>42</sup>. On the discourse surrounding violence against women on social media, an aspect of legislative indistinctiveness, when it comes to the law, is noted<sup>43</sup>. Kenyan Law is not clear how the various forms of violations against women that arise from the use of ICT and social media can be adequately addressed and this explains Professor

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<sup>39</sup> Didi A, Dowse L, & Smith L, 'Intellectual disability and complex support needs: human rights perspective for policy and practice', 22 *International Journal of Human Rights* 8, 2018, 990.

<sup>40</sup> Article 260, Constitution Kenya (2010), Defines "disability" includes any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual's ability to carry out ordinary day-to-day activities.

<sup>41</sup> Part XII, Mental Health Act (Cap 48) See also Persons with Disabilities Act, (No.14 of 2003).

<sup>42</sup> Wamukoya E et al, 'Influence of Social Media Usage on Knowledge of Sexual Violence Among College Medical Students in Kenya' 3 *European Journal of Public Health Studies* 1, 2022, 45.

<sup>43</sup> Njuguna E, 'Perceptions of Violence against Women on the Social Media Platform: The Case of Social Media in Kenya', Published Master of Arts Gender and Development Studies thesis, Kenyatta University, Nairobi, 2017, 18.

Mbote's observation that Kenyan law is still inadequate when it comes to dealing with issues of violence against women.<sup>44</sup> Findings also show that the knowledge on existing laws is scanty, and some members of law enforcement cannot understand that sexual abuse can occur on digital platforms.<sup>45</sup>

In an effort to justify their condition, people with intellectual disabilities in Kenya are typically stigmatized as being mad, immoral, or even cursed.<sup>46</sup> As a result of discrimination and stigma some Kenyans with disabilities may choose not to use assistive technology despite the negative health and social effects.<sup>47</sup> According to KNCHR, persons with disabilities continue to face a lot of challenges when seeking justice as a result of key obstacles such as an inability to exercise their legal capacity.<sup>48</sup> Discourse on the interaction of the police force and persons with intellectual disabilities denotes that there is a lack of specialised training on how to identify and deal with persons with intellectual disabilities this in turn creates a problem during arrest as the law enforcement officials are unable to differentiate between challenging behaviour, as a result of one's condition, and offending behaviour.<sup>49</sup>

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<sup>44</sup> Mbote K, 'Violence Against Women in Kenya; An Analysis of Law, Policy and Institutions', International Environmental Law Research Centre, Working Paper 1,2000, 12— <http://www.ielrc.org/content/w0001.pdf> on 27<sup>th</sup> February 2023.

<sup>45</sup> Njuguna E, 'Perceptions of Violence against Women on the Social Media Platform: The Case of Social Media in Kenya', 2017, 18.

<sup>46</sup> Barbareschi G, Carew MT, Johnson EA, Kopi N, Holloway C, 'When they see a wheelchair, they've not even seen me'—factors shaping the experience of disability stigma and discrimination in Kenya', 18 *International Journal of Environmental Research and Public Health* 8, 2021, 8 <https://doi.org/10.3390/ijerph18084272> on 27<sup>th</sup> February 2023.

<sup>47</sup> Barbareschi G, Carew MT, Johnson EA, Kopi N, Holloway C, 'When they see a wheelchair, they've not even seen me'—factors shaping the experience of disability stigma and discrimination in Kenya', 18 *International Journal of Environmental Research and Public Health* 8, 2021, 16 <https://doi.org/10.3390/ijerph18084272> on 27<sup>th</sup> February 2023.

<sup>48</sup> KNCHR, From norm to practice: A status report on the implementation of the rights of persons with disabilities in Kenya, (2014), 48.

<sup>49</sup> Article 48 Initiative, An exploratory study of the interaction between the criminal justice system and persons with intellectual and psychosocial disabilities in Nairobi Kenya, 2021, 19.

### ***1.8.1 On the technology-facilitated abuse that adults with intellectual disabilities face.***

Discourse generally notes that disability is not a protective cover against abuse.<sup>50</sup> Most of the research work written on the digital inclusion of people with intellectual disabilities is small scale and qualitative or survey based<sup>51</sup>.

Discourse notes that youth are particularly susceptible to online sexual enticement, but no research has calculated this risk for those with intellectual or developmental disabilities (IDD).<sup>52</sup> A recent study in Australia showed that one of the most digitally excluded groups are people with intellectual disabilities (ID).<sup>53</sup> A mere 6.6% of online users are thought to experience cyberbullying on a regular basis however, the percentage of cyber victimization for people with intellectual disability is 15%, which is substantially higher.<sup>54</sup>

Persons with disabilities are described as the ‘invisible victims’ and it is noted that across ethnicities and social classes, disabled people are more likely to be abused, and people with intellectual or developmental disability (IDD) in particular are recognized as a risk factor for abuse.<sup>55</sup> Scholars<sup>56</sup> have written on women with intellectual disability as a focus group and found that stigma and social exclusion characterize the experiences of women with intellectual disabilities, making these women more vulnerable to violence. Their invisible position in society makes them more likely to be the victims of violence, less likely to recognize and

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<sup>50</sup> Nosek M, ‘Vulnerabilities for abuse among women with disabilities’ *Sexuality and disability*, 2001, 177—<https://doi.org.ezproxy.library.strathmore.edu/10.1023/A:1013152530758> on 11<sup>th</sup> January 2023.

<sup>51</sup> Chadwick D, ‘Online risk for people with intellectual disabilities’ *24 Tizard Learning Disability Review* 4, 2019, 184.

<sup>52</sup> Normand C, and Sallafranque F, ‘Cybervictimization of young people with an intellectual or developmental disability: Risks specific to social solicitation’ *Journal of Applied Research in Intellectual Disabilities*, 2015, 99 <http://dx.doi.org/10.1111/jar.12163> on 13th January 2023.

<sup>53</sup> Julian T et al, ‘Measuring Australia’s Digital Divide: The Australian Digital Inclusion Index 2021’, Swinburne University of Technology, <https://doi.org/10.25916/phgw-b725> on 5th March 2023.

<sup>54</sup> Vega V et al, ‘Cyberbullying among Adults with Intellectual Disabilities: Some Preliminary Data, *Research in Developmental Disabilities*’, <https://doi.org/http://doi.org/10.1016/j.ridd.2017.12.006> on 5th March 2023.

<sup>55</sup> Hollins S and Sinason V, ‘Therapeutic Approaches to Abuse and Intellectual Disability’ in Caffo E (eds) *Online Child Sexual Exploitation, Treatment and Prevention of Abuse in a Digital World*, Springer, 2021, [https://doi.org.ezproxy.library.strathmore.edu/10.1007/978-3-030-66654-5\\_7](https://doi.org.ezproxy.library.strathmore.edu/10.1007/978-3-030-66654-5_7) on 13th January 2023. See also Didi A et al, ‘Intellectual disability and complex support needs: human rights perspective for policy and practice’, 997.

<sup>56</sup> Meer T, and Combrinck H, ‘Invisible Intersections: Understanding the Complex Stigmatisation of Women with Intellectual Disabilities in Their Vulnerability to Gender-Based Violence’ *Agenda: Empowering Women for Gender Equity*, 2015, 21 <http://www.jstor.org/stable/43825167> on 13 January 2023.

respond to it, less likely to report it.<sup>57</sup> Results show that the abuse that women with intellectual disabilities endure is comparable to what women in the general community experience however, abusers deliberately target their disabilities in their abusive methods.<sup>58</sup> This is what is referred to as technology-facilitated abuse where perpetrators capitalize on oppressive and discriminatory stereotypes about women with intellectual disabilities.

People with intellectual disability are affected by high rates of violence, exploitation, and abuse as they are more likely to reside in forms of institutions and supported accommodation<sup>59</sup>. In instances when criminal conduct has occurred, it is sometimes reframed as a "service event." This in turn increases the risk that it won't be detected, won't be reported, won't be investigated, won't be prosecuted, but will instead be handled administratively within the Support Institution<sup>60</sup>.

Thornicroft notes that much of the debate within the discourse has been theoretical, focusing more on stigma than on discriminatory acts and change-oriented strategies.<sup>61</sup> Heyman and Sprague note that despite significant advancements in the fight against discrimination and the assurance of equal rights for people with disabilities, some constitutions expressly limit certain rights or employ vague language that invite discrimination.<sup>62</sup>

### ***1.8.2 On the shift from the traditional charity-based approach to an approach based on human rights.***

Once it became evident that isolating individuals with disabilities from the community, where they have little autonomy and choice, is an indignity and is unfair, a shift started in the 1960s

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<sup>57</sup> Meer T, and Combrinck H, 'Invisible Intersections: Understanding the Complex Stigmatisation of Women with Intellectual Disabilities in Their Vulnerability to Gender-Based Violence' *Agenda: Empowering Women for Gender Equity*, 2015, 21 <http://www.jstor.org/stable/43825167> on 13 January 2023.

<sup>58</sup> Woodlock D et al, 'You have to be really careful: technology and the abuse of women with intellectual and cognitive disabilities', *Disability and Society*, 2022, 2 — <https://doi.org/10.1080/09687599.2022.2114886> on 5th March 2023.

<sup>59</sup> Emerson E, 'Self-reported Exposure to Disablism is Associated with Poorer Self-Reported Health and Well-Being among Adults with Intellectual Disabilities in England: A Cross-Sectional Survey', 124 *Public Health* 12, 2010, 682.

<sup>60</sup> Didi A et al, 'Intellectual disability and complex support needs: human rights perspective for policy and practice', 998.

<sup>61</sup> Thornicroft G and Kassam A, 'Public Attitudes, Stigma, and Discrimination against people with mental illness' in Morgan C (eds) *Society and Psychosis*, Cambridge University, California, 2008, 179.

<sup>62</sup> Heymann J et al, 'From Non-discrimination to Full Inclusion: Guaranteeing the Equal Rights of People with Disabilities' in Heymann J (eds) *Advancing Equality*, University of California Press, California, 2020, 164.

with their deinstitutionalization in many nations<sup>63</sup>. The culmination of this was the entering into force of the Convention on the Rights of Persons with Disabilities (UNCRPD) in 2008, which marked a paradigm shift away from the previous charity- and medical-focused responses towards a social model that emphasizes the removal of societal barriers to participation as fundamental to the realization of human rights<sup>64</sup>. In addition to highlighting the rights and empowerment of women with disabilities and children with disabilities as groups that experience multiple and intersecting forms of discrimination, the convention calls for the inclusion and participation of people with disabilities across the human rights, development, and humanitarian agendas.<sup>65</sup> Some academics point out that rather than being viewed solely as an impairment, an individual's experience with a disability is seen as a dynamic interaction between that person and their environment, and that it is discriminatory attitudes toward people with impairments that lead to a culture that excludes those with disabilities from policy responses.<sup>66</sup>

Rather than understanding the complex needs located within disadvantaged individuals, a shift is needed to understand these individuals as those who 'experience' complex support needs. As a result, the emphasis is shifted from the individual as 'having' complex needs, and towards means of supporting people who experience complex forms of disadvantage. People with Intellectual Disabilities can now live in the community with dignity because of the move to person-centered assistance, which addresses many areas of support that have previously gone ignored<sup>67</sup>.

This is the essence of the human rights approach to disabilities. There is evidence that the move toward person-centered assistance for persons with disabilities, particularly in neoliberal nations, has the potential to better take into consideration people with disabilities.

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<sup>63</sup> Torrey E et al, 'Out of the Shadows. Confronting America's Mental Illness Crisis', John Wiley & Sons Inc, New York, 1997,160.

<sup>64</sup> Didi A et al, 'Intellectual disability and complex support needs: human rights perspective for policy and practice',990.

<sup>65</sup> Didi A et al, 'Intellectual disability and complex support needs: human rights perspective for policy and practice',990.

<sup>66</sup> Goddard L, Davidson P, Daly J, and Mackey S, 'People with an Intellectual Disability in the Discourse of Chronic and Complex Conditions: An Invisible Group?',32 *Australian Health Review* 3, 2008,406.

<sup>67</sup>Collings S, Dew A, and Dowse L, 'Support Planning with People with Intellectual Disability and Complex Support Needs in the Australian National Disability Insurance Scheme', 41 *Journal of Intellectual and Developmental Disability* 3, 2016,272.

## **Contribution**

My work will contribute to the field of study of intellectual and developmental disability by emphasizing the need for a more human rights Approach to disabilities. It will additionally, pave way for national awareness on the dangers that PwIDs face online, and it will pave the way for strengthening institutional capacities across key sectors like government and the civil society and at National and County Levels to prevent and respond to OSEA of vulnerable adults in Kenya. My study also complements the works of scholars like Delanie Woodlock<sup>68</sup> who recognize the emerging trend of the use of technology to abuse people with intellectual disabilities and the lack of protection of these individuals in law.

## **1.9 Methodology**

This study will assess how protection from Online Sexual Exploitation should be given to vulnerable adults suffering from intellectual disabilities. It will assess their vulnerable position to online abuse and suggest why they need special protection in law from online exploitation. This study will rely on qualitative evidence mainly from primary sources such as the Mental Health Act, the Children's Act and the Convention on the Rights of Persons with Disabilities while also depending on secondary sources such as journal articles, working papers, books, and reports. I expect to arrive at my finding through a deductive method, with my chapters setting up a premise from which the claim will be derived.

To carry out the proposed research, it is necessary to assess the place of persons with intellectual disabilities in the Kenyan legal framework. This will be done through a critical analysis. The analysis will look at the influence of the stereotypes toward these individuals and how it is detrimental to their full participation as equal citizens with dignity in the society, cementing why Hollins refers to these individuals as the 'invisible victims'. It will also look at how people with moderate to mild intellectual disability may not be offered the same mitigation that would be offered to those with more obvious intellectual disabilities. The critical analysis will establish that the systemic understanding of persons with disabilities as having complex needs rather than experiencing them is a disadvantage and impacted their protection in law.

The study will then include a comparative analysis between Kenya and Australia as regards to establishing a high level, coherent framework to guide government activity across mainstream

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<sup>68</sup> See Woodlock D et al, 'You have to be really careful: technology and the abuse of women with intellectual and cognitive disabilities', *Disability and Society*, 2022, — <https://doi.org/10.1080/09687599.2022.2114886> on 5th March 2023.

and disability-specific areas of public policy. It will look at the National Disability Strategy (NDS) of Australia that sets out a ten-year national plan for improving the life of Australians with disabilities. The NDS recognizes that people with intellectual disabilities who have complex support needs, multiple disabilities, and multiple forms of disadvantage face even greater barriers within the justice system. The NDS has so far aided in enhancing Australians with disabilities' access to services and support. This includes supporting persons with disabilities to participate in social, economic, and civic life as well as providing money for disability services and bettering access to assistive technologies.<sup>69</sup>

The analysis shall also examine the office of the eSafety Commissioner which is an independent statutory office established under the Australian Communications and Media Authority Act. The Commissioner is responsible for promoting online safety for all Australians, including persons with disabilities. The office serves to investigate and take action against online forms of abuse and exploitation and has a complaints mechanism that takes action against such abuse<sup>70</sup>.

The comparative analysis will serve as a guide for Kenya to create their own National Strategy to meet its obligations under the Convention on the Rights of Persons with Disabilities. In addition, it will give visibility to disability issues and ensure they are included in the development and implementation of all public policy.

### **1.10 Chapter Breakdown.**

This research proposal will form the first chapter of the study. It provides the background to the study and forms the foundation for subsequent chapters. It details important aspects of the study such as research objectives, conceptual framework, justification as well as the literature review of the study.

Chapter 2 will determine what Online Sexual Exploitation is and how it poses a danger to persons with intellectual disabilities in Kenya.

Chapter 3 will examine the importance of special protection for persons with intellectual disabilities in the law and will evaluate the current legal measures in place that provide such protection.

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<sup>69</sup>[https://www.dss.gov.au/sites/default/files/documents/10\\_2019/national\\_disability\\_strategy\\_mid-term\\_review\\_report.pdf](https://www.dss.gov.au/sites/default/files/documents/10_2019/national_disability_strategy_mid-term_review_report.pdf) on 4th March 2023.

<sup>70</sup> [Living with disability | eSafety Commissioner](#) on 7<sup>th</sup> March 2023.

Chapter 4 will include a comparative analysis between Kenya and Australia. It will examine the best approaches like the National Disability Strategy (NDS) and the Office of the eSafety Commissioner. Which will give visibility to disability issues and ensure they are included in the development and implementation of all public policy.

The final chapter will provide the conclusions derived from the study and proceed to make recommendations on the way forward in light of the findings of the study.

## CHAPTER TWO

### 2.1 Introduction

Kenya's substantial investment in digital infrastructure and technologies has led to widespread internet adoption and usage among its citizens.<sup>71</sup> While this development has yielded positive outcomes, it has also created opportunities for the migration or exacerbation of harmful or illegal offline activities and practices into digital spaces.<sup>72</sup> Among these challenges are instances of exploitation and violence, with Online Sexual Exploitation and Abuse being one of the diverse expressions of such phenomena. As previously mentioned, persons with intellectual disabilities have been proven in the past to be victims of OSEA.<sup>73</sup> Furthermore, the inherent dignity of persons with disabilities guarantees that they possess fundamental value and simply by being human, regardless of their abilities or limitations.<sup>74</sup> This concept affirms the need for special protections required for these individuals as regards to Online Sexual Abuse and Exploitation. This chapter seeks to explore the intricate intersection of Online Sexual Exploitation and Abuse and its profound implications for persons with intellectual disabilities in Kenya.

### 2.2 Vulnerability of Persons with Intellectual Disabilities

Common discussions often overlook the connection between disability and violence, often wrongly assuming that individuals with disabilities are shielded from violence or not at risk of being targeted, despite the fact that having a disability does not provide protection against violence.<sup>75</sup> Persons with disabilities are perceived as even more vulnerable due to their disabilities. Perpetrators believe they can exploit these individuals because they may not be able to defend themselves or report the abuse. Researchers from the University of New South Wales and Monash University organized focus groups and interviews with six women having intellectual or cognitive disabilities who had encountered instances of technology-facilitated abuse. Additionally, they interviewed practitioners who had experience working with such

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<sup>71</sup> Communications Authority of Kenya, Second quarter sector statistics report for the Financial Year 2022/2023. (1st October -31st December 2022), 28<sup>th</sup> November 2023, 13.

<sup>72</sup> Kenya ICT Action Network, Unmasking the Trolls: Research on Online Gender-Based Violence in Kenya, 28<sup>th</sup> November 2023, 1.

<sup>73</sup> Jane Deith, 'People with Learning Disabilities targeted by groomers', BBC, 5<sup>th</sup> May 2015, [People with learning disabilities 'targeted by groomers' - BBC News](#) on 11<sup>th</sup> January 2023..

<sup>74</sup> Article 1, UNGA, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>75</sup> Nosek M, 'Vulnerabilities for abuse among women with disabilities' *Sexuality and disability*, 2001, 177—<https://doi.org.ezproxy.library.strathmore.edu/10.1023/A:1013152530758> on 11<sup>th</sup> January 2023.

women. The findings revealed that the abusers specifically targeted the impairments of these individuals in their abusive tactics.<sup>76</sup> These perpetrators leveraged oppressive and discriminatory stereotypes associated with women having intellectual or cognitive disabilities. Kramer's notes that persons with intellectual disabilities often exhibit lower levels of sexual knowledge compared to the general population and even individuals with physical disabilities. This is attributed to their generally poorer abstract thinking and problem-solving abilities.<sup>77</sup> Individuals with intellectual disabilities frequently experience increased vulnerabilities when it comes to online sexual exploitation and abuse. This susceptibility stems from factors such as potential difficulties in understanding the risks associated with online interactions, challenges in recognizing and reporting abuse, and the potential for perpetrators to exploit these vulnerabilities. Recent research affirms this as it notes that PwID's limited understanding of sexual matters places them at risk for sexual exploitation and abuse, as they may not recognize potentially harmful situations or individuals.<sup>78</sup> Additionally, these persons may face difficulties in making informed consensual decisions regarding sexual intimacy, making them vulnerable to non-consensual or exploitative situations.<sup>79</sup>

Individuals with intellectual disabilities may face a distinct vulnerability stemming from their limited chances to acquire and practice socio-sexual skills, including aspects like managing sexual relationships. This lack of skill development is not just a contributing factor, it also constitutes a specific vulnerability that heightens their susceptibility to exploitation.<sup>80</sup> This vulnerability extends to various contexts, including Online Sexual Exploitation, where their reduced ability to navigate social and sexual interactions can put them at greater risk. In some cases, individuals with intellectual disabilities may regularly perceive themselves as children,

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<sup>76</sup> Woodlock D et al, 'You have to be really careful: technology and the abuse of women with intellectual and cognitive disabilities', *Disability and Society*, 2022, 2 — <https://doi.org/10.1080/09687599.2022.2114886> on 5th September 2023.

<sup>77</sup> Kramers-Olen A, 'Quantitative assessment of sexual knowledge and consent capacity in people with mild to moderate intellectual disability', 47 *South-African Journal of Psychology* 3, 2017, 368.

<sup>78</sup> Azzopardi-Lane C et al, 'Constructing sexual identities: People with intellectual disability talking about sexuality', 43 *British Journal of Learning Disabilities* 1, 2014, 33.

<sup>79</sup> Azzopardi-Lane C. et al, 'Constructing sexual identities: People with intellectual disability talking about sexuality,' 33.

<sup>80</sup> Jahoda A et al, 'Sexual understanding, sources of information and social networks; the reports of young people with intellectual disabilities and their non-disabled peers', 58 *Journal of Intellectual Disability Research* 5, 2014, 430.

and this perception is often reinforced by how caregivers and family members treat them. This situation can create an environment where they become vulnerable to potential abuse.<sup>81</sup>

### **2.3 Factors That Contribute to Their Heightened Risk**

Numerous factors combine to heighten their susceptibility to exploitation, primarily stemming from their limited online literacy, social isolation, and the added risk due to their disabilities. These individuals often face challenges in understanding and navigating the complexities of the digital realm, leaving them more exposed to various forms of online exploitation. In Kenya, discourse notes that children may have limited digital literacy skills, making it difficult for them to recognize and understand online threats.<sup>82</sup>

One of the contributing factors to their vulnerability is their dependence on caregivers, which can curtail their autonomy. Relying on caregivers for various aspects of their lives, including online activities, can expose individuals with intellectual disabilities to potential exploitation.<sup>83</sup> In addition, apart from the absence of social networks, the isolation that people with intellectual disabilities endure contributes to a significant shortage of emotional and psychological support. This isolation intensifies the likelihood of experiencing feelings of helplessness and powerlessness, which, in turn, exacerbates the difficulty of confronting or disclosing incidents of abuse.<sup>84</sup>

In the context of online sexual exploitation, individuals with intellectual disabilities may face challenges that leave them particularly vulnerable to exploitative situations. One such challenge is their limited capacity to make informed consensual decisions regarding sexual intimacy.<sup>85</sup> This is because they often exhibit deficits in sexual knowledge compared to the general population. This deficit not only places them at risk for sexual exploitation and abuse but also deprives them of opportunities to develop meaningful intimate relationships. According to a baseline survey conducted by Coalition of Violence against Women in Kenya,

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<sup>81</sup> Weller M, 'Self-perception of adults with intellectual and developmental disabilities' 4 *Advances in Applied Sociology* 3, 2014, 29.

<sup>82</sup> Muhingi, W.N.et al , Digital Literacy and Online Child Abuse among Primary School Children in Langata Sub-county, Nairobi City County in Kenya,10 *International and Multidisciplinary Journal of Social Sciences* 2, 2021, 9.

<sup>83</sup> Kramers-Olen A, 'Quantitative assessment of sexual knowledge and consent capacity in people with mild to moderate intellectual disability', 47 *South-African Journal of Psychology* 3, 2017, 368.

<sup>84</sup> Chenoweth L, 'Violence and women with disabilities: Silence and paradox', 2 *Violence Against Women* 4, 1997, 393.

<sup>85</sup> Azzopardi-Lane C. et al, 'Constructing sexual identities: People with intellectual disability talking about sexuality,'33.

women and girls with intellectual disabilities were viewed to be vulnerable to sex without consent based on their mental inability and thus are taken advantage off.<sup>86</sup>

An additional contributing factor that amplifies the risk of online sexual abuse for them is the small size of their friendship circles and social networks, which tend to be more limited. This smaller social circle may curtail their access to support systems, and protective social connections, which are crucial in safeguarding against online exploitation and abuse.<sup>87</sup> This combination of a narrower social network and limited access to external resources leaves them more vulnerable to potential online risks.

## **2.4 Psychological and Social Consequences of Online Sexual Exploitation**

Living with a disability encompasses more than its physical or mental dimensions; it also involves a social dimension characterized by societal prejudice. The particular nature of the disability, its visibility, the level of severity, and whether it pertains to physical or mental health collectively influence the degree of social obstacles encountered by people with disabilities.<sup>88</sup> On a global perspective, people with intellectual disabilities encounter the most extensive levels of misconceptions and social bias.<sup>89</sup> This bias is perpetuated by the medical model of disability, which historically centred on viewing disability as a personal inadequacy rather than as a consequence of a demanding social and physical environment.

Stigmatization in society is often heightened for persons with disabilities, leading to their devaluation, isolation, and exposure to abuse.<sup>90</sup> Derogatory names are commonly directed at them, contributing to their diminished visibility and increased isolation. On the one hand, these are often overlooked as potential victims of sexual abuse, rendering them invisible due to the misperception that such abuse is unlikely. Simultaneously, their isolation means they lack the social networks that could provide protection against abuse.<sup>91</sup> Another facet of disability-

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<sup>86</sup> COVAW, Baseline Survey The knowledge, awareness, practice & prevalence rate of gender-based violence (GBV) especially sexual violence among women and girls with intellectual disabilities, 2013, 45.

<sup>87</sup> Kramers-Olen A, 'Quantitative assessment of sexual knowledge and consent capacity in people with mild to moderate intellectual disability', 47, *South-African Journal of psychology*,3,2017,368.

<sup>88</sup> Gershick T, 'Toward a Theory of Disability and Gender', *University of Chicago Press*, 2000, 1264—<https://www.jstor.org/stable/3175525>.

<sup>89</sup> Chappell L, et al, 'Making connections: the relevance of the social model of disability for people with learning difficulties', *British Journal of Learning Disabilities*,2001, 46 —<https://doi.org/10.1046/j.1468-3156.2001.00084.x>

<sup>90</sup> Meer T, and Combrinck H, 'Invisible Intersections: Understanding the Complex Stigmatisation of Women with Intellectual Disabilities in Their Vulnerability to Gender-Based Violence' *Agenda: Empowering Women for Gender Equity*, 2015, 21 <http://www.jstor.org/stable/43825167> on 16 September 2023.

<sup>91</sup> Chenoweth L, 'Violence and women with disabilities: Silence and paradox', 2, *Violence Against Women*, 4, 1997, 393.

related stigma is that the victims are often seen as incapable, making them appear as perfect victims—compliant, silent, and invisible.<sup>92</sup> This perception may be linked to the infantilization of individuals with disabilities and their stigmatization as gullible.<sup>93</sup> Moreover, they might face challenges in disclosing incidents as they may lack the necessary skills to respond to sexual advances, coercion, and violence, or to report such occurrences. Their limited ability to communicate assertively about their bodies and sexual experiences represents a substantial obstacle to revealing instances of abuse.<sup>94</sup>

As for psychological consequences, individuals who have endured systematic abuse are frequently conditioned by their abusers to harbour self-doubt and grapple with low self-esteem. They hold the belief that seeking help is futile and feel unworthy of assistance.<sup>95</sup> Dagnan notes that individuals with intellectual disabilities operate from a position of relative disadvantage, constantly confronting others' prejudices while grappling with their own negative self-image and fears of rejection.<sup>96</sup>

The myths, negative attitudes, and stereotypes to which individuals with intellectual disabilities are subjected lead them to internalize these negative perceptions. Consequently, they develop a poor self-image, feelings of inadequacy and rejection, and ultimately stigmatize themselves, echoing the societal stigma.<sup>97</sup>

Online sexual exploitation and abuse can inflict enduring and profound consequences on individuals, particularly those from vulnerable groups such as individuals with intellectual disabilities. These traumatic experiences have the potential to leave lasting scars, making the process of recovery and healing even more challenging for this already marginalized population. Over time, the persistent presence of stigma frequently leads to individuals with intellectual disabilities enduring profound social isolation and exclusion in their households, communities, and workplaces. This predisposition makes them susceptible to exploitation and abuse, including through various media, as they are already perceived as insignificant or

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<sup>92</sup> Andrews A and Veronen L, 'Sexual assault and people with disabilities', 8, *Journal of Social Work & Human Sexuality*, 2, 1993, 137.

<sup>93</sup> Andrews A and Veronen L, 'Sexual assault and people with disabilities', 137.

<sup>94</sup> Meer T, and Combrinck H, 'Invisible Intersections: Understanding the Complex Stigmatisation of Women with Intellectual Disabilities in Their Vulnerability to Gender-Based Violence' *Agenda: Empowering Women for Gender Equity*, 2015, 21 <http://www.jstor.org/stable/43825167> on 16 September 2023.

<sup>95</sup> Milberger S et al, 'Violence against women with physical disabilities', 18 *Violence and Victims*, 1,2003, 581.

<sup>96</sup> Dagnan D and Waring M, 'Linking stigma to psychological distress: A social-cognitive model of the experience of people with learning disabilities', 11, *Clinical Psychology and Psychotherapy*, 4, 2004, 230.

<sup>97</sup> Dagnan D and Waring M, 'Linking stigma to psychological distress: A social-cognitive model of the experience of people with learning disabilities', 229.

undesirable.<sup>98</sup> Individuals in this situation may find themselves without the crucial assistance needed to protect themselves from victimization or to effectively communicate and report such incidents to their families, caregivers, and friends.<sup>99</sup> Furthermore, they face the potential of suffering from recurring victimization that persists for extended durations, a consequence of the cumulative impact of stigma related to their disabilities. This enduring victimization continues to wear away at their self-assurance and intensifies the trauma linked with abuse, rendering the process of recuperation and emotional healing a complex and protracted endeavour.<sup>100</sup>

Their inability to confidently communicate about their bodies and sexual behaviours becomes a significant barrier to disclosing online abuse or exploitation, further exacerbating their vulnerability in the digital realm.<sup>101</sup>

## **2.5 Conclusion**

In conclusion, Chapter 2 highlights the intricate challenges surrounding online sexual exploitation and its repercussions on individuals with intellectual disabilities. The chapter underscores the extension of their vulnerability into the digital realm, where challenges in recognizing, reporting, and protecting against online exploitation persist. Social and psychological isolation worsen their struggles, with limited networks and societal stigma contributing to feelings of helplessness. This impedes their ability to confront or disclose abuse incidents, impacting self-esteem and self-image. Recognizing these vulnerabilities is crucial for understanding their experiences and developing effective strategies for prevention and support in the context of online exploitation.

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<sup>98</sup> Andrews A and Veronen L, 'Sexual assault and people with disabilities' 137.

<sup>99</sup> Meer T, and Combrinck H, 'Invisible Intersections: Understanding the Complex Stigmatisation of Women with Intellectual Disabilities in Their Vulnerability to Gender-Based Violence' *Agenda: Empowering Women for Gender Equity*, 2015, 21 <http://www.jstor.org/stable/43825167> on 16 September 2023.

<sup>100</sup> Dagnan D and Waring M, 'Linking stigma to psychological distress: A social-cognitive model of the experience of people with learning disabilities', 11 *Clinical Psychology and Psychotherapy* 4, 2004, 229.

<sup>101</sup> Azzopardi-Lane C. et al, 'Constructing sexual identities: People with intellectual disability talking about sexuality,' 33.

## CHAPTER THREE

### 3.1 Introduction

Persons with intellectual disabilities are proportionately more likely to experience abuse, as noted they are between two to five times more prone to maltreatment and, at a minimum, four times more susceptible to sexual assault.<sup>102</sup> This indicates that people with disabilities face higher risks and experience higher levels of violence, and abuse than those without disabilities.<sup>103</sup>

Chapter 3 delves into an examination of the reason for special protection within the legal framework for individuals with intellectual disabilities in Kenya. The overarching aim of this chapter is to scrutinize and assess the existing legal measures designed to safeguard the rights and well-being of persons with intellectual disabilities.

### 3.2 Kenyan Legal Framework

The UNCRPD was established to preserve the rights and dignity of persons with disabilities. The convention was established in response to discrimination against persons with disabilities and it addressed their civil, economic, and political rights.<sup>104</sup> The initiative to endorse the United Nations Convention on the Rights of Persons with Disabilities in Kenya was spurred by the collaboration of disabled people's organizations (DPOs) under the United Disabled Persons of Kenya (UDPK). Their collective demand was for Kenya to formally ratify the UNCRPD, aiming to enhance the rights and opportunities available to individuals with disabilities.<sup>105</sup> The disability sector aspired to extend its focus beyond national boundaries, aiming for engagement at the international level. Kenya ratified the UNCRPD in 2009 after signing it in 2008 and through article 2(6) of the Constitution, the UNCRPD forms part of Kenyan law.<sup>106</sup>

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<sup>102</sup> Sobsey R, '*Violence, and abuse in the lives of people with disabilities: The end of silent acceptance?*' Paul H Brookes Publishing, 1994, 212.

<sup>103</sup> Heymann J et al, 'From Non-discrimination to Full Inclusion: Guaranteeing the Equal Rights of People with Disabilities' in Heymann J (eds) *Advancing Equality*, University of California Press, California, 2020.

<sup>104</sup> Lenore Manderson, 'Disability, Global Legislation and Human Right,' *47 Society for International Development* 2, 2004,30.

<sup>105</sup> <https://miusa.globaldisabilityrightsnow.org/journey-toward-crpd-kenya/> on 6<sup>th</sup> January 2024.

<sup>106</sup> Article 2(6), Constitution of Kenya (2010).

Article 4 of the UNCRPD mandates that states actively promote the realization of all human rights and freedoms, devoid of any discriminatory practices.<sup>107</sup> This commitment necessitates the implementation of suitable legal and policy measures, ensuring that national legislations explicitly support the rights of persons with disabilities. The obligation extends to legal reforms aimed at enhancing protection against discrimination. Article 16 of the UNCRPD provides protection for persons with disabilities by mandating national governments to implement effective state interventions.<sup>108</sup> These interventions aim to safeguard PWDs from abuse, violence, and exploitation. Additionally, Article 16 emphasizes the importance of public awareness initiatives and robust information-sharing channels to address and prevent cases of exploitation against PWDs.

In the Constitution of Kenya, persons with disabilities have the right to have their dignity, their fundamental freedoms and human rights respected. Article 27 outlaws' discrimination and obligates others to avoid discriminatory practices.<sup>109</sup> Article 28 guarantees the right to human dignity and provides that it is an inherent and inalienable right that is enjoyed by all including people with disabilities.<sup>110</sup> Additionally, their right to redress on violation of constitutional provisions is also provided for in article 22(1), this redress can be sought on a representative capacity for the benefit of persons with disabilities.<sup>111</sup>

The Persons with Disabilities Act was enacted in 2003 and it is Kenya's first disability-specific legislation that establishes a legal framework that prohibits all forms of discrimination against persons with disabilities.<sup>112</sup> It was enacted to protect their rights, to ensure equal opportunity, and create relevant institutions. The Act was passed in an effort to reduce discrimination being perpetuated against persons with disabilities. Section 3 of the Act establishes the National Council for Persons with Disabilities.<sup>113</sup> Its principal mission is to promote and protect opportunities for persons with disabilities, as well as the realization of their human rights, so that they can live decent lives.

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<sup>107</sup> Article 4, Convention on the Rights of Persons with Disabilities (UNCRPD, 2006) Treaty Series No. 2515.

<sup>108</sup> Article 16, Convention on the Rights of Persons with Disabilities (UNCRPD, 2006) Treaty Series No. 2515.

<sup>109</sup> Article 27, Constitution of Kenya (2010).

<sup>110</sup> Article 28, Constitution of Kenya (2010).

<sup>111</sup> Article 22 (1), Constitution of Kenya (2010).

<sup>112</sup> Persons with Disability Act (2003).

<sup>113</sup> Section 3, Persons with Disability Act (2003).

The most relevant pieces of legislation currently in effect regarding sexual offences, including OSEA-related crimes, in Kenya are the Computer Misuse and Cybercrimes Act<sup>114</sup>, the Sexual Offences Act<sup>115</sup> and The Childrens Act.<sup>116</sup>

Firstly, the Childrens Act states the need and obligation to protect children from harm in the online world. Section 22(3) of the Act<sup>117</sup> outlines provisions for protecting children from online child abuse, harassment, or exploitation. It further states that this includes cyberbullying, grooming and solicitation, cyber enticement, cyber harassment, and cyberstalking. This protection follows a series of progressive legislations by governments worldwide to prevent online violence against children<sup>118</sup>.

A recent amendment to the Sexual Offences Act, 2006 included sexual communication with a child as an offense.<sup>119</sup> This is in effort to develop national legislation that allows punishment for an evolving range of OSEA offences as in 2017 when the UK enacted a similar law that makes it illegal to engage in sexual messaging with a child.<sup>120</sup>

The legislation in Kenya regarding OSEA- related crimes heavily revolves around children, who are a vulnerable group susceptible to exploitation. This is because as the world increasingly connects online, an array of risks also present. Broader internet penetration enables the circumstances for offenders to misuse technology with an aim to contact, groom and abuse people with intellectual disabilities.<sup>121</sup>

While Kenya has put in place arrangements to address the online safety in its legislation, the rapid pace of technological developments and the agile practices of distributors of illegal and harmful material, have defied conventional systems of legislation that Kenya has put in place.

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<sup>114</sup> Republic of Kenya, The Computer Misuse and Cybercrimes Act (No. 5 of 2018).

<sup>115</sup> Republic of Kenya, The Sexual Offences Act (No. 3 of 2006.)

<sup>116</sup> Republic of Kenya, The Childrens Act (No. 29 of 2022.)

<sup>117</sup> Section 22(3) The Childrens Act No. 29 of 2022.

<sup>118</sup> [EU's proposed new legislation promises a brave new \(online\) world | End Violence \(end-violence.org\)](#) on 28<sup>th</sup> November 2023.

<sup>119</sup>Section 16A, The Sexual Offences Act No. 3 of 2006.

<sup>120</sup> ECPAT International, 'Summary Paper on Online Child Sexual Exploitation', 2020,9.

<sup>121</sup> EUROPOL, Internet Organized Crime Threat Assessment 2018,31.

While it is apparent that efforts to develop community protections have delivered results, the online safety system remains fragmented and is relatively uncoordinated.<sup>122</sup>

There is a need for legal measures that recognize, respect, and safeguard the rights of people with intellectual disabilities particularly in the context of online vulnerabilities and risks. This can be done by leveraging the inherent dignity of persons with disabilities as a foundational human rights principle.

### **3.3 Challenges of the Current Regime**

#### *Lack of a framework protecting persons with intellectual disability*

Research shows that evidence that supports the targeted abuse of people with intellectual disabilities is inconsistent, the law is characterized as confusing and at times contradictory.<sup>123</sup> Kenya as a case in point shows that the protection for this group of people is lacking yet evidence shows that they are often abused and exploited online.

The population of persons living with intellectual disabilities is heterogeneous in nature.<sup>124</sup> There is a drastic difference in the ability for decision-making and independent living in someone with mild ID and an individual with profound ID who is expected to face substantial limitations in these areas.<sup>125</sup> A neoliberal approach hinged on choice that is influenced by reason of which is taken to be compromised for persons living with an intellectual disability.<sup>126</sup>

Social policies influenced by neoliberalism have a negative impact on individuals with intellectual disabilities.<sup>127</sup> The traditional concept of human rights, which assumes reasoning and conscience, doesn't always align well with the diverse capabilities of people with ID.<sup>128</sup> While human rights are often invoked to abuse and exploitation, there is a mismatch between

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<sup>122</sup> Report of the Statutory Review of the Enhancing Online Safety Act 2015 and the Review of Schedules 5 and 7 to the Broadcasting Services Act 1992, [Report of the Statutory Review of the Enhancing Online Safety Act 2015 and the Review of Schedules 5 and 7 to the Broadcasting Services Act 1992 \(Online Content Scheme\) \(infrastructure.gov.au\)](https://www.infrastructure.gov.au) on 15<sup>th</sup> January 2024.

<sup>123</sup> Sin C et al, 'Targeted violence, harassment and abuse against people with learning disabilities in Great Britain' 15, *Tizard Learning Disability Review*, 1, 2010, 17.

<sup>124</sup> Fyson R and Cromby J "Human rights and intellectual disabilities in an era of 'choice'," 57 *Journal of Intellectual Disability Research* 12, 2013, 1168.

<sup>125</sup> Fyson R and Cromby J "Human rights and intellectual disabilities in an era of 'choice'," 1168.

<sup>126</sup> Fyson R and Cromby J "Human rights and intellectual disabilities in an era of 'choice'," 1169.

<sup>127</sup> Fyson R and Cromby J "Human rights and intellectual disabilities in an era of 'choice'," 1164.

<sup>128</sup> Joint Committee on Human Rights, 'A Life Like Any Other? Human Rights of People with Learning Disabilities' [Seventh Report from the Joint Committee on Human Rights: Session 2007-08: HL 40-1, HC 73-1]. The Stationery Office, London.

the assumed capacities of individuals, reason and conscience, and actual abilities of people with ID.<sup>129</sup> Neoliberalism, that emphasizes on reason and conscience, is an ideology that positions citizens as consumers and emphasizes moral autonomy. It emphasizes individual responsibility, personal choice, and self-determination.<sup>130</sup> Permissive rights have been used as a defense in the English system in cases of extreme abuse involving persons with intellectual disabilities. In these cases, the perpetrators cited that the victims with intellectual disabilities were capable and made their own choices.<sup>131</sup> This approach may not fully consider the unique needs and capacities of people with ID.

Thus, a conflict arises between protective rights, which guarantee the safety of those with intellectual disabilities, and permissive rights, which promote autonomy and choice. According to Fyson, while there has been advocacy for permissive rights, there has been less emphasis on protective rights, leading to oversight in welfare policies.<sup>132</sup> The authors put forth the argument that if there exists an instance of power imbalance, the vulnerable requires protective rights.<sup>133</sup> People with intellectual disabilities are more likely to experience situations where they are subject to unequal power relations, either from intentional acts or systemic effects and therefore should be afforded protective rights that do not assess their capacity for personal choice.

A look at the human rights approach in Kenyan legislation, reflects a permissive rights approach. One could suggest the reason for a lack of protection for adults with intellectual disabilities is because they are old enough to make choices against abuse. However, because of their vulnerabilities there exists a power imbalance in society for them and they need protective rights against potential abuse and exploitation. It should be possible for people with intellectual disabilities to make decisions on a daily basis. Society must recognize that individuals with intellectual disabilities have needs, wants, and wills of their own and are capable of making decisions based on those needs.<sup>134</sup>

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<sup>129</sup> Fyson R and Cromby J "Human rights and intellectual disabilities in an era of 'choice'," 1164.

<sup>130</sup> Brown W, "American nightmare: Neoliberalism, neoconservatism, and de-democratization," 34, *Political theory* 6, 2006, 690.

<sup>131</sup> Fyson R and Cromby J "Human rights and intellectual disabilities in an era of 'choice'," 1169.

<sup>132</sup> Fyson R and Cromby J "Human rights and intellectual disabilities in an era of 'choice,'" 1164.

<sup>133</sup> Fyson R and Cromby J "Human rights and intellectual disabilities in an era of 'choice,'" 1169.

<sup>134</sup> Devi N, Supported Decision-Making and Personal Autonomy for Persons with Intellectual Disabilities: Article 12 of the UN Convention on the Rights of Persons with Disabilities. *The Journal of Law, Medicine & Ethics*, 2013,792- <https://doi.org/10.1111/jlme.12090> .

### *Issues in detecting and reporting OSEA.*

Another challenge of the current regime is the rate of cases that go underreported. Cases on online sexual exploitation and abuse are increasing each day however, it is difficult to grasp the gravity of the problem because many cases are not reported.<sup>135</sup> Victims often blame themselves, feel ashamed, or are blamed by others. This lack of reporting makes the cycle of abuse worse. In Kenya, the Department of Criminal Intelligence is responsible for investigations on online sexual abuse but due to lack of training of their workforce and a lack of equipment, officers often do not have the capacity gather evidence for online cases.<sup>136</sup> Additionally, a survey conducted by UNICEF shows that many victims have a belief that reporting cases of OSEA will have no effect.<sup>137</sup>

A crime survey specific to England and Wales projected that 18 percent of sexual assaults were reported to the police.<sup>138</sup> Considering this, it can be inferred that if only 18 percent of sexual assaults are reported, the degree of underreporting is likely even more pronounced for individuals with intellectual disabilities. Evidence from a study by Mc Gilloway suggests that although members of society face barriers when reporting incidents of sexual assault, adults with intellectual disabilities have additional barriers to overcome in order to access the legal system.<sup>139</sup> This underscores the complexity of achieving full rights without discrimination for individuals with intellectual disabilities. Additionally, it emphasizes the need for a more inclusive approach in legal frameworks to address the unique challenges they face in reporting and seeking justice for sexual assault incidents.

### **3.4 Conclusion**

This chapter has delved into the Kenyan Legal Framework on OSEA- related crimes and also on rights and protections afforded to persons with disability. Additionally, it has highlighted the lack of consistent legislation and proper monitoring and reporting mechanisms.

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<sup>135</sup> Equality Now, 'Ending Online Sexual Exploitation and Abuse of Women and Girls: A Call for International Standards', 2021, 11.

<sup>136</sup> Equality Now, 'Ending Online Sexual Exploitation and Abuse of Women and Girls: A Call for International Standards', 2021, 58.

<sup>137</sup> ECPAT, INTERPOL and UNICEF, *Disrupting Harm in Kenya: Evidence on online child sexual exploitation and abuse*, Global Partnership to End Violence against Children 2021, 73.

<sup>138</sup> Myhill A, '*Rape and sexual assault of women: the extent and nature of the problem*', 2002,48.

<sup>139</sup> McGilloway C et al, 'Barriers faced by adults with intellectual disabilities who experience sexual assault: A systematic review and meta-synthesis,' 33 *Journal of Applied Research in Intellectual Disabilities*, 1,2019, 61 - <https://doi.org/10.1111/jar.12445>

The lack of consistent legislation has led to a gap in protection for persons with intellectual disabilities who lack protection from online sexual exploitation and abuse in Kenya. There is a need for the government to enact laws and policies that appreciate the particularities and evolving nature of OSEA. Such an approach will not only recognize persons with intellectual disabilities as vulnerable to abuse but also employ a protective approach on their rights.

## CHAPTER FOUR

### 4.1 Introduction

Chapter 4 serves as a comprehensive comparative analysis between Kenya and Australia, focusing primarily on the legal frameworks and strategies designed to uphold the rights and improve the quality of life for persons with intellectual disabilities (PwIDs). This chapter aims to critically evaluate the efficacy of strategies such as the National Disability Strategy (NDS) in Australia and corresponding measures in Kenya. Additionally, the role of institutions like the Office of the eSafety Commissioner in addressing disability issues will be examined to provide a holistic understanding of policy implementation and impact. The selection of Australia for this comparative study is strategically motivated. Australia, like Kenya, has encountered challenges in addressing the unique needs of PwIDs. However, the Australian context provides an insightful case study due to the effectiveness of strategies such as the National Disability Strategy (NDS) and the proactive role played by institutions like the Office of the eSafety Commissioner. In order to draw valuable lessons that Kenya can incorporate into its legal and support frameworks for the benefit of PwIDs, aligning with the broader goal of promoting inclusivity and safeguarding their well-being.

### 4.2 Legal Landscape and Policy in Australia

The 2015 Australian Bureau of Statistics Survey of Disability, Ageing and Carers, provides that one in every five Australians experience a disability and that more than half of the aged population are living with a disability.<sup>140</sup> Australia ratified the United Nations Convention on the Rights of People with Disabilities (UNCRPD) in July 2008. The UNCRPD applies to all people with disabilities<sup>141</sup>, and it follows a social model which it mandates as instrumental to the realization of human rights.<sup>142</sup> Individuals with intellectual disabilities require heightened attention to safeguard their human rights. This is crucial because they frequently face disadvantages due to various factors such as inadequate healthcare, sexual offending, and

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<sup>140</sup> [Disability, Ageing and Carers, Australia: First Results, 2015 | Australian Bureau of Statistics \(abs.gov.au\)](https://abs.gov.au) on 28<sup>th</sup> December 2023.

<sup>141</sup> People with disabilities include persons with long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others, Article 1, *Convention on the Rights of People with Disabilities*.

<sup>142</sup> Chan J, 'Challenges to realizing the Convention on the Rights of Persons with Disabilities (CRPD) in Australia for people with intellectual disability and behaviours of concern,' *23 Psychiatry, Psychology and Law* 2, 2016, 207.

limited socio-economic opportunities.<sup>143</sup> The UNCRPD represents a shift from a medical model to a social model where people with intellectual disability and complex support needs are treated as equal members of society with dignity and respect.<sup>144</sup>

### ***Disability Royal Commission***

In 2019, the Disability Royal Commission was established as a response to community concerns surrounding the widespread occurrence of violence, neglect, abuse, and exploitation experienced by individuals with disabilities.<sup>145</sup> The Commission aims to proactively prevent such violence, establish practices for reporting and responding to incidents, and cultivate a more inclusive societal fabric that empowers individuals with disabilities to live independently and without fear of harm. The commission undertook an exhaustive four-and-a-half-year investigation and engaged with approximately 10,000 individuals to compile a final report to the Australian Government for consideration.

### ***National Disability Strategy***

The National Disability Strategy (NDS) of Australia was established with the objective of fulfilling the requirements set forth by the United Nations Convention on the Rights of Persons with Disabilities.<sup>146</sup> The NDS is the primary means of promoting a more inclusive approach<sup>147</sup> in the development of policies, programs, and infrastructure that enable individuals with disabilities to fully engage in society.<sup>148</sup> It directs the development, application, and provision of specialized disability services. The Strategy focuses on six priority areas of policy action including rights protection, justice and legislation.<sup>149</sup> Additionally, in 2011 the Australian Government passed the National Disability Insurance Scheme (NDIS). This was in response to an inquiry that recommended that Australia replaces the existing disability services system with

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<sup>143</sup> Allen D, 'The relationship between challenging behaviour and mental ill-health in people with intellectual disabilities' *12 Journal of Intellectual Disabilities* 4, 2008,267.

<sup>144</sup> Kayess R et al, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities,' *8 Human Rights Law Review* 1, 2008, 3.

<sup>145</sup> [Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability | Communities and Justice \(nsw.gov.au\)](https://www.nsw.gov.au/royal-commission-into-violence-abuse-neglect-and-exploitation-of-people-with-disability-communities-and-justice) on 2<sup>nd</sup> February 2024.

<sup>146</sup> Mellifont D et al, 'Laying or delaying the groundwork? A critical framing analysis of Australia's National Disability Strategy from an implementation planning perspective,' *31 Disability & Society* 7, 2016, 930.

<sup>147</sup> The Strategy's vision is one of 'an inclusive Australian society that enables people with disability to fulfil their potential as equal citizens'.

<sup>148</sup> Department of Social Services, *Review of implementation of the National Disability Strategy 2010-2020*,2018,9.

<sup>149</sup> Department of Social Services, *Review of implementation of the National Disability Strategy 2010-2020*,2018,9.

a national scheme to fund people with disability long-term.<sup>150</sup> Additionally, a component of the NDIS focuses on information, and capacity building where resources are allocated to organizations that facilitate information dissemination, connections, and references to help adults with disabilities, along with their families and caregivers, access suitable support services.<sup>151</sup> The initiative also strives to enhance community understanding and inclusivity.

### ***The Office of the safety Commissioner***

The passing of the Online Safety Act<sup>152</sup>, marked a new regime for online safety. The regime is overseen by the Office of the eSafety Commissioner, a national independent regulatory body which coordinates the government approach on online safety as well as having a broader policy remit to promote safer and more positive online experiences.<sup>153</sup> Established in 2015, the office initially prioritized protecting children from potential online dangers and threats. To fulfil this mission, it was endowed with specific enforcement capabilities to address issues like cyberbullying and inappropriate online content aimed at minors. As time progressed, the scope of its authority broadened to encompass diverse facets of online safety, encompassing both young people and adults alike.<sup>154</sup> The office also follows Australia's Disability Strategy 2021–2031. One of the 7 outcome areas of this strategy is Safety, Rights and Justice. This is line with its aspiration to 'play an important role in protecting, promoting and realising the human rights of people with disability.'<sup>155</sup> The Disability Inclusion Act<sup>156</sup> was also passed on this account to uphold its commitments to the preceding National Disability Strategy and fulfil its obligations under the Convention on the Rights of Persons with Disabilities.<sup>157</sup>

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<sup>150</sup> Department of Social Services, *Review of implementation of the National Disability Strategy 2010-2020*,2018,12.

<sup>151</sup> Department of Social Services, *Review of implementation of the National Disability Strategy 2010-2020*,2018,13.

<sup>152</sup> Online Safety Act (2021).

<sup>153</sup> Farrell A, et al, 'Regulating tech-sex and managing image-based sexual abuse: An Australian perspective,' 32 *Information & Communications Technology Law* 2, 2023, 189.

<sup>154</sup> OECD. Protecting Children Online an Overview of Recent Developments in Legal Frameworks and Policies, OECD Digital Economy Papers, 2020, [Protecting children online: An overview of recent developments in legal frameworks and policies | en | OECD](#) on 2<sup>nd</sup> June 2020.

<sup>155</sup> Australian Government Department of Social Services, Australia's Disability Strategy 2021–2031, December 2021,51.

<sup>156</sup> Disability Inclusion Act, No 14 of 2014.

<sup>157</sup> NSW Government Submission, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, December 2022,4—  
[DCJ Royal Commission into Violence Abuse Neglect and Exploitation of People with Disability report FA2\\_web.pdf \(nsw.gov.au\)](#).

A key function of the safety commissioner is to administer a complaints system for Australian adults against cyber-abuse material.<sup>158</sup> To meet this the Adult Cyber Abuse Scheme was created.<sup>159</sup> Its regulatory components include a reporting system for adult cyber abuse targeting Australians. The scheme grants the commissioner's office investigative powers for assessing complaints, removal powers to issue notices to online service providers and end-users and enforcement powers to issue penalties.<sup>160</sup> Additionally, the office recently introduced the Disability Workforce learning module which aims to enhance the comprehension of technology-facilitated abuse with a specific focus on its dimensions concerning individuals with disabilities.<sup>161</sup>

The recent annual report indicates that the office received a substantial number of complaints related to cyber abuse targeting adults. In response to these complaints, the office made informal requests to online service providers aimed at the removal of material due to the presence of adult cyber abuse material.<sup>162</sup> Encouragingly, the efforts resulted in the successful removal of material in 466 cases out of the 601 informal requests made.<sup>163</sup> The findings reflect a robust response to adult cyber abuse, with a considerable number of complaints addressed, showcasing the regulatory body's dedication to creating safer online spaces for adults.

### **4.3 Conclusion**

This chapter has focused on analysing the legal frameworks and strategies aimed at upholding the rights and enhancing the quality of life for persons with intellectual disabilities in Australia.

Notably, the National Disability Strategy serves as a pivotal instrument in fostering inclusivity, guiding policies, programs, and infrastructure development. Furthermore, the Online Safety Act and the establishment of the Office of the eSafety Commissioner in 2015 reflect Australia's commitment to creating a safer online environment. Initially prioritizing the protection of children, the Commissioner's mandate has expanded to regulate adults. This position is

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<sup>158</sup> Section 25, Online Safety Act, No 76 of 2021.

<sup>159</sup> eSafety Commissioner, *Adult Cyber Abuse Scheme Regulatory Guidance*, December 2021, 2— [Adult Cyber Abuse Scheme Regulatory Guidance.pdf \(esafety.gov.au\)](#).

<sup>160</sup> eSafety Commissioner, *Adult Cyber Abuse Scheme Regulatory Guidance*, December 2021, 2— [Adult Cyber Abuse Scheme Regulatory Guidance.pdf \(esafety.gov.au\)](#).

<sup>161</sup> eSafety Commissioner, *eSafety Commissioner Annual Report 2022-2023*, 28<sup>th</sup> January 2023, 191 — [ACMA-and-eSafety-Commissioner-annual-report-2022-23.pdf](#).

<sup>162</sup> eSafety Commissioner, *eSafety Commissioner Annual Report 2022-2023*, 28<sup>th</sup> January 2023, 174 — [ACMA-and-eSafety-Commissioner-annual-report-2022-23.pdf](#).

<sup>163</sup> eSafety Commissioner, *eSafety Commissioner Annual Report 2022-2023*, 28<sup>th</sup> January 2023, 174 — [ACMA-and-eSafety-Commissioner-annual-report-2022-23.pdf](#).

affirmed in the Australia's Disability Strategy 2021–2031.<sup>164</sup>This evolution positions the Commissioner as a crucial regulatory body, ensuring a safer digital space for all.

The comparative analysis provides valuable insights for Kenya, emphasizing the importance of holistic strategies that address the unique challenges faced by persons with intellectual disabilities. By drawing lessons from Australia's effective frameworks, Kenya can enhance its legal and support systems, contributing to the overarching goal of inclusivity and the protection of the well-being of persons with intellectual disabilities.

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<sup>164</sup> [Disability and Australia's Disability Strategy 2021–2031 | Department of Social Services, Australian Government \(dss.gov.au\)](#) on 18<sup>th</sup> February 2024.

## CHAPTER FIVE

### 5.1 Introduction

This is the final chapter of this study. It will briefly and in a concise manner, give recommendations on the way forward and highlight potential areas for further research to advance the body of knowledge on Online Sexual Exploitation and Abuse of persons with intellectual disabilities in Kenya.

### 5.2 Recommendations

#### *5.2.1 Legislative Amendments for Online Safety*

As a country bound by the UNCRPD, Kenya is obligated to create policies and provide reasonable accommodations for Persons with Disabilities overall. However, this study reveals that Kenya has not fully met the UNCRPD's legal and policy standards. Specifically, Kenyan law often groups persons with intellectual disabilities and those with mental retardation together, which hampers their access to appropriate assistance when engaging with the justice system.

The government needs to create laws and policies that understand the specific characteristics, widespread occurrence, and changing patterns of online sexual abuse. Additionally, they should make sure that regulations regarding online sexual exploitation and abuse are in line with global standards, where applicable. This includes provisions for safeguarding vulnerable individuals like persons with intellectual disabilities.

The definition of disability in the Constitution of Kenya and the Persons with Disabilities Act should be amended to be broad so as to include persons with intellectual disabilities. An effort by Kakamega county<sup>165</sup> to include intellectual disability in the definition of 'disability' is a worthy step towards inclusion of these people. Moreover, it is recommended that the reach of the Persons with Disabilities Act be expanded to explicitly include adults with intellectual disabilities, recognizing their unique vulnerabilities and the need for specific protections, especially against sexual abuse and exploitation.

Additionally, the Mental Health Act should be amended to provide more clarity on the protection of individuals with mental illnesses, especially PwIDs, from online sexual

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<sup>165</sup> Kakamega County Persons with Disabilities Act (2022).

exploitation. It should specify measures to prevent OSEA and outline procedures for reporting and addressing cases involving these vulnerable individuals.

Drawing inspiration from the office of the esafety commissioner, discourse around the establishment of an independent regulatory authority to oversee the implementation of laws and regulations as regards online safety for vulnerable groups in Kenya should be encouraged.

### ***5.2.2 Establish a Comprehensive National Disability Strategy modeled after Australia's Framework***

Drawing inspiration from Australia's National Disability Strategy (NDS), Kenya should develop and implement a high-level, coherent framework to guide government activities across mainstream and disability-specific areas of public policy. This framework should serve as a ten-year national plan, acknowledging the unique challenges faced by individuals with intellectual disabilities, especially those with complex support needs, multiple disabilities, and multiple forms of disadvantage within the justice system.

This should align with international standards, particularly recognizing the rights and vulnerabilities of persons with intellectual disabilities in the context of online safety and adopt a human-rights approach in the national framework, emphasizing the inherent dignity and equal rights of persons with intellectual disabilities.

### ***5.2.3 Capacity Building and Training***

The Government must also invest in capacity-building programs for law enforcement agencies to effectively handle cases of online sexual exploitation and abuse involving individuals with intellectual disabilities. This should include specialized training to address the unique challenges faced by this population in reporting incidents and seeking justice. It should cover diverse groups including law enforcement, human rights institutions, the judiciary, disability and older protection homes, and women's rights departments on OSEA and their responsibility to addressing it.

## **5.3 Conclusion**

In conclusion, addressing the intersection of Online Sexual Exploitation and Abuse with persons with intellectual disabilities in Kenya requires a coordinated effort. By adopting these recommendations and exploring further research directions, Kenya can work towards creating a safer and more inclusive digital environment for individuals with intellectual disabilities, protecting their rights and fostering their active participation in all aspects of society.

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