Realising the right of children with disabilities to early childhood development in South Africa

By

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November 2013
Declaration

I ………………………………………………………………………………………........................................
declare that ‘Realising the right of children with disabilities to early childhood
development in South Africa’ is my original work and has not been submitted
before for any degree or examination to any other university, and that all the sources I
have used or quoted have been indicated and acknowledged as complete references.

Signature: ….........................
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Supervisor
Signature: …........................
Date: …........................
Dedication

This thesis is dedicated to parents of the Disabled Children’s Action Group (DICAG) and to all who work tirelessly for recognition of the dignity of children with disabilities.
Acknowledgements

Completion of this thesis can be likened to arriving at the destination of a journey. It gives me the opportunity to acknowledge those who shared the path as fellow-travellers, as well as those who provided navigation and direction on the way.

I am indebted to the late Professor Tobias van Reenen, who was the first to discern that there was a destination of value towards which to journey. His quiet and perceptive wisdom gave me the confidence to set out. For ongoing support and insights, for encouragement to write and pressure to produce chapters for the colloquia, I am grateful to Professor Julia Sloth-Neilsen and Dr Helene Combrink. It has been a privilege for me to have your guidance and direction as international experts in the fields of children’s rights and disability rights respectively.

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To my children – Ben, Joel and Sarah – thank you for allowing me to be one of the ‘studious’ at home, taking a road different to that of typical motherhood. Graham – I would not be here without your constant encouragement and support.

And to God, who has led and provided every step of the way - from the beginning until the end. Thank you, what a gift this has been.
Key Words

Early childhood development
Children with disabilities
South Africa
Rights
Constitution
State obligations
Law
Policy
Education
Health
Abstract

This study sets out to establish what is required of the South African government to comply with international human rights treaties and Constitutional obligations with respect to early childhood development (ECD) for children with disabilities. This requires clarification of the nature, scope and content of ECD and conceptual frameworks for child development and childhood disability are therefore presented. Early childhood is defined as the period from birth to four years of age. It is a period (by comparison to any other phase in the life course) of accelerated growth, during which brain development can be optimally promoted. It is at the same time a highly sensitive period when permanent damage caused by toxic stress can be averted. Early childhood is an opportunity for early intervention for children with disabilities, and is ideally suited for promoting social inclusion between children with disabilities and those without disabilities, particularly in early learning settings. By virtue of its potential to promote optimal development of young disadvantaged children in particular, ECD is not only a means of working towards equity, it has been recognised as a national investment. The content of ECD, drawing from the most recent publication of the South African Child Gauge (2013), is seen as comprising an ‘essential package’ of services, including nutrition, health, social services, caregiver support and early learning opportunities.

The focus of this study is on the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of Persons with Disabilities (CRPD) all of which have provisions relating to the general context of children with disabilities as well as to the components of the ‘essential package’. In addition to the sector-related rights contained in these treaties, they impose general obligations on the State with respect to legislative and other measures which it must undertake. These are discussed together with the State obligations under the South African Constitution which provide not only for non-discrimination, dignity and equality, but also for specific socio-economic rights for children which create justiciable obligations for the State.
Having established the obligations of the State under international law and the Constitution, there is analysis of current legislation and policies and the extent to which they are compliant. A brief description is given of the history of disability and ECD-related services during the apartheid era, and how these have shaped current provision. Attention is given to provisions of the Children’s Act for ECD, partial care and prevention, and early intervention, where there is a lack of a clear mandate for funding services. Further, while limited Social Security is provided to children with disabilities in the form of Care Dependency Grants, these are likely to reinforce a welfarist perspective unless viewed as part of a broader initiative for equalisation of opportunities and development of children with disabilities. In respect of the right to health, progress made in reducing maternal and child mortality rates is applauded, but the primary focus on preventive and curative care has ‘crowded out’ a comprehensive view of primary health care as also encompassing rehabilitative care. Further, mechanisms to ensure early identification and intervention for children with disabilities, through developmental screening and referral, need to be strengthened. In respect of the right to education, there has been limited attention given to children under the age of five years, including within the Inclusive Education Policy (White Paper 6).

The study therefore concludes that there are various areas in which there is a lack of alignment between the State obligations under international law, and current legislation and policies. However, drawing on the CRPD in particular, and the current heightened political attention being given to ECD, evidenced by its inclusion in the National Development Plan, this study further concludes that there exists at present a tremendous opportunity to ensure the inclusion of children with disabilities such that they are able to enjoy all the benefits of ECD and thereby reach their full potential.
### Abbreviations and Acronyms

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACERWC</td>
<td>African Committee of Experts on the Rights and Welfare of the Child</td>
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<td>CBR</td>
<td>Community Based Rehabilitation</td>
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<td>CASE</td>
<td>Community Agency for Social Enquiry</td>
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<tr>
<td>CARMMA</td>
<td>Campaign for Accelerated Reduction in Maternal and Child Mortality in Africa</td>
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<td>CDC</td>
<td>Centre for the Developing Child</td>
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<td>CDG</td>
<td>Care Dependency Grant</td>
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<td>CSDH</td>
<td>Commission on the Social Determinants of Health</td>
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<td>CRC</td>
<td>United Nations Convention on the Rights of the Child</td>
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<td>CRPD</td>
<td>United Nations Convention on the Rights of Persons with Disability</td>
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<td>DCST</td>
<td>District Clinical Specialist Team</td>
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<td>DICAG</td>
<td>Disabled Children’s Action Group</td>
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<td>DPSA</td>
<td>Disabled People South Africa</td>
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<td>ECCE</td>
<td>Early Childhood Care and Education</td>
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<td>ECD</td>
<td>Early Childhood Development</td>
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<td>EFA</td>
<td>Education for All</td>
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<td>FHC</td>
<td>Free Health Care</td>
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<tr>
<td>HSRC</td>
<td>Human Sciences Research Council</td>
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<td>HEI</td>
<td>Higher Education Institutions</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICF</td>
<td>International Classification of Functioning, Disability and Health</td>
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<td>IDP</td>
<td>Integrated Development Plan</td>
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<td>IMCI</td>
<td>Integrated Management of Childhood Illness</td>
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<td>INDS</td>
<td>Integrated National Disability Strategy</td>
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<td>MDG</td>
<td>Millennium Development Goal</td>
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<td>MEC</td>
<td>Member of the Executive Council</td>
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<td>MICS</td>
<td>Multiple Indicator Cluster Survey</td>
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<td>NAWONGO</td>
<td>National Association of Welfare Organisations and NGOs</td>
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<td>NGO</td>
<td>Non-Governmental Organisation</td>
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NIP National Integrated Plan for Early Childhood Development
NPO Non-Profit Organisation
OSDP Office on the Status of Disabled Persons
PEPUDA Promotion of Equality and Prevention of Unfair Discrimination Act
PHC Primary Health Care
SAHRC South African Human Rights Commission
SALC South African Law Commission
SALRC South African Law Reform Commission
SALGA South African Local Government Association
SASSA South African Social Security Agency
TAC Treatment Action Campaign
UN United Nations
UNESCO United Nations Economic, Social and Cultural Organisation
UNHCHR United Nations High Commission on Human Rights
UNGA United Nations General Assembly
UNICEF United Nations Children’s Fund
WHO World Health Organisation
<table>
<thead>
<tr>
<th>Table of contents</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Declaration</td>
<td>ii</td>
</tr>
<tr>
<td>Dedication</td>
<td>iii</td>
</tr>
<tr>
<td>Acknowledgements</td>
<td>iv</td>
</tr>
<tr>
<td>Key words</td>
<td>v</td>
</tr>
<tr>
<td>Abstract</td>
<td>vi</td>
</tr>
<tr>
<td>Abbreviations and acronyms</td>
<td>viii</td>
</tr>
<tr>
<td>Table of contents</td>
<td>x</td>
</tr>
</tbody>
</table>

**CHAPTER 1: INTRODUCTION**

1. Background to the research

1.1 Ratification of human rights treaties

1.2 Constitution, legislation and policies

1.3 The current situation of children with disabilities

1.2 Problem statement

1.3 Research question and research objectives

1.4 Rationale

1.4.1 The ECD imperatives

1.4.2 International and regional treaties imperatives

1.4.3 Civil society imperatives

1.5 Premises of the research

1.6 Assumptions on which the methodology is based

1.7 Research method

1.7.1 Primary sources

1.7.2 Secondary sources

1.8 Significance of the study

1.9 Overview of chapters

**CHAPTER 2: NATURE, PURPOSE AND CONTENT OF THE RIGHT TO EARLY CHILDHOOD DEVELOPMENT FOR CHILDREN WITH DISABILITIES**

2.1 Introduction
3.3 The African Charter on the Rights and Welfare of the Child 93
  3.3.1 Background to the Charter 93
  3.3.2 Articles relating generally to children with disabilities 95
  3.3.3 Articles corresponding to the components of the ‘essential package’ 97
3.4 The Convention on the Rights of Persons with Disabilities 100
  3.4.1 Background to the CRPD 100
  3.4.2 Articles relating generally to children with disabilities 102
  3.4.3 Articles corresponding to the components of the ‘essential package’ 109
3.5 Other international tools to interpret children’s rights and the implications of a rights-based approach 115
  3.5.1 Disability awareness 117
  3.5.2 Access to mainstream ECD services 117
  3.5.3 Access to targeted ECD services 118
  3.5.4 Participation of children with disabilities and their families 118
3.6 Conclusion 119

CHAPTER 4: SOUTH AFRICAN STATE OBLIGATIONS FOR EARLY CHILDHOOD DEVELOPMENT UNDER INTERNATIONAL LAW AND THE CONSTITUTION 121
4.1 Introduction 121
4.2 International law 121
  4.2.1 General State obligations under the CRC 122
  4.2.2 General State obligations under the African Charter 126
  4.2.3 General State obligations under the CRPD 126
  4.2.4 International law and interpretation of the Constitution 130
4.3 Children’s rights in the Constitution 132
  4.3.1 Introduction 132
  4.3.2 Interpretation of children’s rights 133
  4.3.3 Provisions in the Constitution relating to ECD and children with disabilities 141
4.4 Duties of the State with respect to ECD and children with disabilities 159
  4.4.1 Rights that are immediately realizable 159
  4.4.2 Socio-economic rights 160
CHAPTER 5: THE LEGAL OBLIGATION ON THE STATE TO PROVIDE EARLY CHILDHOOD DEVELOPMENT SERVICES FOR CHILDREN WITH DISABILITIES: LEGISLATION, POLICIES AND STRATEGIES 165

5.1 Introduction 165

5.1.1 Purpose of the chapter 165

5.1.2 History of ECD and disability services and their shaping of current legislative provisions 165

5.1.3 Locus of the mandate 173

5.2 Disability-specific policy, legislation and strategies 175

5.2.1 Integrated National Disability Strategy (INDS) 175

5.2.2 Equality Act 177

5.2.3 Disability policy and strategy 180

5.3 The right to social services 181

5.3.1 Children’s Act 182

5.3.2 National Integrated Plan for ECD (NIP) 200

5.3.3 Guidelines for ECD 202

5.4 The right to social security 202

5.5 The right to health and nutrition 206

5.5.1 Primary health care 206

5.5.2 Nutrition 211

5.5.3 Rehabilitation 212

5.6 The right to education 215

5.6.1 Legislation 215

5.6.2 Policies impacting on ECD and children with disabilities 216

5.6.3 Strategy to support children with disabilities in early learning 218

5.7 Conclusion 221

CHAPTER 6: CONCLUSION 224

6.1 Introduction 224

6.2 Synopsis of the findings 224

6.2.1 The context and parameters of ECD for children with disabilities 225
6.2.2 State obligations with respect to ECD for children with disabilities under international law and the Constitution 225
6.2.3 Current legislation, policies and strategies providing for ECD and children with disabilities 231

6.3 Tapping the transformative potential of international law and the Constitution 236
   6.3.1 Strengthening mechanisms for accountability at national and local levels 237
   6.3.2 Interpretation by the Courts 238
   6.3.3 Coalitions for advocacy 239
   6.3.4 Innovative programming 240

6.4 Conclusion 241

7. BIBLIOGRAPHY 243
7.1 Books 243
7.2 Chapters in books 245
7.3 Journal articles 253
7.4 Dissertations and conference papers 265
7.5 Reports 267
   7.5.1 International 267
   7.5.2 South Africa 270
7.6 International legal instruments 272
   7.6.1 Treaties and declarations 272
   7.6.2 General Comments 273
   7.6.3 African Committee of Experts 273
   7.6.4 Other 274
7.7 UN publications 274
7.8 National legislation 275
7.9 Policy documents and plans 276
7.10 Case law 277
7.11 Other 278
CHAPTER 1: INTRODUCTION

1.1 Background to the research

1.1.1 Ratification of human rights treaties

Over the past 19 years of democracy, the South African government has ratified a number of key international and regional human rights treaties, thereby signifying its commitment to uphold the rights of its citizens, and to be accountable to the international community in this regard. Although there is no one single right that refers to early childhood development (ECD) (as for example the right to health or education), these treaties have important implications with regard to government’s obligations towards young children with disabilities.

The United Nations Convention on the Rights of the Child (CRC)\(^1\) was ratified in June 1995. It includes civil, political, economic, social and cultural rights of children and identifies obligations of States parties, which requires States parties at all times to act in the best interests of the child. The substantive provisions of the CRC can be divided into the four ‘p’s, all of which can be related to ECD. These are provision of basic needs (such as food, health care and education), protection against discrimination, neglect and exploitation, prevention of harm and participation of children in decisions that affect their lives.\(^2\) By virtue of its ratification, the South African government has committed itself to respect and ensure the rights in the CRC to every child under its jurisdiction and without discrimination of any kind.\(^3\)

In 2000, South Africa ratified the African Charter on the Rights and Welfare of the Child (hereinafter referred to as the African Charter).\(^4\) Very similar to the CRC, but taking cognisance of the unique characteristics of the African continent, this Charter guarantees the rights and freedoms of children in Africa. As a State party to it, the government has committed to adopt legislative or other measures necessary to give effect to the provisions of the Charter. It has also undertaken to discourage any custom, tradition, cultural or religious

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\(^1\)Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 44/25 of 20 November 1989.


\(^3\)CRC (1989) (n 1 above) Arts 2 and 4.

practice that is inconsistent with the rights, duties and obligations contained in the Charter.\textsuperscript{5} It too contains provisions related to ECD for children with disabilities.

In 2007, the South African government ratified the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol,\textsuperscript{6} thereby indicating its intention to promote and protect the rights of adults and children with disabilities. The CRPD provides for civil, political, economic, social and cultural rights of persons with disabilities. Among the general principles on which it is based is respect for the dignity of persons, respect for difference and acceptance of adults and children with disabilities as part of human diversity. The CRPD also has provisions for non-discrimination and the right of persons with disabilities to effective participation and inclusion in society, as well as for respect for the evolving capacities of children with disabilities.\textsuperscript{7} All of these have important implications for the States obligations with respect to ECD for children with disabilities.

1.1.2 South African Constitution, legislation and policies

South Africa is known to have one of the most progressive constitutions in the world. Its Bill of Rights contains the range of human rights that are universally recognised; it declares equality for all before the law, and prohibits discrimination on any ground, including that of disability. It also contains a clause dedicated to the rights of children. As the supreme law of the country, the Constitution is binding on all branches and organs of the State, and is the touchstone of all national legislation and policies.

There are various pieces of legislation which are intended to give effect to the provisions of the Constitution, as related to young children with disabilities. These include the Children’s Act,\textsuperscript{8} which gives effect to the rights of children to protection from abuse and neglect, to family care (or alternative care if the family cannot provide it) and to social services, which includes ECD. It contains specific provisions relating to non-discrimination against children with disabilities as well as measures to promote their inclusion.\textsuperscript{9} The Promotion of Equality and Prevention of Unfair Discrimination Act\textsuperscript{10} promotes equality in respect of diversity, and

\textsuperscript{5}African Charter (1990) (n 4 above) Arts 1(1) and 1 (3).
\textsuperscript{6}Adopted 2006, entered into force 2008.
\textsuperscript{7}CRPD (2006) (n 6 above) Art 3.
\textsuperscript{8}Children’s Act 38 of 2005.
\textsuperscript{9}Children’s Act (n 8 above) s6 (2) (d),(f) and s11.
\textsuperscript{10}Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 s9(c).
prohibits unfair discrimination of the ground of disability. A number of policies on disability (such as the Integrated National Disability Strategy\textsuperscript{11} and the Inclusive Education Policy\textsuperscript{12}) envisage transformation of social structures and institutions with the aim that adults and children with disabilities are an integral part of a ‘society for all’.

1.1.3 The current situation of young children with disabilities

ECD services are intended to provide for the nutrition, health, learning, psychosocial and other needs of all young children within the family and community context.\textsuperscript{13} Despite legislative and policy intentions, translation of the rights of children with disabilities into legal provisions, towards implementation (with the necessary human and financial resources as well as institutional capacity) has been limited. This is well illustrated by the approach taken to education of children with disabilities:

‘Instead of ending fragmentation in the implementation of inclusive policy in South Africa, the implementation of inclusive education and training frames ‘what gets done’ as a function of available capacity. In doing so, it mirrors the very disconnectedness it was intended to overcome.’\textsuperscript{14}

Indeed, analysis of disability policy in all spheres of government since 1994 found that although there has been some progress in incorporating disability into policies, numerous problems remain with respect to implementation. These include lack of alignment of policies with programmes of action and the absence of effective monitoring mechanisms.\textsuperscript{15}

The following discussion highlights the current situation of children with disabilities in South Africa with respect to nutrition, health, early learning, social services and parental support.

(a) Nutrition

Lack of essential dietary nutrients such as folic acid, iodine and vitamin A have been directly associated with health conditions leading to disability.\textsuperscript{16} For example, vitamin A deficiency

\textsuperscript{14}Wildeman RA & Nomdo C ‘Implementation of inclusive education: how far are we?’ (2007) 32.
may result in childhood blindness. In South Africa, 9% of children under the age of five are underweight, while the rate of stunting for children in this age group is 24%. Early childhood stunting is caused by poor nutrition and diarrhoea, factors directly linked to conditions of poverty. The consequences of stunting include poor cognitive ability, which compromises educational performance. While malnutrition can be a cause of disability, it may also be a consequence. A child with a disability may not be able to suck or swallow well, he or she may need more time or assistance with eating or a specific diet or high calorie intake to maintain a healthy weight, which may not be available in a context of poverty.

(b) Health

Despite its high health expenditure and many supportive policies, South Africa has made limited progress towards improving child health outcomes. There has been significant expansion of basic services and a massive increase in social and welfare benefits, which have reached close to a quarter of the population, but health problems and social inequalities that are rooted in poverty still persist. Among the challenges being faced by the health sector are a quadruple burden of diseases, which include infectious diseases (such as HIV/AIDS and tuberculosis), chronic non-communicable diseases, peri-natal and maternal mortality, and injury-related disorders. Significantly, in the recent ‘World Report on Disability’ all of these have been correlated with health conditions associated with disability. Further, it has been noted with respect to maternal, newborn and child health, that major long-term morbidity (e.g. cerebral palsy, retinopathy of prematurity) is manifesting especially during the neonatal period as a result of low quality of care. This has contributed to child disability being identified as ‘an emerging global health priority’.

(c) Opportunities for early learning

Unfortunately, there is little recent national evidence available on access to early learning for pre-school children with disabilities. The audit of ECD services conducted by the

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18UNICEF (2013) (n 17 above).
22Gottlieb CA et al. (2009) (n 16 above).
Department of Education in 2001 found only 1% of enrolment to be children with disabilities.24 Further, it found that 31% of children with disabilities were seven years or older (i.e. over-age for ECD centres), indicating difficulties with accessing formal schooling or specialist age-appropriate facilities.25 Even where children with disabilities do access formal schooling, they have lower attendance rates and higher drop-out rates in comparison to those without disabilities.26

Other research confirms the limited access of children with disabilities to early learning opportunities. A national study into the profile of children receiving Care Dependency Grants27 found that only 24% of such children attended a crèche or child-minding group.28 A more localised study, conducted in a peri-urban township of Gauteng, found that only 35% of children with disabilities aged three years and over were attending pre-school.29

Where children with disabilities do have access to early learning, it is frequently in informal community-based settings, with individuals (often mothers of the children) running stimulation programmes.30

‘Currently the lack of an integrated ECD and learning system is a serious barrier to the overall development of children with disabilities. Where early childhood intervention does occur, it often happens within an informal community based setting. Although this is preferred to a total lack of ECD, children with disabilities should be accommodated in mainstream ECD Centres…’31

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26A study analyzing the data contained in the Community Survey conducted by Statistics South Africa in 2007 found children with disabilities to be disproportionately excluded from access to education. While only 167 000 children aged 7-15 years (1.9%) were identified as having some type of disability, children with disabilities accounted for close to 10% of the total number of children who are out of school. Fleisch B, Shindler J & Perry H ‘Children out of school: evidence from the Community Survey’ in Pendlebury S, Lake L & Smith C (eds) South African Child Gauge (2009) 43.
27This is the monthly grant paid out to caregivers of children who require permanent care or support services as a result of their disability. The application process includes a medical assessment to confirm the severity of the child’s disability.
(d) Social services

Research across developed and developing countries shows the link between poverty and disability,\textsuperscript{32} with disabled children frequently caught in a cycle of poverty and exclusion.\textsuperscript{33} The impact of inadequate living conditions is particularly negative for children with disabilities, as poor and cramped housing is a significant barrier to their increasing competence and independence.\textsuperscript{34}

Children with disabilities are recognised as being particularly vulnerable to non-registration at birth and this impacts negatively on access to social grants, health and education services, placing them at greater risk of neglect, institutionalisation, and even death.\textsuperscript{35}

The United Nations Study on Violence against Children\textsuperscript{36} acknowledged children with disabilities as being especially vulnerable to violence and neglect, as well as all forms of abuse. This vulnerability is present in a variety of settings, including the family, schools, private and public institutions. In South Africa, disabled children are 2-5 times more likely to be abused than their non-disabled peers.\textsuperscript{37} A study conducted at a non-profit organisation (NPO) working with abused children concluded that disabled children experience a greater prevalence of all forms of abuse than their non-disabled counterparts, with children with certain disabilities being more prone to particular types of abuse: mentally and physically disabled children are at an increased risk of sexual abuse whilst those with learning disabilities are vulnerable to neglect.\textsuperscript{38} Those with multiple disabilities were found to be at increased risk for sexual abuse, suggesting that the abuse is at the hands of their carers.\textsuperscript{39} Children with disabilities are also particularly vulnerable to neglect and negligent treatment since they often place an extra physical and financial burden on the family.\textsuperscript{40} Lack of access

\textsuperscript{32}For a detailed review of various studies see WHO & World Bank (2011) (n 21 above).
\textsuperscript{33}UNICEF (2013) (n 17 above).
\textsuperscript{35}Committee on the Rights of the Child General Comment No. 9: The rights of children with disabilities’ (2007) para 36.
\textsuperscript{37}Hesselink-Louw AE, Booyens K & Neethling A ‘Disabled children as invisible and forgotten victims of crime’ (2003) Acta Criminologica 16 (2)165-180. This is similar to the figure quoted in General Comment No. 9 (2007), stating that disabled children are five times more likely than able-bodied children to be victims of abuse.
\textsuperscript{38}It reviewed data from the Teddy Bear Clinic in Gauteng over an eight-year period, identifying differences in the prevalence of sexual abuse, physical abuse and neglect of disabled and non-disabled children.
\textsuperscript{39}Deroukakis M ‘A retrospective analysis of children with and without disabilities attending the Teddy Bear Clinic, Johannesburg’ (2010).
\textsuperscript{40}General Comment No. 9 (2007) (n 37 above) para 42.
to an effective complaint-receiving monitoring system, contributes to systematic and continuing abuse.\textsuperscript{41}

(e) Parental support

Various studies have explored the experiences of parents\textsuperscript{42} of children with disabilities in their role as caregivers, both in developed and developing countries. These have tended to focus on specific impairment types such as autism or intellectual disability.\textsuperscript{43} In a study of children with mild developmental delays, Guralnick et al found that responding to the additional demands of a disabled child may result in the coping resources of families becoming depleted, resulting in increases in parental stress.\textsuperscript{44} This may be compounded by lack of information and understanding about the child's condition, uncertainty about the child's future and the physical restrictions associated with attending to the needs of the child.\textsuperscript{45}

However, Gupta & Singhal have cautioned against focusing only on the stressors and their adverse effects on parents of children with disabilities. Instead, they argue for recognition of how families have been able to effectively weave their lives to embrace both the joys and the sorrows that they face 'by reframing their original appraisal to emphasize the positive outcomes, such as their abilities to reach out to others in need''\textsuperscript{46}. Indeed, these scholars cite a growing body of research indicating that families of children with disability can (and do) have positive perceptions, leading to better quality of life for the child and enabling the child to develop to their maximum potential.

\textsuperscript{41}General Comment No. 9 (2007) (n 37 above) para 42.
\textsuperscript{42}This term is used to refer to the primary caregiver, who may not be biologically related to the child.
\textsuperscript{45}Mahoney G, O’Sullivan P & Robinson C ‘The family environments of children with disabilities: diverse but not so different’ (1992) Topics in Early Childhood Special Education 12(3) 386-402. Ziviani J et al. ‘Systematic review of early intervention programmes for children from birth to nine years who have a physical disability’ (2010) Australian Occupational Therapy Journal (57) 210-23. Different stages of parental reactions to having a child with a disability (shock, disbelief and denial, anger and resentment, bargaining, depression and discouragement, acceptance) have been documented by authors such as Cook RE et al. Adapting early childhood curricula for children in inclusive settings 6 ed (2004).
A study by Emerson et al. found that for mothers of children with intellectual disabilities in the UK, there was a significantly higher risk for poorer well-being (as compared to mothers of children without disabilities) that was attributed to their relatively poor socio-economic circumstances. These results indicate that failure to address such circumstances 'is likely to reinforce an overly 'pathological' orientation in which children with intellectual disabilities are implicitly assumed to be a 'burden' and a putative cause of maternal distress'. Similarly, in their research on families of children with intellectual disabilities in Sweden, Olsson & Hwang found that it was not having a child with an intellectual disability that predicted poorer maternal well-being, but rather differences in economic circumstances and (self-rated) health. These authors conclude that the well-being of parents of a child with an intellectual disability depends on the interplay between psychological protective factors and contextual risk factors, including poor socio-economic circumstances.

Given the association between child development and exposure to stimulating early-learning opportunities, it is critical that parents of children with disabilities be given the necessary support in order to provide these opportunities to their children in the early years. This requires a two-pronged approach that addresses the risk factors that compromise parental capacity, and provides the conditions under which positive adaptations of parents can be facilitated.

### 1.2 Problem statement

South Africa has ratified the CRC, the African Charter and the CRPD, all of which have provisions relating to ECD. Although there is no specific right to ECD, these human rights treaties place obligations on the State to provide health and nutrition, opportunities for early learning, social security and protection of the young child within a nurturing family environment. In addition, all of them have specific provisions relating to non-discrimination on the basis of disability, and further, to provide for the ‘special needs’ of children with disabilities. The South African Constitution also provides for the elements of ECD – not only for socio-economic rights of children, but also the rights to dignity and equality and to have their best interests taken into account in all circumstances. Particular legislation has been

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enacted to give effect to the Constitution, most notably the Children’s Act, which not only provides for protection of children as well as for prevention, early intervention and ECD, but also contains a section dedicated to children with disabilities.

Despite these provisions, however, children with disabilities continue to be excluded from ECD services. Clearly current legislation, policies and strategies do not adequately fulfil the State’s obligations with regard to ECD for children with disabilities.

**1.3 Research question and research objectives**

Against this background, the central question of the research is: What is required of the South African government to comply with international human rights treaties and Constitutional obligations with respect to ECD for children with disabilities?

This question will be addressed through the following main objectives. First, this study will establish the obligations of government as contained in specified international treaties which it has ratified, with respect to ECD for children with disabilities. The treaties to be reviewed are the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and the UN Convention on the Rights of Persons with Disabilities.

Secondly, the study will identify Constitutional provisions for children with disabilities, as they relate to ECD, since these create justiciable obligations for the State.

Thirdly, it will analyse current legislation and policies which provide for ECD for children with disabilities and the extent to which these comply with the State’s international and Constitutional legal obligations.

Finally, it will draw conclusions from the findings of the analysis in order to make recommendations to assist government in realising the right of children with disabilities to ECD in South Africa.
1.4 Rationale

1.4.1 The ECD imperative

a) The importance of ECD

The accumulation of scientific research over the past two decades has highlighted the importance of the early years of a child’s life.\textsuperscript{49} It has shown that experiences in this period determine capacity (education and earnings),\textsuperscript{50} health and longevity (particularly related to chronic disease)\textsuperscript{51} as well as personal and social adjustment. The potential of adequate nutrition and health, together with early stimulation and nurturing parenting\textsuperscript{52} make ECD services a priority for national socio-economic development, as is now reflected in the National Development Plan.\textsuperscript{53}

The development of a child occurs progressively and sequentially from conception, and is shaped by genetic potential in response to pre- and post-natal influences. Children are particularly sensitive to their environment during the first 1000 days of life (the 270 days of pregnancy plus 365 days in each of the first two years). In this period very rapid development, adaptation and consolidation occur, particularly in brain structure and function, metabolic reactions, social interactions and self-regulation.\textsuperscript{54} During this period, positive or protective factors determine the extent to which a child is able to take advantage of further opportunities and to develop resilience in the face of challenges. Children who are exposed to risks and adversity in the early years need additional support to enable them to compensate for missed learning. Such support is most effectively provided during this unique early ‘window of opportunity’.\textsuperscript{55} However, once this opportunity is missed, children living in conditions of poverty seldom catch up what has been lost, without intervention. Children

\textsuperscript{50}Engle P et al. ‘Strategies to avoid the loss of developmental potential in more than 200 million children in the developing world’ (2007) \textit{The Lancet} (369) 229-42.
\textsuperscript{52}Maccoby E ‘Parenting and its effects on children: on reading and misreading behavior genetics’ (2000) \textit{Annual Review of Psychology} (51) 1-27.
\textsuperscript{54}Shonkoff J et al. (2012) (n 51 above).
\textsuperscript{55}Hertzman C & Boyce T ‘How experience gets under the skin to create gradients in developmental health’ (2010) \textit{Annual Review of Public Health} (31) 329-347.
with disabilities, who receive little or no support to catch up, are more likely not to be able to reach their developmental potential.\textsuperscript{56}

‘They tend to fall behind their peers, slipping towards the margins, unable to bridge the widening gap between themselves and those who are forging ahead. Inequalities expand and become more intractable and harder to address.’\textsuperscript{57}

Even targeted interventions to address deficits at a later age cost more and are less effective than those taking place in early childhood.

ECD services have been referred to as ‘a powerful equaliser’ because of the contribution they can make during a period when children are most able to make up for the disadvantages that they inherit from previous generations (such as limited education of their parents or poor living conditions), or challenges in their own development (such as disability).\textsuperscript{58} The UN Secretary General stressed the importance of getting it right at this level:

‘Early childhood presents a window of opportunity for preventing negative outcomes. Early childhood interventions represent cost-effective strategies, and... generate higher rates of economic return and yield more positive long-term outcomes for individuals and society than later interventions... Implementing rights in early childhood requires a comprehensive, child-centred framework of laws, policies and community-based services... A positive agenda... requires the development of comprehensive policies and national action plans to ensure respect for the rights of the young child.’\textsuperscript{59}

b) Greatest benefits for the most disadvantaged

A critical function of ECD services is to identify and support children at risk for compromised development. If this is done at an early stage, and appropriate treatment and care is provided, it can reverse the effects of deprivation and support the development of the child. In this way, early intervention makes it possible for children to grow and develop to their full potential, thus reducing the need for remedial services to address developmental delays, stunting, and emotional and social problems later in life.\textsuperscript{60} This is of particular importance for children with disabilities as:

‘ECD and learning can provide children with disabilities with access to early intervention and early opportunities for optimum social, physical, intellectual and emotional development... Effective individualised stimulation can promote independence and inclusion in mainstream society.’\textsuperscript{61}

\textsuperscript{56}Engle P et al. (2007) (n 50 above).
\textsuperscript{58}CSDH ‘Early childhood development: a powerful equaliser’ (2007).
\textsuperscript{60}DSD & UNICEF (2006) (n 13 above)
\textsuperscript{61}OSDP (2008) (n 31 above) 36.
Research shows that developmental gains made by children before the age of 3 years are highest for those with maximum disadvantage.\(^6^2\) ECD, with the provision of care, stimulation, parental support and access to relevant services, has the potential to enhance the effects of interventions for children with disabilities.

c) The foundation for a healthy society

ECD contributes not only to the development of the individual child, it also has a key role to play in supporting the well-being of the family and wider society. This is an ideal phase for instilling of values that form the foundation of a peaceful, prosperous and democratic society. These values include respect for human rights, appreciation of diversity, anti-bias, tolerance and justice.\(^6^3\) ECD and stimulation within an inclusive environment has been described as ‘the cornerstone for the development of an integrated and equitable society’.\(^6^4\) Increasingly national governments are recognizing the potential of ECD services to develop equitable education provision for all children, and have begun to support different initiatives aimed at strategic and economic planning for inclusion of children with disabilities.\(^6^5\) In addition, improved access to ECD services can enable parents, as well as other adult carers, to take up opportunities for education and employment, thus improving the socio-economic status of impoverished families.

In summary, early childhood is a unique period of accelerated growth. Interventions made during this period have the greatest impact on those who are most disadvantaged, enabling them to fulfil not only individual potential but also to strengthen the foundation of society. The provision of ECD has therefore been identified as an essential social service, towards ensuring that children's rights during early childhood are realised.\(^6^6\)


\(^6^4\) OSDP (2008) (n 31 above) 36.

\(^6^5\) UNESCO ‘Rights from the start: Global Campaign for Education’ (2012).

1.4.2 International and regional treaties imperatives

In ratifying the CRC, the African Charter and the CRPD, the South African government signalled its intention to promote and protect the rights of all children in the country. In order to fulfil its obligations in respect of ECD for children with disabilities, it is essential that these obligations are fully understood and incorporated into national legislation, policies and action plans.

The United Nations has set up specific structures to oversee the implementation of different human rights treaties, comprising Committees of Experts elected by States parties. Unfortunately, however, the South African government has until very recently been far behind on its reporting obligations on the CRC, the African Charter and the CRPD. The combined second, third and fourth periodic reports on the CRC (due 2002, 2007 and 2012 respectively) have only just been approved by Cabinet for submission to the CRC Committee and it has taken as long as 11 years for Cabinet to approve the submission of the first country report on the Charter (due in 2002) to the African Union Expert Committee on the Rights and Welfare of the Child.67

1.4.3 Civil society imperatives

Although the State is accountable to these different committees to report on progress in implementing the international human rights treaties that it has ratified, it is also accountable for its actions with regard to children with disabilities to civil society in general and the disability sector in particular. A central tenet of the CRPD is the role of civil society – especially organisations of persons with disabilities and parents of disabled children - in monitoring and reporting on implementation, with advocacy where necessary to remove barriers and promote better access of children with disabilities to quality services.68

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67Draft reports on the CRC and the CRPD were compiled in 2012 through the Department of Women, Children and People with Disabilities and were circulated for comment. In a statement of the Cabinet meeting of 4 September 2013, it was reported that Cabinet had approved the submission of the combined second, third and fourth reports on the CRC to the Committee on the Rights of the Child as well as the first report to the African Union Expert Committee on the Rights and Welfare of the Child.

68French P ‘Human rights indicators for people with disability – a resource for disability activists and policy makers; incorporating an introduction and commentary to the CRPD’ (2007).
1.5 Premises of the research

This study is based on two key premises. The first premise is that, in ratifying the CRC, the African Charter and the CRPD, the South African government has committed itself in good faith to promote the rights of children with disabilities, and to report on its progress in doing so.

The second premise is that the State has an obligation to promote the well-being of all its citizens. Section 28 of the Constitution highlights the particular responsibilities that it has towards children, including the right of children to basic nutrition, shelter, basic health care and social services (s28 (1)(c)). Further, the founding values of Constitution (s9(3)) include prohibition of discrimination on the basis of disability, and thus children with disabilities have an equal right to that of other children to ECD services. Judgments of the Constitutional Court contain important pointers to the ‘reasonableness’ of action to be taken by the State, towards attainment of social justice and improving the quality of life for every citizen of the country.

The Grootboom judgment found the positive obligation imposed on government for socio-economic rights not to be an absolute or unqualified one, but defined by three key elements. First, there is an obligation to ‘take reasonable legislative and other measures’. Secondly, these measures must be directed towards the progressive realisation of the rights concerned, and thirdly, they must be within available resources. This judgment found that despite the fact that s28 (unlike ss26 and 27) of the Constitution has no internal limitations, the State’s obligation in terms of socio-economic rights is affected by the availability of resources. Indeed, this is a significant factor in determining what is reasonable and it ‘does not require the State to do more than its available resources permit’. Further, determination of what constitutes ‘reasonable legislative and other measures’ must take cognisance of the fact that the Constitution provides for different spheres of government viz. national, provincial and local government. A reasonable programme must allocate responsibilities and tasks to these different spheres, and ensure that appropriate financial and human resources are available.

69 Government of the Republic of South Africa and Others v Grootboom and Others, 2000 (11) BCLR 1169 (CC).
70 Grootboom (n 69 above).
In the ruling of the *Minister of Health and Others v Treatment Action Campaign and Others* it was emphasised that measures taken towards the realisation of socio-economic rights must be balanced and flexible, making necessary provision for responding to crises as well as to short, medium and long term needs.\(^{71}\) The ruling in this case made it clear that the State would take responsibility for protecting the rights of children in the absence of parental care or when parents were unable to provide for the basic needs of their children.

Another instructive judgment was that made by the High Court in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*.\(^{72}\) In finding for the *Forum* the High Court based its judgment on the provisions of the CRC,\(^{73}\) African Charter\(^{74}\) and CRPD\(^{75}\) to emphasise the need for the State to provide fully for disabled children, including the right to education which should be directed to ‘the development of the child’s personality, talents and mental and physical abilities to their fullest potential’.\(^{76}\)

In summary, the South African government has declared its commitment to upholding the rights of children with disabilities through the ratification of key human rights instruments. In addition, provisions of the Constitution place the onus on the State to ensure that ‘reasonable legislative and other measures’ are taken to realise the socio-economic rights of children. These are the premises of this study and the basis on which it seeks to establish the right of children with disabilities to ECD.

### 1.6 Assumption on which the methodology is based

The methodology is based on the assumption that the State is the primary duty-bearer giving effect to the provisions of the Constitution and complying with international treaties that have been ratified. These provisions are fulfilled through the public resources at the disposal of the State, including finances, services, personnel and infrastructure. The hypothesis of the study is therefore that if the State complies with the international treaties that it has ratified, and

\(^{71}\) *Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 (CC).

\(^{72}\) *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* (2011) 5 SA 87 (WCC).

\(^{73}\) CRC Arts 23 (children with disabilities), 28 (education) and 29 (purposes of education).

\(^{74}\) African Charter Arts 11 (education) and 13 (handicapped children). *Western Cape Forum* (n 72 above).

\(^{75}\) CRPD Preamble (r), Art 24. *Western Cape Forum* (n 72 above) para 23.

\(^{76}\) *Western Cape Forum* (n 72 above) para 20.
makes a reasonable effort to implement these, taking the necessary actions and measures,\textsuperscript{77} then it stands a reasonable chance of realising the right of children with disabilities to ECD.

In order to test this hypothesis, it will be necessary to review and analyse relevant international treaties, and to establish the obligations that they impose on the State for ECD for children with disabilities. It will also be necessary to review and analyse the Constitution, to establish its provisions for ECD as well as for children with disabilities. Together, these provide the benchmarks for State action. The review and qualitative analysis will be directed at what the State has done through its organs and how this has been done (i.e. how the State has interpreted its obligations).

\section*{1.7 Research method}

The primary method used for data collection in this study was desktop research, drawing from both primary and secondary sources.

\subsection*{1.7.1 Primary sources}

Sources of primary data included the international treaties themselves, viz the CRC, the African Charter and CRPD. Although not legally binding, the Concluding Observations and recommendations on State reports provide an explanation of the practical nature of the rights and carry significant political weight.\textsuperscript{78} Using the Universal Human Rights Index, a search was conducted of Concluding Observations and recommendations made by the Committee on the Rights of the Child (in response to different country reports) with respect to ECD.\textsuperscript{79}

Reference was also made to court decisions that interpret specific provisions of the Constitution (such as s28 of the Bill of Rights) and define their terms:

\begin{quote}
\textquote{Since the English legal system depends so heavily of the doctrine of precedent, there is an obvious need for accessible, accurate and reliable reports of what the courts have decided.}'\textsuperscript{80}
\end{quote}

Particular attention was paid to rulings which have implications with respect to children’s socio-economic rights (\textit{Grootboom} and \textit{Treatment Action Campaign})\textsuperscript{81} and the rights to dignity and education for children with disabilities (\textit{Western Cape Forum}).\textsuperscript{82}

\textsuperscript{77}Actions and measures’ include legislation, policies, strategies and action plans relating to ECD and children with disabilities.
\textsuperscript{79}Use was made of the website of the United Nations to access these documents.
\textsuperscript{80}McLeod I \textit{Legal Method} 4 ed (2002) 105.
There was also desktop research into actions and measures taken by the State in providing for young children with disabilities. This included review and analysis of legislation, regulations, policies and strategies relating to ECD and children with disabilities. Particular focus was on the Departments of Social Development, Education and Health.

1.7.2 Secondary sources

Various documents were used to shed light on how international law is interpreted: for example, the negotiations that led to the adoption of the CRC provided insights into the intentions underlying specific articles. In addition, reporting guidelines for a particular treaty were used to ascertain factors considered important by the monitoring bodies. Other interpretive documents such as General Comments, documents issued following Days of Discussion and statements of the UN Secretary General were also consulted. In addition, academic commentaries on articles within treaties provided insights into what is required of State parties.

With respect to the phenomenon of ECD, secondary sources of data were accessed both internationally and with reference to South Africa. Internationally, information was obtained from various sources, including United Nations specialised agencies involved with ECD, such as WHO, UNICEF and UNESCO (e.g. monitoring reports of ‘Education for All’). To determine the country-specific situation, literature was reviewed on the history of ECD and of disability in South Africa. Numerous documents were also sourced on the current status of ECD in the country as well as the situation of children with disabilities. For example, the Diagnostic Review of ECD and the Situation Analysis of children with disabilities (both completed in 2012) provided important secondary sources for this study.

81 Grootboom (n 69 above). TAC (n 71 above).
82 Western Cape Forum (n 72 above).
84 These are statements issued by a treaty monitoring body, which detail particular rights and freedoms contained in a treaty. Those of particular relevance to this study are Committee on the Rights of the Child General Comment No 7 Implementing rights in early childhood (2005) and General Comment No. 9 (2007) (n 37 above).
87 Diagnostic Review (2012) (n 57 above).
1.8 Significance of the study

There is a vast body of literature on ECD, with more recent work underpinned by the seminal study conducted by Shonkoff & Phillips. Many have contributed to the now undisputed argument that ECD (particularly the first 1000 days) is important not only for well-being in childhood, but also for setting in place a solid foundation for adulthood. Research indicates that children who are most disadvantaged (by factors such as poverty and disability) stand to gain most from ECD services and the nature and impact of early intervention for young children with disabilities has been detailed. However, little has been done to locate the findings from the science and sociology of early childhood into a rights-based framework, which identifies government responsibilities to realise the rights of young children with disabilities.

Within the health sector, there has been a major focus on decreasing child mortality rates. This is reflected in the Millennium Development Goals (MDGs) (integrated into the National Strategic Plan of the Department of Health), with the current high rates of HIV infection making it a legitimate priority of government. However, that the country’s quadruple burden of disease can be correlated closely with causes of childhood disability means that the current neglect of rehabilitation services is a short-term saving that will exact a significant cost in the long-term with respect to children with permanent impairments. Indeed, there has been a growing recognition of the need to move beyond survival to focusing on child development. Based on a human rights framework, this study clarifies the obligation of

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93This is beginning to change as the Diagnostic Review of ECD included a background paper on legal obligations on the State. Martin P ‘The role of the State: Review of legal obligations to provide comprehensive early childhood development services’ (2012).
94Department of Health Strategic Plan 2010/11-2012/13.
95Chopra M et al. (n 19 above). Mayosi B et al. (n 20 above). WHO & World Bank (2011) (n 21 above).
government in moving beyond the right to survival of children with disabilities towards early identification and intervention, so that they are given the opportunity to develop to their fullest potential.

From an education perspective, much work has been done on the right to education and developing inclusive education services for children with disabilities. However, review of the report that informed the development of the inclusive education policy reveals that it envisaged a very broad approach to inclusion, encompassing ECD as one ‘band’ of education. Unfortunately, however the inclusive education policy makes no mention of ECD, focusing almost exclusively on primary school education, thereby omitting the foundation of learning for children with disabilities. This study seeks to re-establish ECD as the first band of education and the foundation of all subsequent learning for children with disabilities, both formal and informal, as a legal obligation of government.

The South African government has ratified various international rights treaties, and therefore is legally bound to implement their provisions. To date, much work has been done on clarifying State obligations for children under the various articles of the CRC and African Charter. Further, the State’s obligations in respect of rights in early childhood and rights of children with disabilities have been elaborated on in General Comments 7 and 9 of the CRC Committee. As the most recently ratified human rights treaty, scholarly writings on interpretation of government obligations under the CRPD are still emerging, with education

101Committee on the Rights of the Child General Comment No. 7: Implementing child rights in early childhood (2005) and General Comment No 9 (2007) (n 37 above).
being one of the key areas of attention. There is no single right to ECD contained in any of these treaties (in contrast to the right to health or education), and yet it cuts across many different articles, particularly as it pertains to children with disabilities. It could be that these factors have contributed to the lack of attention that has been given to establishing State obligations for ECD for children with disabilities under a human rights framework, as delineated by these treaties.

The picture is similar with respect to the obligations of the government under the Constitution. Many have elaborated on rights in the Constitution and their interpretation through court rulings. There has also been much work done to clarify children’s socio-economic rights in general and the right of children with disabilities to education in particular. However, ECD for children with disabilities has not been systematically problematised in relation to the provisions of the Constitution – not only for socio-economic rights for children (e.g. health, education), but also in relation to its founding values of dignity and equality.

The South African government has recently identified ECD as a ‘national priority.’ The National Development Plan: vision for 2030 provides for a range of services for young children, including nutrition, health and early learning. The Minister of Social Development has described how the African National Congress, as the ruling party, has accelerated rollout of community-based services in order to ensure provision of essential services for children in the age range 0-4. State initiatives towards this goal include a Diagnostic Review of ECD services and a national conference on ECD (both of which took place in 2012), which...
have informed the new National Integrated Programme of Action for ECD (2013-2018).\textsuperscript{111} However, early identification and early intervention is not specifically identified as a component of ECD services, and little attention has been given to strategies to ensure that children with disabilities, as among the most vulnerable children, are to be reached.

Herein lies the contribution of this study: it seeks to ‘make rights a reality’ with respect to ECD for children with disabilities through establishing the legal obligations on the State under international rights treaties and the Constitution, and elucidating with as much precision as can be adduced the scope, content and normative framework of this human right and Constitutional obligation.

1.9 Overview of chapters

This thesis comprises of six chapters. The first gives the background to the study, describing its significance in the current context as well as its rationale and setting out its objectives.

Chapter 2 contains conceptual frameworks for ECD and for childhood disability. It identifies the purposes of ECD for children with disabilities and clarifies the different components of services required for all-round development of young children.

In Chapter 3, the specific provisions of the CRC, the African Charter and the CRPD are identified as they relate to the components of ECD and young children with disabilities. The State obligations emerging from these are established.

Chapter 4 focuses on general obligations of the State under these treaties, as well as Constitutional provisions relating to the components of ECD and to persons with disabilities. It draws on a range of court rulings to ascertain how courts have interpreted particular provisions, most notably the ruling made by the High Court in \textit{Western Cape Forum}.\textsuperscript{112} The standard of ‘reasonableness’ is established with respect to the specific components of ECD, towards which the State is obliged to work progressively. In addition, those rights which are immediately realisable are identified.

papers from this conference are cited in various chapters of this thesis.

\textsuperscript{111}Dept of Social Development ‘South African Integrated Programme of Action for Early Childhood Development – moving ahead (2013-2018)’.

\textsuperscript{112}\textit{Western Cape Forum} (n 72 above).
Building on the previous two chapters, Chapter 5 contains a review of the legislation that the South African government has enacted to give effect to its international legal obligations and to the Constitution. Specific attention is paid to the Departments of Social Development, Health and Education, with respect to the policies and strategies that have been put in place to guide ECD services, and the extent to which they are inclusive of children with disabilities. The legal and policy framework on the right to ECD is evaluated against the standards established in Chapters 3 and 4.

Chapter 6 contains a summary of the findings of this study in light of the current context and draws conclusions regarding the State’s response to the legal obligation to provide early childhood development services for children with disabilities.
CHAPTER 2: NATURE, PURPOSE AND CONTENT OF THE RIGHT TO EARLY CHILDHOOD DEVELOPMENT FOR CHILDREN WITH DISABILITIES

2.1 Introduction

Given that the objective of this thesis is to establish the legal obligations on the South African government with respect to ECD for children with disabilities, it is necessary to identify the nature, purpose and content of this right. This is the intention of this chapter.

I begin by discussing various theoretical frameworks for understanding childhood development. The bio-ecological and transactional models are informative not only for providing insights into processes and factors that shape (adversely or positively) development of the young child, they provide important pointers for policy in support of vulnerable children. Further, the notions of vulnerability and resilience can be related to risk and protective factors that determine the extent of limitation that a child with an impairment experiences.

The unique nature of the period of early childhood is discussed – as one during which there is accelerated growth, as well as heightened sensitivity, and when the environment has a disproportionate influence. This period thus provides a ‘window of opportunity’ for early interventions, particularly for children with disabilities, in which brain development can be promoted and developmental outcomes enhanced. Benefits of ECD for children with disabilities in accrue not only to individual children but also to their families and to the wider society (as reflected in the bio-ecological model). Further, this is an ideal phase in which to promote inclusion of children with disabilities with non-disabled children, as learning programmes for young children are by nature in small groups, and flexible in responding to each child’s level of development. Investments in early childhood services have been shown not only to contribute to improved outcomes in the long-term, but to reducing inequities in society. These are likely reasons as to why the South African government has recently given
priority to extending ECD services to vulnerable children, and it has been included in the National Development Plan.¹

In determining the content of ECD, I draw from recent work published in the *South African Child Gauge*, which identifies the components of the ‘essential package of ECD services’.² While all of these services are required by all children, I draw attention to considerations that need to be given to children with disabilities.

### 2.1.1 Defining early childhood

Early childhood has been defined by some as covering the period from birth to school-going age.³ However, it has also been considered as spanning the prenatal period until eight years of age, or until the child starts school.⁴ The latter definition includes the first 1000 days of a child’s life, which covers the period of gestation and the first two years.⁵

Although these age ranges vary, the scope of this study is limited to children in the age range of 0-4 years. It therefore does not include the prenatal period or children who are five years and older (responsibility for the latter falls primarily under the Department of Basic Education, as children enter their first year of compulsory schooling at this age). This is consistent with the international literature, which defines early childhood as the period ‘from birth to entry into primary school in formal, informal and non-formal settings’ and well as the most recent programme of action for ECD in South Africa.⁶ It must be noted, however, that the definition of early childhood is based on the assumption that the achievement of particular developmental milestones can be correlated with the child’s chronological age. This might

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⁵Richter L et al. ‘Diagnostic review of early childhood development’ (2012). Goswami notes that even prior to birth, many critical aspects of brain development are complete. Indeed, by 7 months gestation, almost all of the neurons that comprise the mature brain have been formed. Goswami U ‘Neuroscience, education and special education’ (2004) *British Journal of Special Education* 31(4) 175-83. The ‘1000 days partnership’ is an international initiative established by Hilary Clinton in 2010 to improve nutrition for young children and their mothers. http://www.thousanddays.org/
not be the case for children with disabilities, who may either be delayed in reaching a particular milestone, or not reach it at all. Therefore, although early childhood is defined as a particular age range, the evolving capacities of children with disabilities need to be taken into account and it may be preferable to regard early childhood as a phase of development rather than occurring at a defined age.

2.1.2 Conceptual framework for child development

Different theoretical models of human development have contributed to shaping early childhood policies and practices over the past several decades. Of particular influence have been the bio-ecological and transactional models and the concepts of vulnerability and resilience. These frameworks highlight the extent to which child (and indeed adult) outcomes are shaped by a dynamic relationship between the cumulative impact of risk factors and the effects of protective factors that can be identified within the individual, family, community and broader socio-economic and cultural contexts. They also acknowledge the active role that young children play in their own development. The transactional model in particular affirms the importance of reciprocal adult-child interactions in the process of development, and the need of young children to experience stable and nurturing relationships.

(a) The bio-ecological model of human learning and development

Based on the work of Uri Bronfenbrenner, the bio-ecological model holds that behaviour exists and is best understood in the social context in which it occurs. Development is viewed as a joint function of environmental influences and child characteristics, with learning opportunities occurring within various settings in which an infant or young child participates - including the family, early childhood education programmes and the community.

The disciplines of biology, education, sociology, socio-biology and psychology have examined child development from many angles. The approaches can be conceptualised as ranging from a focus on individual or group characteristics (along a vertical axis) and biological and environmental factors (along a horizontal axis). The bio-ecological model

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provides a framework for integrating these disciplines, as well as the different child
development and learning theories (maturational, constructivist and social constructivist)
underpinning them. Not only does it provide for the integration of empirical and theoretical
strands, the bio-ecological model highlights the importance of interactions between the
multiple factors that shape human development over time.9 Bronfenbrenner's
conceptualisation of the 'ecology of human development' recognises that human development
is influenced by factors operating at systems levels within a broad ecological structure, which
exert reciprocal influences on one another. He provides a taxonomy of contexts for
considering environmental influences on developmental outcomes, comprising a nested
hierarchy of systems.10

What are the implications of this model for children with disabilities? Traditionally,
development has been examined as a function of the individual child, using static concepts
such as Intelligence Quotient (IQ) or impairment type, to compare children with disabilities to
typically developing children. Recognizing that such concepts contribute little to revealing the
mechanisms that account for child change, Bronfenbrenner stressed the need for recognition
of ‘developmentally instigative’ features of children.11 These include personal characteristics
that elicit or discourage particular kinds of reactions from the environment, which can either
hinder or support the child’s development.12 The bio-ecological model acknowledges multiple
risks as well as specific characteristics of the child and of the environment. The systemic,
reciprocal nature of child-environment interactions has led to the concept of 'ecological
niches,' requiring that consideration be given to individual attributes as well as patterns of
being that interact with unique environmental circumstances, in order to achieve full
realisation of potential. According to this approach, there is a need to recognise the child’s

9Guhn M and Goelman H ‘Bio-ecological theory, early child development and the validation of the population-
10Sontag J (1996) (n 8 above). At the centre are microsystems, factors within the child’s most immediate
environment, which may affect or be affected by the child. At the next level are mesosystems, the interrelations
between the settings experienced by the child. Exosystems are settings that do not involve the child as an active
participant, but which impact on the setting in which the child is located. Macrosystems encompass micro-,
meso- and exosystems, comprising systems of cultural beliefs and societal values, as well as public policies.
Finally, chronosystems refer to transitions that take place at different times across the lifespan and involve socio-
historical contexts. Bronfenbrenner U The ecology of human development: Experiments in nature and design
(1979). Odom SL et al. (undated) ‘Inclusion at the preschool level: an ecological systems analysis.’ Yoshikawa
Development 72(6) 1887-903.
12Sontag J (1996) (n 8 above).
‘developmentally structuring’ attributes, i.e. their active orientation towards and interaction with the environment, based on the conception of self as an active agent in the world. This perspective shifts the focus from purely physical factors (e.g. bodily characteristics or impairment) towards recognition of the environment as a powerful influence on the processes of development. It informs work on children's resilience and the search for protective factors that can reduce risks to development.

The bio-ecological model has been found to be valuable for understanding and responding to young children and their families as it reflects the broad context within which they are located as well as the dynamic nature of family relations. It highlights the need to look at interventions beyond the hospital or classroom, taking cognisance of the characteristics of multiple settings in influencing children's performance. Further, this approach provides tools with which educators and others in the early childhood sphere can make use of a range of environmental contexts to promote growth and development of children whose conditions threaten to limit their future development. It can also be used to inform social policies guiding inclusion of children with disabilities at preschool level, based on an understanding of the multi-dimensional nature of child development.

(b) Transactional model of child development

The transactional model of child development views the transactions between the child and his or her environment as ‘an iterative process by which the child changes in response to interactions with the environment, which, in turn changes the environment itself’. Child development is thus an outcome of the continuous dynamic interactions of the child and the experience provided by his or her family and social context. This process is governed by the envirotpe, viz the social organisation regulating the way that human beings fit into society.

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12Bronfenbrenner U (1992) 219 [Quoted in Sontag n 11 and 8 above].
15Sontag J (1996) (n 8 above) 320. In applying the bio-ecological framework to services for young children, Swick & Williams emphasise the important role that early childhood practitioners can provide in supporting and caring for families in addressing the stressors that they face. Swick KJ & Williams RD (2006) (n 14 above).
which include culture (socialisation and education), family (sense of belonging) and individual characteristics. Developmental outcomes are seen neither as a function of the individual alone nor the experiential context in isolation, but as a combination of an individual and his or her experience. Thus in the transactional approach ‘the problems of children are no longer seen as restricted to children’. Indeed, it emphasises that the context of the child is as important as the characteristics of the child in determining successful development. From this perspective, intervention programmes cannot be successful if changes are made only at the level of the individual child - there also need to be changes in the environment that build on existing competencies of the child and buffers him or her from stressful life events that may occur in the future. From the transactional model perspective, improving the quality of children’s daily experience through relationships must be a primary goal of all initiatives around parenting, childcare and monitoring rights in early childhood.

The relationship between parental stress and children's behaviour problems is well described by the transactional model, where (over time) high parenting stress contributes to a worsening of child behaviour problems, and high child behaviour problems contributes to an increase in parenting stress. Further, the meaning that an individual attaches to a stressful event determines its impact on them.

Although the transactional model acknowledges the powerful effect that families have on their children's development (as a direct result of characteristics of the family and their interactions, experiences and beliefs), interventions to support children with disabilities tend to focus on individual children and not on families. This framework provides a useful guide

21 Baker found parenting stress to be higher among children with developmental delays (as compared to those without), but this was attributed to the extent of the behaviour problems rather than to the child's disability. Baker B et al. ‘Pre-school children with and without developmental delay; behaviour problems and parenting stress over time’ (2003) Journal of Intellectual Disability Research Part 4/5.
for assessment as well as provision of all forms of early intervention services and support, with a particular focus on the family.\textsuperscript{24} Indeed, the central goal of early intervention is to strengthen families in a manner that optimises patterns of interaction, with outcomes which focus not only on individual children, but also on their families.\textsuperscript{25}

Drawing from the transactional model, Guralnick has proposed a developmental framework for early intervention, which informs practice for children at risk for and with established disabilities. It is based on the premise that experiential factors shaping the course of child developmental outcomes can be understood as three sets of family patterns of interactions viz. the quality of parent-child transactions (e.g. reciprocity, warmth); family-orchestrated child experiences (e.g. educational or recreational activities) and health and safety provided by the family (e.g. immunisations, nutrition, protection from violence).\textsuperscript{26} However, when a child who is at biological risk or has an established disability is born into a family, there are often stressors associated with the child that (if they gain sufficient magnitude) may disrupt these patterns of interaction.\textsuperscript{27} Among the stressors in families is the lack of information relating to the disabled child. Families need to have knowledge of the implications of a specific diagnosis if their expectations of their child's developmental and behavioural progress are to be realistic. Another stressor relates to interpersonal and family distress, which may be a consequence of a child's biological risk or established disability (recurring at various developmental stages and transition points) or an attribute of the parent.\textsuperscript{28} If this is not resolved, there is a danger of the family’s social isolation. A further stressor relates to securing of resources required to provide the necessary care for the child.\textsuperscript{29} Families often struggle to find and co-ordinate services that they need, and this creates additional demands on their time and resources. Finally, as a result of a combination of these stressors, families

\textsuperscript{24}Bruder MB (2010) (n 8 above).
\textsuperscript{25}Outcomes for children are positive socio-emotional skills, demonstration of acquisition and use of knowledge and skills and use of appropriate behaviour to meet needs. Outcomes for families are that they know their rights, they effectively communicate their children's needs and they help their children develop and learn. Bruder MB (2010) (n 8 above).
\textsuperscript{27}Certain characteristics of families may also serve as stressors and undermine the development of the child (e.g. poor mental health of the parent, lack of financial and social supports). Guralnick MJ (2001) (n 26 above).
\textsuperscript{28}For example, maternal depression is negatively associated with early childhood development and the quality of parenting across different cultures and socio-economic groups. Risk factors include poverty, low education, high stress and poor social support. Walker SP et al. ‘Inequality in early childhood: risk and protective factors for early child development’ (2011) \textit{The Lancet} 378 (9799) 1-14.
\textsuperscript{29}Guralnick MJ (1998) (n 26 above).
frequently face confidence threats, i.e. the undermining of their ability to solve current and future child-related challenges. Guralnick holds that, by virtue of their interference with one or more of the critical family interaction patterns, these stressors negatively influence child development outcomes. Early intervention can be conceptualised as ‘a system designed to support family patterns of interaction that best promote children’s development’. It aims to be responsive to these stressors through provision of resource support (with the family becoming aware of, accessing and co-ordinating appropriate educational, health and social services), social support (promoting leadership by parent organisations) and provision of information and services through formal early intervention programmes.

Both the bio-ecological and transactional models emphasise the need to explore the nature of interactions between the child and significant others in the environment. Woolfson describes how, at several levels, the social environment influences the behaviour of parents caring for a disabled child. At the centre of the system, the family is influenced by attitudes and perceptions of disability on the part of relatives, friends and the immediate social network, local schools and the broader community. These attitudes and perceptions are often based on the view of disability as individual tragedy. They convey to families the view that it would have been better if their disabled child had not been born, and that he or she needs to be helped to be more like able-bodied children. These attitudes permeate parents and families’ own beliefs about disability, and in turn (according to Bronfenbrenner’s theory) shape parenting behaviour. There needs to be intervention to break this pattern, providing an affirmative approach to disability, in which the notion of disability as personal tragedy is rejected and parents and families of children with disabilities convey positive identities for their children as ‘valuable members of society living valid lives as people with impairments’.

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30Margalit et al. found that different factors influence parent’s experience of stress and their ability to cope. Their study concluded that ‘individuals will cope better with stress when they understand their problems, have the necessary resources, and are motivated to cope with the problem’. Margalit M, Al-Yagon M & Kleitman T ‘Family subtyping and early intervention’ (2006) Journal of Policy and Practice in Intellectual Disabilities 3(1) 33-41.
35This is also described by in Guralnick M ‘The nature and meaning of social integration for young children with mild developmental delays in inclusive settings’ (1999) Journal of Early Intervention 22(1) 70-86. Lerner JW et al. (2003) (n 15 above).
Bogenschneider & Corbett argue for a focus on families within social policy because family ‘embodies an essential quality found in few policy frameworks and one that is seldom advanced by special interest groups: commitment to others even when such actions exact a personal cost’.\(^{37}\) A family perspective also moves away from overly specific problems or single solutions towards a more holistic, multidimensional approach to policy challenges. Giving consideration to quality of life of families of children with disabilities can also provide insights into appropriate support, as family quality of life concepts\(^{38}\) focus on broader environmental impacts and contexts, as well as the individual’s unique interpretation of their environment.\(^{39}\) A study by Brown et al. on families of children with disabilities affirmed the importance of providing services that enhance overall quality of life for the family, rather than focusing exclusively on the needs of the disabled child. This includes promoting a balanced, psychologically and socially healthy family, ensuring provision of respite care\(^{40}\) and preventing social isolation.\(^{41}\)

(c) The notions of vulnerability and resilience

Vulnerability refers to an individual’s susceptibility to a negative outcome, while risk factors are biological or psychosocial hazards that increase the likelihood of negative outcomes.\(^{42}\) The literature provides a typology of children who are recognised to be at risk for negative developmental outcomes.\(^{43}\) These include those at established risk (with diagnosed health conditions such as Down syndrome), those at biological risk as a result of conditions around their birth which might compromise their development (e.g. premature or low birth weight...
babies), and those at environmental risk, for whom life experiences and the environment pose
a threat to their developmental well-being (e.g. children living in poor economic and social
environments). The term ‘double jeopardy’ has been used to refer to risks children face as a
result of biological and environmental risk factors acting together. A pattern of ‘risk-
attracts-risk’ biological sensitivity to context has been seen as a ‘bellwether in a socially
partitioned world... those from less privileged backgrounds will tend to find themselves in
risk-augmenting contexts, whereas those from more privileged backgrounds will tend to find
themselves in protective environments’. This suggests that children’s heightened exposure to
risks and vulnerability is closely linked to social inequalities. Indeed, unequal access to
health and education is caused by the unequal distribution of power, income, goods and
services nationally and internationally, resulting in inequalities in the conditions of people's
lives.

‘This unequal distribution of health-damaging experiences is not in any sense a 'natural' phenomenon
but is the result of a toxic combination of poor social policies and programmes, unfair economic
arrangements and bad politics... the high burden of illness responsible for appalling premature loss of
life arises in large part because of the conditions in which people are born, grow, live, work and age.’
The commercialisation of vital social goods - including health and education – are seen to be
contributing directly to social inequity.

Recent research has identified key factors that impact negatively on the development of
young children, which include nutritional deficiencies and inadequate feeding practices,
inadequate health, parental and other care and low levels of stimulation. They may result in
delayed development and/or lead to irreversible damage, and increase the risk that poor
health and poverty will follow the child into adulthood. It is estimated that more than 200
million children younger than 5 years are not reaching their developmental potential because

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44Lerner et al. define ‘children with special needs’ as comprising two distinct groups, viz those with confirmed
disabilities and those at risk for school and learning failure as a result of environmental, biological or established
46Hertzman C & Boyce T (2010) (n 14 above) 343. Sameroff’s research found that single environmental factors
most often do not make a difference by themselves: rather, it is the combination of multiple risks that
characterize high-risk groups. Therefore interventions need to address ‘the broad constellation of ecological
factors in which these individuals and families are embedded.’ Sameroff AJ and Fiese BH (2000) (n 19 above)
141.
48Walker SP et al. (2011) (n 28 above).
49Lake A ‘Comment: early childhood development - global action is overdue’ (2011) The Lancet 378 (9799)
1277-78.
of poverty, nutritional deficiencies and inadequate learning opportunities. Many who could benefit greatly from ECD services – including children with disabilities - cannot access them as a result of household risks or structural barriers to access.51

The notions of resilience and protective factors are the positive counterparts to those of vulnerability and risk. Protective factors are moderators of risk and adversity that enhance developmentally appropriate outcomes, while resilience refers to ‘the capacity of the child to thrive, despite growing up facing adversity’.52

'As long as the balance between stressful life events and protective factors is favourable, successful adaptation is possible. However, when stressful life events outweigh the protective factors, even the most resilient child can develop problems. Intervention may thus be conceived as an attempt to shift the balance from vulnerability to resilience, either by decreasing exposure to risk factors and stressful life events, or by increasing the number of available protective factors (e.g. competencies and sources of support) in the lives of vulnerable children.'53

Protective factors can be understood as both internal and external sources of support. Within the child, protective factors include the personal attributes of the child that elicit positive responses from the environment (e.g. intelligence, easy temperament, self-esteem and self-confidence, the ability to recover quickly from discomfort and to ask for support when needed). They may also be located within the family, and include the fostering of emotional attachments and socialisation thus nurturing trust, autonomy and initiative.54 Protective factors may also be found within the community, as external support systems that reinforce competence and provide children with a positive set of values. These can be provided through friends, school and teachers and mentors.55 In addition, policies at national level that encourage educational attainment and support income transfers, health care and access to safe housing provide support to families, thereby indirectly promoting the resilience of children.56

51Britto et al. (2011) (n 50 above)
52Siddiqi A et al. (2007) (n 20 above) 39.
53Werner EE (1990) (n 42 above) 111.
54In their work with families of children with disabilities Margalit et al. see resilience as reflecting the ‘struggling abilities of parents and their learning from adversity’. Social support systems were found to be significant in predicting personal adjustment and familial coping with stress related to having children with disabilities. Margalit M et al (2006) (n 30 above).
55Werner EE (2000) (n 42 above). This reflects the ecological perspective.
56Siddiqi A et al. (2007) (n 20 above).
Shonkoff argues that services targeting young children should be augmented by protective interventions informed by the ‘biology of adversity’:

‘The same neuroplasticity that leaves emotional regulation, behavioural adaptation and executive functioning skills vulnerable to early disruption to stressful environments also enables their successful development through focused interventions during sensitive periods in their maturation.’

This suggests that there should be a two-pronged approach to enhancing protective factors and promoting resilience of young children with disabilities. First, there needs to be enrichment of learning experiences and cognitive and linguistic stimulation. Secondly, there needs to be increased emphasis on protective interactions which have the potential to prevent, reduce or mitigate the consequences of stress and adversity on the developing brain. This requires that greater attention be paid to building the ‘stress-buffering’ capacities of parents and service providers in the ECD sector.

2.1.3 Conceptual framework for childhood disability

(a) Defining childhood disability

Much has been written about the different models of disability and how these have shaped services and policies pertaining to adults and children with disabilities. These are typically contrasted as the ‘medical model’ and the ‘social model’ of disability. The medical model focuses on the impairment of the individual, and their resulting deficits and deficiencies. Persons with disabilities are portrayed as tragic and unfortunate victims, requiring either cure or care. Service providers (such as doctors or social workers) are deemed to be the experts, able to identify what is best for the disabled persons and thus to make decisions on their behalf. Rehabilitation, education and other interventions focus on the extent to which the disabled person can be ‘normalised’ into mainstream society. In contrast, the social (or rights-based) model of disability locates the ‘problem’ not within the individual with an impairment, but within society and the way that it is structured to exclude persons with impairments from opportunities to participate. It views people with disabilities as rights holders and members of communities who are often more disabled by the barriers that society

58Shonkoff J (2011) (n 57 above).
erects to exclude and stigmatise them, than they are by their own impairments.\textsuperscript{61} Architectural, attitudinal, informational and financial barriers are seen as preventing adults and children with disabilities from access to services such as health and education.

While these are sometimes pitted as polar opposites, the International Classification of Functioning, Disability and Health: Children and Youth Version (ICF-CY)\textsuperscript{62} includes elements of both the social and the medical models. It is based on the premise that disability is determined by a complex and dynamic interaction between health conditions and contextual factors at the individual level, as well as at the broader environmental level.\textsuperscript{63} Disability is seen as having three dimensions viz impairments (problems in body function or structure), functional limitations (difficulties related to activities, based on comparisons with typically-developing children of the same age) and participation restrictions (difficulties related to social participation).

In the ECD literature, disability is seen as delays in development relative to the norms of chronological age of a particular culture, formally diagnosed conditions with associated developmental delays (e.g. Down syndrome, autism) and sensory impairments.\textsuperscript{64} Based on the classification system above, this definition would be equated with ‘impairment’.

Article 1 of the CRPD links the concepts of impairment and participation restrictions in its position that ‘persons with disabilities include those who have 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’.\textsuperscript{65} It thus acknowledges that there are many factors (positive or negative) determining the extent to which an adult or child with a disability is able to participate in society. Trani takes this further, using the capabilities approach to explore how impairment becomes disability when the child with impairment faces restriction in the range of opportunities available in a

\textsuperscript{62}WHO ‘The International Classification of Functioning, Disability and Health: children and youth version’ (2007). This version of the ICF reflects the growth and development of children through the different stages of childhood (from infancy to adolescence).
\textsuperscript{63}WHO & World Bank ‘World report on disability’ (2011).
\textsuperscript{64}Odom SL et al. (n 10 above).
particular context. It has been noted that the definition of disability in the CRPD is ‘not exhaustive’, and disability is ‘an evolving concept’. Indeed, this provision does not require States to adopt a single definition of disability in all their laws, policies and programmes.

The ICF-CY provides a classification for the contextual factors which have a significant impact on the extent of disability and how it is experienced. These are either facilitators (promoting participation) or barriers (limiting or preventing participation). Such factors may be internal, personal characteristics, such as coping styles, which can influence the extent to which a child participates in society. They may also be external, relating to physical and information access, as well as to policies, service delivery systems and institutional arrangements. Knowledge and attitudes are also environmental factors, which have a significant impact on service provision and levels of participation. The ICF-CY reflects the range of factors that need to be identified and addressed, towards the fulfilment of the rights of children with disability, especially at the point of limitation - which may be at the level of impairment, activity or participation. It enables a critique of facilitators and barriers within the environment and has been recommended as a useful framework for providing a common language for parents and professionals.

Causes of impairments can be broadly classified into those resulting from environmental factors early in a child’s development, and interactions between the child’s genotype and the environment. Environmental factors include prematurity, traumatic brain injury, congenital hydrocephalus, meningitis and encephalitis and chemical factors. Impairments may occur in one or more of the domains of child development, to different degrees of severity. However, impairments in domain-specific functions often have wide-ranging developmental consequences that may mimic domain-general impairments, and therefore damage to very

67CRPD Preamble (e).
69WHO & World Bank (2011) (n 63 above).
specific mechanisms are seen to act as ‘gatekeepers in development’. Further, the transactional impact of co-occurring disabilities (in particular intellectual disability) is often a predictor of developmental outcomes of children with disabilities.

(b) Measuring childhood disability

In recognition of the need for internationally comparable information on the number and situation of young children with disabilities, UNICEF recommended countries include the ‘Ten Questions Screen for Disability’ in the Multiple Indicator Cluster Surveys (MICS). This tool elicits parent’s perceptions of their child's functioning, and in this way identifies children at increased risk of disability, who are most likely to benefit from referral for professional assessment and rehabilitation or other services. Using this tool, information emerging from a number of low and middle income countries indicates that more than 10% of children aged 2-9 years screen positive for, or are at high risk of disability, with a median prevalence of approximately one in four children. Not only do these results raise awareness of the number of children at high risk of disability in low and middle incomes countries, they highlight the need for resources and policies to provide access to diagnostic and therapeutic interventions.

Within South Africa, prevalence rates for childhood disability vary widely, depending on how disability is defined and measured. However, most recent estimates indicate that the disability prevalence rate for children under the age of 4 years is between 4-6%.

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73Hatton et al. stressed the need for further research into alternative developmental pathways and identification of strategies that parents and professionals can use to promote successful adaptation, as an alternative to alleviating perceived delays that result from comparisons with able-bodied children. Hatton DB et al. (1997) (n 72 above).

74Focusing on children aged 2-9, this tool comprises 10 questions requiring yes-or-no answers that screen for functional limitations in the domains of speech, cognition, hearing, vision, motor or physical and seizure disorders. Children screening positive are considered to be at increased risk of disability.


(c) Risk factors for disability and compromised development

There are two categories of children who are particularly vulnerable to compromised developmental outcomes - those at biological or environmental risk for disability and those with established disabilities. There is a higher proportion of children with disabilities (or at risk of disability, delays or emotional problems) among poor families than in the general population. Children with disabilities in situations of poverty face a ‘co-occurrence of multiple risk factors’, making it difficult to identify protective factors.

‘Poverty is associated with inadequate food, and poor sanitation and hygiene that lead to increased infections and stunting in children. Poverty is also associated with poor maternal education, increased maternal stress and depression and inadequate stimulation in the home.’

Children living in poverty are more likely than those in the general population to face biological risks, experience premature birth, be born with low birth weight and experience environmental stressors during early childhood. The deterioration of parenting resulting from the conditions of poverty (e.g. the struggle to find money to pay for food and rent, overcrowded living conditions, coping with living in a dangerous community) may contribute to adjustment difficulties of children growing up in resource-poor households. Family income has an impact on the quality of the home environment by determining the resources available for the purchase of books and toys. Children with disabilities have also been found to be at increased risk of caregiver stress and depression. All these factors impact negatively on child development.

Using early childhood stunting and poverty as indicators of compromised development, Grantham-McGregor et al. estimated that globally, over 200 million children under the age of 5 years are not fulfilling their developmental potential. Risk factors related to poverty frequently occur together with developmental deficits, increasing with the number of risk factors. In addition, because development is cumulative, deficits seen in infancy increase.

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78Guralnick MJ (2001) (n 26 above). The early intervention model that he proposes is discussed in more detail in Section 1 of this chapter.


84Walker SP et al. (2011) (n 28 above). Gilberg C & Soderstrom H (2003) (n 71 above). For more on this see also Chapter 1.
with age. The literature indicates that disability among young children is itself is ‘a marker for compromised development’. The study by Walker et al. found that 23% of children aged 2-9 had, or were at risk for, disabilities.

Although research indicates that children with disabilities have reduced access to education and health services, currently very few countries have national data for benchmarking or comparing whether early childhood services make provision for disadvantaged or vulnerable children, such as children with disabilities. This lack of statistics, and of any agreed standard by which access for disadvantaged children might be monitored, remains a ‘salient deficiency’ in attempts to develop internationally comparable minimum standards for early childhood services. Identifying the barriers to access and quality of these services for children with disabilities is thus an important priority if alternative strategies to improve access are to be considered.

2.2 Nature of early childhood development

There are a number of core concepts inherent in ECD which have implications for social policy.

2.2.1 A period of accelerated growth

First, early childhood is the most critical time in a child's development, as it lays the foundation for physical, emotional and intellectual well-being and growth into adulthood. From the latter stages of pregnancy until the age of two, the brain is undergoing a period of accelerated growth, especially of the central nervous system. Because this process consumes higher amounts of energy than any other stage in the lifespan, young children need sufficient amounts of nutrients (especially long-chain polyunsaturated fatty acids), as well as
stimulating and nurturing relationships and environments for optimal maturation. Research has shown the link between growth faltering of children during this period (e.g. as a result of malnutrition) and hypertension, diabetes and coronary heart disease in adulthood.

2.2.2 Skills built from the bottom up

Secondly, neuroscientists have found that both brain architecture and developing skills are built ‘from the bottom up’, with simple circuits and skills providing the foundation and scaffolding for more complex ones to develop over time. This means that the child's ability to successfully master the developmental tasks of early stages will influence the extent to which they can master those of later stages. Similarly, damage done to the young child's developing self-image and personality is likely to have far-reaching effects on subsequent socio-emotional development.

2.2.3 Influenced by genetics and experience

Children’s cognitive, language and socio-emotional competencies are inextricably linked throughout childhood. The ‘architecture’ of the developing brain and the process of skill formation are shaped by the combined influences of genetics and experience. This is mediated by children’s relationships with their parents and other caregivers in their family and community, with reciprocity reflected on a ‘serve and return’ principle, i.e. when the child responds to someone (smiling, gurgling), that person reinforces the interaction through tactile, visual and auditory cues which encourage the behaviour. Research has found that environmental conditions play a critical role in 'sculpting' the developing brain.

‘Virtually every aspect of human development, from the brain’s increasing circuitry to the child's capacity for empathy, is affected by the environments and experiences that are encountered in a cumulative fashion, beginning in the prenatal period and extending throughout the early childhood years.’

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92Prabhakaran D ‘Adult onset cardiovascular disease: the first 1000 days’ (2013).
93CDC (2007) (n 89 above).
95Siddiqi A et al. (2007) (n 20 above).
Early relationships are so crucial to development that once basic needs for nutrition, health and safety are met, they provide the primary environmental factor required for healthy brain development.\textsuperscript{96} The absence of supportive, nurturing relationships may contribute to ‘toxic stress’\textsuperscript{97} in early childhood, which is associated with negative effects on the nervous system and stress hormone regulatory systems. This can damage the young child’s brain architecture and chemistry, resulting in lifelong problems in learning and behaviour, and may also compromise physical and mental health.\textsuperscript{98}

\textbf{2.2.4 Characterised by sensitive periods}

Neuroscientific research has found that although adaptation continues throughout life, human abilities develop in a predictable sequence of sensitive periods. These are ‘spans of developmental time in which specific brain systems and the cognitive, emotional or behavioural capacities they govern are maximally receptive to environmental factors’.\textsuperscript{99} During early childhood, the formation of specific neural circuits and the behaviour that they mediate, are more pliable and therefore more sensitive to external influences. Because synapse formation is experience-dependent, lack of stimulation and social interaction negatively impact on cognitive and emotional development.\textsuperscript{100} Some abilities have a lower likelihood of achieving full potential than others when the sensitive period is missed.\textsuperscript{101}

In summary, early childhood is a period in which the young child moves from dependence to increasing independence, gaining skills in a number of linked domains. Development occurs through a series of milestones, progressing from simple to complex, shaped not only by the child’s genetics but also by their interactions with the environment.\textsuperscript{102} The basic principles of neuroscience indicate that providing the right conditions for healthy development in early

\textsuperscript{96}Lally J (2010) (n 91 above).
\textsuperscript{97}Toxic stress may be a result of recurrent child abuse or neglect, severe maternal depression, parental substance abuse or family violence, factors which are often associated with families of children with disabilities.
\textsuperscript{98}CDC (2007) (n 89 above).
\textsuperscript{99}Hertzman C & Boyce T’ (2010) (n 14 above).
\textsuperscript{101}Goswami U (2004) (n 5 above). However he concedes that, particularly for cognitive abilities, focused intervention can have an impact on development.
\textsuperscript{102}WHO & UNICEF (2012) (n 4 above).
childhood is likely to be more effective than treating problems at a later stage. Indeed, early childhood (particularly the first 1000 days of a child’s life) is recognised as a ‘unique window of opportunity to shape healthier and more prosperous futures’.

2.3 Purposes of early childhood development for children with disabilities

Comprehensive early childhood services can improve developmental outcomes for children with disabilities. Regular monitoring of the growth and development of all children helps to ensure early diagnosis and appropriate intervention when problems are detected. In a seminal study conducted by Shonkoff & Phillips, they argue that:

‘Model early childhood programs that deliver carefully designed interventions with well-defined objectives and that include well-designed evaluations have been shown to influence the developmental trajectories of children whose life course is threatened by socioeconomic disadvantage, family disruption, and diagnosed disabilities. Programs that combined child-focused educational activities with explicit attention to parent-child patterns and relationship building appear to have the greatest impacts.’

When learning programmes for young children are child-centred and provide the necessary individualised support that addresses the unique learning styles, needs and abilities of children with disabilities, they facilitate a positive transition from home to preschool and (later) into school. Research shows that participation in ECD programmes improves primary school attendance and performance. Further, ECD programmes that are responsive to diversity among children benefit all children and contribute to promoting the values which are central to an inclusive society.

What purposes can be achieved for children with disabilities through ECD?

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103Research cited by Goswami showed that development of certain sensory systems can be enhanced when other systems are impaired or absent, suggesting that specific education programmes can affect very specific areas of the brain. Goswami U (2004) (n 5 above).
2.3.1 Early intervention

(a) Defining early intervention and its benefits

Early intervention services are designed to support young children who are at risk of developmental delays or have disabilities. They comprise a range of services to promote children’s personal development and resilience, strengthen families and promote social inclusion of children with disabilities. Based on the premise that it is possible to alter outcomes such as cognitive, emotional and social skills of young children, providers of early intervention anticipate that such programmes can prevent or minimise risk factors from exerting a negative influence on child development. For children with disabilities, early intervention has the potential to prevent or minimise further delays or secondary complications.

Research over the past 50 years has confirmed the effectiveness of intervention for infants and young children with disabilities, showing that early learning and development can be influenced by intervention across different developmental domains and sub-populations of children. In particular, good quality ECD services can enable early identification of children with disabilities, remediation of impairments and assist in the transition into primary school. In reviewing early intervention programmes for children with disabilities, Ziviani et al. identified outcomes occurring at two different levels. Child-related outcomes were found to be developmental gains and progress on individual goals (educational achievement and behaviour), while family-related outcomes included improved parental satisfaction (and reduction in stress), being informed about their child's disability and available services and training on how to care for the child and encourage his or her development.

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110Guralnick, MJ and Albertini G (2006) (n 32 above). For example, research has shown that the decline in intellectual development that occurs after the first 12 to 18 months for children with Down Syndrome can be prevented almost entirely through early intervention. Guralnick MJ (1998) (n 26 above).
111Bruder MB (2010) (n 8 above).
112UNESCO (2007) (n 3 above) 162.
114Walker S (2011) (n 100 above) 142.
115Sameroff and Fiese identify transactional categories of intervention between parent and child, viz remediate (change the way the child behaves towards the parent), redefine (change the way the parent interacts with the
(b) Stages of early intervention

Stages of early intervention have been documented in the literature and include identification of children at risk or with disabilities (termed ‘child-find’) and developmental screening and diagnosis. The ‘Ten Question Screen for Disability’ has been proposed as an appropriate tool for use in low and middle income countries, but requires follow-up to confirm screening results and application of the information through service provision to improve outcomes for children with disabilities. In some countries this comprises of individualised programmes and interventions, which are subject to ongoing monitoring and evaluation.

(c) Strategies for early intervention

Most of the published work on early intervention has focused on developed countries. However, Walker documented evidence of the impact of interventions aimed at improving development for children from birth to three years of age in low and middle-income countries. Four different strategies are described viz home visits, individual parent counselling, parent groups and day care centres. The first three are based on the premise that equipping parents with knowledge and skills about parenting will increase their capacity to provide a nurturing and stimulating environment for their child. Following analysis of the impact of these different approaches, Walker concluded that parental support is most effective through home visiting and that ‘the loss of developmental potential in children disadvantaged through poverty, under-nutrition or both, can be reduced or prevented through home visits that help parents learn how to promote child development’. More locally, Pckett et al. describe an early intervention targeting young children infected with HIV. They found that a basic home programme structured around activities of daily living and developmentally appropriate play can significantly improve both the cognitive and motor development of young children infected with HIV.

\[\text{References}\]

Gottlieb CA et al. (2009) (n 75 above).

Lerner JW et al. (2003) (n 15 above).

Walker S (2011) (n 100 above). She draws on research from Jamaica, which targeted different risk groups including severely malnourished children, stunted children and term low-birth-weight children.

Central to effective early intervention services are two principles. First, early childhood intervention for vulnerable children is closely associated with active involvement and participation of parents. Indeed, 'genetic risks may or may not become manifest, depending on the quality of the parenting children receive... Well-functioning parents can buffer children against the emergence of negative genetic potentials'. Pretis went as far as to say that 'early childhood intervention without parents does not work and is not worth it'. Research shows that programmes combining parental support and child stimulation have a stronger impact than those which focus on the child only. For young children from families experiencing significant disadvantage, ‘two-generation’ programmes can impact positively on both. These provide direct support to parents, through parent education, as well as high quality centre-based care and education for children. In this way they foster growth-promoting experiences both at home and in the community. Services must be responsive to the self-articulated needs of families, which are likely to correspond to the manner in which they are adjusting to their disabled child. A particular focus on mothers’ strengths and their beliefs in their ability to promote family well-being is important, as it is likely to enhance effective parental care-giving and decrease stress, thus supporting parents’ ability to promote their child’s development. In addition to being legally responsible for their children, parents are the 'most proximal members of their children in terms of micro-ecology' (based on the biocultural framework) and are thus well-positioned to support implementation of programmes. Pretis cautions, however, that parents of children with disabilities are firstly parents and their participation is dependent on what they can and want to do and what the programme can provide.


123Pretis M (2011) (n 70 above).


125CDC (2007) (n 89 above).


127Margalit M et al. (2006) (n 30 above).

128Pretis M (2011) (n 70 above).

129There have been high drop-out rates of parents in some home-visiting programmes as a result of parents experiencing conflicts with programme staff or dissatisfaction with the service. Because these services are voluntary, parents may exercise their right to leave.
A second principle of early intervention programmes is that they should encourage the use of natural environments as important learning opportunities for young children. This is underpinned by the view that participation in everyday activities is important for children's learning, which is a core element of development-in-context perspectives of human growth and development. The nature of participation in everyday activities (and the way they are undertaken as part of everyday life) is shaped by personal and family beliefs and routines as well as values and customs of the wider community and using them as sources of children's learning opportunities is a means by which to strengthen parents capacity to support their child's development.

2.3.2 Promotion of inclusion

It has been argued that ECD fosters social inclusion by giving young children experiences that support their active participation in community life. What does this mean for young children with disabilities?

(a) Defining inclusion

Inclusion has been defined as the active participation of disabled and non-disabled children in the same classroom and community settings, with the necessary support services. It has been identified as a 'core principle' of early intervention, and emphasises the involvement of the child in family routines, social activities and educational and recreational opportunities. Inclusion is more than placement of a child with a disability in the least restrictive environment - it encompasses the elements of participation, social relationships and learning outcomes, including acquisition of developmental, academic or social skills.

‘Early childhood inclusion embodies the values, policies and practices that support the right of every infant and young child and his or her family, regardless of ability, to participate in a broad range of

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131 Dunst CJ et al. (2006) (n 130 above).
133 Odom SL et al. (n 10 above).
135 This concept is based on Individuals with Disabilities Education Act (IDEA) of the USA. See Mogharreban CC & Bruns DA ‘Moving to inclusive pre-kindergarten classrooms: lessons from the field’ (2009) Early Childhood Educational Journal (36) 407-14.
activities and contexts as full members of families, communities and society. The desired results of inclusive experiences for children with and without disabilities include a sense of belonging and membership, positive social relationships and friendships, and development and learning to reach their full potential.¹³⁷

(b) Early childhood a unique period in which to promote inclusion

Pre-school programmes for young children have been described as 'fertile ground for high quality inclusive education'.¹³⁸ Indeed, inclusion at this level is unique because of the nature of young children's development and early childhood teaching practices, which encourage child-initiated learning and children's active engagement with the environment and with each other. During the period of accelerated growth and development, young children mature at varying rates, and so differences in skills are expected and accommodated within the curriculum. ‘The range of so-called 'normalcy' in early education is much broader than that usually found in elementary classrooms’.¹³⁹ In addition, early childhood facilities and structures tend to be much smaller and flexible than those for older children, making it easier to respond to the varying needs of children.¹⁴⁰

Among the important aspects of effective learning for all young children are an age-appropriate environment and corresponding activities and routines which facilitate learning. Positive outcomes for all young children can be supported by personnel who have knowledge of developmentally appropriate practice as well as inclusive attitudes and skills.¹⁴¹

(c) The benefits of inclusion

There are a number of reasons as to why inclusion is beneficial for young children. First, the regular education curriculum and access to peers without disabilities provide learning

¹³⁷DEC/NAEYC ‘Early childhood inclusion: a joint position statement of the Division for Early Childhood (DEC) and the National Association for the Education of Young Children’ (NAEYC) (2009).
¹⁴⁰Odom SL et al. (undated) (n 10 above).
opportunities that do not exist in settings where there are only children with disabilities. More demands for appropriate behaviours are placed on children with disabilities in inclusive settings, and there are opportunities for observational learning and interactions with non-disabled peers. Children with disabilities tend to engage in higher levels of play when they are with non-disabled children. Because inclusion at preschool level increases social contact between children with and without disabilities, it has the potential to impact positively on the attitudes of non-disabled children towards their peers with disabilities. In addition, inclusion at preschool level has been found to increase the likelihood of inclusion at primary school.

Conversely, failure to adopt inclusive practices within early childhood services is likely to have adverse consequences on development of children with disabilities ‘including limiting the full range of stimulation that children can experience, restricting social and educational learning opportunities and perhaps creating low expectations for achievement’.

(d) Strategies to promote inclusion

The bio-ecological systems model has been used to examine factors that support or hinder inclusion of young children with disabilities. Odom et al. stress the importance of quality, and the need to individualise early care and education practices such that every child can reach his or her potential, regardless of learning or behaviour difficulties or identified disabilities. Specialised intervention services need to be implemented around the defining features of high-quality inclusion, viz access, participation and supports. For example, adaptations of activities that promote participation by all children as well as attention to issues

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142 Research has shown that children with disabilities enrolled in inclusive settings make at least as much progress on standardised measures of cognitive, language, motor and social development as children in non-inclusive preschool special education programmes and typically developing children in inclusive settings make similar developmental gains as they would in regular classrooms. Odom SL et al. (2011) (n 136 above).


145 Partnerships for Inclusion (2007) (n 144 above).


148 For example, simply placing deaf young children in a setting with hearing children does not necessarily lead to increased interaction. One of the primary tasks of early childhood education for deaf young children is to acquire language, and this requires particular expertise on the part of personnel. Bowe FG (2004) (n 45 above). Odom SL et al. (2011) (n 136 above). DEC/NAEYC (2009) (n 137 above).
of fairness and equity of opportunity have been found to be effective in supporting play activities between young children with disabilities and their peers.149

However, factors that continue to restrict opportunities for inclusion of young children with disabilities include limited childcare options and lack of transportation. Further, the attitudes and beliefs of staff within ECD services may impact on the extent to which children with disabilities are able to participate.150 These factors perpetuate the isolation and separation of children with disabilities and their families.151

Despite the benefits already identified, universal access to inclusive early childhood programmes is still far from a reality. Much more work is needed to develop strategies for inclusion of children with disabilities, in order to identify protective factors and to guide provision of support services.152

2.3.3 Working towards equity

ECD is an important means of nurturing diverse abilities as well as reducing disadvantages and inequalities.153 It has the potential to reduce inequalities because, regardless of underlying factors, interventions can compensate for vulnerability and disadvantage.154 In this context, equity has been defined as ‘the assurance that the greatest possible opportunities for quality early childhood programs are available for all children and families’.155 Achieving this depends on two critical elements. First, there is a need to improve access by increasing the availability and provision of programmes particularly targeted towards disadvantaged

149Diamond K & Hong S ‘Young children's decisions to include peers with physical disabilities in play’ (2010) *Journal of Early Intervention* 32(3) 163-77. Play is an important means of learning for young children. It develops in a predictable sequence, with stages being consistent with mental age rather than chronological age. Vig S ‘Young children's object play: a window on development’ (2007) *J Dev Phys Disabil* 19 201-15. Not only does play contribute to successful inclusion in classroom and community settings, it provides a useful ‘window’ for assessing development and is an important domain for intervention. Lifter K, Mason EJ & Barton EE ‘Children's play: where have we been and where we could go’ (2011) *Journal of Early Intervention* 33(4) 281-97.

150Buysse et al. (1998) (n 147 above).


155Britto PR et al. (2011) (n 50 above) 8.
children and their families.\footnote{Heckman JJ (2011) (n 89 above) 32.} Secondly, there is a need to improve the quality of interventions.\footnote{Britto PR et al. (2011 (n 50 above)). This is discussed in more detail in an earlier section of this chapter.} Participation in quality ECD programmes can significantly alter the developmental trajectory of a child and universal access to early education is a means of promoting equitable educational provision for all children and can be promoted through inclusive education approaches.\footnote{Betts J & Lata D (2009) (n 87 above).}

Health, nutrition and education are areas in which benefits have been consistently identified.\footnote{UNESCO (2007) (n 3 above) 109.} The Commission on the Social Determinants of Health found ECD including physical, socio-emotional, language and cognitive elements, to influence subsequent life chances and health. It has both a direct and indirect impact on the risk of obesity, malnutrition, mental health problems, heart disease and criminality.\footnote{Commission on the Social Determinants of Health 'Closing the gap in a generation: health equity through action on the social determinants of health’ (2008).} This report concluded that investment in young children provides one of the greatest opportunities to reduce health inequalities within a generation. However, there needs to be both political commitment and the necessary resources invested to address inequalities and thus narrow the gap between advantaged and disadvantaged.\footnote{Pugh G ‘Improving outcomes for young children: can we narrow the gap?’ (2010) \\ Early Years 30 (1) 5-14.}

\subsection*{2.3.4 A good investment}

Finally, an argument in support of ECD services is that investment in programmes for young children yield high returns - even higher than those for other educational interventions (with Heckman estimating that every dollar invested in high-quality early childhood education produces a 7-10\% per annum return). The argument is that the negative impact of genetic, parental and environmental inadequacies can be reduced through quality early childhood education, thus providing children and their parents with the resources to develop cognitive and social skills that promote productivity.\footnote{Cameiro P & Heckman JJ ‘Human capital policy’ (2003). Diagnostic Review (2012) (n 5 above). UNESCO (2007) (n 3 above).} Because healthy and socially well-adjusted

\begin{footnotesize}
\footnotetext[156]{Heckman JJ (2011) (n 89 above) 32.}
\footnotetext[157]{Britto PR et al. (2011 (n 50 above)). This is discussed in more detail in an earlier section of this chapter.}
\footnotetext[158]{Betts J & Lata D (2009) (n 87 above).}
\footnotetext[159]{UNESCO (2007) (n 3 above) 109.}
\footnotetext[160]{Commission on the Social Determinants of Health ‘Closing the gap in a generation: health equity through action on the social determinants of health’ (2008).}
\footnotetext[161]{Pugh G ‘Improving outcomes for young children: can we narrow the gap?’ (2010) Early Years 30 (1) 5-14.}
\footnotetext[163]{Heckman JJ (2011) (n 89 above).}
\end{footnotesize}
children are more likely to become economically productive adults, early childhood experiences also provide a foundation for building social capital.\footnote{Heckman JJ ‘Skill formation and the economics of investing in disadvantaged children’ (2006) Science 312.} 

However, the argument that ECD is a means to build social capital has been critiqued as reductionist, that it minimises the child, attributing him or her value by virtue of what he or she can contribute to the economy of the country in the future.\footnote{UNESCO ‘Rights from the start: early childhood care and education’ (2012).} Further, it brings into question the value of ECD for children with disabilities who may never enter the formal labour market. This approach focuses on measuring future benefits and impacts, without considering how ECD currently enables children to enjoy their rights (to dignity, self-reliance and participation). It exposes a disconnect between the purpose of education (viz ‘the development of the child’s personality, talents and mental and physical abilities to their fullest potential’)\footnote{CRC Article 29(1) (a)} and what actually takes place in services for young children. Further, the view that economic development is the main objective of (early) education means that (in the context of early childhood) it is seen as an expense and not as a human right.\footnote{UNESCO (2012) (n 165 above).} In contrast, when ECD is viewed as a human right, attention is paid to the needs and rights of children on an individual basis. While it has positive implications for the future, it has clear benefits \textit{now}.\footnote{National Scientific Council on the Developing Child ‘The science of early childhood development: closing the gap between what we know and what we do’ (2007).}

Research has shown that appropriate interventions for young, highly vulnerable children produce better outcomes and cost less than later remediation (for example through special education)\footnote{Heckman JJ (2011) (n 89 above). CDC (2007) (n 89 above).} and thus investment in early childhood has been described as a situation of ‘pay now or pay more later’.\footnote{Lally J (2010) (n 91 above).} Such investments for the most disadvantaged children can provide enormous returns and have been shown to increase the likelihood of healthier lifestyles, lower crime rates and reduce overall social costs.\footnote{Moodie-Dyer A ‘A policy analysis of child care subsidies: increasing quality, access and affordability’ (2011) \textit{Children & Schools} 33(1) 37-45. Lake (2011) (n 49 above).} As Heckman notes, ‘investing early allows us to shape the future; investing later chains us to fixing the missed opportunities of the past’.\footnote{Heckman JJ (2011) (n 89 above) 47.} Such investments could be channelled through two inputs, viz direct investment in children’s...
cognition and socialisation (though organised early learning programmes) and indirect investment to support parents and the family environment they create (through quality parenting programmes).

On a national level, ECD can support national economies through enabling parents to return to work, thus increasing a country’s Gross Domestic Product and public revenues. It further leads to reducing poverty rates and welfare budgets and (because of improved access and retention rates) it increases returns on public spending in education. ECD therefore represents an opportunity for societies to work towards significant reduction in poverty and social and economic inequalities.\textsuperscript{173} The recent World Conference on Early Childhood Care and Education describes ECD as ‘an investment in the wealth of nations’.\textsuperscript{174}

\textbf{2.4 Content of early childhood development services}

ECD services embrace a wide range of support services for young children and their families. This range is expressed through the varying terminology that is contained in the literature in the sector,\textsuperscript{175} all of which include the core elements of care (including health, hygiene and nutrition within a safe environment that supports the child’s cognitive and socio-emotional well-being), as well as education and learning (promoted through early stimulation and play).\textsuperscript{176} The overall purpose of ECD programmes is to ‘improve the survival, growth and development of young children, prevent occurrence of risks and ameliorate the negative

\textsuperscript{173}UNICEF (2008) (n 87 above).

\textsuperscript{174}UNESCO ‘Moscow framework for action and cooperation: harnessing the wealth of nations’ (2010).


\textsuperscript{176}UNESCO (2007) (n 3 above). The interconnection of many factors necessary for development of the young child has led to the observation that reference should not be made to ‘care and education’ (as distinct elements) but ‘care in education,’ because ‘care without education is not care.’ UNICEF (2008) (n 87 above) 8. In the EFA Global Monitoring Report on early childhood, ‘early childhood care and education’ (ECCE) is defined as interventions that support ‘children's survival, growth and development and learning - including health, nutrition and hygiene, and cognitive, social, physical and emotional development - from birth to entry into primary school in formal, informal and non-formal settings.’ UNESCO (2007) (n 3 above) 15.
effects of risks. They provide the means whereby every young child has the opportunity to live and learn and to develop to their full capacity.

The components of ECD services in South Africa have most recently been identified in an ‘essential package of early childhood services and support to vulnerable children’ which comprises health, nutrition, social services, support for primary caregivers and stimulation for early learning. These are not stand-alone interventions, but are to be provided as part of a comprehensive strategy to support young children. Indeed, research indicates that combined nutritional and educational interventions are most effective and cognitive benefits are greater when interventions include stimulation or education inputs compared with those comprising nutrition or economic assistance only. Given the range of components that it embraces, and the different sectors providing ECD services it is important that there is co-ordination between them, with continuity of support over the transitions from one to another.

Children with disabilities need to have access to services contained in the ‘essential package’, which are required by all children, such as health care and opportunities for early learning. In addition, children with disabilities may require services which address their specific needs for support, such as rehabilitation and assistive devices. Addressing both of these elements is described as the ‘twin-track’ approach. Each of the elements of the ‘essential package’ is discussed here.

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177Engle PL et al. ‘Strategies to avoid the loss of developmental potential in more than 200 million children in the developing world’ (2007) The Lancet (369) 229.
179UNESCO (2007) (n 3 above)
180Walker SP et al. (2011) (n 28 above)
181In many countries, the two dominant government departments involved with services for young children are Health and Education. Britto et al. (2011) (n 50 above). In South Africa it includes these two departments as well as the Department of Social Development as well as many civil society organisations.
182Early D ‘Services and programs that influence young children's school transitions’ in Tremblay RE, Barr RG & Peters RDeV Encyclopadia on Early Childhood Development (2004). Pugh documents a process of integration of services for young children at local level, in which it is mandatory for every local authority to set up Early Years Development and Childcare Partnerships. Elements of this include partnerships consisting of representatives of private and voluntary sectors, local education, social services and health representatives, employers, training institutions and parents. There is also an audit of services and compilation of annual local plans which are linked to national government targets. Pugh G (2003) (n 161 above).
2.4.1 Nutrition

Much has been written about provision of vitamins, supplements (such as vitamin A and folate) and micronutrients to improve the nutritional status of both mothers and young children. These are required by all children who are at risk for under-nutrition and stunting. In addition, however, particular aspects may need to be emphasised to ensure adequate nutrition for young children with disabilities. There needs to be recognition of the vulnerability of children with disabilities\(^\text{184}\) to under-nutrition as a result of difficulties with chewing, tongue movements, mouth closure and swallowing.\(^\text{185}\) Negative attitudes on the part of society towards persons with disability may lead to a disabled child being fed less, denied food or provided with less nutritious food than siblings without disabilities.\(^\text{186}\)

Support of children at nutritional risk could be addressed during growth monitoring, with early identification through regular assessments of feeding skills and nutritional nutritional status.\(^\text{187}\) Once a disabled child has been identified as nutritionally compromised, interventions must address nutritional as well as physiological and behavioural factors, taking cognisance of the need to strengthen the parent-child relationship in the process.\(^\text{188}\)

2.4.2 Health

Health services for young include promotive health care with regular weight checks and immunisations.\(^\text{189}\) Indeed, measures aimed at reducing child mortality lay the foundation for establishing comprehensive ECD programmes. The health sector has a unique responsibility because it has the greatest reach to children and their families during pregnancy, childbirth and early childhood.\(^\text{190}\)

Immunisation programmes are among the most cost-effective and successful public health interventions to reduce morbidity and mortality of children under the age of five. Although

\(^{184}\)This is particularly the case for disabilities associated with prematurity and low birth weight.


\(^{189}\)UNESCO (2007) (n 3 above).

they are a means of preventing conditions leading to disability and death, children who are already disabled are at the same risk of contracting childhood diseases as all other children. Therefore, the inclusion of children with disabilities is not only ethical practice, it is an imperative for public health and equity.\textsuperscript{191} Indeed, the goal of universal coverage can only be achieved if children with disabilities are able to access to immunisation programmes.

Developmental screening involves the detection of disability in young children within the primary health care setting, and often takes place during immunisation visits. The purpose of such screening is to identify children ‘at risk’ and to refer them for further assessment and intervention as required. Assessment is made against developmental milestones for each of the domains (motor, vision, hearing and cognition). The Road to Health Booklet\textsuperscript{192} introduced by the Department of Health in 2011 provides a potential tool for identification of children with disabilities.

Another important service provided within the health sector is that of rehabilitation.\textsuperscript{193} Rehabilitation interventions contribute to a child with a disability achieving and maintaining optimal functioning in interaction with their environment. Outcomes may relate to the prevention of loss of function, slowing the rate of loss of function, improvement or restoration of function, compensation for lost function and/or maintenance of current function.\textsuperscript{194} Rehabilitation measures may include therapy (e.g. occupational therapy to improve independence in activities of daily living), rehabilitation medicine (e.g. surgical treatment of contractures) and assistive technology (e.g. orthotics, wheelchair and hearing aids).

\subsection*{2.4.3 Stimulation for early learning}
All young children need opportunities for early learning at home and in the community. There need to be safe environments created for them to play and to socialise with their peers. In the context of early childhood, curriculum includes all of the experiences, activities and events which take place in an environment which is designed to support children's learning

\textsuperscript{191}UNICEF (2013) (n 186 above).
\textsuperscript{192}This is a parent-held record distributed to mothers of newborns and is designed to assist health workers in monitoring the growth and development of the child. It contains a chart of developmental milestones for children aged 14 weeks, six months, nine months, eighteen months, three years and five-six years.
\textsuperscript{193}The International Classification of Functioning, Disability and Health provides a framework for different aspects of rehabilitation, as they relate to body functions and structures, activities and participation, environmental factors and personal factors.
\textsuperscript{194}WHO & World Bank (2011) (n 63 above) 97.
and development. While there have been debates about the effectiveness of structured vs. unstructured approaches for teaching of young disabled children, depending on the extent of their disability, no single curriculum or type of curriculum has yet been shown to be more effective for children with disabilities than others. ‘Rather, curricula designed and selected to respond to individual needs of children are likely to prove more successful.’

Lerner et al. identify four components of curriculum for young children who are at risk or have disabilities. First, the content of the curriculum must have meaningful goals for the child and foster the development of the child, encouraging self-directed learning and positive relationships. Secondly, curriculum design and activities must be appropriate for the child’s stage of development. Thirdly, intervention strategies and methods selected for teaching children with disabilities must be effective. Finally, the curriculum should provide activities that promote social relationships, and involve social interactions of the child with adults and other children. To ensure quality, constant monitoring and evaluation of the curriculum for early learning for children with disabilities is essential.

Bowe advocates against the tendency in early childhood education to work within a deficit model, i.e. one in which services are provided specifically in response to a child’s disability. Rather, an approach is advocated for promoting a child’s development in all five domains through integrated learning experiences. Further, approaches to curriculum for children with disabilities need to recognise that children with diverse learning needs are not ‘the problem’, but the root of the difficulty is the barriers within the curriculum itself.

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196 For example, some use behaviour modification techniques to help children learn more rapidly, while other prefer a more passive approach of encouraging children to learn at their own pace.
197 Bowe F (2004) (n 45 above) 161. New Zealand provides an example of how the early childhood curriculum takes into account various factors that have a powerful impact on the child's well-being and his or her ability to learn. Using Bronfenbrenner’s bio-ecological framework, the curriculum is related to the child and their immediate environment, as well as to the major settings experienced by the child viz home, services or settings beyond the home, and relationships between these. It is envisaged as a ‘whariki’ or mat which is woven from different principles, strands and goals and is applicable to all children. It is designed to be inclusive and appropriate for all children, anticipating that varying needs will be met as children learn together. New Zealand Ministry of Education (1996) (n 195 above).
Features of inclusion of children with disabilities in early childhood services and programmes have been identified as being ‘access, participation and support’. 202 ‘Access’ refers to the provision of a wide range of learning opportunities, settings and environments for children with disabilities. 203 Often relatively small modifications are required to enable access for individual children. The concept of universal design may be used to support access to a range of different settings through the removal of physical and structural barriers. 204 A system of universal design for learning and assessment provides a wide variety of formats for teaching and learning and ‘a range of options for accessing, using and engaging with learning materials’ such that it meets the needs of all preschool children. 205 In addition to programmes and environments designed to facilitate access, some children will need additional individualised support to enable them to participate fully in play and learning activities. 206 A range of approaches can be used to scaffold learning and support participation for all children, based on their individual needs. Particular support may be required for socio-emotional development and behaviours that facilitate participation. 207 There is also a need for infrastructural systems-level support to underpin inclusive services. This includes staff training (equipping them with the necessary knowledge, skills and attitudes for inclusion), clarification of roles, collaboration between sectors, co-ordination of services and pooling of resources. 208

2.4.4 Social services

The ‘essential package of early childhood services and support to vulnerable children in South Africa’ includes two specific areas of service provision as part of social services. The first relates to social security and the second to the protection of young children.

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204 For example, the physical environment that forms the setting for early childhood learning needs to be designed in such a way that it encourages exploration and interactions between children. There needs to be adequate space indoors and on the playground. Modifications to the environment may include ramps (to ensure access for adults and children with physical disabilities), and ensuring the room is free of obstacles and the door fully open or shut (to assist children with visual impairments.) Lerner JW et al. (2003) (n 15 above). Hitchcock C et al. (2002) (n 201 above).
207 DEC/NAEYC (2009) (n 202 above). Many authors have stressed the importance of play in the curriculum for young children. But despite the fact that play is a primary means of learning, it often poses a challenge for children with disabilities. They may need to have toys adapted or specially constructed, to be taught how to play and/or have play materials arranged in a particular way. Lerner JW et al. (2003) (n 15 above).
(a) Social security

Family socio-economic conditions are important because children born to poor families are more likely to be exposed to conditions that are adverse for development and, in turn poorer children are more likely to be affected by adverse conditions, resulting in 'double jeopardy.' Like any child, a child with a disability requires care, but children with disabilities often require exceptional levels of care, incurring costs related to these. These may be direct costs linked to the child's disability, indirect costs incurred by the family in coping with the disability (for example, a parent who is not able to secure employment because of having to look after the child) and long-term costs associated with the future economic functioning of the child.209

Parents of children with disabilities often require more time off work and are more likely to work reduced hours.210 In a country characterised by extremely high levels of unemployment,211 these restrictions are likely to impact negatively on their ability to secure and retain employment.

(b) Protection

As discussed in the previous chapter, children with disabilities are particularly vulnerable to abuse and neglect, which is extremely damaging to their early development. Interventions to protect children with disabilities can be conceptualised within the bio-ecological model of child development.212 At the micro level, direct support needs to be provided to the individual child, with intervention at the level of the family to ensure prevention of abuse and neglect. At the meso level, service providers in the ECD sphere can make an important contribution through an explicit commitment to child protection, clear definitions of good practice and ensuring that staff members are trained in recognizing signs of abuse and responding appropriately to it.213

Cognisance also needs to be taken of the macro level i.e. the context which fosters and perpetuates abuse and neglect of children with disabilities. This requires an attitude change towards acknowledging that human differences are to be celebrated and not used as the basis of discrimination. Further, breaking down segregation and promoting of inclusive services is key to ensuring that disabled children are not at risk for abuse and neglect.214

2.4.5 Support for parents

Affectionate and responsive parenting215 is essential for the development of every young child. Based on the twin-track approach described above, there is a need for both general support for caregivers of children with disabilities, and support which is specifically to assist in parenting a child with a disability.216

The challenges associated with parenting of a child with a disability have been described earlier in this chapter and caregiver support needs to be responsive to stressors experienced by parents. The value of parental support lies in the promotion of a sense of control for parents in situations where they feel out of control, and is associated with a sense of competence and parent attachment. Indeed, social support provided to parents of children with disabilities has a consistent and strong relationship with parental stress and plays an important role in family adaptation and personal well-being.217 High levels of support correspond with lower levels of parental stress. If such support is provided during the early childhood period, it is predictive of lower levels of parent stress over the transition to the early primary years.

'Successful interventions to enhance social support, particularly parenting support, during the early childhood period will create a supportive set of relationships that carry forward to the early elementary period and beyond.' 218

One of the most efficient strategies for supporting the development of young children is to find ways to convince parents and caregivers of the importance of play and the ways they can promote it.219

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215 The terms ‘parent’ and ‘primary caregiver’ are used interchangeably here.
218 Guralnick M et al. (2008) (n 216 above) 1150.
There also needs to be resource support provided to parents of children with disabilities, towards enabling the family to become aware of, access and co-ordinate appropriate educational, health and social services (e.g. a parent of a child with suspected hearing loss could be assisted with making an appointment for the child to undergo an auditory assessment). Parents not only require information about their child’s disability, possible treatment and prognosis, they need services which are appropriate for the child:

'services that enhance the mental health, executive function skill and self-regulation capacities of vulnerable mothers... Such services are particularly important for parents with histories of early adversity... to help them to create a well-regulated caregiving environment that helps young children develop their own adaptive capacities.'

Parent support programmes, which draw on family quality of life concepts, enable supporters to focus both on the parents unique interpretation of their environment and broader environmental impacts and contexts. Support services should work towards enhancing overall quality of life for the family, rather than focusing solely on the needs of the disabled child. This includes promoting a balanced and healthy family, ensuring provision of respite care and preventing social isolation.

2.4.6 Indicators of quality early childhood development services

An important factor in promoting quality in early childhood services is the establishment of standards, and monitoring service delivery on a routine basis. The myriad of factors indicative of child well-being create challenges of measuring ECD, and this has been referred to as an 'imprecise science'. Grantham-McGregor et al. used the proxy indicators

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222Hertzman & Boyce note that it is the meaning of discriminatory social interactions and their implications for self-worth, social position and respectability that lead to their negative effects. Hertzman C & Boyce T (2010) (n 14 above).
224In recognition of the important role of families of young children in promoting their well-being and development, Bailey et al identified five outcomes for families of young children with disabilities. These include that families understand their child's strengths, abilities and special needs, know their rights and can advocate effectively for their children, help their children develop and learn and have support systems and access the necessary services, programmes and activities in their community. Bailey DB et al. ‘Recommended outcomes for families of young children with disabilities’ (2006) Journal of Early Intervention 28(4) 227-251.
of poverty and stunting to estimate that more than 200 million children under the age of five in developing countries fail to reach their full potential.226

In 2008 UNICEF proposed a set of ten benchmarks for early childhood care and education in economically advanced countries, as minimum standards for protecting the rights of young children. The focus is on what governments can do to ensure that ECD is managed so as to ensure that it is in the best interests of children and the future of society. The benchmarks are clustered around four themes, as indicated in the table below.

Table 1: Benchmarks for early childhood education and care227

<table>
<thead>
<tr>
<th>Themes</th>
<th>Benchmarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) Policy framework</td>
<td>- a minimum entitlement to paid parental leave</td>
</tr>
<tr>
<td></td>
<td>- a national plan with priority for disadvantaged children</td>
</tr>
<tr>
<td>2) Access</td>
<td>- a minimum level of childcare provision for under-threes</td>
</tr>
<tr>
<td></td>
<td>- a minimum level of access for four-year-olds</td>
</tr>
<tr>
<td>3) Quality</td>
<td>- a minimum level of training for all staff</td>
</tr>
<tr>
<td></td>
<td>- a minimum proportion of staff with higher level of education and training</td>
</tr>
<tr>
<td></td>
<td>- a minimum staff-to-children ratio</td>
</tr>
<tr>
<td></td>
<td>- a minimum level of public funding</td>
</tr>
<tr>
<td>4) Supporting context</td>
<td>- low level of child poverty</td>
</tr>
<tr>
<td></td>
<td>- universal outreach</td>
</tr>
</tbody>
</table>

Since then, UNICEF has been working in developing countries to identify a number of specific indicators for child development, which are based on selected childcare practices and elements of the home environment that may either contribute to healthy development of children under five or place them at risk.228 While this is a useful base to work from, these indicators may need to be adapted if they are to be relevant to children with disabilities. The indicators and findings from the Multiple Indicator Cluster Survey (MICS), together with considerations for children with disabilities, are presented in the table below.229

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226Grantham-McGregor S et al. (2007) (n 81 above).
229The Ten Question Screen for disability used together with MICS in low and middle income countries is discussed in Section 1 of this chapter.
Table 2: Indicators of ECD, findings from MICS and considerations for children with disabilities

<table>
<thead>
<tr>
<th>Indicators</th>
<th>Findings from MICS</th>
<th>Considerations for children with disabilities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Availability of children's books in the home.</td>
<td>Poorer households tend to have fewer books.</td>
<td>Children with particular impairments (e.g. visual impairment) may not be able to use books as a source of learning even if they are available.</td>
</tr>
<tr>
<td>Support for learning (i.e. caregiver engagement in activities that promote early learning and school readiness).</td>
<td>Children from poorest households are less likely than children from richest households to be engaged in early learning.</td>
<td>Children with disabilities may need particular support for learning; their caregivers may not be aware of how this can be done (e.g. encouraging communication with a deaf child; supporting learning with a child with an intellectual disability).</td>
</tr>
<tr>
<td>Use of disciplinary practices, both positive and violent</td>
<td>Mothers are the adult household members most likely to engage in early learning activities for children.</td>
<td>The capacity of mothers of children with disabilities to support early learning activities may be compromised as a result of lack of information and support.</td>
</tr>
<tr>
<td>Absence of one or both biological parents.</td>
<td>Children are at high risk of growing up without a biological parent, usually their father.</td>
<td>Children with behaviour difficulties may be especially susceptible to abusive disciplinary practices.</td>
</tr>
<tr>
<td>Being left at home alone or with inadequate care.</td>
<td>The poorest children are at greatest risk of being left alone or with inadequate care.</td>
<td>Attitudinal barriers and traditional beliefs about disability as punishment contributes to stress within the family.</td>
</tr>
<tr>
<td>Access to early childhood care and education services</td>
<td>Children in the poorest households are less likely than children in the richest households to attend early childhood education programmes.</td>
<td>Children with disabilities often require more intensive care-giving for longer periods than their able-bodied peers; this makes them particularly vulnerable to inadequate care.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Cost, transport and attitudinal barriers prevent children with disabilities from accessing early learning services.</td>
</tr>
</tbody>
</table>
In the process of monitoring ECD services, it is important to move beyond quantitative measures (viz. information on the numbers of disabled children who access services) to greater emphasis on the goal of improving the quality and outcomes associated with inclusion. From a bio-ecological systems perspective, conceptualisation of the quality of early childhood programmes and policies needs to take account of setting and systems levels. For example, many interventions consistently fail to take cognisance of the ‘parenting context of poverty’ focusing primarily on changing the child instead of changing the child-rearing context for families. High quality programmes include support to parents and the broader home environment by working with parents of young children through parent education and support programmes. These include creating high aspirations both within and for families, and recognition of the power of communities to support children and families. Pugh stresses the importance of building on the strengths of parents and families and working in partnership with them, and central to this is the need for stability and continuity in relationships between professionals and parents. Further, it is also essential to ensure that the views of children are considered and their participation encouraged. Because teaching young children is a ‘skilled and demanding job’, quality of provision is linked to quality of staff. To ensure that care environments are developmentally appropriate, adult-child ratios in childcare must be kept low and there needs to be training of care providers. In addition, quality considerations need to take into account available resources and their distribution, and the extent to which there is prioritisation of resources for early childhood services for children with disabilities relative to other priorities. Physical and spatial characteristics of services are likely to impact particularly on accessibility for children with disabilities.

Britto et al. make the observation that the term ‘quality’ suggests a uniform, measurable standard which does not exist in reality. Instead, these authors propose a more appropriate term to be ‘effectiveness factors’ which link characteristics of programmes to improved child outcomes. Indeed, the most effective interventions have been found to be ‘comprehensive

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234 Britto PR et al. (2011) (n 50 above).
235 Britto PR et al. (2011) (n 50 above). CDC (2007) (n 89 above). Researchers at this centre stress that no single programme approach or means of service delivery has been shown to be a ‘magic bullet’, but they urge policy makers and planners to select strategies for which effectiveness has been documented.
programmes for younger and disadvantaged children and families that are of adequate
duration, intensity and quality and are integrated with health and nutrition services’. 236

Despite its importance, however, many families are forced to make decisions about childcare
on the basis of affordability, not quality, and yet it is precisely the children in these families to
whom quality childcare is most critical for the enhancement of cognitive development and
social skills. 237

2.5 Conclusion

How do children grow and learn? Two theories of child development described in this
chapter point to the importance of the environment on the developing child, as well as the
importance of interactions between the child and primary caregivers. The role and influence
of environmental factors for children with disabilities is particularly important, given that
disability is understood as the dynamic interaction between the child with impairment and the
environment.

The vast literature on child development enables us to move beyond theory, to knowledge of
what children need in the early years. Research points to the remarkable developments that
take place in the period of early childhood, particularly the first 1000 days. We know which
experiences and environments are damaging for the child, and we know which are beneficial.
Because it is such a sensitive period, nurturant conditions are needed to ensure that the
process of development occurs optimally for every child. Not only do these conditions
promote brain development of the young child, they have also been found to improve
developmental outcomes of young children. They are a means of early identification and
intervention for young children with disabilities and a means of promoting their social
inclusion. They can contribute to improving equity by addressing factors that have the
potential to disadvantage young children. Indeed, investing in young disadvantaged children
‘is a rare public policy initiative that promotes fairness and social justice and at the same time

promotes productivity in the economy and in society at large.\textsuperscript{238} In summary, ECD ‘holds enormous potential for good’.\textsuperscript{239}

Key components of services for young children have been established as the ‘essential package’ of ECD services which includes nutrition, health, support for primary caregivers, stimulation for early learning and social services. There are particular considerations that need to be made for children with disabilities if quality services are to be appropriate and accessible for them.

This chapter has established what must be done for young children with disabilities and why. But what is the obligation on the South African government to provide ECD services for them? The following chapter explores these obligations as they emerge from three international human rights instruments that the State has ratified.

\textsuperscript{238}Heckman J (2006) (n 89 above) 1902.
\textsuperscript{239}UNICEF (2008) (n 227 above) 8.
CHAPTER 3: EARLY CHILDHOOD DEVELOPMENT AND CHILDREN WITH DISABILITIES: PROVISIONS AND REQUIREMENTS OF INTERNATIONAL LAW

3.1 Introduction

The international human rights framework is based on recognition of the equality of all human beings. Indeed, the Universal Declaration of Human Rights (adopted by the UN General Assembly in 1948) enshrines the principle that 'all human beings are born free and equal in dignity and rights'.¹ In this context, rights are understood as norms based on international law and traditions,² and entitlements with associated legal obligations.³ Such rights are enshrined when States adopt treaties, or legally binding instruments, which reflect the fundamental rights and freedoms to which a nation ascribes, and to which its citizens are entitled.⁴ Such instruments not only create obligations on governments to promote or enforce individual rights, they provide important policy imperatives, frameworks and guidance for the development of practices,⁵ such as those that are inclusive of children with disabilities. Treaties or conventions only become sources of rights for individuals in a country if they are incorporated into the country's own domestic laws,⁶ but once this is done, they create public commitments to which activists can point as they 'push nations to make gradual, if grudging, improvements'.⁷

¹This Declaration establishes human rights law as 'a common standard of achievement for all peoples and all nations' (Preamble). Together with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights it makes up the international Bill of Rights. Steiner H & Alston P International human rights in context: law politics morals 2 ed (2000). These early human rights treaties reflect a split between civil and political rights on the one hand, and economic and social rights on the other. Schulze views this split as a separation of 'rights' and 'development' which reflects a lack of full recognition of the right to development. Schulze M Understanding the UN Convention on the Rights of Persons with Disabilities: a handbook on the human rights of persons with disabilities (2010).
⁴A treaty becomes legally binding when it enters into force, i.e. from the date it becomes applicable and enforceable law. A protocol may be added on to a treaty, providing additional rights and freedoms or optional enforcement mechanisms. The South African Constitution itself recognises the binding nature of instruments of international law. Constitution of the Republic of South Africa Act 108 of 1996 s231 & 233.
There are different ways in which international human rights treaties can impact on State signatories. First, they may be instrumental in creating principles that bind the ratifying country, and modify practice in particular ways. Secondly, they may be expressive in declaring to other nations the position of the country that has ratified. Quinn has emphasised the critical role that international law plays as ‘an engine of change’ in the process of ‘socialisation and acculturation’ of policy makers, towards alignment of policy with international norms.\(^8\)

It has been noted that ‘rights are important because those who lack rights are like slaves, means to the ends of others, and never sovereigns in their own right’.\(^9\) Indeed, the rights discourse signals a shift away from a charity/welfare approach, in which favours are bestowed on fortunate recipients, towards the fulfilment of clear legal obligations.\(^10\) Therefore, the focus of this exploration on the implications of human rights treaties is not on young children with disabilities, but on those whose actions may affect them i.e. those who have obligations to fulfil with regard to their development.

Specific instruments have been developed to protect the rights of marginalised groups, including children and people with disabilities. In this chapter, I explore the provisions of three such treaties, identifying their implications for ECD for children with disabilities under two broad themes. I begin by focusing on articles that relate generally to children with disabilities. Thereafter I explore those corresponding with elements of the ‘essential package’ as elucidated in the previous chapter.\(^11\) The general obligations of the State under these treaties are discussed in the following chapter.

### 3.1.1 Rights of marginalised groups

Core to a rights-based approach is the recognition of human beings as individuals worthy of development and fulfilment, with the principles of equality and non-discrimination as


\(^{10}\)Committee on the Rights of the Child General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (2003) para 11.

\(^{11}\)It must be noted that all of the treaties contain articles relating to health, education, protection and support for caregivers or parents. Nutrition and social services (as components of the ‘essential package’) are subsumed under the rights to an adequate standard of living and social protection (in the CRC and CRPD respectively).
fundamental elements of international human rights law.\textsuperscript{12} If they are to fulfil their obligations under this law, States are compelled to identify and support those groups that experience inadequate achievement of basic capabilities i.e. those whose rights are not being realised.\textsuperscript{13} Indeed, States are obliged to take special additional measures to ensure ‘effective protection to their most disadvantaged, discriminated and socially excluded groups...’.\textsuperscript{14} The United Nations itself has recognised children and persons with disabilities as being among the ‘most disadvantaged’, and in an attempt to further both instrumental and expressive actions of States, has developed treaties which elaborate what human rights mean for each.

(a) Children
The need for a convention specifically providing for the rights of children, i.e. one comprehensive law containing international standards for children, arose out of the recognition that precise obligations were required of States.\textsuperscript{15} This was based on two key arguments. First, there was the recognition that children are entitled to human rights in their own independent right. Secondly, children’s increased physiological vulnerability renders them dependent on others for their survival and thus they require additional protection.\textsuperscript{16}

(b) Persons with disabilities
Although existing international treaties are generally applicable, in practice they have done little to protect, promote and fulfil the rights of persons with disabilities. This has been attributed to the fact that the formulation and implementation of these treaties have not sufficiently taken cognisance of the specific forms of human rights violations that people with disability experience; neither has the UN system adequately recognised persons with disabilities as rights-bearers.\textsuperscript{17} A disability-specific convention was seen as being necessary to increase the visibility of disabled people and to establish disability rights firmly within the

\textsuperscript{13}Poverty has been defined as the denial of a person’s rights to a range of basic capabilities - such as the capability to be adequately nourished, to live in good health, and to take part in decision-making processes and in the social and cultural life of the community. OHCHR (2006) (n 3 above).
\textsuperscript{14}UNHCHR (n 3 above) 10.
\textsuperscript{15}Soon after end of the First World War, the Declaration of Geneva was drafted. It contained five principles, one of which was to give children priority in receiving relief in emergencies. From then on ‘children first’ became a principle in the struggle for children’s rights. In 1959 the UN Declaration on the Rights of the Child asserted that ‘mankind owes to the child the best it has to give’. However, this was a statement of principle with no specified obligations or assigned duty-bearers. Hammarberg T ‘The UN Convention on the Rights of the Child - and how to make it work’ (1990) \textit{Human Rights Quarterly} (12) 97-105.
\textsuperscript{16}Freeman M (1992) (n 9 above).
international human rights arena. It was also envisaged that such a treaty would have a transformative effect, by encouraging more effective monitoring and reporting on enforcement by government and organisations of civil society. The CRPD ‘places the protection of the full and effective enjoyment of human rights by persons with disabilities at the same level – and thus equally visible – as the other specialised human rights treaties’ and details the actions required of accepting disability as a human rights issue.

3.1.2 Requirements of States parties

Human rights instruments place positive and negative obligations on States to respect, protect, and fulfil human rights. Respecting rights requires States to refrain from interfering with the enjoyment of economic, social and cultural rights, and prevent violations of rights by third parties. To fulfil rights, States must take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of rights. For each of these, the State has obligations of conduct (action directed towards realising a particular right) and obligations of result (achievement of specific targets to reach a detailed substantive target), and there need to be monitoring and accountability procedures for each.

The United Nations has established mechanisms for ensuring that treaty obligations are implemented by State signatories, for ‘law that has no effect on behaviour is no law at all’. Committees have been set up specifically to administer single treaties, their power being derived from the provisions of the particular treaty. Based on reporting guidelines given to them by the Committees, States compile reports on the actions they have taken to realise the

20Schulze M (n 1 above) 20.
22Committee on Social, Cultural and Economic Rights General Comment 12: The right to adequate food (1999). UNHCHR (n 3 above).
24The CRPD in Article 1 (Purpose) replaces ‘fulfill’ with ‘ensure’ [the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities…]. This was to make sure that all possible State actions would be covered and that the anticipated outcome would be achieved. Schulze M (n 1 above). Note that this wording is also reflected in Article 4(1).
26Note that the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) outline an approach to violations of economic, social and cultural rights generally.
obligations undertaken in terms of specific instruments. Unfortunately, however, delays and non-submission of reports has been a major challenge facing the monitoring structures of the UN. Undoubtedly there is a need to improve monitoring of the commitments contained in treaties, but it is recognised that better enforcement of international law is achieved not by ‘coerced compliance’ but ‘voluntary obedience’.

In summary, international human rights instruments provide a potential tool and guide for States in the protection of marginalised groups, including children with disabilities. They create goals to which nations can aspire and a mechanism for holding them to account.

### 3.1.3 Treaties which are to be considered here

There are numerous international human rights instruments that have a bearing on ECD and young children with disabilities. However, the scope of this study is limited to three particular treaties, viz the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (African Charter) and the Convention on the Rights of Persons with Disabilities (CRPD). I have termed these the ‘three sisters’. There are two reasons for selecting these three as (using my analogy) the immediate members of the family. First, treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are generally applicable and have been used to inform the CRC and the CRPD for children and people with disabilities respectively. While certainly important, their influence on the issues being

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27These Committees then receive, consider and give opinions on the reports. Committees may conduct visits to states parties to investigate their compliance record; some also influence law through issuing General Comments on specific issues. Some treaty monitoring bodies conduct in situ investigations but are not permitted unannounced visits; all visits have to be at the invitation of the State. Smith R (2010) (n 2 above).


32In her seminal publication on the CRPD, Schulze refers to two General Comments of the CRC Committee to interpret Article 7 (children) of the CRPD. These are Committee on the Rights of the Child General Comment No. 7 Implementing rights in early childhood (2005) CRC/C/GC/7 and Committee on the Rights of the Child General Comment No. 9: The rights of children with disabilities (2007) CRC/C/GC/9. Schulze (2010) (n 1 above).
discussed here is more indirect, and perhaps they could be seen as ‘parents’ or ‘grandparents’. Secondly, the focus of this study is on the most recent treaties that focus primarily (globally and regionally) on the target group, viz children with disabilities. Limiting the scope to three treaties makes it possible to explore them in depth, rather than conducting a superficial survey of numerous human rights instruments.

3.2 The Convention on the Rights of the Child

3.2.1 Background to the CRC

The adoption of the CRC was seen as heralding a new era, changing the approach to children from charity to entitlement. It provides an authoritative, universal definition of children's civil and political rights as well as economic, social and cultural rights, and holds society legally accountable for meeting the obligations which give meaning to these rights. The CRC has been described as ‘a practical ever-expanding resource tool for children in the world’ as it provides child advocates with the means to make a major impact on all levels of society, towards one in which children can develop their physical, mental, spiritual, moral and social capacities.

The CRC is based on the premise that children carry within themselves the potential for their own development and they should be supported to develop this fully. The concept of ‘development’ is seen not just as preparation of the child for adulthood, but as ensuring optimal conditions for childhood, for the child’s life now.

34Rishmawi M (2006) (n 23 above).  Hammarberg (1990) notes that the division between economic and political rights has long plagued UN discussions on human rights, but this division is not reflected in the CRC, which instead has an integrated approach and deals with a range of human rights.
Central to the developing agenda on children's rights is the recognition that children are human beings entitled to dignity and respect of their own. As the global community begins to fully adopt an attitude toward children based on their integrity as human beings, not human becomings, we also need to see childhood as a state in itself and see children as more than potential adults.  

South Africa ratified the CRC in 1995, and submitted its initial report in 1997. However, the combined second, third and fourth periodic reports (due 2002, 2007 and 2012 respectively) have only just been approved by Cabinet for submission to the CRC Committee.

3.2.2 Articles relating generally to children with disabilities

There are a number of articles in the CRC which implications for the context of ECD services for children with disabilities. These are the rights to non-discrimination, the rights of children with disabilities, the right to life, survival and development, the right of the child to have their best interests taken into consideration and the right to have their views respected. Each of these is considered in turn.

(a) Non-discrimination

The specific mention of disability as a prohibited ground for discrimination in Article 2 of the CRC has been attributed to the fact that children with disabilities are among the most vulnerable children in society. Significantly, however the CRC does not prohibit discrimination on the basis of 'a disability’ but on the basis of an abstract, viz 'disability'. If disability is defined as an impairment or deficiency in the functioning of an organ or other part of the body, it is as a merit-based notion because individuals with impaired ability to function need to be treated differently from those who do not have impairments. Thus ‘differential treatment on the basis of 'a disability' (the right-holders specific type and degree of impairment) is not discrimination. In contrast, differential treatment on the basis of an

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39 In a Statement of Cabinet meeting of 4 September 2013, it was reported that Cabinet had approved the submission of the combined second, third and fourth reports on the CRC to the Committee on the Rights of the Child.
40 General Comment No. 9 (2007) (n 32 above) (para 5 (a)). Indeed, not only is discrimination against them prohibited by the CRC, children with disabilities are entitled to special care and assistance, including health care services, which shall be free of charge when possible (Article 23 (3)).
abstract classification or label such as ‘hearing impaired’ or ‘disabled’ is discriminatory, as it
treats a person as a member of a class or category, rather than according to merit. Such labels
give no indication of the person's actual needs or abilities, but perpetuate stereotypes based on
assumptions about inferiority.

Under Article 2, States parties must ensure that all children within their jurisdiction enjoy all
the rights contained in the CRC without discrimination of any kind, and they must take
appropriate measures to prevent all forms of discrimination, including on the ground of
disability. The obligation on States arises from two places in the CRC, viz sectoral rights,
(since failure to act reasonably in realising a context-dependent right violates that right) and
from Article 2(1). This provision takes into account that the most significant source of
injustice and suffering experienced by children with disabilities is societal discrimination. The
State obligation to change these norms comes from the 'horizontal effects' of sectoral rights,
not from Article 2(1). There is thus a need for a pro-active approach to non-discrimination,
which integrates this principle into implementation of all other articles of the CRC, such that
all rights are available to all children without discrimination of any kind. In doing so, the
State cannot simply be passive, relying on evolutionary processes or prohibitions, it has a duty
to take non-discriminatory affirmative action.

While incorporation of the principle of non-discrimination into legal systems is essential, this
is not sufficient to ensure implementation, and other strategies are required in order to
challenge discriminatory attitudes and practices. States parties need to explicitly name
disability as a prohibited ground for discrimination with effective remedies in case of
violations. In addition to State entities, private employers and suppliers need to be subject to
both non-discrimination and equality norms in relation to children with disabilities. Where
governments rely on private and/or voluntary groups to provide services to children with
disabilities – such as in the ECD sector – this does not absolve the State from their duty to
ensure full compliance under the CRC. There also need to be awareness raising and

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45 Under international human rights law, discriminatory affirmative action is prohibited, but non-discriminatory
affirmative action is not only lawful, it is mandatory ‘whenever the well-being of one segment of society is
lagging behind the rest of the nation.’ Abramson distinguishes between non-discriminatory affirmative action
(in which preference is given to Group A, without discriminating against individual members of Group B) and
discriminatory affirmative action (in which preference to Group A, by means of giving preference to individual
members of Group A at the expense of individual members of Group B). Both have the same goals, but differ
with regard to the presence or absence of discrimination. Abramson B (2008) (n 42 above).
educational campaigns focusing on the rights of persons with disabilities, with the involvement of political, religious and community leaders in influencing attitudes and discouraging discrimination.47

In the ‘Guidelines for Periodic Reports’,48 the CRC Committee requests disaggregated data under many articles, including by age, gender, rural/urban area and disability. This provides information to judge whether there is discrimination in implementing the article or provision concerned.49

(b) Children with disabilities

The CRC was the first human rights instrument to contain a specific reference to disability in its article on non-discrimination and a separate article addressing the rights and needs of children with disabilities.50 Article 23 is included ‘without prejudice to’ the general applicability of the principles and provisions of the CRC to children with disabilities. It adds weight to other articles, including freedom from discrimination, respect for the dignity of the child and the nurturing of his or her potential to assume a responsible and independent life in society.51

The CRC Committee recognises that the key factor preventing the realisation of the rights of children with disabilities is not the disability itself, but the numerous social, cultural, attitudinal and physical barriers that children with disabilities face in their lives.52 The human rights approach to disability attributes these barriers to a lack of responsiveness by the State and civil society to the difference that disabilities represent.53 The General Comment on early childhood specifically stresses the importance of protecting the rights of young children with disabilities:

‘Early childhood is the period during which disabilities are usually identified and the impact on children’s well-being and development recognised... It is a priority to ensure that they have equal opportunities to participate fully in education and community life, including by the removal of barriers

48Committee on the Rights of the Child ‘General guidelines regarding the form and content of periodic reports to be submitted by States Parties under Article 44 para 1 (b) of the Convention’ (2005).
50Arts 2 and 23 respectively.
52General Comment No. 9 (2007) (n 32 above) para 5.
that impede the realisation of their rights. Young children are entitled to appropriate specialist assistance, including support for their parents (or other caregivers). Disabled children should at all times be treated with dignity and in ways that encourage self-reliance.\(^\text{54}\)

A review of recent Concluding Observations on Country reports, which include comments in respect of ECD, indicates that the CRC Committee regards ECD as being particularly important for children with disabilities.\(^\text{55}\) Recommendations include the provision of early childhood education and care for children with disabilities in a way that corresponds with their needs, ‘preferably in mainstream facilities and conducive to the child’s achievement of fullest possible social integration and individual development’.\(^\text{56}\) There is a need to improve access to ECD services for children with disabilities, with the necessary support to children and their families. In particular, personnel working with children with disabilities in the early childhood sector must be provided with adequate support, supervision and training.

The travaux préparatoires of the CRC reflect discussions of the Working Group and the view that disabled children should not be regarded simply as a vulnerable group, but rather as a specific category of children who should receive special treatment.\(^\text{57}\) These records also show the rationale behind paras 2-4 of Article 23, which contain specific steps to be taken by States parties for the implementation of para 1, i.e. the means to ensure the realisation of the right of a disabled child to a full and decent life, specifically the means of financing services. The first paragraph of Article 23\(^\text{58}\) contains the core message that children with disabilities should be included in society and that all measures taken by States parties towards the realisation of their rights should be directed towards this. ‘The enjoyment of a full and decent life in conditions that ensure dignity, promote self-reliance and facilitate active participation in the

\(^{54}\)General Comment No. 7 (2005) (n 32 above) para 36 (d).

\(^{55}\)These are for Belgium (CRC/C/BEL/CO3-4, CRC 2010), Bulgaria (CRC/C/BGR/CO/2, CRC 2008) and Latvia (CRC/C/LVA/CO/2, CRC 2006).

\(^{56}\)CRC/C/LVA/CO/2, CRC (2006).

\(^{57}\)Detrick S (1992) (n 30 above). During the drafting of the CRC, Working Group members held different positions regarding duty bearers for children with disabilities. Some felt that government should bear primary responsibility for these children, and services should be free of charge. Others felt that the child’s parents and family should bear primary responsibility for the care of the disabled child, with the state providing basic services but not sole care for the child. The compromise reached was that states must provide necessary services, but due to limited resources, not all governments can provide them free of charge. These discussions led to the adoption of para 2 of the article on disabled children.

\(^{58}\)This is based on wording of the UN Declaration on the Rights of Disabled Persons (1975) Resolution 3447, which is one of the earliest documents on the rights of persons with disability. It refers to the right to enjoy a decent life, ‘as normal and full as possible,’ and emphasises self-reliance and participation.
community’ is regarded as the ‘leading principle’ in the implementation of the CRC for children with disabilities.59

Article 23 places the obligation on States parties to ensure that children with disabilities enjoy all of the rights provided for in the CRC without discrimination, and that the child and their parents, or others caring for them, receive the special care and assistance that they need. This has been interpreted as taking ‘an extensive view of the concept of the development of the child’.60 States parties should make the provision of such care a high priority, investing to the maximum extent of available resources in the elimination of discrimination against children with disabilities and towards their full inclusion in society. Care and assistance must be designed such that children with disabilities have effective access to and benefit from a range of services, including education and recreation.61 Such services must be appropriate to the child’s condition, as well as to the circumstances of parents or others caring for the child and be provided in ‘a manner conducive to the child’s achieving the fullest possible social integration and individual development’.62

(c) Life, survival and development

The CRC provides for the child’s ‘inherent right to life, survival and development’ which has been described as ‘the most fundamental of all human rights of the child’.63 As it is both a right and a principle of the CRC,64 it needs to be interpreted in light of other articles. For example, Article 23 details the minimum conditions and aims of child development for children with disabilities.65 Further, the right to health is a precondition for development,66 and protection against violence and exploitation is important for the survival and development of the child.67 In addition, children need safe, nurturing environments and age-appropriate

59Detrick S (1992) (n 30 above) 332.
61General Comment No. 9 (2007) (n 32 above) para 14.
62CRC Article 23 (3).
63Nowak M ‘Article 6 The right to life, survival and development’ in Alen A et al. (eds) A commentary on the United Nations Convention on the Rights of the Child (2005) 1. The travaux preparatoires indicates that the two words ‘survival’ and ‘development’ were seen to reflect a view of the child's survival necessary to realise the full development of his or her personality, both from the material and spiritual points of view. Detrick S (1992) (n 30 above).
64Some scholars have raised concerns about the inclusion of this right as a general principle, particularly in the reporting process, where states report about it under the general principles rather than under the clusters of substantive rights. Nowak M (2005) (n 63 above).
65Nowak notes that the list of selected rights conducive to the development of disabled children is relevant to all children. Nowak M (2005) (n 63 above).
66Nowak M (2005) (n 63 above).
stimulation for their physical, social and cognitive growth, and the right to education is an important means of ensuring the child's development in accordance with his or her evolving capacities. Thus the right to life, survival and development can only be realised through the enforcement of all the other provisions of the CRC, including provision of support for parents.

Development is understood by the CRC Committee as ‘including physical, mental, spiritual, moral, psychological and social development, in a manner compatible with human dignity… to prepare the child for an individual life in a free society.’ The specification of developmental domains reflects the importance of holistic child development, with the recognition of children as fully human, with complex needs, characteristics and abilities that must be nurtured from birth. Statements by the Working Group and other provisions of the CRC (e.g. Article 27 on the right of the child to an adequate standard of living) indicate that development is seen as the right of individuals, groups and populations to participate in, contribute to and enjoy sustained economic, social, political and cultural development in an environment in which all human rights are realised. It is underpinned by the principles of

author notes that while progress has been made with decreasing child mortality rates, the development of children is not given a sufficiently high priority; an indication that priority is given to civil and political rights over economic, social and cultural rights.


69General Comment No.7 (2005) (n 32 above).

70Committee on the Rights of the Child ‘General guidelines for periodic reports’ (1996) para 40. This formulation links closely to the aims of education contained in Article 29 (1) of the CRC.

71Andrews A ‘Securing adequate living conditions for each child's development’ (1999) in Andrews A & Kaufman N (eds) Implementing the UN Convention on the Rights of the Child: a standard of living adequate for development 126. In their chapter on the social development of the child Flekkoy & Kaufman detail the importance of social competence of children, particularly ‘the ability to co-operate, share, help others, and follow the rules or understand the consequences of breaking them, asking for help when needed, standing up for oneself, reacting in adequate ways to the behaviour of others, being able to wait for a turn, compromise, and finally to empathise by showing concern and respect for the feelings and views of others. Flekkoy M & Kaufman N ‘The social development of the child’ in Andrews A & Kaufman N (eds) Implementing the UN Convention on the Rights of the Child: a standard of living adequate for development (1999) 117-132.

72McGoldrick D (1991) (n 35 above). Andrews A (1999) (n 71 above). This is in line with the UN Declaration on the Right to Development, which defines development as 'a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.' UN General Assembly ‘Declaration on the Right to Development’ (1986).
equality of opportunity and distributive justice for all,\textsuperscript{73} characterised as a participatory process leading to the full realisation of all human rights and fundamental freedoms.\textsuperscript{74} Further, provisions of the CRC address the underlying cause of under-development with the understanding that ‘the overarching goal… of development is the eradication of poverty’.\textsuperscript{75}

The principles of the CRC are based on the bio-ecological approach to child development, which recognises that the child's capacity to exercise the right to develop is influenced by living conditions that include the conditions of the parent, home, neighbourhood, community, natural environment and broader society.\textsuperscript{76} This assumes that if adequate environmental resources and opportunities exist and are accessible, the child will be able to develop to his or her maximum potential. Thus the CRC provides a framework for mobilising families, communities and societies to promote positive child development.\textsuperscript{77}

Article 6(1) provides for States parties to respect the life of children through non-interference, while 6(2) places positive obligations on States to ensure the survival and development of children through comprehensive measures of protection and fulfilment.\textsuperscript{78} Under the CRC, States undertake to 'create an environment which enables all children under their respective jurisdiction to grow up in a healthy and protected manner, free from want, and to develop their personality, talents and mental and physical abilities to their fullest potential consistent with their evolving capabilities'.\textsuperscript{79} This means addressing developmental threats (particularly poverty which is a cause and consequence of disability) that undermine the right to life, survival and development of children with disabilities and providing interventions that promote adequate prenatal care and supplementary nutrition to children living in poverty.

\textsuperscript{73}van Bueren G (1995) (n 67 above).
\textsuperscript{74}Nowak M (2005) (n 63 above). The UNDP Development Report (1997 43) gives a human rights definition of poverty, viz ‘Poverty is the denial of opportunities and choices most basic to human development - to lead a long, healthy, creative life and enjoy a decent standard of living, freedom, dignity, self-esteem and respect for others.’
\textsuperscript{75}Nowak M (n 63 above) 48. See also discussion on the Millennium Development Goals as measures of development later in this chapter.
\textsuperscript{77}Andrews A (1999) (n 71 above). Based on the CRC, State policies on early childhood must address the child’s right to child’s survival, development, participation and protection. But because the family is the most immediate environment in which young children exercise them, the State has an obligation to support parents, particularly those who are vulnerable or experience discrimination. UNESCO ‘Rights from the start: early childhood care and education’ (2012) \textit{Global Campaign for Education}.
\textsuperscript{78}Nowak M (2005) (n 63 above).
\textsuperscript{79}Nowak M (2005) (n 63 above) p.2.
States parties must take all the necessary measures to improve peri-natal care for mothers and babies and reduce infant and child mortality. All practices that compromise the right to life for children with disabilities (such as infanticide) must be ended and conditions created to promote the well-being of all young children. In addition, the State must raise public awareness of disability and establish and enforce laws that ensure appropriate punishment to all those who directly or indirectly violate the right to life, survival and development of children with disabilities. States are required to ensure this right for children with disabilities through promoting equality of opportunity in access to services and resources. Further, parent support programmes help to ensure that children are brought up in safe, nurturing and stimulating environments, and high-quality educational programmes that begin early and provide age-appropriate stimulation to children over an extended period of time have been identified as important in promoting child development.

Although the CRC places a positive obligation on States to fulfil the right to survival and development of the child by comprehensive measures of protection and fulfilment, this is with the recognition that parents have primary responsibility for the upbringing and development of the child. Under Article 27(3) States parties are obliged to take appropriate measures to assist parents in need, by providing material assistance and support programmes, particularly in respect of nutrition, clothing and housing and (Article 18(2)) through the development of childcare services and facilities.

(d) Best interest of the child

The principle of considering what is in the best interest of the child applies to all aspects of care and protection for children in all settings. Invoked eight times in the CRC, this principle has been described as ‘a major building block’ in its philosophy, underpinning the whole Convention and its associated jurisprudence.

Interpretation of best interests must be consistent with the spirit of the CRC as a whole, particularly its emphasis on the child as an individual with his or her own views and feelings,
as well as the child as subject of civil and political rights and special protections.\textsuperscript{84} This principle is particularly important for young children, not only because they have the right to have their welfare given priority, but also because they are more vulnerable than older children or adults, and therefore their best interests are more likely to be ignored. Young children with disabilities rely on responsible authorities, who are required to assess and represent their rights and best interests in relation to decisions and actions that affect their well-being, while taking cognisance of their views and evolving capacities.\textsuperscript{85} However, social problems within a limited welfare system means that there are often few options from which to choose when making decisions according to the best interests of the child. As a result, children may remain in unsuitable situations simply because of lack of alternatives.\textsuperscript{86}

Review of the country reports and Concluding Observations of the CRC Committee reveals the Committee’s perspective on factors which are not in the best interests of children. These include corporal punishment, (mal)treatment of children with disabilities\textsuperscript{87} and poverty, characterised by poor housing, unemployment, food insecurity and poor environments.\textsuperscript{88}

Although it will not always be the single, overriding factor to be considered, the child’s best interests must be actively considered and it needs to be shown that these have been explored and taken into account.\textsuperscript{89} This principle implies that there must be consideration of both the short- and long-term needs of the child as well as an ‘increase[d] awareness of the life-chances of children; [for] this is what ultimately their best interests are about’.\textsuperscript{90} Article 3 requires States parties to take active measures which protect children’s rights and promote their survival, growth and well-being and giving them the opportunity to become successful adults.\textsuperscript{91} It also includes measures to support and assist parents and others who have day-to-day responsibility for realising children’s rights.\textsuperscript{92}

\begin{footnotesize}
\begin{enumerate}
\item Save the Children (2002) (n 37 above).
\item General Comment No. 7 (2005) (n 32 above).
\item Freeman M (2007) (n 9 above) 57.
\item UNICEF (2007) (n 30 above).
\item Freeman M (2007) (n 9 above) 60.
\item Freeman M (2007) (n 9 above).
\item General Comment No. 7 (2005) (n 32 above).
\end{enumerate}
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The CRC Committee recommends that States parties take measures to realise the principle of the best interest of the child on two levels. First, all decision-making concerning the care, health and education of individual children must take it into account and secondly, all law, policy and services that affect children as a group or constituency must take account of the best interest principle. This includes actions that impact directly on children (e.g. health services) and those that impact on them indirectly (e.g. housing, transport). Institutions and facilities that provide services for children with disabilities must conform to standards and regulations and have the safety, protection and care of children as their primary consideration. Making the ‘best interests’ a primary consideration requires identifying principles that underpin these interests and prioritising them among competing interests.

(e) Respect for the views of the child

Article 12 of the CRC states that children have a right to express their views freely in all matters affecting them, and to have these views taken into account. Participation of children in decisions affecting them is a core element of children's rights, enabling children to progressively develop skills required for adulthood. The exercise of participatory rights begin when infants interact with their mothers, fathers and other caregivers, who in responding to them support young children’s capacity for expression.

Although the CRC Committee has noted that there is no age limit on the right of a child to have their views respected, the young child’s role as a participant in the family, community and society is frequently overlooked, or rejected as inappropriate on the grounds of age and immaturity. A young child is often considered to be undeveloped, and without basic abilities to understand, communicate or make choices. In the case of children with disabilities, it is further assumed that they have neither a view to express nor a way to express it. Although young children with disabilities are acutely sensitive to their surroundings and of people,

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94 General Comment No. 7 (2005) (n 32 above).
95 General Comment No. 9 (2007) (n 32 above).
98 General Comment No. 7 (2005) (n 32 above).
places and routines in their lives, assumptions about their (in)abilities renders them ‘…powerless within their families, and often voiceless and invisible in society…’.  

Full implementation of Article 12 ‘requires recognition of, and respect for, non-verbal forms of communication, including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences’. Respect for the views of the child embodies recognition of children with disabilities as active participants and not passive recipients of the welfare or charity of others. States parties are obliged to ensure implementation, particularly for children who experience difficulties in making their views heard. This implies that 'children with disabilities should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views’.

Measures to address discrimination against young children with disabilities have already been discussed. With respect to their right to participation, non-discrimination requires a shift away from traditional beliefs that regard early childhood mainly as a period for the socialisation of the immature human being towards mature adult status. Every child, even the very youngest and the most severely disabled, must be respected as persons in their own right and recognised as being active members of families, communities and societies, with unique concerns, interests and perspectives. Community-based and professional support for parents and other caregivers can contribute to better understanding of children’s development, including how to communicate with babies as well as promoting play, exploration and learning and guiding behaviour.

‘To achieve the right of participation requires adults to adopt a child-centred attitude, listening to young children and respecting their dignity and their individual points of view. It also requires adults to show patience and creativity by adapting their expectations to a young child’s interests, levels of understanding and preferred ways of communicating.’

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99 General Comment No. 7 (2005) (n 32 above) para 14.
100 Committee on the Rights of the Child General Comment No. 12: The right of the child to be heard (2009) para 21.
101 It thus challenges the individual/medical model of disability, which is discussed in more detail in Chapter 2.
102 General Comment No. 12 (2009) (n 100 above) para 21.
The participation of children with disabilities without discrimination may require the production of materials in accessible formats and the provision of appropriate technology, interpreters and training, including training of other children, parents and other family members and teachers.\(^{104}\) Parents may need support in providing environments where children with disabilities can freely express their views and have them taken seriously. This serves not only to promote individual child development, but also to nurture family relations and support children's socialisation. Further, child participation plays a preventive role against all forms of violence and abuse in the home and family.\(^{105}\)

### 3.2.3 Articles corresponding to the components of the ‘essential package’

I now focus on articles in the CRC that correspond to the components of the ‘essential package’ of services and support for vulnerable children, as elucidated in the previous chapter.

(a) Health

Article 24 of the CRC states that every child has the right to the ‘highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health’. It is a right to the best possible health outcomes, taking cognisance of the biological pre-conditions of the child, their living conditions and their access to health care.\(^{106}\) There are a number of other provisions of the CRC that have a bearing on the right to health, including the child's inherent right to life, and the obligation of the State to ensure the survival and development of the child.\(^{107}\)

The CRC Committee interprets the right to health not only as the provision of timely and appropriate health care, but also as addressing the underlying determinants of health.\(^{108}\) Indeed, enjoyment of the highest standard of health care is dependent on a range of factors, some of which can be addressed through health services, while others are related to more

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\(^{104}\) General Comment No. 9 (2007) (n 32 above).


\(^{108}\) This includes access to safe and potable water, adequate sanitation, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. McGoldrick D (1991) (n 35 above).
general policies of the State, which directly and indirectly influence health protection. This is particularly important for children with disabilities, as close to 50% of disabilities are preventable and directly linked to poverty.\textsuperscript{109}

A review of recent Concluding Observations on Country reports which include comments in respect of ECD, indicates that the CRC Committee regards ECD as a component of the right to health. For example, the Committee notes that the survival and development of children continue to be threatened by early childhood infectious diseases, diarrhoea and malnutrition.\textsuperscript{110}

The obligation is for States to ensure that ‘no child is deprived of his or her access to… health care services’. The right to health implies a duty to ensure that health care services are available, accessible, acceptable and of high quality.\textsuperscript{111} This includes affordable services, with equitable provision such that health expenses do not disproportionately place a burden on poorer households.

In commenting on the right of children with disabilities to health, the CRC Committee makes reference to the CRPD.\textsuperscript{112} In order to avoid repetition therefore, further interpretation of this article is included under that treaty (Section 3.4.3 (b)).

(b) Education

Under the CRC, children with disabilities have the same right to education as all other children and to enjoy it without any discrimination and on the basis of equal opportunity.\textsuperscript{113} Education is to be directed towards 'the development of the child’s personality, talents and mental and physical abilities to their fullest potential’ (Article 29 (1) (a)). The CRC Committee interprets the right to education as starting at birth and being closely linked to the young child’s right to maximum development.\textsuperscript{114} It has emphasised the importance of the

\textsuperscript{109}Department for International Development ‘Disability, poverty and development’ (2000). General Comment No. 9 (2007) (n 32 above).

\textsuperscript{110}Universal Human Rights Index. Accessed 17 Jan 2012. See for example the reports on Haiti (CRC/C/15/ADD.202 CRC, 2003), Dominican Republic (CRC/C/DOM/CO/2 CRC 2008) and Rwanda (CRC/C/15/ADD.223 CRC 2004).


\textsuperscript{112}CRPD Article 25 (b) refers to the need for the state to provide early identification and intervention services as well as services to minimise and prevent disabilities among children.

\textsuperscript{113}UNICEF (2007) (n 30 above) 407. The phrasing of this article is very similar to Article 13 of the ICESCR.

\textsuperscript{114}General Comment No. 7 (2005) (n 32 above).
early years and educational provision for pre-school-aged children, requiring States to include in their periodic reports the number of available childcare services and facilities, and the percentage of children and families that have access to these services.\textsuperscript{115}

The CRC Committee has also emphasised the need for States parties to ensure that all young children receive education ‘in the broadest sense’, acknowledging the important role of parents, the wider family and community, as well as the contribution of organised programmes of early childhood education provided by the State, the community or civil society institutions.\textsuperscript{116} It is recognised that such programmes can have a positive impact on young children’s successful transition to primary school, their educational progress and their long-term social adjustment.\textsuperscript{117}

A review of Concluding Observations on Country Reports which include comments in respect of ECD, indicates that the CRC Committee regards ECD as a component of the right to education. Recommendations include ensuring that education, including early childhood education, is directed towards development of the child’s personality, talents and mental and physical abilities to their fullest potential,\textsuperscript{118} promoting, developing and ensuring access to ECD and education, especially for children at risk of delayed development and socio-economic deprivation\textsuperscript{119} and establishing more childcare services.\textsuperscript{120}

The Committee notes that early childhood education by the State, community or civil society organisations can provide important assistance to the well-being and development of children with disabilities.\textsuperscript{121} Specifically, it recommends that States parties support ECD programmes, including home- and community-based pre-school programmes in which the empowerment and education of parents and other caregivers are main features.\textsuperscript{122} States also need to provide

\textsuperscript{115}UNICEF (2007) (n 30 above). General guidelines regarding the form and content of periodic reports to be submitted by States Parties under Article 44 para 1 (b) of the Convention CRC/C/58/Rev 1 para 11 (b).
\textsuperscript{116}General Comment No. 7 (2005) (n 32 above) paras 28 & 30.
\textsuperscript{117}Many countries and regions now provide comprehensive early education starting at 4 years old, which in some countries is integrated with childcare for working parents. The Committee notes however, that traditional divisions between ‘care’ and ‘education’ services have not always been in children’s best interests, and the concept of ‘educare’ is sometimes used to signal a shift towards integrated services. General Comment No. 7 (2005) (n 32 above) paras 28 & 30.
\textsuperscript{118}See Romania CRC/C/ROM/CO/4 CRC 2009.
\textsuperscript{119}See Mozambique CRC/C/MOZ/CO/2 CRC 2009 and former Yugoslav republic of Macedonia CRC/C/MKD/CO/2 CRC 2010.
\textsuperscript{120}See Belgium CRC/C/BEL/CO/3-4 CRC 2010.
\textsuperscript{121}General Comment No. 9 (2007) (n 32 above) para 65.
\textsuperscript{122}General Comment No. 7 (2005) (n 32 above) para 31.
a legislative framework for the provision of quality, adequately-resourced services, which are relevant to the circumstances of groups and individuals and to the developmental priorities of specific age groups. States must actively support a rights-based approach to early childhood programmes, directed towards building children’s confidence, communication skills and enthusiasm for learning. The Committee stresses that the rights and best interests of children must be central to all childcare and that it must actively support development of young children, rather than just a form of ‘containment’.123

The CRC Committee views the education of the disabled child as important for promoting positive self-awareness and ensuring that the child feels respected by others. Education should also be empowering, providing the child with experience of control, achievement and success to the maximum extent possible.124 The Committee has stressed that all children, no matter how severely disabled they are, are entitled to education that enables them to reach their potential. Any law or practice that limits this right (e.g. deeming certain children ‘uneducable’ or allocating them ‘therapy’ rather than ‘education’) is considered to be in breach of Articles 2 and 28. In addition, the education of children with disabilities should be provided ‘in a manner conducive to the child’s achieving the fullest possible social integration’ (Article 23(3)).125 Indeed, the Committee holds that educating children with disabilities should be done through inclusive education,126 and this is discussed further in the following section in relation to the provisions of the CRPD with respect to education.

The CRC also recognises the right of the child to rest and leisure activities, which are appropriate to his or her age (Article 31). The right to play is an expression of the right to belong to a society which respects the approach of children in their own discovery and development and in socialisation.127 Play is a distinctive feature of early childhood and a means by which children enjoy and challenge their abilities, and an important vehicle for learning how to solve the conflicts. Learning through play is different from the learning children do in relation to adults, because peers are equals.128 It is considered as being vital for

124 General Comment No. 9 (2007) (n 32 above) para 64.
125 UNICEF (2007) (n 30 above) 418.
126 A distinction is made between integration (which focuses on the individual child and her/his deficits) and inclusion (which enables education structures, systems and methodologies to meet the needs of all children, i.e. the system is changed to fit the child). Combrinck H (2008) (n 53 above).
127 Gils JV ‘The child's right to play: the right to be a child’ (2006).
the development and well-being of children\textsuperscript{129} and the best source of learning a variety of skills, including social skills. Children with disabilities may need support in gaining access to or using recreational facilities and attention must be given to inclusive forms of recreation:\textsuperscript{130} ‘The attainment of full inclusion of children with disabilities in society is realised when children are given the opportunity, places and time to play with each other (children with disabilities and no disabilities).’\textsuperscript{131}

While the range of children’s play is vast and ever-changing, their basic play needs are relatively simple. All that is required is safe, accessible space for children’s use, preferably containing possibilities for creating or changing things, for exploring and physical exertion. The CRC Committee has encouraged governments to promote children’s play, appealing to States parties, organisations of civil society and the private sector to identify and remove barriers to the enjoyment of these rights by the youngest children, including as part of poverty reduction strategies. States parties are encouraged to pay greater attention and allocate adequate resources (human and financial) to the implementation of the right to rest, leisure and play.\textsuperscript{132}

(c) Protection from abuse and neglect

The CRC Committee has recognised children with disabilities as being particularly vulnerable to mental, physical or sexual abuse.\textsuperscript{133} Article 19 affirms children’s equal human right to full respect for their dignity, as well as physical and personal integrity. As a principle, it is linked to the right to life, survival and development.\textsuperscript{134} This article makes reference to ‘social programmes’ which provide the necessary support for the child and their caregivers in the prevention of abuse and neglect, as well as for reporting, referral and treatment of victims.

Under Article 19, States parties must take comprehensive measures to protect children from ‘all forms of physical or mental violence’ from adults who should be caring for them and from neglect, careless treatment, exploitation and sexual abuse while in the care of any

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\textsuperscript{130}UNICEF (2007) (n 30 above).
\textsuperscript{131}General Comment No. 9 (2007) (n 32 above) para 70.
\textsuperscript{132}UNICEF (2007) (n 30 above). General Comment No. 7 (2005) (n 32 above).
\textsuperscript{133}This is discussed in more detail in Chapter 1, which describes the current context of young children with disabilities.
\textsuperscript{134}UNICEF (2007) (n 30 above).
\end{flushright}
person.\textsuperscript{135} The State is responsible for the prevention of all forms of violence against children, whether perpetrated by State officials, parents or other carers or other children. In response to the key message of the Study on Violence Against Children (‘No violence against children is justifiable; all violence against children is preventable’), States parties are urged to take all measures for the prevention of violence, abuse and neglect, and the protection of children with disabilities.\textsuperscript{136} This includes training parents to understand the risks and detect the signs of child abuse, and ensuring that they are vigilant about choosing caregivers and facilities for their children. Because ECD programmes that include parenting support are an important means of preventing child abuse and neglect, risks for violence against disabled children may be reduced through the setting up of support groups for parents, siblings and others taking care of the child, as well as assistance in caring for the child and coping with the disability. Educational facilities have a responsibility to take measures to combat bullying, paying particular attention to children with disabilities, and providing them with the necessary protection while maintaining their inclusion in the mainstream system. ECD for children with disabilities must be staffed with trained personnel, who are subject to appropriate standards, and regularly monitored and evaluated.\textsuperscript{137}

(d) Social protection

The CRC provides that all children have a right to a standard of living which is adequate for their physical, mental, spiritual, moral and social development.\textsuperscript{138} The approach is child-focused, implying the child's realisation of basic living standards, rather than access to opportunities on the basis of a family's or community's living standards. There is affirmation of a child's entitlement to special care and assistance within an ecological approach, as reflected in the responsibilities placed on parents, other adults and States parties to the CRC.\textsuperscript{139} Article 27 is based on the premise that the child’s development cannot be divorced from his or her conditions of living.\textsuperscript{140} Indeed, the CRC Committee notes with concern that ‘relative poverty undermines children’s well-being, social inclusion and self esteem and reduces opportunities for learning and development. …absolute poverty has even more serious

\textsuperscript{135}See also CRPD Arts 16 & 17.
\textsuperscript{136}UNICEF (2007) (n 30 above).
\textsuperscript{137}General Comment No. 9 (2007) (n 32 above).
\textsuperscript{139}This principle is also contained in Arts 5, 7 and 18 of the CRC.
\textsuperscript{140}UNICEF (2007) (n 30 above).
consequences, threatening children’s survival and their health, as well as undermining the basic quality of life’.141

The recognition by the CRC Committee that ECD is particularly important for children in situations of poverty is reflected in numerous times in General Observations of Country Reports that reference is made to ECD strategies to target ‘persons living in poverty’.142 Further, recognising the link between disability and poverty, the CRC Committee has specifically stated that children with disabilities have the right to an adequate standard of living, and improved living conditions, which includes sufficient adequate food, clothing and housing.143

Under the CRC, States parties are urged to implement strategies aimed at reducing poverty in early childhood and to combat its negative effects on children’s well-being. All possible means should be employed, including ‘material assistance and support programmes’ for children and their families, to ensure that young children are able to enjoy a basic standard of living which is consistent with rights, including the right to benefit from social security.144 Article 27 requires identification of the most critical factors within each cultural context that promote children’s well-being and protect them from harm or threats. Families, communities, and States must also identify the most effective and efficient ways within their means to positively influence the living conditions of children, with particular attention to justice and equity. Governments are required to implement systematic strategies to reduce poverty in early childhood and to combat its negative effects on children’s well-being.145 In particular, ensuring living conditions are adequate for the development of children confronted by extraordinary challenges (such as disability) requires focused action on the part of the child’s caregivers as well as the State.146 States parties need to allocate adequate budgetary resources and ensure that children with disabilities have access to social protection as well as poverty reduction programmes.147

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141General Comment No. 7 (2005) (n 32 above).
142See for example Dominican Republic (CRC/C/DOM/CO/2, CRC 2008), Paraguay (CRC/C/PRY/CO/3 CRC 2010) and Bangladesh (CRC/C/BDG/CO/4, CRC 2009).
144General Comment No. 7 (2005) (n 32 above).
145General Comment No. 7 (2005) (n 32 above).
147General Comment No. 9 (2007) (n 32 above). A three-stage action model has been proposed for facilitating
(e) Support for parents and families

The Preamble of the CRC affirms the family as the ‘natural environment’ for the growth and well-being of all children and recognises that the child, ‘for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding’.

As with other children, children with disabilities are best nurtured and cared for within the context of their own family, provided that the family receives the necessary support.

The CRC recognises parents as having the primary responsibility for bringing up children and promoting their development and well-being, with the child’s best interests as their basic concern. However, parents’ responsibilities are delineated by the child’s rights, as contained in the CRC, and may be shared with others such as members of the wider family. Further, the responsibility of parents is 'primary' rather than exclusive, indicating that the secondary responsibility lies with the State.

Article 27 embraces a wide range of activities necessary for the child's development and obliges parents, others responsible for the child and States parties to secure the child's right to a standard of living adequate for development. Kaufman and Blanco see this as an acknowledgement of ‘the primacy of the role of parents or caregivers, and the strategy of putting the necessary resources in the hands of parents or those responsible for the child, brings to the fore the centrality of parents and family to the entire spirit and orientation of this
treaty’. The family and others responsible for the child are required to invest time, personal
skills and energy as well as economic resources into creating and maintaining the conditions
necessary for the child's development.

The CRC Committee has acknowledged that when rights of the primary caregiver are
infringed, the child is also likely to suffer, and Article 24 recognises the unique
interrelationship between the rights of the mother and rights of the child. 'Securing respect for
universal rights must therefore remain a priority as the rights of children and the rights of their
carers are often interdependent to a degree which defies separation, especially during the
formative years of the child's development.' When parents are unable to provide material
support to the child, including food, clothing and housing, it is the State’s duty to do so,
particularly in view of the negative influence of poverty on the home environment and its
association (as a result of inadequate nutrition, health care etc) with poor cognitive
development leading to weaker academic outcomes and more limited life chances. Article
27 thus establishes a collective commitment to support parents and others in the challenging
task of parenting.

States parties are obliged to provide ‘appropriate assistance’ to parents and legal guardians in
the performance of their child-rearing responsibilities and ensure the ‘development of
institutions, facilities and services for the care of children (Article 18 (2)). This includes
assisting parents in providing living conditions necessary for the child’s development (Article
27(2)), and ensuring that the child receives protection and care, including quality childcare
services. The State has a duty to advise and educate parents about their responsibilities.
The term ‘appropriate assistance’ in Article 18 is closely aligned to ‘special care’ and
‘assistance’ referred to in Article 23 in relation to children with disabilities. These allow for a
wide range of options to support parents and children with disabilities, taking into account the
extent and limitations of a country’s resources.

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153 Kaufman N and Blanco M ‘Drafting and interpreting Article 27’ in Andrews A & Kaufman N (eds)
Implementing the UN Convention on the Rights of the Child: a standard of living adequate for development
155 Smith R (2010) (n 2 above) 446.
158 General Comment No.7 (2005) (n 32 above).
159 UNICEF (2007) (n 30 above).
160 Article 4 obliges States parties to undertake all appropriate measures to implement rights ‘to the maximum
The CRC Committee stresses that support from the State needs to take cognisance of the challenges facing parents and families in relation to their childcare responsibilities, particularly the resources, skills and personal commitment required of parents and others responsible for young children in communities where there are many young, single parents. The Committee acknowledges that early childhood is:

‘the period of the most extensive (and intensive) parental responsibilities related to all aspects of children’s well-being covered in the Convention: their survival, health, physical safety and emotional security, standards of living and care, opportunities for play and learning, and freedom of expression. Accordingly, realising children’s rights is in large measure dependent on the well-being and resources available to those with responsibility for their care.’

The Committee urges States parties to take all necessary steps to ensure that parents are able to take primary responsibility for their children, to support parents in fulfilling their responsibilities, including by reducing harmful deprivations, disruptions and distortions in children’s care and to take action wherever young children’s well-being is at risk.

What are the obligations of States parties to the CRC to assist families of young children with disabilities? Providing adequate assistance must take cognisance of the roles and skills required of parents, particularly through the different phases of the child’s growth during early childhood. There needs to be psychological support (including parent counselling) that is sensitive to the stress and difficulties experienced by families of children with disabilities, which nurtures positive and sensitive relationships between family members. There must be access to information on the child’s disability, including its causes, management and prognosis. There also needs to be provision of material support (e.g. special allowances, consumable supplies, equipment and assistive devices) that enable the child to live in dignity and be fully included in the family and community. In addition, caregivers need the support of respite care, including care assistance in the home and daycare facilities accessible at community level, enabling parents to work as well as relieve stress and maintain healthy...

161 General Comment No.7 (2005) (n 32 above) para 20.
162 General Comment No.7 (2005) (n 32 above).
163 General Comment No.7 (2005) (n 32 above). General Comment No 9 (2007) (n 32 above).
family environments. Such a range of services need to be provided within the framework of an integrated approach, which includes interventions that impact indirectly on parent’s ability to promote the best interests of their children (e.g. adequate housing), as well as interventions that impact directly on their child-rearing abilities (e.g. parent education).

3.3. The African Charter on the Rights and Welfare of the Child

3.3.1 Background to the Charter

The African Charter on the Rights and Welfare of the Child (hereinafter ‘the African Charter’) was created partly to complement the CRC, but also because African countries were under-represented in the drafting process of the CRC, and it was felt that another treaty was required to address the specific realities of children in Africa. As with the CRC, the rights within the African Charter can be categorised into themes, viz rights relating to provision (of services and material resources), protection and participation and these are reflective of and informed by African cultural values and heritage. While acknowledging the dire situation of children on the continent, the Charter (in its Preamble) identifies the child as occupying ‘a unique and privileged position in the African society’.

The Charter differs from the CRC insofar as it reflects the African notion of communities’ responsibilities and duties, and the duties and responsibilities of the child towards the family and community, by imposing duties and responsibilities on everybody: parents, community, government and children. The Charter refers to the duties of the child (Article 31) which includes promoting the cohesion of the family, respecting parents, superiors and elders and helping them in times of need, and serving the national interest through their physical and

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167 Kaim notes that the Charter does not provide a blueprint for the implementation of its provisions, and thus the mechanisms for implementation need to be complemented with locally developed processes and institutions which build the cultural legitimacy of children’s rights in an African context.
intellectual abilities. The expectation that children (in accordance with their age and maturity) will play an active role at family, community, national and continental levels is seen as an important contribution to the international human rights agenda.

The Charter is considered to be the main instrument of the African human rights system for promoting and protecting children’s rights, representing the emergence of ‘a renewed energy and vision for African children’s rights’. Some scholars assert that it offers higher standards than the CRC and has advanced the status of socio-economic rights beyond the traditional scope of rights, which are considered only attainable by progressive realisation. It therefore complements the CRC and provides an additional human rights framework for the protection, development, survival and participation for children of Africa.

The Committee of Experts on the Rights and Welfare of the Child has oversight of the Charter and reports to the African Union. In addition to receiving reports from member States, this Committee plays an important role in interpreting and promoting the rights of children in Africa. A key tool of the Committee of Experts is the Day of the African Child, and in 2012 its theme was ‘The rights of children with disabilities: the duty to protect, respect, promote and fulfil’. Through this the Committee raised particular concerns around poverty, social attitudes and discrimination, access to education and violence against children with disabilities, urging African countries to view these as national priorities and address them through national programmes and budgets.

State parties to the Charter undertake to submit initial and periodic reports within two years of ratification and thereafter every three years. South Africa ratified the Charter in 2000, but

172 Olowu D (2002) (n 166 above). These include the guaranteed right to education (Article 11), to leisure, recreation and cultural activities (Article 12) and to health and health services (Article 14).
has been greatly delayed with its reporting obligations. It has taken as long as 11 years for Cabinet to approve the submission of the first country report on the Charter (due in 2002).  

Discussion of the provisions of the Charter for ECD for children with disabilities is structured in the same way as for the CRC. I begin with looking at principles that impact generally on young children with disabilities, viz rights relating to non-discrimination, children with disabilities, development, best interests of the child and freedom of expression. This is followed by a discussion on articles that correspond directly with components of the ‘essential package.’ The general obligations of the State to implement all of the rights set out in the African Charter (contained in Article 1) are discussed in the following chapter.

### 3.3.2 Articles relating generally to children with disabilities

(a) Non-discrimination

Article 3 of the Charter protects children from discrimination on a number of grounds, but does not include disability as one of these. Given that the first part of the article grants the right to ‘every child’, it is unlikely that discrimination against children with disabilities is allowed under the Charter. However, this omission has been described as ‘unfortunate’ in that it represents a missed opportunity for the Charter to reaffirm the rights of children with disabilities and raises the question as to why this omission was made.  

Significantly the phrasing of this article indicates that the obligation is binding not only on the State party, but also on ‘other actors’.

(b) Children with disabilities

The African Charter contains an article referring to children with disabilities. Some of the provisions herein are similar to the corresponding article in the CRC (Article 23), such as that both are subject to available resources. However, there are some notable differences. First, the Charter states that a disabled child has the right to protection ‘in keeping with his physical and moral needs’, an insertion not included in the CRC. While physical needs may be obvious (e.g. for assistive devices, physiotherapy), it is not clear exactly what is covered by

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176 This was reported in a Statement of Cabinet meeting dated 4 September 2013.
179 ‘African Charter Article 13, which refers to them as ‘handicapped children.’
the reference to ‘moral needs’. Secondly, the Charter provides a very clear right, while the provisions of the CRC are much broader and unspecific. Thirdly, the Charter refers to ‘access to training, employment and recreation opportunities’, while the provisions of the CRC for children with disabilities are much broader.

Significantly, the CRC provides for special care, which shall be generally free of charge, while this is not mentioned at all in the Charter. Unlike the CRC, the Charter does not contain a clause relating to international co-operation in information exchange around preventive health care and methods of rehabilitation, education and vocational training for children with disabilities, in order to build capacity and skills.

Article 13(3) of the Charter does not have an equivalent in the CRC. Although clumsily formulated, it refers to access of children with disabilities to public institutions and facilities, which have been referred to being of ‘utmost importance’ to the realisation of the rights of children with disabilities in Africa and beyond.

(c) Survival and development
In addition to ensuring the right to life, the Charter provides that State parties ‘shall ensure, to the maximum extent possible, the survival, protection and development of the child’. This phrasing is identical to that in the CRC and thus it is subject to the same interpretation, as described in Section 3.2.2.

(d) Best interest of the child
Like the CRC, the African Charter contains a dedicated article (Article 4) relating to the best interest of the child. However, its formulation represents one of the most significant differences between the two treaties, viz while in the CRC, the best interest is to be ‘a primary consideration’, in the Charter, it is stated as being ‘the primary consideration’ in all actions.

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181 ‘Every [disabled child] shall have the right to special measures of protection…’
182 ‘States parties recognise that a [disabled child] should enjoy…’
183 ‘Article 23 (3) of the CRC states that assistance to the disabled child must be directed to ensuring that ‘the disabled child has access to and receives education, training, healthcare services, rehabilitation services, preparation for employment and recreation opportunities...’
185 African Charter Article 5(2).
concerning the child.\textsuperscript{186} In the Charter, therefore this principle ‘proclaims its supremacy over other considerations’.\textsuperscript{187}

(e) Freedom of expression

While the CRC provides for children who are capable of ‘forming their own views’ to express these views, the Charter takes a more restrictive approach, limiting it to children who are ‘capable of communicating his or her own views’. Gose has noted that the Charter fails to acknowledge that there can be no freedom of expression if the individual cannot receive information necessary to form his or her opinion. Without this, he argues, the guarantee of freedom of expression is meaningless and thus the Charter’s silence on it ‘is a major disadvantage that could hamper the effectiveness of this guaranteed right’.\textsuperscript{188} However, in the context of young children, freedom of expression may not require information so much as an environment in which children are encouraged to express themselves.

3.3.3 Articles corresponding with components of the ‘essential package’

There are a number of dedicated rights in the Charter that correspond with the components of the ‘essential package’ of services for young children.

(a) Health

Interestingly, the Charter refers to ‘physical, mental and spiritual health’, embracing not only western health notions and services, but also traditional ways of dealing with health issues, such as use of traditional healers. It imposes an obligation on States to ensure the provision of medical assistance and health care to all children, with emphasis on development of primary health care.\textsuperscript{189} Indeed, this is seen as a key means of protecting the right of children to health and health services.\textsuperscript{190}

However, provisions for health in the Charter differ from those in the CRC in three respects. First, the Charter\textsuperscript{191} includes ‘community leaders and community workers’ (as opposed to only parents and children) as those who need to be informed and supported in the use of

\textsuperscript{187}Gose M (2002) (n 177 above).
\textsuperscript{188}Gose M (2002) (n 177 above) 130.
\textsuperscript{189}African Charter Article 14(2) (b).
\textsuperscript{190}Clauses (b), (f) and (j) of this article refer to Primary Health Care.
\textsuperscript{191}African Charter Article 14(2).
knowledge of child health issues. Secondly, the Charter provides for the meaningful participation of civil society and NGOs in the planning and management of a basic service programme for children. Thirdly, the Charter includes reference to technical and financial support for the mobilisation of local community resources in the development of primary health care for children. All of these would seem to extend the range of those involved in health care, and this is to be welcomed as a means of increasing access for children with disabilities.

(b) Education

Article 11 of the Charter deals with the right to education and its purpose. Although differently structured, the provisions of the Charter are similar to those of the CRC. Article 3(e) of the Charter differs from the CRC, adding an additional obligation on States parties to take affirmative action in respect of ‘female, gifted and disadvantaged children to ensure equal access to education for all sections of the community’. This represents recognition of social imbalances in education, which are to be addressed by State action. The Charter also makes reference to basic, secondary and higher education, emphasizing the need for States parties to take measures to encourage regular attendance and reduce dropout rates. However, there is no acknowledgement of the need for ECD, nor is there reference to pre-school education. This omission has been described as ‘unfortunate’ in light of the fact that children’s attitudes are formed in the pre-school years.

The right to leisure, recreation and cultural activities is phrased in the Charter exactly as it is in the CRC. This includes the right of the child to participate in age-appropriate play and recreational activities.

(c) Social protection

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193 However, clauses (e), (f) and (h) are unique to the Charter and relate to the preservation of national independence, territorial integrity and African unity and solidarity, respect for the environment and natural resources and understanding of primary health care. The latter has special significance for children in Africa, given the threat that HIV/AIDS and other diseases pose for people on the continent. Gose M (2002) (n 177 above).
Article 21 of the African Charter provides for protection of children by placing an obligation on States to ‘eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child’. Children must be protected from ‘all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse’. Protective measures include establishment of special monitoring units, as well as other forms of prevention and for identification, reporting, treatment and follow-up. These provisions must be read in conjunction with those of Article 1(3), the obligation of States parties to ‘discourage’ any custom, tradition, cultural or religious practice that is inconsistent with the Charter. This is important in the current context because it is often (traditional and/or religious) beliefs about disability that legitimate harsh treatment of children with disabilities, in an attempt to punish or correct them for their perceived sins or those of their parents.

Significantly, the Charter contains no specific clause relating to government’s obligations to ensure an adequate standard of living for children, or the right of parents to social security necessary for maintaining the standard of living of the child.

(d) Support for parents and caregivers

The Charter asserts that parents or other persons responsible for the child have the primary responsibility for their upbringing and development. State parties in turn have an obligation to assist parents and guardians where necessary by providing material assistance and support, especially in the areas of health, education, clothing and housing. Assistance with child-rearing and the development of ‘institutions responsible for providing care of children’ as well as ‘care services and facilities’ (for working parents) are provided for in the Charter; they appear to be open to every child of every working parent.

196Protection from harmful social and cultural practices.
197African Charter Article 16(1)). Additional provisions for protection against sexual abuse are contained in Article 27 sexual exploitation.
199African Charter Article 20
3.4 The Convention on the Rights of Persons with Disabilities (CRPD)

3.4.1 Background to the CRPD

The significance of the CRPD\textsuperscript{202} lies in the fact that it is the first binding international treaty that recognises the extent to which discrimination and abuse of adults and children with disabilities exists worldwide.\textsuperscript{203} States parties to it undertake to promote the realisation of all human rights for all persons with disabilities, without discrimination of any kind on the basis of disability. The rights provided for in the CRPD can be summarised into three broad themes: those that protect persons with disabilities against the abuse of power, those that nurture the capacities of persons with disabilities so that they can participate as equals in society, and those that empower persons with disabilities to use the new opportunities emerging from a strategy of equality.\textsuperscript{204}

The CRPD embodies an important milestone in the struggle to re-frame the needs and concerns of persons with disabilities in terms of human rights.\textsuperscript{205} Acknowledged as both a human rights treaty and a development tool,\textsuperscript{206} the CRPD recognises the inherent dignity of all people, regardless of disabilities or differences, and affirms society's obligation to support freedom and equality of all individuals, including those who may need particular support.\textsuperscript{207} Based on the social model of disability, as discussed in Chapter 2, it emphasises the extent to which disability is a social construct and the need to challenge normative practices that contribute to disabling individuals with impairments.\textsuperscript{208} The rights-based approach emphasises respect, support and celebration of diversity by creating conditions that allow meaningful participation by a wide range of people, including adults and children with disabilities. The

\textsuperscript{203}The negotiations leading to its adoption were the result of intense and ongoing collaboration among DPOs, NGOs and State parties from different regions and countries across the globe and the process that brought it to fruition is considered as one of the most inclusive that the UN has seen. For the first time in the history of the UN, a treaty formulation process included the very people who it was intended to protect. Kanter A (2006-2007) (n 6 above).
\textsuperscript{204}Quinn G (2009) (n 8 above).
\textsuperscript{206}Schulze M (2010) (n 1 above).
\textsuperscript{207}Kanter A (2003) (n 6 above) 247.
CRPD thus provides 'a moral compass for change as well as legal benchmarks against which to measure that change'. Further, its application goes beyond persons with disabilities, because it is based on ‘a theory of justice that every citizen can ascribe to and in which every citizen has a stake… [It] is a beacon for international consensus on justice and disability’.

Significantly, the General Assembly mandate, under which the CRPD was developed, stipulated that the negotiating Committee was not to develop any new human rights, but was rather was to apply existing human rights to the particular circumstances of persons with disabilities. It therefore gives detail to what existing human rights mean for people with disabilities, and clarifies the obligations of States parties to protect and promote them.

While the CRC and the African Charter set out the rights that must be respected for all children (with Articles 23 and Article 13 respectively identifying the specific obligations of the State in respect of children with disabilities), the CRPD builds on these, introducing three specific measures required to protect the rights of children with disabilities. First, the CRPD reaffirms existing rights, emphasising that they must be respected for children with disabilities on an equal basis with other children. Secondly, it places specific obligations on government to ensure that rights are protected for children with disabilities. Thirdly, the CRPD contains a number of additional provisions, which are aimed at establishing an environment which is conducive to the fulfilment of the rights of persons with disabilities.

The CRPD provides for the establishment of a Committee on the Rights of Persons with Disabilities which is responsible for receiving four-yearly reports from States parties on progress in implementation. Thereafter, the Committee makes suggestions and

209Quinn G (2009) (n 8 above) 34.
210Quinn G (2009) (n 8 above) 52.
211UNHCHR (2010) (n 17 above).
212Save the Children ‘See me, hear me: a guide to using the UN Convention on the Rights of Persons with Disabilities to promote the rights of children’ (2009).
213For example, it sets out specific obligations to ensure a properly supported inclusive education system at all levels (Article 24) and to ensure that in no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents (Article 23(4)).
214For example (Article 8) States parties are obliged to conduct awareness programmes to promote a positive image of people with disabilities, (Article 9) take action to ensure that adults and children with disabilities have equal access to the physical environment, transportation, information and communications and other public facilities and (Article 26) provide habilitation and rehabilitation in order to enable adults and children with disabilities ‘to attain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life’. UNHCHR (2010) (n 17 above).
215Article 34. Although there is no absolute requirement that disabled people should be represented on this body, states are required to take cognisance of the need to consult with disability organisations when deciding on nominations to the Committee.
recommendations directed towards increasing the capacity of States to implement its provisions. 216 Although the CRPD was ratified by South Africa in 2007, with the initial report being due in 2010, this has not as yet been submitted. 217

As with the previous two treaties, I begin discussion of the CRPD by focusing on those articles that relate generally to children with disabilities. Thereafter I explore those articles which correspond with components of the ‘essential package’ as elucidated in Chapter 2. The general obligations of the State to implement all of the rights set out in the CRPD (contained in Article 4), are discussed in the following chapter.

3.4.2 Articles relating generally to children with disabilities

(a) Equality and non-discrimination

Non-discrimination is a general principle of the CRPD as well as (with equality) a specific article, 218 aiming to ‘conserve human variety, while enhancing equality of outcomes’. 219 The CRPD contains three inter-related elements, which require an analysis of the right to equality and non-discrimination, and other articles. 220 First, the possession of legal capacity is core to the CRPD, with the effect that disabled people must be recognised as persons (and not objects) and as such as bearers of rights and responsibilities and thus their entitlement to rights must be protected. 221 Secondly, the CRPD provides for the exercise of legal capacity, with the State taking measures to ensure access of persons with disabilities to the necessary support in such a way that it not only gives effect to the principle of equality, but also to the

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216Committee on the Rights of Persons with Disabilities ‘Guidelines on the treaty-specific document to be submitted by States Parties under Article 35 of the Convention on the Rights of Persons with Disabilities’ (2009). For example, reports should include statistical data on the realisation of each Convention right, disaggregated by age, sex, type of disability (physical, sensory, intellectual and mental), ethnic origin, urban/rural population and other relevant categories, on an annual comparative basis over the past 4 years (Para A3 (h)).

217In December 2012, the Department of Women, Children and People with Disabilities circulated a draft report on the CRPD, but as of October 2013, this has not as yet been finalised and submitted to the CRPD Committee.

218Although non-discrimination is core to it, many scholars have warned against the CRPD being seen simply as an international anti-discrimination bill. It is essential that the comprehensive nature of the CRPD is given due weight. See Schulze M (2010) (n 1 above).


221Art 12(2) provides that ‘States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’ which is seen to be derived from Article 12 (1) which states that ‘persons with disabilities have the right to recognition everywhere as persons before the law.’
values of dignity and autonomy. Thirdly, there is the equal protection of, and benefit from, the law.

States bear the primary responsibility for ensuring equality and eliminating discrimination in a context in which often attitudes pose the greatest barriers to the enjoyment of rights by adults and children with disabilities. Like the CRC, the CRPD places an obligation on States parties to prohibit discrimination on the basis of disability. Further, it takes cognisance of the fact that a major source of hardship for disabled adults and children is that enjoyment of sectoral rights is dependent upon resource allocations, and the principle of equality and non-discrimination in the CRPD is based on the recognition that ‘greater needs require greater allocations to produce equivalent outcomes of well-being’. One way of increasing allocations is to adopt laws and policies on reasonable accommodation, requiring States to give more social goods to disabled persons than to those who are not disabled. Reasonable accommodation entailing material resources can be understood as a type of non-discriminatory affirmative action.

The concepts of equality and reasonable accommodation reflect 'substantive equality', viz treating persons with disabilities according to their actual merits, capacities and circumstances, not based on stereotypes:

‘Substantive equality does not mean treating everyone in exactly the same way. Indeed, accommodating people's differences is the essence of substantive equality, and... key to eliminating discrimination against people with disabilities.’

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222 Article 12 (4).
223 This is dealt with specifically in Article 13 (access to justice).
224 Kanter A (2006-2007) (n 6 above). This is also reflected in General Comment 9 of the CRC.
225 Such discrimination is defined in Article 2 (3) as ‘any distinction, exclusion, restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. See also Section 3.2.3 for provisions for non-discrimination in the CRC.
227 This is defined in Article 2 as 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.
228 This is not 'disability discrimination' since it does not deprive a person without a disability, in order to give it to a person with a disability. This is similar to provisions of the CRC as discussed in 3.2.3 of this chapter.
Thus equality in the context of disability goes beyond respecting differences, to positively accommodating them, and entails equipping persons with disabilities with the means to make new opportunities a reality.\footnote{Quinn G (2009) (n 8 above).}

The general principle of equality of opportunity is closely linked to equality and non-discrimination.\footnote{In international human rights law, equality manifests itself through respect for two complementary principles viz. non-discrimination and dignity. Respect for dignity implies respect for humanity in all its diversity - individual or group characteristics do not mean that one group has more rights than another, and thus society should treat every person in a way that respects differences, including those related to disability. Hendricks A (1995) (n 219 above).} It is based on the Standard Rules for the Equalisation of Opportunities for Persons with Disabilities, which define equalisation of opportunities as being 'the process through which the various systems of society and the environment, such as services, activities, information and documentation, are made available to all, particularly persons with disabilities'.\footnote{UN ‘Standard Rules for the Equalisation of Opportunities for Persons with Disabilities’ (1994) para 24.} The Standard Rules also make reference to the principle of equal rights, which:

\begin{quotation}
'implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation.'\footnote{Standard Rules (1994) (n 233 above) para 25.}
\end{quotation}

As has been discussed under the provisions of the CRC, the CRPD requires States to prohibit all forms of (direct and indirect) discrimination against persons with disability ‘by any person, organisation or public enterprise’.\footnote{Lawson A (2006-2007) (n 18 above).} Denial of reasonable accommodation is seen as a form of disability discrimination and thus States are required to prohibit such denials and to do so immediately, as it is not a right to which the principle of progressive realisation applies.\footnote{CRPD Article 5(3). The difference between accessibility and reasonable accommodation, is that the former may be realised progressively, while the latter has to be ensured immediately. Schulze M (2010) (n 1 above).} States have the obligation to ‘take all appropriate steps’ to ensure that reasonable accommodation is provided.\footnote{Lawson A (2006-2007) (n 18 above) 563.} This has been interpreted as imposing ‘a positive obligation to identify barriers in the way of a disabled person’s enjoyment of their human rights and to take appropriate steps to remove them’.\footnote{Lawson A (2006-2007) (n 18 above) 563.}
Because the focus of reasonable accommodation is on the individual, measures to remove barriers of access must be tailored to their unique situation; these may involve changes to practices, the physical environment or provision of additional equipment or support.\(^{238}\) The duty to provide reasonable accommodation is subject to ‘disproportionate or undue burden’, a condition which is not an absolute amount of money, but rather a consideration of the impact of making the relevant changes on the entity. Factors that need to be taken into account when assessing whether accommodations requested constitute an undue burden include ‘practicability of the changes required, the cost involved, the nature, size and resources of the entity involved, the availability of other financial support… and the impact on the operations of the entity’.\(^{239}\)

(b) Full and effective participation and inclusion in society

Rejecting the notion of assimilation, the CRPD adopts an inclusive philosophy, which requires positive respect for difference towards the full and effective inclusion of adults and children with disabilities in society.\(^{240}\) The strategy for protecting and promoting the rights and full inclusion of children with disabilities is to remove barriers which prevent or hinder the realisation of their rights, and enable their inclusion in society. Indeed, inclusion has been defined as the creation of barrier-free environments.\(^{241}\) The State must ensure access for all young children with disabilities and those with primary responsibility for their well-being, to appropriate and effective ECD services, including programmes of health care and education specifically designed to promote their well-being.\(^{242}\)

\(^{238}\)It is therefore not possible to have a ‘one size fits all’ approach.


\(^{240}\)There are various provisions in the CRPD which relate to full and effective participation of children and adults with disabilities in society. For example, Lawson notes that although it is possible to identify principles of independence and access in many articles of the CRDP, they are particularly evident in those relating to mobility and the physical environment and those relating to information and communication. Lawson A (2006-2007) (n 18 above).

\(^{241}\)UNICEF (2007) (n 5 above).

\(^{242}\)General Comment No. 7 (2005) (n 32 above). The Committee recommended that the CRC and Standard Rules for the Equalisation of Opportunities for Persons with Disabilities be used as complementary tools to promote the rights of children with disabilities. The latter identifies preconditions and target areas for equal participation, implementation measures and monitoring mechanisms. The Standard Rules define equalisation of opportunities as ‘the process through which the various systems of society and the environment, such as services, activities, information and documentation, are made available to all, particularly persons with disabilities’ (para 24). The notion of equalisation of opportunities is based on the principle of equal rights and the recognition that resources must be allocated such that every person has equal opportunity for participation.
The CRPD adopts a ‘twin-track’ approach towards ensuring that children with disabilities are included and able to participate in society. First, it addresses the need to remove general societal barriers so that persons with disabilities have access to mainstream services and facilities. The right to access is enshrined in Article 9 and, as a general principle, it applies to all areas of implementation. Accessibility embraces a range of dimensions including social or attitudinal accessibility, which requires challenging stereotypes and prejudices often associated with disability. Intellectual accessibility entails providing reading formats and speaking in a way that can be understood by people with intellectual impairments. Communication access can be promoted through accessible formats in alternative modes and means of communication. Institutional accessibility implies ensuring that legislation, policies and practice do not contribute to the exclusion and discrimination of disabled persons. Physical accessibility refers to removal of barriers in the physical environment (including public facilities and services and transport), and economic accessibility (also referred to as ‘affordability’) has been affirmed as a core requirement of social and economic rights. Read together with Article 20 (Personal mobility), Article 9 ‘has the potential to change the physical form of societies across the world’.

In working towards access to mainstream facilities and services (under Article 19(c)), States parties to the CRPD recognise the rights of adults and children with disabilities by ensuring that ‘community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs’. States are required to take steps to ensure that people with disabilities are able to access the physical environment, which includes ‘buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities…’. In accommodating the range of impairment types, States are to provide signage in Braille, ‘forms of live assistance and intermediaries’ (including sign language interpreters), as well as physical access to buildings and other public

243Note that this is also the approach advocated by the UN for monitoring the implementation of the CRPD. UN ‘Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for human rights monitors’ (2010).
244Lawson A (2006-2007) (n 18 above).
245Standard Rules (1994) (n 233 above). Rule 5 relates to accessibility. Schulze has noted that accessibility is a new concept in a human rights treaty, and is a precursor of various provisions, enshrining accessibility as a means of ensuring equality as well as full and equal access to the enjoyment of all human rights. Schulze M (2010) (n 1 above) 32, 45.
246UNHCHR (2007) (n 239 above).
247See CESCR, General Comment 12, the right to adequate food para 6. Schulze M (2010) (n 1 above).
249CRPD Art 9 (1)(a)).
facilities. States must ensure that private facilities that are open to the public take into account accessibility for disabled persons. In working towards this, States are required to develop and implement minimum standards for accessibility of public facilities.

Secondly, the CRPD it provides for disability-focused services that facilitate participation and inclusion. Article 26 defines habilitation and rehabilitation as a means of enabling people with disabilities to ‘attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life’. These are not limited to medical and health-related services, but are to be provided in the areas of health, education, social services and life skills.250 With regard to disability-focused services that facilitate participation and inclusion, the CRPD places an obligation on States to ‘organise, strengthen and extend’ habilitation and rehabilitation services,251 which must begin at the earliest possible stage and support persons with disability to participate and be active in all aspects of society. These should be offered at no cost, where possible, within a service that is efficient and with minimal delays.252 The State is responsible for ensuring that services are available in local communities, including rural areas.253 This has been understood to refer to community-based rehabilitation, as defined in a joint position paper issued by ILO, WHO and UNESCO.254 States have an obligation to ensure development and continuing training for professionals and staff working in habilitation and rehabilitation services, as well as continuous updating on assistive devices and new technologies as they relate to (re)habilitation. Further (under Article 20), States are required to take steps to facilitate personal mobility, so that disabled adults and children can be as independent as possible. Indeed, without the benefit of these interventions, they would probably not be able to realise the rights to accessibility and education.255

250 The fact that rehabilitation was not included under the right to health, and its formulation with respect to participation and inclusion, is an expression of the paradigm shift from the medical to the social model of disability, in which persons with disabilities are not objects of interventions by medical professionals, but are able to make decisions about their own lives.

251 Habilitation and rehabilitation differ from reasonable accommodation in that they focus on equipping the individual with the specific knowledge or resources that he or she needs, rather than adaptation to the environment or programme or practice to ensure that people with disabilities can participate on an equal basis with others. Human Rights ‘Yes! Action and advocacy on the rights of persons with disabilities’ (2010) Accessed 20 July 2012.

252 General Comment No. 9 (2007) (n 32 above).


255 UNHCHR (2007) (n 239 above).
In the context of ECD, the twin-track approach of the CRPD requires not only supporting young children with disabilities to reach their maximum level of independence (through habilitation) but also (through the removal of barriers) the provision of opportunities for learning together with other young children. Given that both rehabilitation and early education services aim to develop social, emotional, physical and other competencies of young children towards independence, it is critical that there is synergy between them. Therapists, mobility instructors and others working with children with disabilities may well be in a position to advise regarding reasonable accommodations that need to be made within specific ECD services (e.g. adaptations to teaching methods and the physical environment).

Article 30 is considered to be an application of the principles of equality and non-discrimination in respect of culture, recreation and sport. It provides that disabled people are ‘entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture’ and aims to ensure that adults and children with disabilities are able to participate, on an equal basis with others, in ‘recreational, leisure and sporting activities’. This requires States to take various measures, including those that ‘ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities…’. Schulze interprets this too as part of the ‘twin-track’ approach of the CRPD, viz ensuring access to mainstream venues and facilities as well as highlighting the need for activities in venues and facilities where children with disabilities (by their own choice) are with other children with disabilities.

(c) Children
The precursor to Article 7 is found in the Preamble of the CRPD, with the text of this article itself containing some elements of the CRC. Thus interpretation of the rights of children

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256 Participation in cultural life, recreation, leisure and sport.
258 Article 30 (5)(d).
260 This provides that ‘children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by states parties to the Convention on the Rights of the Child.’ CRPD Preamble (r).
261 For example, the consideration of the best interests of the child and the right to express views freely. The provision in the CRPD (Art 7 (2)) is almost identical to that in the CRC (Art 3 (3)) with the omission of the clause indicating who is undertaking the ‘action concerning children’.
with disabilities under the CRPD is very closely linked to interpretation of their rights under the CRC.

In addition to Article 7, reference is also made to children in several other provisions of the CRPD. The notion of evolving capacities is derived from Articles 5 and 14 of the CRC and refers to ‘processes of maturation and learning whereby children progressively acquire knowledge, competencies and understanding… including their rights and how they can best be realised’). This principle acknowledges that parents and other caregivers need to continually adjust the levels of support and guidance that they give to children in response to their rapidly changing levels of physical, social and emotional levels of functioning. Evolving capacities should be seen as a positive process towards increasing autonomy of the child.

Under Article 23 (Respect for home and family), children with disabilities have the right to equal respect of family life. Parents and caregivers should be encouraged to offer child-centred guidance and direction to their children, through communication as well as example, such that the child is able to exercise their rights. An obligation linked to this principle is contained in Article 18(2), which provides that ‘children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents’.

3.4.3 Articles corresponding with components of the ‘essential package’

(a) Health

It has been noted that health is important in itself for people with disabilities, but in addition ‘it serves a more instrumental function in helping to prime people with disabilities for a life of active participation in the mainstream’. The CRPD provides for ‘enjoyment of the highest attainable standard of health without discrimination on the basis of disability’. This is another instance of the CRPD adopting a twin-track approach: on one hand, States must ensure that disabled persons have access to the same range of health services as the rest of the

262 General Comment No. 7 (2005) (n 32 above) para 17.
265 CRPD Art 25.
population and that these are rendered without discrimination on the basis of disability; on the other, there is an obligation to provide disabled adults and children with impairment-related health care and services, including rehabilitation.

Under the CRPD, there are a number of features required of health services. Services need to be available, viz they need to be of sufficient quantity within the State party and need to include measures that address underlying determinants of health. Health services also need to be accessible to everyone without discrimination. This refers to all aspects of accessibility as referred to in the previous section. In addition, health services must be acceptable, viz respectful of medical ethics and culturally appropriate. They must also be scientifically and medically appropriate and of good quality. It is essential that children with disabilities enjoy access to health services such as immunisations and nutritional supplementation without discrimination and as early as possible.

As part of the right to health for children with disabilities, States parties must support early identification and intervention:

“For children with disabilities, early intervention involving stimulation and interaction with parents soon after birth is essential to development... Early identification can also be promoted through the preparation of all family members, especially parents, to monitor their child’s developmental progress through the use of simple instruments, strengthened with a basic understanding of children’s capacities at different stages.”

There also needs to be a link with birth registration and procedures for following the progress of children identified with disabilities at an early age. In addition, services need to be community- and home-based, making them easy to access, with links established between early intervention services, pre-schools and schools to facilitate the smooth transition of the child. States parties should give effect to the right to health for children with disabilities through the provision of health services within the same public health system that provides for children without disabilities, at no cost whenever possible and as updated and modernised as

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266Lawson notes that this approach is taken by the CRPD in relation to physical access and access to information. Lawson A (2006-2007) (n 18 above).
267In interpreting the right to health in the CRPD, Schulze cites the CESCR Committee General Comment 14 Right to health para 11. Schulze M (2010) (n 1 above).
268This includes safe and potable drinking water, adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel and essential drugs.
possible. In addition, health professionals working with disabled children must be trained to
the highest standard of practice, based on a child-centred approach.

Given the high number of disabilities that are preventable, States must introduce and
strengthen prenatal care for children and ensure adequate quality of care during delivery.
There is also a need to provide post-natal healthcare services for mothers and infants in order
to nurture healthy family-child relationships, especially between a child and his or her mother,
or primary care-giver. There must be campaigns to inform parents and others caring for the
child about basic health care and nutrition. States parties must ensure access to clean drinking
water, adequate sanitation, immunisation, nutrition and medical services. There must also be
public education on child health and development, as well as preventable causes of disability
(such as Foetal Alcohol Syndrome).270

(b) Education

Article 24 enshrines the right to education for children with disabilities, which is to be
directed towards development of personality, talents and creativity as well as physical and
intellectual abilities, to the fullest potential. It closely resembles Article 28 of the CRC, but
goes further in requiring an inclusive education system i.e. education provided for all children
within the regular education system271. It is based on the view that inclusion is the most
effective means of combating discriminatory attitudes and achieving education for all.272 The
General Comment on children with disabilities makes reference to UNESCO’s Guidelines for
Inclusion273 which understands inclusion as focusing on identification and removal of barriers,
stressing that the earlier this is done the better:

‘Successful inclusive education experiences in numerous countries are also linked to the expansion of
early intervention programmes – guaranteeing an early start for children and their families. In addition,
important steps are now being taken to initiate inclusive education programmes at the pre-school
level.’274

Inclusive education nurtures a society that accepts and embraces disability, instead of fearing
it. ‘When children with and without disabilities grow up together and learn, side by side, in

270General Comment No. 9 (2007) (n 32 above) para 53 & 54. General Comment No. 7 (2005) (n 32 above) para
27.
271This is the definition contained in the Salamanca Declaration, adopted at the World Conference on Special
Needs Education. The Declaration calls on states to ensure that children with ‘special educational needs’ must
have access to regular schooling.
the same school, they develop a greater understanding and respect for each other.\textsuperscript{275} This theme is echoed in Article 8 (2)(b) on awareness-raising, in which the State is to undertake measures to foster ‘at all levels of the education system, including all children from an early age, an attitude of respect for the rights of children with disabilities’.

The CRPD provides for the right to education for persons with disabilities ‘without discrimination and on the basis of equal opportunity’ towards the goal of fully supported educational inclusion within the general education system. The only departure from inclusive education is contained in Article 24 (3), which takes cognisance of situations when the general education system cannot adequately meet the support needs of individual children with disabilities. Lawson cautions that although this is based on the principle of the best interests of the child – and not administrative convenience – this is a provision that States may interpret over-broadly and therefore it needs to be closely monitored in the implementation of the CRPD.\textsuperscript{276}

As with the right to health, interpretation of the right to education has drawn from the CESCR Committee, which identifies obligations of States in fulfilling the right of children to receive education.\textsuperscript{277} These include availability – that educational institutions providing quality education are available in sufficient quantity. They also need to be accessible i.e. available to everyone without discrimination, including being physically and economically accessible. Education services also need to be acceptable, with the form and substance, including relevant teaching methods, culturally appropriate and of good quality. Finally, education needs to be adaptable, i.e. flexible in order to adapt to the needs of changing societies.\textsuperscript{278}

Under Article 24, States are required to work towards the goal of full and effective inclusion, with children with disabilities attending regular local or neighbourhood schools.\textsuperscript{279} This requires provision to children with disabilities the support that they need within mainstream education as well as support necessary to ensure that in instances of non-inclusive settings, the same standards of academic and social development are upheld.\textsuperscript{280} It also requires the

\textsuperscript{275}UNHCHR (2007) (n 239 above) 83.
\textsuperscript{276}Lawson A (2006-2007) (n 18 above).
\textsuperscript{277}CESCR General Comment 13, the right to education Article 13 para 6.
\textsuperscript{278}Tomasevski K ‘Human rights obligations: making education available, accessible, acceptable and adaptable’ (2001).
\textsuperscript{279}Hernandez VT (2008) (n 208 above).
\textsuperscript{280}This should be read in conjunction with 3(c) where children are blind, deaf or deafblind are ensured of
provision of suitable equipment and teaching materials for children with disabilities and the adoption of teaching methods and curricula that address the needs of all children and promote acceptance of diversity. There needs to be training of teachers to teach in inclusive settings and the provision of a range of support systems that meet the diverse needs of all students to the greatest extent possible. There also needs to be facilitation of the learning of Braille and sign language so that children who are blind, deaf or deaf-blind can communicate and have access to education.  

The obligations of the State with regard to education under the CRPD are three-fold, viz provision of non-discriminatory access, reasonable accommodation and individualised support designed to nurture the full potential of the child. Although the CRPD does not make reference to pre-school education, it places an obligation on States to ensure ‘an inclusive education system at all levels’ directed towards the development of the personality, talents, creativity as well as physical and intellectual abilities of children to their fullest potential.

(c) Adequate standard of living and social protection

Article 28 of the CRPD provides for an adequate standard of living and social protection, which includes adequate food, clothing and housing and the continuous improvement of living conditions. States parties are to realise this right without discrimination on the basis of disability. Under this article, State parties are to recognise the connection between disability and poverty and to respond by ensuring access to social protection and poverty reduction programmes. Particular mention is made of families living in conditions of poverty, obliging States parties to assist with ‘disability-related expenses’ which include training, counselling, financial assistance and respite care. States are required to realise this right through a number of different measures including access to clean water, appropriate and affordable services and housing.

__education that is ‘delivered in the most appropriate languages and modes and means of communication for the individual and in environments which maximise academic and social development’.__

281UNHCHR (2007) (n 239 above) 84. This document provides some useful pointers in making education more inclusive, which could be equally applicable to ECD, viz link existing CBR networks to inclusive ECD networks, ensure reasonable accommodation is provided in child assessment, use existing specialised centres as resource centres and set up a reporting mechanism to monitor school registration and completion by children with disabilities.

282In the context of education, this includes changes to school buildings, the curriculum and culture that increase the ability of children with disabilities to engage in meaningful learning.


284Art 28 (2) (c).
Access to social security is an important component of ECD services for young children living in poverty. It is particularly important for children with disabilities whose disability-related expenses are high. Such support makes it possible for young children to access a range of services including habilitation and early learning opportunities.

In relation to young children with disabilities, this article requires that service providers acknowledge the processes by which children with disabilities mature, and offer guidance and support as necessary. Frequently children with disabilities are over-protected or treated as babies, thus preventing them from acquiring the necessary competencies for increasing autonomy. Parents and other caregivers need particular support in this regard. In addition, emphasis must be placed on registration of children with disabilities so that they are able to access the range of services to which they are entitled.

The CRPD\(^{285}\) also obliges States to prevent exploitation, violence and abuse by providing age-appropriate assistance and support as well as protection services that are age- and disability sensitive. States must put in place child-focused legislation and policies to ensure that instances of exploitation, violence and abuse against adults and children with disabilities are identified, investigated and, where appropriate, prosecuted.

(d) Support to families

Like the CRC, the CRPD acknowledges the family as the natural and fundamental group of society and as such is entitled to protection by the State.\(^{286}\) Further, it affirms the ‘equal right of all persons with disabilities to live in the community, with choices equal to others’.\(^{287}\) The CRPD provides for equal rights for children with disabilities with respect to family life,\(^{288}\) i.e. children with disabilities should receive the protection and assistance necessary to enable their families to contribute to the full enjoyment of their rights. States are required to take ‘effective and appropriate measures’ to ensure the realisation of the right of children to live with their families and to facilitate ‘the full inclusion and participation’ of disabled people in their communities.

\(^{285}\)CRPD Art 16 Freedom from exploitation, violence and abuse.  
\(^{286}\)CRPD Preamble para (x).  
\(^{287}\)CRPD Art 19.  
\(^{288}\)CRPD Art 23 Respect for home and the family.
As with other articles, the CRPD adopts a twin-track approach with regard to children with disabilities and their families. This includes ensuring that community services available to the general population are available for children with disabilities on the one hand, and on the other providing specific community support services necessary to facilitate the inclusion of disabled adults and children and to prevent their isolation.\(^{289}\)

In order to reduce the risk of the abandonment or hiding of disabled children, States have an obligation to ‘provide early and comprehensive information, services and support to children with disabilities and their families’.\(^{290}\) Parents of young children with disabilities require a great deal of support as well as information about their child’s impairment and how and where to access appropriate services, including habilitation and early learning programmes.\(^{291}\)

3.5 Other international tools to interpret children’s rights and the implications of a rights-based approach

Two types of international tools initiated by the UN and international development agencies have been described as ‘catalysts for equity’.\(^{292}\) These are human rights treaties, three of which have already been discussed, and economic and social development frameworks, which include the Millennium Development Goals (MDGs)\(^{293}\) and the goals of Education for All (EFA). Since its inception in 1990, EFA has recognised pre-primary education as an important component of basic education.\(^{294}\) As the first of the EFA goals, ‘early childhood care and education’ requires a strong and co-ordinated government response.\(^{295}\) The achievement of this goal is in line with MDG 2, which aims to provide universal primary education.

\(^{289}\)CRPD Art 19 (1)(b).

\(^{290}\)CRPD Art 23 (3).


\(^{293}\)The Millennium Declaration, adopted on 8 September 2000 contains eight key development goals - the Millennium Development Goals - which include basic goals for child survival and development. United Nations General Assembly resolution 55/2. The CRC Committee has consistently urged States to fulfil these goals. UNICEF (2007) (n 30 above).

\(^{294}\)This is reflected in the Dakar Framework for Action, of which Goal 1 calls for expanding and improving early childhood care and education for those who are most vulnerable and disadvantaged.

education by 2015. Described as a ‘powerful boost to [both] education and development’, ECD can contribute to the MDGs and goals of EFA through promoting young children’s physical, emotional and intellectual development, and supporting them in the transition to school, with improved enrolment and retention rates (EFA Goal 2).

The Implementation Guidelines for the CRC cite the General Assembly targets and strategies for education. As a step towards the goal of universal primary education, a number of targets have been set, including to ‘expand and improve comprehensive early childhood care and education, for girls and boys, especially for the most vulnerable and disadvantaged children’. The EFA Global Monitoring Report indicates that there have been very high returns from investing in good quality early childhood care and education, confirming that this has the potential to make a positive difference for children. The report cites a study illustrating that what children achieve in education is greatly shaped by what happens to them before they get to school.

Significantly, however, both the MDGs and the EFA strategy have been criticised for failing to take cognisance of children with disabilities, resulting in their invisibility in monitoring of implementation. However, this exclusion has been acknowledged and it is being increasingly recognised that goals for equity cannot be fully achieved without a specific focus on those who are most marginalised. In 2010 the UN General Assembly adopted the resolution ‘Realising the Millennium Development Goals for persons with disabilities’ in which it calls upon governments to enable adults and children with disabilities to ‘participate as agents and beneficiaries of development… in achieving the MDGs, by ensuring that programmes and policies namely on eradicating extreme poverty and hunger [and] achieving universal primary education… are inclusive of and accessible to persons with disabilities’. Further, the fundamental principle of EFA - that all children should have the opportunity to

learn - can be closely correlated with the fundamental principle of inclusive education, viz that all children should have the opportunity to learn together.\textsuperscript{301}

Based on the obligations emerging from the human rights treaties and frameworks considered, there are four priorities that emerge with respect to ECD for children with disabilities:\textsuperscript{302}

\subsection*{3.5.1 Disability awareness}

First, in order challenge discriminatory attitudes and practices towards children with disabilities, the State must undertake advocacy at all levels to promote the inclusion of children with disabilities within all initiatives related to ECD, both mainstream and targeted.\textsuperscript{303} A wide range of media and communication channels must be used to challenge stereotypes about disability and promote positive attitudes towards children with disabilities.

\subsection*{3.5.2 Access to mainstream ECD services}

The State is responsible for ensuring comprehensive and integrated services for young children (including care, health and education) that are regularly monitored to ensure high quality.\textsuperscript{304} Attention must be paid to addressing the ‘invisibility of children with disabilities’,\textsuperscript{305} by ensuring that mainstream ECD services are accessible for them. Based on high expectations for every child to reach his or her full potential, health, social services, child protection and early childhood education need to be inclusive of children with disabilities,\textsuperscript{306} with curricula and approaches that meet their educational, developmental, nutritional, health and individual needs. However, in expanding access and affordability, quality of care must not be compromised.\textsuperscript{307}


\textsuperscript{303}National Early Childhood Technical Assistance Centre ‘Evaluation summary of the Expanding Opportunities Interagency Inclusion Initiative’ (2011).

\textsuperscript{304}Britto PR et al. (2011) (n 292 above).

\textsuperscript{305}Richler D ‘Better Education for All when we're included too: 15 years since the Salamanca World Conference on Special Needs Education’ (2009).

\textsuperscript{306}DEC/NAEYC ‘Early childhood inclusion: a joint position statement of the Division for Early Childhood (DEC) and the National Association for the Education of Young Children (NAEYC)’ (2009).

3.5.3 Access to targeted ECD services

The State is also responsible for programmes and services which specifically target young children with disabilities and their families. These include early identification of children with developmental delays and/or disabilities, assessment and planning for early intervention and targeted service provision (e.g. therapy services and assistive devices). These need to be delivered in places that will not isolate the disabled child or their family.

Walker argues that early intervention programmes are more likely to be sustainable if they are integrated into an existing infrastructure (such as health); and linking ECD programmes with those targeting children identified through health and nutrition programmes is seen as an effective way to ensure that interventions reach those in greatest need. Of particular urgency is the need for expansion of early stimulation programmes, incorporating these as part of a core set of services for children from birth to three years of age. However, an ongoing challenge lies in the training, recruitment and employment of therapists and other professionals to provide these services. Different approaches, such as the ‘trans-disciplinary model,’ have been proposed as ways of ensuring most effective use of available human resources.

3.5.4 Participation of children with disabilities and their families

The State is obliged to involve children with disabilities and their families in all ECD activities including policy development, service design and programme monitoring. Children may require assistance in order to strengthen their capacity to participate meaningfully and to promote positive attitudes and actions of their peers.

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310 An example of what is possible, is the home programme described by Potterton et al., which was simple and easily implemented and recommended as standard practice at paediatric clinics in South Africa. Potterton J et al. ‘The effect of a basic home stimulation programme on the development of young children infected with HIV’ (2010) Developmental Medicine and Child Neurology 52(6) 47-61.
In addition, ‘the caregiving family must be seen as the constant in the child's life and the primary unit for family-centred service delivery’.\textsuperscript{313} The family must be treated with dignity and respect, with their active involvement encouraged and support rendered such that they are enabled to care for and bring up their children in ways that have a positive impact on the child, parent and family.\textsuperscript{314} This requires a commitment not only to 'leave no child behind' but to 'leave no family behind’.\textsuperscript{315} Attention also needs to building of strong partnerships between parents and professionals, towards ensuring that ECD services are relevant to the needs of both the child and his or her family.\textsuperscript{316}

\textbf{3.6 Conclusion}

International human rights treaties have been described as ‘an engine of change’. Not only do they embody a vision towards which States parties can aspire, the process by which States report on progress in implementation ensures accountability not only to its own citizens, but also to the international community.

Review and analysis of three particular treaties with respect to ECD for children with disabilities indicates a great deal of synchronicity between them. First, in relation to the general context of children with disabilities, all the treaties prohibit discrimination. But they also go further, in placing on States the obligation to provide conditions for dignity and self-reliance, with the care and assistance that they require. Consideration of the best interests of children with disabilities includes providing them with opportunities to become successful adults.

Secondly, the treaties contain important directives relating to the different components of ECD. They adopt the ‘twin-track’ approach, in which services for young children are made accessible and appropriate for those with disabilities and in addition, specific services targeting children with disabilities are provided. Within the health sector early identification, early intervention and habilitation and rehabilitation are critical to promoting the

\textsuperscript{313}Bruder MB ‘Early childhood intervention: a promise to children and families for their future’ (2010) \textit{Exceptional Children} 76(3) 341.
\textsuperscript{314}Bruder MB (2010) (n 313 above) 341.
\textsuperscript{316}WHO & UNICEF (n 302 above).
independence of young children with disabilities. Recognising that learning begins at birth, the treaties emphasise the need to focus on the purpose of education, with the CRPD placing an obligation for the State to provide an inclusive education system. Inclusive early learning opportunities not only provide stimulation and learning for children with disabilities, they provide the possibility for participation and play. The ‘A4’ framework is very useful in that could be applied to situations of early learning and development for young children with disabilities. Further, given the high costs associated with disability-related expenses, the State is responsible for providing an adequate standard of living for young children with disabilities, where their parents are unable to do so. Finally, provision of support services for parents of young children has been found to be an important preventive measure against violence, abuse and neglect.

The chapter that follows takes these themes forward, as it explores the general obligations on the State under the three selected treaties, as well as those emerging from its own Constitution with respect to ECD for children with disabilities.
CHAPTER 4: SOUTH AFRICAN STATE OBLIGATIONS FOR EARLY CHILDHOOD DEVELOPMENT UNDER INTERNATIONAL LAW AND THE CONSTITUTION

4.1 Introduction
As outlined in the Chapter 1, the central purpose of this study is to establish what is required of the South African government in order to comply with its obligations under selected international human rights treaties and the Constitution, with respect to ECD for children with disabilities. The nature, content and purposes of ECD for children with disabilities have been clarified. I have also reviewed the CRC, African Charter and CRPD and associated interpretive texts to identify provisions relating generally to young children with disabilities, and well as those corresponding to the components of the ‘essential package’ of ECD services.

Attention now turns to establishing the general obligations of the State, which emerge from two sources. First, there are obligations imposed on the State as a signatory of the CRC, African Charter and the CRPD, which complement the duties associated with specific rights identified in the previous chapter. But not only does (binding and non-binding) international law have implications for State obligations, it also has implications for interpretation of the South African Constitution. Secondly, therefore, this chapter identifies obligations imposed on the State by the Constitution. This begins with an overview of children’s rights in the Constitution and a summary of several court rulings that have a bearing on how they have been interpreted. Thereafter, provisions of the Constitution, as they relate to ECD and children with disabilities, are reviewed towards establishing the duties of State in this regard.

4.2 International law
What is required from States in ‘making reality of the human rights of children’? The following discussion focuses on general State obligations arising from the CRC, the African Charter and the CRPD with respect to ECD for children with disabilities.

1Committee on the Rights of the Child General Comment No. 5: General measures of implementation
4.2.1 General State obligations under the CRC

There are four general principles that underpin implementation of the CRC. These are the obligation on the State to respect the rights of every child without discrimination, to view the best interests of the child as a primary consideration in all actions concerning children, to ensure that implementation measures are aimed at achieving the optimal survival and development of all children, and to respect the child’s right to express their views and have them taken into consideration. While it is the State that bears primary responsibility for implementation, this requires engagement with all sectors of society, including children themselves. Article 4 describes the process by which States parties are to take action to ensure that all rights contained in the CRC are realised for all children within their jurisdiction.

(a) Legislative, administrative and other measures

Under the CRC, there is an obligation on States to conduct a comprehensive review of all domestic legislation and policies to ensure compliance. The CRC Committee has emphasised that this treaty reflects the interdependence and indivisibility of all human rights, and that economic, social and cultural rights must be justiciable. In giving effect to its provisions, therefore, domestic law must set out entitlements ‘in sufficient detail to enable remedies for non-compliance to be effective’. While the Committee has welcomed the development of consolidated legislation on children, it emphasises that all relevant sectoral laws (on education, health etc) must also reflect the principles and standards of the CRC. Further, States need to review policies regularly to ensure that they are rights-based and conform to international human rights standards. There also needs to be speedy promulgation of amendments where
necessary and adequate provision made for effective implementation.\textsuperscript{7}

There are a number of important administrative measures required for effective implementation of the CRC. States parties are required to develop a comprehensive national strategy based on the CRC, which identifies and prioritises marginalised and disadvantaged groups of children. It must include a description of a sustainable process for realising the rights of children, statements of policy and principle, and identify achievable targets for economic, social, cultural and civil and political rights for children. It must also allocate the necessary human and financial resources,\textsuperscript{8} with effective cross-sectoral co-ordination.\textsuperscript{9}

The CRC also requires States to set and monitor standards of services provided for children,\textsuperscript{10} including services which are arranged by parents themselves (such as child-minding).\textsuperscript{11} Attention must be paid to suitability of staff, which extends to ‘appropriate training and qualifications of officials and personnel of childcare institutions’.\textsuperscript{12} Further, States parties are required to report on measures they have taken to ensure adequate training of those responsible for the care of children with disabilities, including at family and community levels.\textsuperscript{13}

(b) Progressive realisation to the maximum extent of available resources

Because lack of resources (financial and other) can limit full and immediate realisation of rights, and socio-economic rights will generally not be able to be achieved in a short space of time,\textsuperscript{14} the notion of 'progressive realisation' of such rights was introduced.\textsuperscript{15} But the CRC Committee has emphasised that, while the realisation

\textsuperscript{8}General Comment No. 5 (2003) (n 1 above).
\textsuperscript{9}Rishmawi M (2006) (n 7 above).
\textsuperscript{10}Art 3(3).
\textsuperscript{12}Freeman M (1992) (n 11 above) 72.
\textsuperscript{13}CRC 'Treaty-specific guidelines' (2010) (n 2 above).
\textsuperscript{14}Detrick S A commentary on the United Nations Convention on the Rights of the Child (1999) 103. This was also provided for in ICESCR Article 2 (1).
\textsuperscript{15}Maastricht Guidelines (2007) para 8. Note this is not specific to the CRC - the Maastricht Guidelines state that although realisation of most rights can only be achieved progressively, this does not alter the legal obligation of States to take certain steps immediately and others as soon as possible. The burden is on the State to indicate that it is making measurable progress towards the full realisation of specified rights. Despite these provisions, it is recognised that the quality of children’s social and economic rights is dependent upon the resources to which they have access. Indeed, van Beuren points out that
of economic, social and cultural rights is progressive, the obligation to take steps is immediate.16 Progressive realisation should therefore not be interpreted ‘to imply that a State is allowed to defer indefinitely its efforts to ensure full realisation of rights’.17

Even where the resources available are inadequate, States must ensure the widest possible enjoyment of the particular right, especially with respect to the most disadvantaged children, i.e. those experiencing non-realisation of their rights.18 Further, States need to be able to demonstrate that they have implemented 'to the maximum extent of their available resources' and where necessary, have sought international cooperation.19 The CRC Committee has urged governments not to allocate responsibility for realising children's rights to NGOs, without providing them with the necessary resources.

Central to the protection and fulfilment of children’s socio-economic rights is that States ensure ‘equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income…’20 This implies that economic and social reforms be carried out towards eradicating social injustice, for ‘[u]ltimately the question of rights for children resolves into questions of distributive justice’.21

(c) Monitoring implementation
Assessing the extent to which it is fulfilling children’s socio-economic rights ‘to the maximum extent of its available resources’ is only possible if States are able to identify the proportion of the national budget allocated to the social sector, and within that, allocations made to children directly and indirectly.22 In essence, children in
general and children with disabilities in particular must be made visible in budgets.

The CRC Committee requires collection of sufficient and reliable data on children, which is disaggregated,\(^{23}\) such that it enables identification of discrimination and/or disparities in the realisation of rights.\(^{24}\) The ‘Guidelines for Periodic Reports’ require use of indicators to show what proportion of the budget is allocated to social services for children, and what measures are being taken to decrease disparities between different groups, including allocation of financial and human resources.\(^{25}\)

Specifically in relation to ECD services, the ‘Guidelines’ require details on allocation of resources for social services in relation to total expenditure for family and/or child allowances or conditional cash transfers, primary health services and ECD (care and education).\(^{26}\) In reporting on education, leisure and cultural activities, States must provide disaggregated data on the percentage of children who attend preschool education and other early education facilities.\(^{27}\) In reporting on family environment and alternative care, States must indicate the number of services and programmes aimed at providing support to parents in their child-rearing responsibilities, the number of childcare services and facilities and the percentage of children who have access to them.\(^{28}\) Further, to ascertain if the State is giving primary consideration to the best interests of the child through legislation, policy development and implementation, there needs to be a continuous process of child impact assessment and evaluation. This would be directed towards predicting the value of a proposed law and evaluating the impact of its implementation.\(^{29}\)

Development of indicators related to all rights contained in the CRC\(^{30}\) is a particular challenge in relation to children with disabilities, given the need for these to reflect the different dimensions of disability and the various levels of well-being, including individual child status, the family and household environment, the neighbourhood

\(^{23}\)Data is to be disaggregated by indicators including age, gender, location in urban/rural area, ethnicity and disability.
\(^{24}\)Rishmawi M (2006) (n 7 above).
\(^{26}\)Annex para 3.
\(^{27}\)Annex para 22.
\(^{28}\)Annex para 11.
\(^{29}\)General Comment No. 5 (2003) (n 1 above) para 45.
\(^{30}\)General Comment No. 5 (n 1 above) para 48.
environment and access to services.31

(d) Collaboration with civil society
The CRC requires the State to work in collaboration with civil society in realising children’s rights. This is important in supporting the development of young children with disabilities, and there need to be partnerships established not only with parent organisations, but also with disability-related NGOs.

4.2.2 General State obligations under the African Charter
As discussed in the previous chapter, the African Charter is similar in many respects to the CRC, including in its provisions for non-discrimination, the right to survival and development and consideration of the best interests of the child.32 Article 1 sets out the obligations of States parties.

Significantly, the Charter does not have a specific provision elaborating the nature of State obligations in respect of economic, social or cultural rights. Indeed, the wording of Article 1 (obligation of States parties) does not directly include language relating to 'maximum available resources' or 'progressive realisation' of specific rights.33

4.2.3 General State obligations under the CRPD
The CRPD also sets out the general obligations of the State, which are closely linked to its general principles.34 Respect for dignity, non-discrimination, inclusion, participation and accessibility are to be the basis for legislative, administrative and other measures of implementation.35 The extent to which the CRPD is implemented depends on whether States acknowledge ‘the contradiction between [our] universal

32Arts 3, 4 and 5 respectively.
33Rishmawi M (2006) (n 7 above) 14. This author notes, however, that the African Commission on Human and People's Rights has indicated its recognition that the fulfillment of obligations regarding social and economic rights depends to a great extent on the availability of resources. In Art 5(2) the Charter provides that the State ‘shall ensure, to the maximum extent possible, the survival, protection and development of the child’.
34Arts 4 and 3 respectively.
human rights and [our] practice on disability, and embrace its ‘domestic institutional architecture for change’. Indeed, the value of the CRPD is its potential to contribute to a ‘new form of disability politics of engagement’ towards improving the lives of adults and children with disabilities.

(a) Legislative, administrative and other measures

Under the CRPD, the State must adopt legislation where necessary, repeal inconsistent legislation, and mainstream disability into policy formulation and programming towards the realisation of all human rights by persons with disabilities. This implies that all policies and programmes relating to ECD need to take cognisance of children with disabilities and how their rights can be ensured and promoted.

The CRPD makes it clear that realising rights of persons with disabilities is not limited to the provision of disability-related services, but includes the adoption of measures to change attitudes and practices that stigmatise and marginalise people with disabilities. As already discussed in the previous chapter (Section 3.4.2), the State is to take action to eliminate discriminatory practices against persons with disabilities on the part of any person, organisation or private enterprise. There need to be mechanisms in place to guard against discrimination on the basis of disability within services targeting young children, including those run by the private sector.

It is also necessary to put in place legislation and policies that remove barriers to the exercising of rights, provide programmes, awareness and social support to change the way society operates, in order to give adults and children with disabilities opportunities to participate fully. States have the responsibility to take positive steps

39This is reflected in the Preamble of the CRPD at (g) ‘emphasising the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development’.
40Schulze sees this as including the adoption of measures to ensure that privatisation of the health sector does not undermine the availability, accessibility, acceptability and quality of health facilities, goods and services. Schulze M (2010) (n 35 above).
to promote the development and availability of universal design and assistive technology. Principles of universal design should be incorporated in ECD services, such that they are able to cater for the diversity of children. Indeed, it has been argued previously that the early childhood sector lends itself to inclusive practices based on the principles of universal design.\textsuperscript{42} The State also has an obligation to promote research and development of assistive technology, giving priority to technology that is affordable. This includes assistive technology and simple adaptations that could be made to support learning and development of young children with disabilities.

(b) Progressive realisation to the maximum of available resources

A major challenge facing adults and children with disability is the fact that enjoyment of sectoral rights is often dependent upon resource allocations. Indeed, changing the social, political and legal environments so that people with disabilities will get more resources has been a major objective of the disability rights movement.\textsuperscript{43} As with other human rights instruments, the CRPD sets out the principle of progressive realisation for economic, social and cultural rights to the maximum of the States available resources.\textsuperscript{44}

The notion of progressive realisation genuflects to an inescapable reality that resources are finite and some change take time. Yet this nod towards reality in the Convention does not rob the concept of some core meaning. There needs to be some positive dynamic in place - it must be measurable and it should lead to positive results within a reasonable time frame.\textsuperscript{45}

Even in a situation of economic recession, progressive realisation must maintain a minimum level of provision to ensure human dignity and autonomy, and avoid the tendency to cut back first against the weakest.\textsuperscript{46} States must therefore take positive action to reduce structural disadvantages, giving ‘appropriate preferential treatment’ to adults and children with disabilities, towards their full participation and equality.\textsuperscript{47}

\textsuperscript{42}See Chapter 2 section 2.3.2.


\textsuperscript{44}Art 4(2).

\textsuperscript{45}Quinn G (2009) (n 36 above) 44.

\textsuperscript{46}Quinn G (2009) (n 36 above).

\textsuperscript{47}Committee on Economic, Social and Cultural Rights General Comment No. 5: Persons with disabilities (1994) para 9.
(c) Monitoring implementation
The CRPD\textsuperscript{48} describes the monitoring and reporting process required of States parties. Schulze notes that the challenge associated with respect to monitoring the rights of persons with disabilities is ‘who gets to define the factors or statistical indicators for collecting data’, adding that the risk of inaccuracy is high, depending on whether the definition of disability is wide or narrow. Accuracy is also compromised by societal attitudes which may make parents reluctant to identify their child as being disabled.\textsuperscript{49}

In the previous chapter, reference was made to adopting a ‘twin-track’ approach with respect to services for children with disabilities, and the Office of the High Commissioner on Human Rights recommends using it for monitoring the CRPD.\textsuperscript{50} States must collect statistics and data collection in order to formulate and implement policies which give effect to the CRPD.\textsuperscript{51} Such information is to be disaggregated as appropriate and used to assess progress in implementation, as well as to identify and address barriers faced by persons with disabilities in the exercising of their rights. These statistics must be disseminated and accessible to persons with disabilities and their representative organisations.

(d) Consultation with persons with disabilities and their representative organisations
The CRPD emphasises the need to recognise the contributions that disabled adults and children have made (and will make) to society, and affirms that promotion of their rights towards full participation will lead not only to a sense of belonging but also to development of society and the eradication of poverty.\textsuperscript{52} There is an obligation on States to actively consult persons with disabilities and their representative organisations, and to establish mechanisms involving them in monitoring compliance.

\textsuperscript{48}Articles 31-36.
\textsuperscript{49}Schulze M (2010) (n 35 above) 172.
\textsuperscript{50}UNHCHR (2010) (n 41 above).
\textsuperscript{51}Bickenbach builds a convincing argument in support of using the International Classification of Functioning, Disability and Health (ICF) (discussed in Chapter 2) as a tool for monitoring implementation of the CRPD, through the provision of (cross-country) comparable indicators linked to available data sources. In this way it would be possible to link rights, goals and sub-goals (contained in the CRPD) with targets and measurable outcomes. Bickenbach J ‘Monitoring the United Nation's Convention on the Rights of Persons with Disabilities: data and the International Classification of Functioning, Disability and Health’ (2011) \textit{BMC Public Health} 11 (Supplement 4) S8.
\textsuperscript{52}CRPD Preamble (m)
with the provisions of the CRPD. This involvement is not seen as an optional extra, but as a ‘key tool to achieve conformity with the Convention’. This obligation is supplemented by the duty (imposed on States by Article 8) to raise awareness of the contribution and potential of disabled people, counter negative stereotypes and promote positive images of disability. In the context of young children with disabilities, engaging with parents of children with disabilities and their representative organisations is critical for the development of effective policies and programmes.

(e) International co-operation

The CRPD also provides for international co-operation to support implementation, through capacity-building and exchange and sharing of information, experiences, training programmes and best practices. International organisations such as Inclusion International, UNESCO and Save the Children have been very active in promoting inclusive education, and tools and resources have been developed around the MDGs and the Education for All initiative. There is a need to extend these into the arena of ECD for young children with disabilities. The documentation and analysis of examples of good practice would assist States to identify practices that could be replicated and scaled up, as well as providing a framework to guide planning in the most effective use of available resources.

4.2.4 International law and interpretation of the Constitution

The Committee on the Rights of the Child, the African Charter Committee of Experts and the Committee on the Rights of Persons with Disabilities monitor the implementation of their respective treaties. As supervisory bodies, they also adopt General Comments which, although not strictly binding under international law, clarify the meaning of specific rights and the duties imposed by them. These are

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53 Article 4(3) obliges states to ‘closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations’ in the implementation of the CRPD and other policies impacting on adults and children with disabilities. Article 33(3) provides for persons with disabilities to be involved in monitoring implementation.

54 Schulze M (2010) (n 35 above). See also Committee on the Rights of the Child General Comment 12 Right of the Child to be heard (2009).


56 CRPD Article 32(1)(b).

57 As discussed in Chapter 3.

58 Examples of good practice are documented in: Save the Children ‘Addressing exclusion and invisibility in early childhood years: report on promising practices in working with young children in South Africa’ (2010).
complementary and should be read together. For example, the General Comment on early childhood\textsuperscript{59} and the General Comment on children with disabilities\textsuperscript{60} both have relevance for ECD and children with disabilities.

As part of their obligations under the different treaties, State parties undertake to submit periodic reports, describing what has been done to implement the treaty. These are considered by the respective supervisory bodies, after which Concluding Observations are issued, pointing out where the country has made adequate progress in implementing the treaty, and where implementation is weak. Although theoretically this process provides a means of accountability, there is the danger of States failing to adhere to reporting requirements and/or not giving attention to the recommendations of the Committee. A further weakness is the absence (until recently) of a complaints system.\textsuperscript{61} Notwithstanding these limitations, if international law on children's rights is to be enforced, it is critical to strengthen the powers of domestic Courts under the Constitution.\textsuperscript{62}

What is the relevance of (binding and non-binding) international law for interpreting the rights of children in the Constitution? First, as a State party to these conventions, the South African government is under the obligation to give effect to their provisions. Secondly, the drafters of the Bill of Rights included key concepts contained in the CRC and the African Charter.\textsuperscript{63} Thirdly, the Constitution itself

\textsuperscript{59}Committee on the Rights of the Child General Comment No. 7: Implementing child rights in early childhood (2005).
\textsuperscript{60}Committee on the Rights of the Child General Comment No. 9: The rights of children with disabilities’ (2007).
\textsuperscript{61}On 19 December 2011 the UN General Assembly adopted the Third Optional Protocol to the CRC which was opened for signing in February 2012. It provides for a communications procedure such that individual children, groups of children or their representatives may submit complaints directly to the CRC committee with respect to violations of their civil, political, economic, social or cultural rights by the State party. Both the African Charter and the Optional Protocol to the CRPD also provide for complaints mechanisms. Indeed, the first decision under the Charter traversed socio-economic rights, as the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) found Kenya to be in violation of its obligations under the African Charter by not granting Nubian children nationality at birth. ACERWC ‘communication 002/2009 HRDA and OSJI (on behalf of children of Nubian descent in Kenya) v Kenya’. www.acerwc.org Accessed September 2013.
requires Courts to consider international law in their deliberations. Finally, Courts should consider international law in order to ensure that treaties that the State has ratified are ‘more than words on paper’. However, a number of flaws have been identified in how the Courts have used and interpreted international and regional human rights law. These include the lack of detailed consideration of binding law, which has not been given as much attention as non-binding law. That the Courts have drawn from non-binding instruments raises the challenge for child law litigators and child rights activists to be informed of developments at the international level, so that they can alert Courts to ‘newly developed rules, guidelines and standards where they can supplement domestic legal provisions’.

4.3. Children’s rights in the Constitution

4.3.1 Introduction

The Constitution of South Africa is widely recognised as being transformative in nature, heralding a ‘radically reformed constitutional order that clearly inclines towards an expansive universe of equality, recognises a humanity that is diverse but equal in worth and dignity, inscribes justiciable second-generation rights and horizontality, requires participatory governance, and is historically conscious’. As noted earlier, provisions for children’s rights in the Constitution (s28) are based on the CRC and the African Charter. And because the child is seen as a beneficiary of rights rather than a passive recipient of needs or welfare, this provision sets out an approach to child development based on a child rights framework.

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64Constitution of the Republic of South Africa Act 108 of 1996 s39(1)(b). The Constitution of the country makes reference to the significance of international agreements, stating that ‘Any international agreement becomes law in the Republic when it is enacted into law by national legislation’ s231(4).
67Sloth-Nielsen J & Kruuse H (2013) (n 66 above) 27. Generally, the legal representatives of the parties draw the attention of courts to these issues, because there is a limit to the extent to which courts are able to do so, particularly at the lower levels such as Magistrates Courts and High Courts. This is why child law litigators have made such a valuable contribution; they have found cases which illustrate issues and taken them up at Constitutional Court level.
be broadly categorised as those relating to protection and those relating to autonomy.  

4.3.2 Interpretation of children’s rights

Under the Constitution (s7(2)), the State must ‘respect, protect, promote and fulfil the rights in the Bill of Rights’.  
Notably, in fulfilling rights, the State must take positive steps to assist adults and children to gain access to their socio-economic rights and there are internal qualifiers that apply to the positive duties contained in s26(2) and s27(2).  
Significantly, children's rights and the right to basic education differ from other socio-economic rights in two respects, viz they are phrased more directly (not ‘access to’, but ‘to’) and they do not contain any internal limitation. However, s28 is not the only section that confers rights on children, as the rights of ‘everyone’ apply also to children. Children's socio-economic rights under s28(1)(c) and s29(1)(a) are therefore augmented by general socio-economic rights in the Bill of Rights.  
Indeed, Skelton observes that in cases involving children’s rights, the Courts have largely avoided basing their decisions on s28(1)(c), but instead have focused on the rights applicable to everyone in ss26 and 27, with s28(1)(c) (only) adding weight to these provisions.

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70 Constitution (n 64 above) s28(1) and s28(2) respectively. Skelton emphasises that interpretation of children's constitutional rights must achieve a balance between the child's need for autonomy and their need for protection. During the process of childhood, children develop autonomy, through maturation, socialisation and guidance and thus parents have a degree of latitude in raising their children, but at the same time, the explicit inclusion of protection in the Constitution means that children are not seen merely as extensions of their parents. Skelton A ‘Children’ in Currie I & de Waal J (eds) The Bill of Rights Handbook 6 ed. (2013) ch 27.

71 The requirements of each of these are defined in Section 3.1.2. The minimum level of justiciability places negative obligations on the State to ensure non interference with ‘someone who is doing what they have a constitutional right to do … [and] not acting in ways that infringe socio-economic rights directly,’ also referred to as ‘deliberately retrogressive measures’. The requirement that no one may diminish or interfere with enjoyment of a right applies not only to the State, but also to individuals and private entities. Brickhill J & Ferreira N ‘Socio-economic rights’ in Currie I & de Waal J (eds) The Bill of Rights Handbook 6 ed. (2013) 568.

72 These are with respect to the right to have access to adequate housing (s26) and the right to have access to health care, food water and social security (s27).

73 Skelton A (2013) (n 70 above) 600. Constitutional provisions for socio-economic rights can be broadly placed into two categories. The first includes the rights of ‘everyone’ to access to housing (s26) and health care, food, water and social security (s27) and further education (s29 (1)(b), which are qualified by available resources and progressive realisation. The second category includes ‘basic’ rights, including children’s socio-economic rights (s28 (1)(c), basic education and adult basic education (s29(1)(a)). In Governing Body of the Juma Musjid Primary School v Essay NO 2011 (8) BCLR 761 (CC), the Court interpreted the right to basic education (in s29(1)(a)) as containing no internal qualifiers. This is also the case with s28(1)(c), but Proudlock has noted that although the Courts have adopted a similar approach with respect to children not living with their parents, they have taken a ‘more nuanced procedural approach’ with respect to children in the care of their parents. Proudlock P ‘Children's socio-economic rights’ in Boezaart T (ed) Child law in South Africa (2009) ch 12.

74 Skelton A (2013) (n 70 above). The judgment at Grootboom held that children's rights in s28 needed
There has been criticism that the Courts have not effectively defined the scope and content of children's socio-economic rights. Some have argued that ‘the full obligations of the State ought to be set out by the Court so that the State can plan and monitor accordingly’.75 But the approach of the Court has been not to focus on the content of a particular right, but rather to assess whether the State has a ‘reasonable’ plan to implement that right.76 The test for compliance with its positive duties is whether the State's efforts to realise the rights are reasonable in the light of the internal qualifiers. This is a three-fold requirement, viz reasonable legislative and other measures, towards achieving progressive realisation of the right and within available resources. The Court rulings cited here show how children’s socio-economic rights in the Constitution have been interpreted, and thus have a bearing on the right of children with disabilities to ECD.77

(a) Grootboom – access to housing

The Grootboom78 case focused on the right of access to adequate housing. A group of adults and children moved from the squalid conditions of an informal settlement onto private land, but were evicted and their housing materials destroyed. The Constitutional Court held that the government’s housing programme did not comply with the obligation to take reasonable steps to fulfil the right of the applicants to have access to adequate housing. After assessing the State’s housing programme under s26, the Court considered the applicability of the right of children to shelter under to be seen together with ss25, 26 and 27 of the Constitution, which oblige the State to take 'reasonable legislative and other measures, within its available resources' to achieve. Building on this, the Court's approach to progressive realisation in TAC was to give attention to different groups of applicants, holding that the State was obliged to realise progressively the particular rights and accommodate the most needy. Government of the Republic of South Africa and Others v Grootboom and Others, 2000 (11) BCLR 1169 (CC) para 43. Minister of Health v Treatment Action Campaign (2) 2002 (5) SA 721 (CC) para 68. These cases are discussed in more detail later in this section.

75Rosa S & Dutschke M (2006) (n 6 5 above). Others have also criticised the Constitutional Court for its failure to give content to the meaning of socio-economic rights and not holding government accountable for the delivery of a minimum core of services, despite the wealth of international law jurisdiction and expert evidence which is available. Proudlock P & Mahery P 'Children's rights to health’ in Kibel M et al. (eds) South African Child Gauge (2010).
77The Constitutional Court is the highest court in the country and its judgments bind all other courts. To be binding, the principle articulated must be germane to the decision of the matter. The next highest court is the Supreme Court of Appeal, whose decisions are binding on all courts other than the Constitutional Court. The decisions of High Courts of each provincial division are binding on all courts in that division, such as Magistrates Courts.
78Grootboom (n 74 above).
s28(1)(c), holding that it must be read together with s28(1)(b). The Court’s rationale was that parents have the primary obligation to fulfil the rights of children to ‘basic nutrition, shelter, basic health care services and social services’, with the State liable only when children lack a family environment. The overarching duty on the State is therefore to provide the legal and administrative infrastructure required to ensure that children are given the necessary protection. In its ruling in Grootboom, the Court therefore refuted the view that s28(1)(c) created separate or distinct entitlements for children, indicating its reluctance to interpret socio-economic rights in the Constitution as granting individual claims for material assistance from the State. Based on this approach, the fulfilment of children's socio-economic rights is achieved through the upliftment of parents generally in order to benefit children. The ruling in Grootboom thus 'put a damper on the development of constitutional arguments privileging children's claims'.

Although there are binding obligations on the State under the CRC and African Charter with respect to children’s socio-economic rights, the Court did not consider the provisions of either of these in interpreting the State’s obligations under s28(1)(c). Further, the Court’s reasoning in Grootboom has been criticised for its failure to affirm that the State has a direct duty to assist families living in poverty to meet the socio-economic needs of their children. Characterising the State’s primary duty in terms of s28(1)(c) ‘as the enforcement and regulation of parents common law and statutory duties towards their children’, the Court served to reinforce the traditional dichotomy between the public and private spheres with the assumption that welfare services for children will be provided by the family. Liebenberg has noted that this traditional liberal discourse has tended to shield the institution of the family from State intervention in protecting children and providing for their socio-economic

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79Right to basic nutrition, shelter, basic health care and social services.
80Right to family care.
needs, thereby undermining the realisation of children's rights.\(^88\)

In *Grootboom* the Court identified certain criteria that the State policy or programme would have to meet in order for it to be reasonable, thus establishing a standard of review to assess whether State measures are reasonable in progressively facilitating access to socio-economic rights.\(^89\)

(b) Treatment Action Campaign – access to health care

This case involved a challenge to the Department of Health by the Treatment Action Campaign (TAC) on the limited nature of government measures historically used to prevent mother-to-child transmission of HIV. Both the High Court and the Constitutional Court applied the reasonableness test developed in *Grootboom*, finding that the government’s programme did not comply with the right of access to health services and the duty to take reasonable measures under s27(2) of the Constitution, because they excluded and harmed a particularly vulnerable group.\(^90\)

In this case, the Court clarified its position regarding the government’s duty to provide for children’s socio-economic rights, which did not only arise when children were physically separated from their families (as was suggested by the *Grootboom* ruling). Instead, the State has a direct duty to provide for socio-economic rights contained in s28(1)(c) when parents are too poor to provide for their basic needs and where the provision of these services is a State function (e.g. education and health services).\(^91\) Further, a feature of the reasonableness test is that government programmes to improve access to socio-economic rights must make provision for those whose situation is urgent and who will suffer serious harm if their needs are not met.\(^92\) Based on the urgency of the need, such programmes must be implemented without delay.

\(^{88}\)Liebenberg S (2010) (n 85 above).

\(^{89}\)These criteria are summarised in Section 4.4.2 of this chapter.

\(^{90}\)TAC (2002) (n 74 above) para 18.


\(^{92}\)Liebenberg S (2004) (n 91 above).
A new measure of reasonableness was developed by the Constitutional Court in this case, viz that the government must be transparent and allow for the participation of a range of stakeholders in the implementation of the programme.93

(c) Khosa – access to social assistance
In this case, a group of permanent residents challenged the constitutionality of certain provisions of the Social Assistance Act of 1992 and the Welfare Laws Amendment Act 106 of 1997, arguing that they discriminated against permanent residents. The Constitutional Court ruled that permanent residents are a vulnerable group and that their exclusion from access to a social security scheme was not consistent with the Constitution (s27). Further, excluding children from access to grants on the basis of their parents’ nationality was found to constitute unfair discrimination and a violation of their right to social security under s28(1)(c). The Court further added to the reasonableness test by emphasising that the purpose of social security is to ensure that basic needs are met, thus recognising the fundamental dignity of people.94

(d) NAWONGO – funding of NPOs
This case related to difficulties experienced by non-profit organisations (NPOs)95 with respect to State funding for services rendered to vulnerable people. The National Association of Welfare Organisations and Non-Governmental Organisations (NAWONGO) accused the State of delays in payment of funding that had been allocated to them, as well as inadequate funding to enable the NPOs to provide critical social services to vulnerable children.96 The NPOs application was not only that the State should pay them immediately transfers that had been allocated, but also that there should be a review of State policies with respect to NPO funding. In its ruling, the Free State High Court noted that NPOs providing care to vulnerable children as well as statutory services fulfil constitutional and statutory obligations of the State. That these functions are being provided by NPOs does not relieve the State of its Constitutional obligations to do so. The Court held that the approach of the State's

94Khosa v Minister of Social Development; Mahlaule v Minister of Social Development, 2004 (6) SA 505 (CC) para 52.
95Note that in this context, the terms NPOs and NGOs are used interchangeably to refer to organisations of civil society.
financing policies in funding of private welfare organisations providing services on behalf of the State, were fundamentally flawed, as 'the policy fails to identify the Department of Social Development as the primary locus of the constitutional obligation to provide social welfare services'. 97

(e) Western Cape Forum for Intellectual Disability – education for children with disabilities

In this case, the Western Cape Forum for Intellectual Disabilities (representing a number of NGOs) accused the State of failing to provide education for children with severe and profound intellectual disabilities. 98 These children were deemed ineligible for special schools and were being provided with a minimal subsidy through the Department of Health (and not the Department of Education) for ‘Special Care Centres’. The applicants argued that this subsidy was much lower than that provided for children with less severe disabilities, and made no provision for their educational requirements. They sought to establish that the State had breached the right to education 99 in two ways. In a positive sense, by failing to provide the affected children with school facilities for basic education, and in a negative sense, by excluding them from admission into special (or other) schools. Further, the discriminatory treatment of children with severe and profound intellectual disabilities on the part of the State was seen to be a violation of their Constitutional rights to equality, dignity, and protection from neglect or degradation. 100

Two main defences were raised by the State as respondent. First, they argued that ‘no amount of education will be beneficial for them [children with severe and profound intellectual disabilities] and they will be dependent on the imparting of life skills to them by their parents’. 101 Secondly, they argued that the State has limited resources and thus has to make difficult policy choices regarding distribution of available

98 Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa 2011 5 SA 87 (WCC). The judgment, unless overruled, binds all courts in the Western Cape and is persuasive for courts (including High Courts) outside the Western Cape other than the Supreme Court of Appeal and the Constitutional Court.
99 Constitution (n 64 above) s29(1)(a).
100 Constitution (n 64 above) s9, s10 and s28(1)(d) respectively.
101 NAWONGO (n 96 above) para 17.
resources. The right to education of the affected children is a socio-economic right and should not be seen in isolation, but together with rights to housing, food, water and health care, all of which must be addressed within a context of scarce resources and the progressive realisation of rights.

Submissions made by the applicants included the expert testimony of Prof Chris Molteno (Emeritus Professor in the Department of Psychiatry and Mental Health at the University of Cape Town) confirming that children with severe and profound disabilities can benefit from education because:

‘Their needs are different from other children, but no less vital. They go to the heart of the ability of the children to lead a life with the necessary dignity, fulfillment and as much independence as possible...It is my professional experience and opinion that children with profound or severe intellectual disability are able to benefit very substantially from appropriately designed and supported educational programmes. Their needs are substantially greater than those without disabilities.'

The High Court based its judgment on the provisions of the CRC, to emphasise the need to provide fully for mentally and physically disabled children as well as the right to education, which should be directed to ‘the development of the child’s personality, talents and mental and physical abilities to their fullest potential’. Provisions of the African Charter were also used to support this argument, specifically that every child has the right to education in order to promote the development of their full potential. The Court also drew from the CRPD, which provides that ‘children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children’ as well as the right of children with disabilities to ‘education directed at the development of ‘their fullest potential.’

The Court also made reference to a decision of the Irish High Court in O’Donoghue, in which it found for the applicant, viz that the State’s obligation is to provide free

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102 Western Cape Forum (2011) (n 98 above) para 19.
103 CRC Arts 23 (children with disabilities), 28 (education) and 29 (purposes of education). Western Cape Forum (2011) (n 98 above) para 20.
104 African Charter Arts 11 (education) and 13 (handicapped children) Western Cape Forum para 21.
105 CRPD Preamble (r).
106 CRPD Art 24. Western Cape Forum (n 98 above) para 23.
107 The applicant was an intellectually disabled boy living in the Cork area. There was only one organisation in his area which provided for the education of children with intellectual disabilities.
education for all children without discrimination. Refusing to accept the State’s argument that a child with a profound intellectual ability is ‘ineducable,’ or to accept the narrow definition of education as meaning only ‘scholastic’ education, the Irish High Court adopted a definition of education:

‘that was informed by a paradigm shift in the normative construction of education and the purpose it ought to serve. The Irish High Court approached the notion of education from the perspective of growing international consensus that every child needs appropriate education, and that education is a fundamental right that cannot be closed to children that are intellectually disabled. It adopted a child-centred and learner-centred holistic notion of education to mean teaching and training that allows every child to maximise their potential by making the best possible use of their inherent and potential physical, intellectual and moral capabilities with the active support of the state.’

A related ground of the Western Cape Forum case was the breach of the affected children’s right to equality. The Court rejected the argument of the State that the education policy was justifiable because it was rationally connected with a legitimate government purpose (viz gradually extending services to children with intellectual disabilities in a context of severe shortage of resources), finding that there was no rational connection to such a purpose. This was because the State had not adequately explained why the budgetary constraints had to be borne only by children with severe and profound intellectual disabilities, and not by all children. That the most disadvantaged and vulnerable category of disabled children should be excluded from access to basic education because of a scarcity of resources was unjustifiable. Further, the State failed to demonstrate what its existing resources were, and what the additional costs would be of providing education for all children. The Court noted that reliance on NGOs does not relieve the State from its Constitutional obligation to provide education for children with disabilities. It ruled that the limitations clause of

When he reached school-going age, he was denied access to this organisation. When the applicant began proceedings to compel the State to provide free education, he was informed that he would be provided with a place. O’Donoghue v The Minister for Health, The Minister for Education, Ireland and the Attorney General (1993) IEHC 2 (1996) 2 IE 20.

Ngwenya C & Pretorius L (2012) (n 68 above) 94.

Constitution (n 64 above) s9.


This test is required by s36 with respect of any limitation of a right. The Court cited the Constitutional Court ruling in Harksen v Lane NO, 1997 (4) SA 1 (CC) 1997 (11) BCLR 1489 in applying the test for unfair discrimination.
The High Court found for the applicants, viz that the State had failed to take reasonable measures to make provision for the education needs of children with severe and profound intellectual disabilities, in breach of the rights to basic education, protection from neglect or degradation, equality and human dignity. It granted a structural interdict, requiring the State to submit a programme outlining how the breach would be remedied and for progress reports to be submitted periodically thereafter.

4.3.3 Provisions in the Constitution relating to ECD and children with disabilities

In discussing the obligations on the State arising from the Constitution, I begin by elaborating on its founding values and then focus on provisions which correspond to components of the ‘essential package’ of ECD services.

(a) Founding values of the Constitution

An important feature of the Constitution is the founding values on which it is based; these define ‘the type of society against which any infringement of a constitutional right must be compared… setting a normative value system for the ordering of society’. Thus interpretation of the Constitution must be done in such a way as to reflect and support these values. The values of dignity and equality have particular relevance in relation to ECD for children with disabilities and are thus discussed in detail.

(i) Dignity

Five specific references to human dignity confirm its importance in the Constitution,

112 Western Cape Forum (n 98 above) para 39.
113 Western Cape Forum (n 98 above) para 52.
114 These include human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism, the supremacy of the Constitution and the rule of law. O'Regan K ‘On the reach of the Constitution and the nature of constitutional jurisdiction: a reply to Frank Michelman’ in Woolman S & Bishop M (eds) Constitutional Conversations (2008) 69.
and as both a right and a value, it has been invoked on numerous occasions by the Constitutional Court.\textsuperscript{117} Dignity is understood as affirming the inherent worth of human beings.\textsuperscript{118} It builds upon a simple premise which is the beginning of moral awareness - the refusal to turn away from suffering - leading to the recognition that every human being is entitled to concern and respect, and that they have abilities and talents that enable them to pursue ends which give meaning to their lives. Recognising someone's dignity requires treating them not as means, but as ends,\textsuperscript{119} and requires provision of the material conditions necessary to live as ends.\textsuperscript{120} In particular, children need to be viewed as human beings of value, as:

\begin{quote}
"Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them."\textsuperscript{121}
\end{quote}

To value human dignity is to respect the intrinsic worth of every person, no matter their age or (dis)ability. This has profound implications at an individual level, for ‘our sense of self-worth, personal development and well-being is inextricably bound up with the extent to which we are valued by others and by society at large’.\textsuperscript{122} It also has implications for how we function as a society and the State’s obligations towards its citizens. Indeed, following an extensive review of dignity in local jurisprudence, Sloth-Nielsen & Kruuse conclude that 'the elaboration of children's right to dignity holds considerable promise as a tool of legal interpretation for the future'.\textsuperscript{123}

Woolman provides a categorisation for understanding the different dimensions of dignity, several of which are valuable for understanding the rights of young children with disabilities to ECD. First, dignity can be understood as a formal entitlement to equal concern and equal respect. In \textit{Western Cape Forum}, the Court found that the

\begin{footnotesize}
\textsuperscript{117}Review of dignity jurisprudence over a number of cases, leads Woolman to conclude that the Courts have taken seriously 'the urgency rooted in the manifold demands of dignity.' Woolman S ‘Dignity’ in Woolman S et al. (eds) \textit{Constitutional law of South Africa} 2 ed (2005) 60.
\textsuperscript{121}S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) para 18.
\textsuperscript{122}Liebenberg S (2005) (n 119 above).
\end{footnotesize}
rights of children with severe and profound disabilities had been infringed because they had been marginalised and ignored by the Department of Education in comparison with able-bodied children and those with less severe disabilities. Failure to provide these children with education placed them at risk of neglect because it meant that they often have to be educated by parents who do not have the skills or capacity to do so.

The Constitutional Court has also linked the values of dignity and equal concern and respect with the goal of eliminating group-based disadvantage. In the ruling in *Khosa v Minister of Social Development*, the Court found that 'decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society'.

Thus the notion of equal moral worth and the requirement that all people are treated with equal concern and respect underpins the value of dignity within the equality right. In this sense the value of dignity reflects a Constitutional concern with the equal moral worth of persons and groups, and the importance of their inclusion and participation within society as equals, without stereotyping, prejudice or isolation. Respect for human dignity requires an approach that is responsive to unique individual needs and circumstances, and challenges patterns of discrimination, it implies that the needs of young children with disabilities are not neglected in favour of children without disabilities.

Secondly, dignity ‘secures the space for self-actualisation’. The value of human dignity is inseparable from the physical conditions which make it possible for children to develop their potential. Nutrition, health and social services not only contribute to children’s survival, they enable them to develop and exercise their ability to shape their own lives and to be active agents in shaping society.

Respect is shown for human potential and agency when children are able to flourish in an environment of basic liberties and material support. The State therefore has an obligation to guarantee the social basis of each person's basic human capabilities, recognising the principle of each person as an end. Making capabilities the goal requires promoting material equality.

Human dignity derives from the value we ascribe to human beings. Because we value them, we wish to ensure that conditions are created that enable them to develop their capabilities and to flourish as individual and social beings.

Conversely, the inability of children to develop to their full potential, however limited that may be, is a form of degradation. The State is thus obliged to support parents so that they can provide the conditions within which children with disabilities can flourish physically, socially and emotionally. As discussed in Chapter 2, this requires early identification and support of children with disabilities and their families.

Thirdly, human dignity can be understood as a relational concept, underpinning the imperative of society to respect the equal worth of the poor through the provision of resources to redress the conditions that create and perpetuate their marginalisation. In *Khosa v Minister of Social Development*, the Court noted that the Constitution embraces an understanding of dignity in which ‘wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole’. This perspective draws attention to the impact of the State's action (or inaction) upon disadvantaged groups.

If we as a society are to value human dignity for young children with disabilities, we need to view them in the context of their lives, reflecting on what they are able to be and to do. We need to acknowledge power relations and material conditions that influence their ability (and that of their parents) to survive and to develop their capabilities. Further, we need to develop appropriate responses to conditions of

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128 *Ferreira v Levin* 1996 (1) SA 984 (CC), 1996 BCLR 1 (CC) para 49.
129 Liebenberg S (2005) (n 119 above) 8.
131 *Western Cape Forum* (2011) (n 98 above) para 46.
133 Liebenberg S (2005) (n 119 above).
disadvantage and material deprivation in social policy and Constitutional adjudication. The former requires the provision of an environment that enables children with disabilities to flourish and develop their abilities to the maximum potential. The latter requires a focus on the outcomes and impact of the State's actions or omissions on the life chances of young children with disabilities.\textsuperscript{134}

(ii) Equality

The Constitution values the achievement of substantive equality rather formal equality. The latter denotes an abstract prescription of equal treatment for everyone, regardless of their actual circumstances.\textsuperscript{135} In contrast, substantive equality recognises inequality as being deeply rooted in structures and institutions of society, and addressing it requires understanding of the social and economic factors that create and perpetuate these inequalities. There is recognition that it is not differences \textit{per se} which are the problem, but rather the harm that results from these differences.\textsuperscript{136} Substantive equality requires an analysis of the context in order to identify actual situations and disadvantages experienced by various groups as a result of historical factors as well as current social, economic, political and gender relations.\textsuperscript{137} The focus is on structural inequalities and their effect on perpetuating the marginalisation and disadvantage of certain social groups. All of these inequalities are provided for in the protection against unfair discrimination, and addressing them is an important part of ‘the constitutional project of transformation’, with the law envisaged as 'a tool for social change'.\textsuperscript{138} The right to equality requires the State to take positive measures, which can be assessed by whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination, if it is designed to protect persons or categories of persons who have been disadvantaged by unfair discrimination, and if it promotes the achievement of equality.\textsuperscript{139}

\textsuperscript{134}Liebenberg identifies various ways in which dignity can ‘enrich’ the jurisprudence of socio-economic rights. It can be used as justification of claims against social resources when groups lack the material conditions necessary for the development of their capabilities as human beings. Respect for human dignity requires consideration of the impact of the deprivation on the actual needs and circumstances of individuals and groups concerned. Respect for dignity supports the argument that urgent needs and severe deprivations require an immediate response. Liebenberg S (2005) (n 119 above).
\textsuperscript{135}Albertyn C & Goldblatt B (2007) (n 125 above).
\textsuperscript{136}Albertyn C & Goldblatt B (2007) (n 125 above) 7.
\textsuperscript{137}Liebenberg S (2005) (n 119 above).
\textsuperscript{138}Albertyn C & Goldblatt B (2007) (n 125 above) 5.
\textsuperscript{139}Albertyn C & Goldblatt B (2007) (n 125 above).
Promotion of equality requires the prohibition of unfair discrimination on various grounds which are listed in s9(3).¹⁴⁰ In this respect, the Constitutional Court in *Harksen* noted:

‘What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity... The temptation to force them into neatly self-contained categories should be resisted. Section 8(2) seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history.’¹⁴¹

Two particular grounds of discrimination are relevant to the focus of this thesis. First, the Constitution prohibits discrimination on the basis of age, which refers to 'the conditions of disadvantage and vulnerability suffered by persons on the basis of age, especially advanced age'.¹⁴² By virtue of their immaturity and inability to speak up in defence of their rights, very young children are vulnerable to discrimination.¹⁴³

The Constitution also prohibits discrimination on the basis of disability. Despite this, disability has been described as a 'severe site of discrimination'.¹⁴⁴ In his article on ‘Disability and equity in South Africa’, Swartz¹⁴⁵ identifies several challenges to achieving equity for disabled adults and children. Among these are 'persistent stigmatising social attitudes' which create and perpetuate stereotypes linked to disability, with adults and children with disabilities assumed to be dependent, helpless, abnormal or ill. The disability/ability dichotomy not only differentiates between people, it penetrates the formation of socio-economic culture to give legitimacy to unequal distribution of resources, social status and a biased socio-economic and architectural environment so that denying equal participation to

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¹⁴⁰These are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
¹⁴¹Harksen (n 111 above) para 49.
¹⁴²Albertyn C & Goldblatt B (2007) (n 125 above).
¹⁴³General Comment 7 (n 59 above).
disabled people appears natural and even economically efficient'.

Although discrimination on the basis of disability is prohibited in the Constitution, it is not difficult for State policies 'to give the appearance of advancing a transformative agenda when, on closer inspection, they are paradoxically still trapped in a disabling, apartheidising discourse'. Strangely though, disability still tends to be invisible in our contemporary public discourses on equality. Swartz’s analysis is instructive here: he argues that realisation of disability rights rests on two pillars, viz the right of people with disabilities to participate equally in society, and the need for society to protect those that are vulnerable. He associates the first with the human rights/social model of disability and the latter with the charity/medical model. In South Africa, the rights-based model is applauded in theory, but in practice few opportunities are given to adults and children with disabilities to gain skills and develop their potential. By not providing opportunities for early learning and development of young children with disabilities, the view of disability as (primarily) vulnerability and dependency is reinforced.

Neither the Constitution nor the Equality Act interprets equality as requiring identical treatment. Rather they require equal concern and equal respect for all people, which includes treating people differently, if necessary, in order to achieve equality. Indeed, rulings of the Constitutional Court indicate that the acknowledgement of equal moral worth requires ‘treatment as an equal as opposed to equal treatment’. This is not a call for uniformity, but rather a call to identify and eliminate the disadvantages and inferior status associated with membership of particular groups. The Constitution requires us 'to think differently about difference’; it does not state that we should never categorise or recognise differences per se, but that we should not give legitimacy to social constructions of difference that are 'historically privileged

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146 Ngwenya C & Pretorius L (2012) (n 68 above) 111.
147 Ngwenya C & Pretorius L (2012) (n 68 above) 86.
149 Swartz L (2012) (n 145 above).
150 This is discussed in Chapter 2, Section 2.1.3.
and are used... to create and sustain hierarchical human essences’. Indeed, the
affirmation of diversity is a theme that runs through the entire body of jurisprudence
on sexual orientation as it evident from *Minister of Home Affairs v Fourie:*

'Equality means equal concern and respect across difference. It does not presuppose the
elimination or suppression of difference. Respect for human rights requires the affirmation of
self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of
behaviour.'

Equality thus implies positive affirmation of differences so that they ‘do not become
socially embedded bases of exclusion and marginalisation of particular groups’. The
Constitutional Court has recognised that for persons with disabilities, reasonable
accommodation may be required to ensure equality, as often they are excluded from
access to public and private facilities, with the result that ‘disabled people can,
without any positive action, easily be pushed to the margins of society’.

In her book ‘Making all the difference’ Martha Minow argues for a move from
focusing on differentiating between people for the purpose of creating boundaries, to
a focus on differentiating in order to create positive relationships. She terms this the
'social relations approach' in which categories are constructed in relational terms, yet
are conscious of the imperatives of respecting human dignity and equality. This goes
beyond tolerating differences: it requires affirming differences through taking positive
steps to empower groups that have been excluded and marginalised so that they are
enabled to participate in socio-economic activities. Substantive equality thus
requires a ‘recognition of and responsiveness to difference, rather than mechanical
standardisation’.

As discussed in Chapter 2, disability cannot be reduced simply to physical, sensory or
intellectual impairment, but needs to be understood as the interaction between the
body and an environment with numerous (attitudinal, architectural and socio-

154Ngwenya C & Pretorius L (2012) (n 68 above) 84.
155Minister of Home Affairs v Fourie & Another; Lesbian and Gay Equality Project & Others v
Minister of Home Affairs 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) 2006 (1) SA 524 (CC),
2006 (3) BCLR 355 (CC) para 60.
156Ngwenya C & Pretorius L (2012) (n 68 above) 84.
157MEC for Education: KwaZulu-Natal and others v Pillay 2008 (1) SA 474 (CC) para 74.
158Minow M Making all the difference: inclusion, exclusion and American law (1990).
159Ngwenya C & Pretorius L (2012) (n 68 above) 106.
160Swartz notes the impact of the spatial legacy of apartheid on people with disabilities and the
economic) barriers. Contextual analysis requires identification and analysis of barriers that prevent access to services, and the impact that these have on children with disabilities. It also requires understanding of action that can promote or facilitate access. If this does not happen, it is likely that the pervasive influence of disabling policies will persist. Indeed, Ngwenya & Pretorius\textsuperscript{161} argue that this is what happened in respect of White Paper 6\textsuperscript{162} and the ruling made in Western Cape Forum,\textsuperscript{163} where the Court found there was no rational connection between a legitimate government purpose and differential treatment of children with severe and profound intellectual disabilities.\textsuperscript{164} The Court found that the State had failed to explain why budgets had not been allocated equitably for the children with intellectual disabilities who were the most vulnerable and deserving of prioritisation.

Equality for persons with disability requires the removal of barriers to opportunities and participation,\textsuperscript{165} eradicating discrimination and providing positive measures to accommodate and include them. Indeed, the Constitution provides for legislation to be enacted to prevent or prohibit unfair discrimination.\textsuperscript{166} There is a need for understanding bodily difference in a manner that is non-hierarchical and does not set disabled people apart. It is an understanding that must be consistent with the notion of a transformative Constitution and that ‘puts a premium on inclusive citizenship…. [this] requires that we recognise humanity as diverse but, at the same time equal in worth and dignity’.\textsuperscript{167} Thus priority needs to be given to developing programmes and policies for young children with disabilities that embrace the diversity of needs.

Socio-economic rights have been seen as a means of promoting equality and a society based on social justice, i.e. the substantive vision of equality contained in the Constitution s9(2) is dependent on the realisation of socio-economic rights.\textsuperscript{168} Conversely, inequality and discrimination have also been closely linked to the

\textsuperscript{161}Ngwenya C & Pretorius L (2012) (n 68 above) 84.
\textsuperscript{163}Western Cape Forum (2011) (n 98 above).
\textsuperscript{164}The test for unfair discrimination is based on the ruling made in Harksen (n 111 above) para 92.
\textsuperscript{165}CRPD Article. See also General Comment No. 9 (n 60 above).
\textsuperscript{166}Constitution (n 70 above) s9(4). This has taken the form of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
\textsuperscript{167}Ngwenya C & Pretorius L (2012) (n 68 above) 115.
\textsuperscript{168}Liebenberg S (2010) (n 85 above) 206.
violation of socio-economic rights. From this perspective, equality implies removing structural inequalities in access to economic resources and social services. This is consistent with the transformative agenda of the Constitution, which is concerned not only with absolute deprivation, but also a more equitable distribution of socio-economic resources and services.

What are the implications of linking equality and socio-economic rights? First, it requires that substantive equality be part of the reasonableness review that the Constitutional Court has developed to assess the extent to which State efforts to realise socio-economic rights are constitutionally sound. There must be consideration of both the historical and current social context of the claimant group and the impact of denial of access to the relevant socio-economic resource or service on this group.

Secondly, the value of substantive equality informs application of the requirement that socio-economic rights must be realised progressively.

This requires establishing what the impact of denial of ECD services is on children with disabilities, the urgency of their need for such services and the order of their need. Historically, categorisations have been and continue to be used to exclude children with disabilities from a variety of services. The focus of State policy must be on removing disabling barriers and providing accommodations in order to ensure that services are accessible and facilitate equal participation in society.

(b) Consideration of the best interests of the child

The provision of the Constitution that a child’s best interests are of paramount

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169 The decision of the Court in *Khosa* illustrates how these can mutually reinforce one another. Recognizing non-citizens as a vulnerable group in society, the Court found that a government programme excluded them unreasonably, and therefore ordered that the programme be expanded to include this group, with the necessary budget to do so. *Khosa* (2004) (n 94 above).


171 Consideration of substantive equality is evident in the judgment of *Grootboom* in the Court's emphasis on the necessity of responsiveness to differing degrees of deprivation on developing measures to realise socio-economic rights. The Court held that to be reasonable, ‘measures cannot leave out of account the degree and extent of denial of the right they endeavour to realise’ (para 77). The Court also affirmed that a reasonable government policy must cater for different groups and orders of need in society (para 44). *Grootboom* (n 74 above).

172 Ngwenya C & Pretorius L (2012) (n 68 above) 98.

importance in every matter concerning them is unusual, in that it applies to both individual children and to groups or categories of children, such as children with disabilities. The wording indicates that the best interests standard must be applied not only to the provisions in s28(1), but to all rights contained in the Bill of Rights: in every matter where a child's interests are involved, those interests must be taken into account. It creates a right for children as children, i.e. because they are vulnerable, often their interests are subsumed by the interests of others. Children's interests alone are made a right and it requires a process of weighing up various interests of children to determine what is best for them.

Visser argues that the wording of this section suggests that it is a 'constitutional principle', which is to guide all dealings of the State with regard to children. By implication, it creates a right for a child to have his or her best interests taken into consideration, but this is not a 'super right' when balancing other rights and the interests of children, as this would be inconsistent with the Constitution's assertion that all rights are mutually interrelated and form a single value system. It thus ‘cannot over-ride other rights, as it is a right within a non-hierarchical system of rights [and] is itself capable of being limited’.

A child's ‘best interests’ in a given situation is understood as being ‘the child's most advantageous position practically possible and desirable in view of the relevant law’. Although the Children’s Act provides a list of factors to be taken into account when applying the best interest standard, such a list can never be exhaustive, and thus a court or duty-bearer (such as a State official) has wide discretion in determining what the best interests of a child are and how effect should be given to them. Indeed, that the best interest standard has been interpreted and applied very differently in different contexts is understandable in light of the fact that values with

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174 Constitution (n 70 above) s28(2).
175 Visser P 'Some ideas on the "best interests of a child" principle in the context of public schooling' (2007) THHR 70 461.
176 Friedman A et al (2013) (n 63 above).
177 Friedman A et al (2013) (n 63 above).
178 Skelton A (2013) (n 70 above) 620.
180 Children’s Act 38 of 2005. Consideration must be given to s7(g)(i) the child’s age, maturity and stage of development and s7(i) any disability that the child may have.
respect to and ideas about children vary over time and place.\footnote{Friedman A et al. (2013) (n 63 above).}

In applying this principle to public schooling, Visser argues that it should be applicable in respect of all decision-makers in education concerning children - every provision of legislation should be measured against it, including management, policies, training of practitioners, respect for differences, quality of education and care and protection.

There is enough evidence from the science of early childhood and experience documented internationally to indicate what is in the best interests of young children with disabilities. In answer to the question (adapted from Visser) ‘What would an ECD system look like which is in the best interests of children with disabilities?’ a number of important resources come to mind. For example, UNICEF\footnote{UNICEF ‘The child care transition: a league table of early childhood education and care in economically advanced countries’ (2008). This is discussed in more detail in Chapter 2, Section 2.4.6.} provides a set of ten benchmarks for early childhood education and care, which are clustered around four themes, viz an enabling policy framework, access, quality and supporting context. More specifically, the index for inclusion\footnote{Booth T, Ainscow M & Kingston D ‘Index for Inclusion: developing play, learning and participation in early years and childcare’ (2006).} provides guidance and support in developing and monitoring inclusive play, learning and participation in the early years. The indicators that it includes could be viewed as guiding the development of services which are in the best interests of children with disabilities.

(c) Children’s rights to family care, parental care or alternative care

There are a various types of family that exist in South Africa at present, with different parents or family members providing different degrees of care to a child. Drawing on previous judgments of the Constitutional Court, Friedman et al. conclude that ‘the best way to define family or parental care is not in terms of a narrow set of criteria, but in terms of generous and flexible standards’.\footnote{Friedman A et al (2013) (n 63 above) s47.3(a).} These authors argue that the purposes of the inclusion of s28(1)(b)\footnote{This refers to a child’s right to family care or parental care, or to appropriate care when removed from the family environment.} is to affirm the importance of a healthy parent-child relationship in a family environment. In addition, these provisions require that care of
a certain quality be given to children and identify the parties responsible for providing such care (i.e. parents and other family members). Building on the provisions of the CRC which obliges States to provide for children whose parents are unable to do so, Friedman et al reason that s28(1)(b) defines who is responsible for caring for children (viz parents or family), while s28(1)(c) details what this care actually entails. This argument is supported by the Constitutional Court in Grootboom, which concluded that parents must provide for their children and that the State's role is to make sure that they do so, the State has a responsibility to provide for children in parental care only if their parents are unable to do so. Thus legislation and common law impose obligations on parents to care for their children. In the absence of such care, i.e. when the child is with his or her family and the family is unable to provide proper care, the State has a duty to provide appropriate care.

(d) The right to basic nutrition, basic health care services and social services

The Constitution provides to children the right to ‘basic nutrition, basic health care services and social services’, all of which correspond to components of the ‘essential package’ of ECD services. However, as discussed earlier in this chapter, the Constitutional Court has been criticised for its failure to give content to the meaning of socio-economic rights, including identification of what constitutes a minimum core of basic nutrition or health care services, and for not holding the State to account in this regard.

Several sections of the Constitution refer to the right to health. For example, s27(1)(a) provides for everyone to have the right of access to health care services, while s28(1)(c) provides that all children have the right to ‘basic’ health services.

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186Both the CRC and the African Charter recognise parents as having primary economic responsibility for the child. However, in situations where parents are unable to do so, the treaties compel States to provide material assistance to children indirectly through their parents, or directly to children themselves. CRC Art 18, African Charter Art 20.
188TAC (2002) (n 74 above).
189Constitution (n 64 above) s28(1)(c).
190Note however that the ‘minimum package of services’ proposed by SADC includes a component on ‘food security and nutrition’ with a target related to the MDGs. SADC ‘Minimum package of services for orphans and other vulnerable children and youth’ (2011).
191The obligations with respect to State obligations have been outlined in various non-binding instruments, such as the Committee on the Rights of the Child General Comment No. 15 The right of the child to the enjoyment of the highest attainable standard of health (Article 24). Note that the Department of Health has recently identified a ‘core package’ of Primary Health Care services.
Further, s24 provides that everyone has the right to an environment that is not harmful to their health or well-being, and requires the State to take reasonable legislative and other measures to prevent pollution and ecological degradation. In addition, s152(1)(d) calls on local government to promote a safe and healthy environment.

In addition to their need to have access to all the other services required by young children (particularly preventative services such as weight monitoring and immunisations), young children with disabilities require early identification and intervention services as well as habilitation and rehabilitation in order to promote their maximum development.192

‘social services’ are included in the list of rights to which children are entitled and is the only right that applies exclusively to children. Sloth-Nielsen notes that while the duty to provide nutrition and shelter are understood (in common law) as part of the duty of parents, parental provision of social services ‘sits uncomfortably in this scheme’,193 i.e. it must mean something different and distinctive from what is covered by other socio-economic rights. However, the precise meaning of children’s right to social services in the Constitution has not yet been explained in detail by any Court.194 Further, although international law does not specifically provide for the right to ‘social services’, review of the CRC and African Charter shows that rights to family or parental care are strongly linked to the right to be protected from abuse and neglect. The right to social services must therefore be interpreted according to these rights and aligned with the argument that by strengthening the family, the abuse and neglect of children is prevented.195 This is supported by a review of the context of children in South Africa, which concluded that the causes of child abuse and neglect are often triggered by family breakdown and parental poverty and that ‘this is the most glaring threat to the fulfillment of children's rights, including their rights to protection from ill treatment’.196

A distinction has been made between a narrow and broad interpretation of social

192 These are provided in the CRPD, Art 25 (b) Health and Art 26 Habilitation and rehabilitation.
services. A narrow interpretation views social services as comprising of services to victims, protection and special support services for children with disabilities, which are part of the mandate of the Department of Social Development and delivered by social workers and NGOs. In contrast, a broad interpretation encompasses all categories of social services typically provided by the State to ensure children's survival and development, such as health care, water and sanitation, childcare facilities, social security and education. The broader reading is seen as better promoting the achievement of the underlying purpose of children's socio-economic rights and is closely linked to the child's right to an adequate standard of living.

Five ‘layers’ of social services have been identified (which correspond to the rights in the CRC and African Charter that they give effect to), all of which have a preventative function. First, social services should support parents and families in their child-rearing responsibilities. Secondly, children have the right to appropriate alternative care if their family cannot provide necessary care and protection. Thirdly, there is a need for other services which directly prevent abuse and neglect. Fourthly, rehabilitation services are required once the first three layers of prevention have failed. The fifth layer relates to services for children in need of special care and protection, including those with disabilities.

What are the implications of this for ECD of young children with disabilities? Significantly, addressing the ‘special needs’ of children with disabilities is included in both the narrow and the broader interpretation of social services, indicating that it is critical core focus area. Further, ECD programmes can perform the functions of many of the ‘layers’ comprising social services. As a preventative measure, services to support parents of children with disabilities in their child-rearing roles are critical as are programmes to support children’s early learning. Protective services include community-based day care centres and family education programmes which promote

200 CRC Art 18 and African Charter Art 18.
201 CRC Arts 20, 21 and 25 and African Charter Arts 24 and 25.
202 CRC Art 19 and African Charter Art 16.
203 CRC Art 39.
maximum social development of the child, as well as providing family support and information on disability and how it can be prevented.205

(e) The right to protection

The Constitution imposes a positive obligation on the State to prevent harm to children, with s28(1)(d) stating that children have a right ‘to be protected from maltreatment, neglect, abuse or degradation’.206 It is well established that young children with disabilities are particularly vulnerable to abuse and neglect and their parents often require additional support to enable them to provide the necessary care.207 Provision of such support may be hindered by discrimination as well as inadequate, insufficient or inaccessible (preventive and rehabilitation) services, contributing to the neglect of young children with disabilities, such that their basic physical, intellectual, emotional or social needs are not met. As was evident in the ruling in Western Cape Forum, lack of provision of mandated services on the part of the State constitutes a violation of the right of children with disabilities to protection.

(f) Education

Education rights have been described as 'empowerment rights' because of being necessary for exercising and enjoying other rights and enabling individuals to set the direction of their own lives.208 The Courts have highlighted the ‘transformative potential’ of education as a means of addressing the legacy of apartheid.209 The provision in the Constitution (s29(1)(a)) is for everyone to have the right to a basic education, which the State must make progressively available and accessible through reasonable measures.210

The South African legislature has defined the parameters of 'basic education' by

206‘Abuse’ has been defined in the Children’s Act as referring to any form of harm or ill-treatment which is deliberately inflicted on a child, including assault, sexual abuse, bullying, or exposing the child to behaviour that may harm them psychologically or emotionally. ‘Neglect’ refers to ‘a failure in the exercise of parental responsibilities to provide for the child’s basic physical, intellectual, emotional or social needs.’ Children’s Act (n 180 above) s1(1).
207This is discussed in more detail in Chapters 1 and 2.
209Juma Musjid Primary School (n 73 above).
210This provision confers both negative and positive dimensions of the right to education. The State is responsible for ensuring that people are not prevented from accessing existing educational resources. There is also a positive right to education as a socio-economic right.
providing for it to be compulsory for a learner to attend school from the age of 7 until the age of 15 or ninth grade, whichever comes first. Some commentators have noted that this definition is very narrow because it stops at Grade 9. I would argue that it is very narrow because it starts only at Grade R, and does not acknowledge that learning begins at birth.

As with other socio-economic rights, the Courts have not yet defined the content or nature of ‘basic education’. Woolman and Bishop suggest that this could be done in two ways. Either 'basic education' could refer to a specific period of schooling (such as primary school), as has been the approach by the Department of Basic Education. Another approach is to see ‘basic’ as referring to a standard of education (its quality or adequacy). Significantly, the World Declaration on Education for All has adopted the latter approach, with Article 4 stating that:

'The focus of basic education must, therefore, be on actual learning acquisition and outcome rather than exclusively upon enrolment, continued participation in organised programmes and completion of certification requirements.

Further, this Declaration recognises that learning begins at birth and this calls for early childhood education, which can be provided through families, communities as well as institutional programmes. This priority is reflected in the first goal of the international initiative of Education for All, which is that of ‘expanding and improving comprehensive early childhood care and education, especially for the most vulnerable and disadvantaged children’. This priority builds on a growing body of evidence showing that high-quality early learning opportunities for young children can act as a ‘springboard of success’ in school.

In its ruling in *Western Cape Forum*, the High Court made reference to the CRC, African Charter and CRPD, which unequivocally recognises a corresponding individual right to an education that is holistic and is aimed at the full development of the person and a sense of dignity and self-worth, so that the learner's potential is

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211This includes one year of pre-school (the Reception Year or Grade R). South African Schools Act 84 of 1996. Department of Education ‘White Paper on Education and Training’ (1996).
215UNESCO ‘Reaching the marginalised’ (2010) 42. See also Section 3.5 in the previous chapter.
216UNESCO (2010) (n 215 above) 42.
developed to the fullest extent, regardless of disability’. The order given by the Court in the *Western Cape Forum* indicates recognition of a wide array of factors that need to be considered under the right to education and included provision of funds to NGOs for facilities, staff, transport and staff training.

Although the Constitutional provision is not for explicitly free education, the provision and funding of educational services is an obligation that the Constitution places directly on the State. Despite this, the ruling made in *Western Cape Forum* indicated that this provision was not being implemented for children with severe and profound intellectual disabilities, as State subsidies for private social service providers were seen as discretionary, with the term 'subsidy' suggesting that this support is 'an essentially benevolent form of State augmentation of private means to assist the recipient in achieving its goals'. This approach is inconsistent with the Constitution, as reliance on the NGOs does not relieve the State of its constitutional obligations. This ruling in *Western Cape Forum* drew from that of *NAWONGO*, in which the Court held that the State's financing policies in respect of NPOs providing services on behalf of the State, were inconsistent with the constitutional imperative to provide social welfare services.

The ‘Charter of Children’s Basic Education Rights’ recently published by the SAHRC provides a common legal framework to guide and monitor role-players in the education sector. The Charter is based on the 'A4 legal framework' developed by Tomasevski. In the introduction to the Charter, UNICEF representative Aida Girma notes that education must include 'the right of access to education by children with

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217Ngwenya C & Pretorius L (2012) (n 68 above) 93. For more detail on this ruling, see s 4.3.1 of this chapter.
218Para 52.
219Sloth-Nielsen & Kruuse note the willingness of the courts to assume this type of supervisory role as indicating that they consider effective implementation of the order as important as the finding itself where children’s rights are at risk. Sloth-Nielsen J & Kruuse H (2013) (n 66 above).
220The substantive equality-related unreasonableness of the funding of Day Care Centres was that this funding came from the Department of Health and not the Department of Education (indicating unresponsiveness to the educational needs of particularly vulnerable children) and that the subsidy from Health is proportionally far less than that from Education for able-bodied children and disabled children in special schools. Ngwenya C & Pretorius L (2012) (n 68 above) 99.
221*NAWONGO* (n 96 above) para 47.
disabilities and investment in ECD from birth to school-going age’. It therefore follows that the legal framework applied in the Charter is applicable to ECD and children with disabilities, and can be of value in clarifying the duties of the State in this regard.

4.4 Duties of the State with respect to ECD and children with disabilities

What are the duties of the State with respect to ECD of young children with disabilities under these treaties and the Constitution? These are discussed under two broad themes, viz those rights that are immediately realisable and those that are subject to progressive realisation.

4.4.1 Rights that are immediately realisable

The first ‘level’ of response by the State is shaped by particular values, which have profound significance for children who are among the most neglected and marginalised. Dignity calls for equal concern and respect to be given to children with disabilities: it challenges the State to support parents and make available the physical conditions necessary for children with disabilities to develop to their full potential. Indeed, the Constitutional Court has recognised human dignity as the ‘animating value’ of the reasonableness review in the context of social and economic rights:

'It is fundamental to an evaluation of the reasonableness of State action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of State action concerned with housing is determined without regard to the fundamental constitutional value of human dignity.... In short, I emphasise that human beings are required to be treated as human beings.'

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224 Indicators relate to available education, including early childhood education, with sufficient funds for these services. Accessible education involves the identification and removal of barriers preventing access, and requires that education is non-discriminatory and accessible, with measures being taken to include the most marginalised children. Specifically, physical barriers such as distance and access for children with disabilities must be addressed. Acceptable education focuses on quality, with adequate curriculum and training of teachers. An adaptable education system is seen as one which is inclusive, flexible and responsive to the different circumstances and learning styles of children, with particular attention paid to the inclusion of children with disabilities.


226 Grootboom (n 74 above) para 83.
Equality requires an analysis of the context into which disabled children are born and in which they grow up, including identification of barriers which prevent their access to nutrition, basic health care and social services. It also requires prohibition of discrimination both on the basis of age and on the basis of disability, with differentiation not to create boundaries, but to foster positive and nurturing relationships.

In addition to growing international consensus on the importance of ECD, the science of early childhood provides important pointers to identification of the best interests of children with disabilities. While such factors need to be individualised and context-specific, much can be drawn from the field to guide government programmes in developing programmes to promote ECD of children with disabilities. For example, as the source of primary relationships, family care is critically important for young children with disabilities, and strengthening the parent-child relationship is core to healthy child development. This requires the State to support parents in their caregiving functions.

4.4.2 Socio-economic rights

There are also various aspects of socio-economic rights which relate to ECD for children with disabilities. Under international law and the Constitution, all children have rights (subject to internal limitations) to nutrition, health care and social services, which contribute to their growth and well-being.

(a) Reasonable measures

As indicated earlier, the standard of reasonableness has been developed as 'the key to the justiciability of the socio-economic rights' in the Constitution. Brickhill & Ferreira summarise this standard as essentially 'reason-giving', i.e. the Court requires the State to give an explanation in which it justifies to the public ‘its choice of means’. Further, it requires that such an explanation must be able to 'convince a reasonable person of its coherence'.

Various judgments of the Constitutional Court have contributed to development of the

reasonableness review as a model for assessing positive socio-economic rights claims and determining whether the means adopted are reasonably capable of facilitating the realisation of the rights in question. These judgments have been collated to provide criteria against which to assess ‘legislative and other’ measures taken by government to fulfil its constitutional obligations.\(^{228}\) Programmes must be reasonable both in conception and in implementation, clearly allocating responsibilities and tasks to different spheres of government and the necessary financial and human resources. They must be balanced and flexible. They must make appropriate provision for attention to crises, as well as to short, medium and long-term needs. Programmes may not exclude a significant segment of society and must not ignore those most urgently in need.\(^{229}\)

In identifying groups who are in desperate need and in designing relevant policies, the State must take into account the special needs of children and the particularly severe impact on them of the denial of basic socio-economic rights. Such denial may be the result of lack of programmes, or existing programmes being inadequate, or programmes that exist, but do not benefit vulnerable children.\(^{230}\) In the judgment made in *Western Cape Forum*, it was not enough that disabled children were excluded from access to education on the basis of ‘statistical incrementalism’, because this ‘progress’ had been achieved at the expense of exclusion of children with severe and profound intellectual disabilities.\(^{231}\)

Liebenberg argues that if claims brought on behalf of children for access to socio-economic rights are evaluated according to a reasonableness standard, consideration should be given to the heightened vulnerability of children, which is exacerbated by poverty.\(^{232}\)

The fact that children will suffer serious harm to their health and future development should they not receive certain social services should be a compelling ground for finding that a failure

\(^{228}\)Liebenberg S (2010) (n 85 above).
\(^{229}\)Liebenberg S (2008) (n 225 above) 307. In *TAC* the Constitutional Court described the duty to take reasonable steps as recognising that children are especially vulnerable and their needs most urgent (i.e. without access to Neviripine they will die). *TAC* (2002) (n 74 above).
\(^{230}\)Liebenberg S (2004) (n 82 above)
(b) **Progressive realisation**

Under international law and the Constitution, the duty to realise socio-economic rights progressively requires the State to take action towards the full realisation of rights over a period of time. This ‘does not alter the obligation on the State to take those steps that are within its power immediately and other steps as soon as possible’. These must contribute to facilitating access over time by removing legal, administrative, operational and financial barriers to fulfilling rights. The State is also responsible for steadily making services more accessible to a greater number and wider range of people as time progresses, which requires specified targets and goals which are linked to timeframes. Further, the burden is on the State to show that it is making progress towards full realisation of the rights. In applying this to the current context one could ask ‘is the State steadily increasing access to quality ECD services for children with disabilities?’ This requires a plan to work towards this goal in the short, medium and long-term, with a baseline of the current situation and indicators with which to measure progress.

(c) **Within available resources**

A further qualification for socio-economic rights under international law and the Constitution is that ‘they are only available to the extent that State resources permit’. As its resources are not unlimited, the State must do the best it can with the resources at its disposal. This requires that the State justifies its use of public resources, and prioritises its budget and other resources to fulfil its constitutional mandate.

The availability of resources is a condition of reasonableness. Indeed, a programme for which resources have not been allocated cannot be regarded as being reasonable. In determining reasonableness, therefore, Courts may examine budgeting processes and decisions. The State cannot claim that it lacks 'available resources' when its budgetary and financial policies clearly favour privileged groups at the expense of

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234 Brickhill J & Ferreira N (2013) (n 71 above) 575.
236 Brickhill J & Ferreira N (2013) (n 71 above) 575.
those that are disadvantaged. The first priority should be to ensure that vulnerable and disadvantaged groups have access to at least a basic level of socio-economic rights (i.e. primary health care, basic education and nutrition). Even when there are severe resource constraints, vulnerable members of society need to be protected through the adoption of relatively low-cost programmes.

What are the remedies recommended by Courts for the State’s infringement of the positive dimensions of socio-economic rights? The Court may impose a structural interdict, (under its supervision) to correct a violation of the right, as was the outcome of Western Cape Forum. It was also the outcome of Grootboom, but unfortunately Irene Grootboom died eight years after the ruling, without ever being given the emergency shelter the Court said the government should cater for in its policies.

4.5 Conclusion

This chapter began by exploring the general obligations of the State under the CRC, African Charter and CRPD with respect to ECD for children with disabilities. It points to a level of synchronicity between these treaties with respect to legislative, administrative, particularly measures to prevent discrimination on various grounds, including disability. The CRPD takes this further, in placing an obligation on the State to promote inclusion of persons with disabilities in society; it also builds on the provision of the CRC for the training and suitability of all staff working with children, stating that professionals working with children with disabilities need to be appropriately trained so that they have the expertise to provide the assistance and services guaranteed by the rights contained in the CRPD.

The treaties place an obligation on the State to undertake progressive realisation of all rights contained therein to the maximum of their resources. Assessing the extent to

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239 Committee on the Rights of the Child General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (2003).
240 Western Cape Forum (n 98 above).
241 Grootboom (n 74 above).
243 Art 3(c).
244 Art 4(i).
which this has been done requires tracking State spending on children, including transfers to NGOs. Responsibility for implementation of services which give effect to rights may not be devolved to NGOs without providing the necessary resources. Under international law, the State is to work towards the widest possible enjoyment of rights, particularly to children who are most disadvantaged, avoiding the tendency to ‘cut back first against the weakest’. States must take positive action to reduce structural disadvantages, giving appropriate preferential treatment to persons with disabilities. All of the treaties recognise the need for the State to support parents in their childcare functions, and to work in collaboration with organisations of civil society in realising the rights of children. Again, the CRPD goes further, in placing an obligation on the State to actively consult with persons with disabilities and their representative organisations, and to establish mechanisms involving them in the promotion, protection and monitoring compliance of the CRPD. This obligation is supplemented by the duty (imposed on states by Article 8), both to raise awareness of the contribution and potential of disabled people and to counter negative stereotypes about disability.

Dignity and equality, as foundational values of the Constitution, have far-reaching implications for ECD services for children with disabilities, requiring not only for respect for them as human beings, but creation of opportunities which enable them to reach their full potential. In respect of socio-economic rights and the fulfilment of government’s Constitutional obligations, Courts have developed the test of ‘reasonableness’ to assess legislative and other measures taken. Although the South African Courts have rejected the ‘minimum core’ approach in interpreting the State’s obligation in respect of such rights, tools that have been developed (such as that by the SADC) may still be used to guide planning and policy development. Given the establishment of these benchmarks by which to assess progress of the State, the following chapter explores the actions that the State has undertaken with respect to ECD for children with disabilities.

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245 Article 4(3).
247 SADC (2011) (n 190 above).
5.1. Introduction

5.1.1 Purpose of chapter

In previous chapters I have defined the nature and scope of ECD and the obligations of the South African government towards young children with disabilities under certain international law and the Constitution. I now move on the assessing what the South African government has done in response to these obligations, posing the questions: Do the government’s legal and policy provisions for ECD for children with disabilities fulfil its international human rights treaties obligations; and Do they meet the requirements of the ‘reasonableness’ test?

I begin by tracing some of the key historical developments that have shaped services for young children with disabilities in South Africa prior to and following the democratic elections of 1994, as this provides a context for understanding the racially-based inequalities entrenched by the ideology of apartheid and the vision of civil society and government for the ‘new era’ of democracy embodied in documents such as the Disability Rights Charter of South Africa. I review over-arching legislative provisions for disability and explore what their implications are for children. This is followed by a focus on specific rights related to ECD, viz social services, social assistance, health and nutrition and early learning.

5.1.2 History of early childhood development and disability services and their shaping of current legislative provisions

A brief history of ECD and disability in South Africa and how they have been reflective of dominant political ideologies provides some valuable insights into current provisioning. The key features of the apartheid era and the early democratic
era are presented, and then I identify several challenges shaping current legislation, policies and strategies.

(a) The apartheid era

Disabled adults and children have been acknowledged as among the worst victims of the apartheid system. The experience of white disabled people was primarily discrimination on the basis of disability, while that of black disabled people was compounded by the inequalities and oppression of the system of apartheid, with limited access to education, health and social welfare services.1

Prior to 1994, services for disabled children operated along racial lines, with huge inequalities between those provided to white and those for black (particularly African) children. Services were based on the medical model, with disability seen as a social welfare and medical concern, requiring diagnosis and treatment of 'special needs'. Children with disabilities were seen as helpless and in need of assistance; provision of social services was therefore welfare- and grants-based - resulting in dependency, lack of self-esteem and disempowerment.2 This approach served to keep the focus on the individual child, thereby diverting attention from the failure of the education system to provide for the needs of different learners. The use of intelligence tests for assessing intelligence and learning potential in learners justified the institutionalisation of 'special' education.3 In addition to the distinction made between ‘special’ and ‘ordinary’ education services, there was inadequate provision of facilities for early learning. A limited number of children with specific impairments (hearing, visual, cerebral palsy) were accommodated in special schools from the age of three, while some with severe intellectual disabilities were admitted to custodial-oriented health and welfare institutions. Thus the majority of young children with disabilities were traditionally excluded from co-ordinated support services provided through Education, with minimal support coming from Health and Welfare. These factors contributed to lack of early intervention services and facilities, which was seen

as constituting ‘the most severe barrier to learning and development’ for children with disabilities at the pre-school level.4

During the apartheid era, early childhood care and education was generally seen as being the responsibility of parents, with limited support from government providing for poor white children, thus reflecting a ‘segregationalist and apartheid policy intent’.5 There was a clear distinction between physical care and a stimulating education based on the child’s developmental level. Nursery schools were seen as extensions of the home and serving an educational function, while crèches were seen as providing care while mothers were at work. The majority of children in crèches were black and disadvantaged. Crèches and day care centres were seen as the responsibility of welfare, with the State providing some black children with custodial care but not educational care. Such services were characterised by overcrowding, inappropriate curricula and high child-adult ratios.

In the absence of State support for young children with disabilities, parents played an important role in establishing informal day care centres and specialised centres of learning. NGOs were also instrumental in setting up and running innovative programmes (particularly in rural areas), relying heavily on external funding.6 Indeed, prior to 1994, NGOs emerged as a dominant provider in the training of ECD practitioners and establishment of early childhood services through donor funding,7 lobbying for the concept of ‘educare’ to bridge the divide between education and care. However, training offered by NGOs was not accredited or monitored and there were fundamental differences between the curriculum of the Department of Education (which was formal) and that of NGOs (which was child-centred, process-oriented and play-based).8 In addition to differential subsidies, race-based discrepancy in practitioner training contributed to racial polarisation in early childhood services.9

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6NGOs have also played a critical role in identifying and supporting learners at risk, and thus provide important lessons in identifying and addressing barriers to learning and development. Dept of Education (1997) (n 3 above).
8Ebrahim H (2010) (n 7 above).
Under the Child Care Act 74 of 1983, welfare services in South Africa were based on a residual system of social welfare, i.e. remedial services were offered once social problems had already manifested.\(^{10}\) Rendering of social services relied on charitable work by organisations of civil society, with partial subsidisation by the State in some instances.\(^{11}\) The emphasis was on interventions to protect children, rather than prevention and early intervention services.\(^{12}\)

During the 1980s, there was growing awareness that disability rights were strongly linked to the struggle against racial oppression, and the recognition that the liberation of disabled people was fundamentally linked with the liberation of the majority of people in South Africa.\(^{13}\) Thus the disability rights movement (through Disabled People South Africa)\(^{14}\) aligned itself with the anti-apartheid movement and the mass democratic movement. Its goals were to create a voice for disabled people through self-representation\(^{15}\) and to establish a base for economic empowerment of disabled people. There was a major focus on equality of opportunity - in employment, transport, education and accessibility of the built environment. As an organisation of parents of disabled children, the Disabled Children’s Action Group (DICAG) sought to ensure that the rights of disabled children were taken up as part of the broader struggle for disability rights, and to raise awareness and promote inclusion of children.

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\(^{11}\)Because provisioning clauses were framed in discretionary terms, this Act did not place any legislative obligation on the State to provide social services for children. Proudlock P & Jamieson L ‘The Children’s Act: providing a strong legislative foundation for a developmental approach to child care and protection’ in Proudlock P et al. (eds) *South African Child Gauge* (2008).


\(^{13}\)Howell et al note that the establishment of the disability rights movement was influenced by the black consciousness movement. ‘They [disabled people] did not want to be integrated into a society that remained unequal and discriminatory because of differences between people. They wanted to contribute to a new society where all people would be regarded as equal and would be able to contribute equally to the social, economic and political life of that society.’ Howell C et al. (2006) (n 1 above) 51.

\(^{14}\)The formation of DPSA as a cross-disability movement was significant because previous divisions based on impairment types had the potential to create competition for resources.

\(^{15}\)Indeed, self-representation of disabled people (and not being represented by professionals) is considered to be one of the greatest achievements of the disability rights movement in South Africa. Howell C et al. (2006) (n 1 above).
with disabilities into initiatives relating to children's rights in South Africa.\textsuperscript{16}

(b) The early democratic era
During the late 70s and early 80s, as resistance movements grew and there was increasing national and international economic pressures on the government, the crumbling of apartheid became evident. The early 1990s was a time of intense political activity, and an opportunity to infuse disability issues into the policy framework of post-apartheid South Africa. Integration of disability into new legislation and policy had two prongs, viz to prevent discrimination, and to promote opportunities for disabled people to have access to services such as education, health and employment.\textsuperscript{17} Policies were based on international best practice,\textsuperscript{18} working towards re-dressing the injustices of the apartheid era and reframing disability as a human rights issue, based on the social model.\textsuperscript{19} These values and principles were reflected in the Disability Rights Charter of South Africa.\textsuperscript{20}

The turn to democracy was also characterised by strong political will to support children in their early years. Although ECD services are not articulated per se as a specific right, the Constitution provides a rights-based legislative framework upon which to base the mandate for equitable and quality services,\textsuperscript{21} and reflects the political will to address past imbalances and provide equal opportunities. Affirmation of the rights of children (as contained in s28 of the Constitution, based on the CRC and African Charter) was accompanied by growing recognition of historical and cultural variations in views of the ideal childhood and of children's active

\textsuperscript{16}Howell C et al. (2006) (n 1 above).
\textsuperscript{17}DPSA’s involvement with the Convention for a Democratic South Africa (CODESA), the multi-party negotiation process, is credited with the fact that the Constitution recognises the prevention of unfair discrimination on the basis of disability and the need for measures to redress the inequalities experienced by disabled people in the past.
\textsuperscript{18}For example, the INDS (n 2 above) was based on the World Programme of Action Concerning Disabled Persons (adopted by the UN General Assembly in 1982 by is resolution 37/52) and the UN Standard Rules for the Equalisation of Opportunities for Persons with Disabilities (adopted in 1994).
\textsuperscript{19}The social model is discussed in more detail in Chapter 2 of this thesis.
\textsuperscript{20}Lawyers for Human Rights ‘Disability Rights Charter of South Africa’ (2000). The Charter embodies a rights and development approach to disability, which recognises the fundamental needs of all people and their right to have these needs met. It affirms the duty of the State to ensure that equal opportunities are created for disabled people so that they are able to share in the social and economic benefits of the country.
\textsuperscript{21}The ECD policy question was located in a rights-based approach, embracing both children's rights to develop their potential and women rights to choice and control over their own lives. Porteus K (2004) (n 5 above).
participation in society.22

Post-1994 there was a major policy shift toward prevention and early intervention in relation to social problems, and a focus on young children outside of early education became more prominent.23 The White Paper on Social Welfare was adopted in 1997 articulating the vision of a developmental social welfare system ‘which facilitates the development of human capacity and self-reliance within a caring and enabling socio-economic environment’, in which social welfare is ‘an integrated and comprehensive system of social services, facilities and programmes and social security to promote social development, social justice and the social functioning of people’.24 Social welfare services were thus seen as encompassing a broad range of services directed towards social development, including health, education, nutrition and recreation. Under the White Paper, the family was viewed as the basic unit of society, with the recognition that the well-being of children is dependent on families ability to function effectively. Interventions were to concentrate first on prevention, by strengthening family functioning to prevent the need for children’s removal into alternative care, then on protection and lastly on the provision of statutory services.25 Policies and programmes based on it were to strengthen and promote families as a means of prevention:

‘The aim of family and child welfare services is to preserve and strengthen families so that they can provide a suitable environment for the physical, emotional and social development of all members... Those in need of special support are families with children, especially those who are under five years old, single-parent families and families caring for children and members with disabilities… These families should be targeted for immediate action and should receive the highest priority in family upliftment programmes.’26

Significantly, the White Paper recognised that disability in a family is likely to increase the impact of poverty, while poverty is a contributing factor for disability.

22In the policy processes leading up to the 1994 elections, ECD was prioritised and articulated within a human rights framework, and there was a commitment to integrated and multifunctional ECD services, catering for a wide range of needs of children and mothers with various sites offering services to children in poverty. Value was placed on innovation and services provided by NGOs and there was a commitment to increase government spending towards massive redress in the sector. Porteus K (2004) (n 5 above).
26Department of Welfare (1997) (n 24 above) 41.
The Department of Welfare sought to ensure that the conditions were created for optimum development of all children and their families through the rendering of appropriate ECD services. These were seen to be preventative in nature and constituting a social investment towards healthy and capable citizens. It was agreed that disadvantaged children under the age of five were to be the primary target for services, with the needs of children below the age of three years and those with disabilities being of particular urgency. The policy committed government to subsidise programmes aimed at meeting the varied needs of young children and their families.

Both the Integrated National Disability Strategy (INDS) (discussed in the next section of this chapter) and the White Paper on Social Welfare embody a paradigm shift from dependency to independence, dignity, self-reliance and acknowledgement of people's capabilities through an enabling social and economic environment. They reflect a move from welfarism (with a focus on provision of grants) to a developmental and rights-based approach.

Within the education sector, there was a shift in focus from ‘educare’, towards addressing the development processes of children aged birth to 9 years, as part of ECD. There was acknowledgement of the fundamental inequalities resulting from racially-based policies of the past, as well as the limitations of education which had focused largely on educational interventions which was 'only one component of caring for young children'. The White Paper on Education and Training accepted the term 'ECD' and identified it as a priority needing urgent attention.

(c) Implications for the current era

'The 1996 moment’ has been recognised as being critical for policy and programme developments, particularly in the ECD sector, and for young children with disabilities.

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29Department of Welfare (undated) Disability Policy.
30Developmental social welfare seeks to combine social development with economic development and ensure equality of vulnerable groups.
31Dept of Education ‘White Paper on Education and Training’ (1995). ECD was defined as referring to strategies to meet the needs of young children from birth to 9 years.
This is because of the multiple radical shifts that were made - from racially-based services to those based on equity, from a medical to a social, rights-based model of disability, and from a focus on ‘educare’ to one addressing all aspects of ECD. There was also growing recognition of the role of the State in ECD. All of which set the scene for policy and programme developments for young children. However, while children’s rights were key to shaping post-apartheid policy development, ECD-related processes have (until recently) been at the margins of policy attention, particularly in the education sector. Porteus attributes this to her observation that:

‘early policy processes in education misunderstood the location of the most important debates defining the parameters of possibility for education policy, which lay not with educationalists but with economists in the Departments of Finance and Treasury… The macroeconomic strategies and their consequences for social spending implied from early on that massive innovation and redress in the ECD sector would not be possible through State investment.’³³

In addition to persistent under-resourcing of ECD services, there have been a number of other factors that have contributed to transformational challenges within the ECD sector. The State has had to grapple with developing appropriate policies to address a history of fragmented and unequal patterns of provision focused on protection as opposed to prevention.³⁴ Further, the complexities of ECD has meant that no single institutional stakeholder is held accountable for it, nor is there a single strategy for child development (for children from conception to school entry).³⁵ In addition to a scarcity of ECD professionals, the ECD sector is generally less organised than other sectors (of Education), with practitioners and parents often not taking an active role in advocating for State change and young children not able to voice their concerns.³⁶

Among the key questions that have had to be addressed in the sector are, What is the best form of ECD provisioning in South Africa? How can the State best bring about massive redress to ensure improved access for vulnerable children, and how should such services be funded?³⁷ It is within this context that State provision for ECD services for children with disabilities is discussed.

5.1.3 Locus of the mandate

ECD embraces a wide range of services, and the responsibility for providing them is shared between different government departments at different spheres. The mandates of these departments emerge from the Constitution as well as from legislation and policies. The primary role of national departments is to develop national legislation, and policies to monitor and evaluate service delivery. They are also responsible for funding and streamlining of services and capacity building of provincial departments and national NGOs. The role of provincial departments is to develop provincial policies that are aligned to national priorities. They also provide direct services, build capacity and fund provincial NGOs. This requires the development of operational policies and guidelines, establishment of networks at provincial level and contracting with private providers.38

Under the Constitution, childcare facilities are a concurrent competence of national and provincial government with municipalities having executive authority in respect of matters relating to these facilities.39 Legislation can be enacted by national or provincial government indicating how and to what extent municipalities are to provide for childcare facilities. Assessment of health and safety appropriateness of buildings and premises being used as childcare facilities are the role of local authorities in terms of appropriate bye-laws.

(a) Department of Social Development

The Constitution (s28(c)) provides for the right of children to social services. The Department of Social Development is the lead agency for children from birth to four. Its legislative mandate includes the Children’s Act 38 of 2005,40 under which it is responsible for the provision of partial care, ECD and prevention and early intervention services.

38Department of Social Development ‘National Strategy towards the integration of services to children with disabilities’ (2013). This is a draft document containing an implementation plan, which is currently being circulated for comment. Copy on file with the author.
40Department of Social Development Strategic Plan 2012-2015.
The Social Assistance Act 13 of 2004 establishes the legislative framework for providing social grants. It also shifts the social assistance function from national to provincial sphere, establishing the South African Social Security Agency (SASSA) for the management and administration of child grants.\(^{41}\)

Under the Non-Profit Organisations Act of 1997, the Department of Social Development is mandated to provide an enabling environment within which non-profit organisations (NPOs) can flourish. It also establishes an administrative and regulatory framework within which NPOs can conduct their affairs.\(^{42}\)

(b) Department of Health

The legislative mandate of the Department of Health is based on the Constitution (s28(1)(c)) which provides for the right of children to basic health services. Under the National Health Act 61 of 2003, the Department is to work towards a transformed national health system based on the Primary Health Care (PHC) approach.\(^{43}\) The role of the Department of Health begins prenatally, with provision of antenatal care to pregnant women. For all young children below four years of age, the Department’s mandate is to provide integrated management of childhood illnesses, primary health care and HIV and AIDS interventions.

(c) Department of Education

The Constitution (s29) provides for the right of everyone to basic education. The role of the national Department of Education is the development of a national policy framework for the education of the young child, including the structure of provision, determination of financial responsibilities, and the establishment of national norms and standards for ECD curricula and training.\(^{44}\) Two particular policies clarify the Department’s position. First, although its main focus is on the expansion of the Reception Year,\(^{45}\) Education White Paper on Early Childhood Development\(^{46}\) provides

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\(^{41}\)Department of Social Development 2012-2015 (n 40 above).

\(^{42}\)Department of Social Development 2012-2015 (n 40 above). Note that the Act was amended in 2000 for certain textual alterations.

\(^{43}\)Dept of Health Strategic Plan 2010/11-2012/13.

\(^{44}\)Dept of Education (1995) (n 31 above).

\(^{45}\)Also known as ‘Grade 0,’ this is the first year of compulsory schooling for children aged 5 years, which takes place the year before they start Grade 1.

for improvement in the quality of programmes, including curriculum development, early stimulation, teacher training and provision of learning and teaching resources for children below four years of age. Secondly, Education White Paper 6 on Inclusive Education describes the intention of the Department of Education to implement inclusive education, which is directed towards the reduction of barriers to learning and inclusion of vulnerable learners, such as those with disabilities. This is to be promoted through targeted support and mechanisms that will improve the retention of learners in the education system, particularly those who are at risk of dropping out.

The following section critiques the legislation, policies and strategies that government has put in place to provide ECD services for children with disabilities. It begins by discussing over-arching provisions relating to disability and then focuses on specific components of the ‘essential package’ of ECD services, viz social services, social security, health and nutrition and early learning.

### 5.2 Disability-specific policy, legislation and strategies

#### 5.2.1 Integrated National Disability Strategy (INDS)

The INDS is based on the Constitution and the UN Standard Rules on the Equalisation of Opportunities of Persons with Disabilities; it provides a comprehensive and ambitious programme aimed at transforming the disabling attitudes and environments that undermine the dignity of people with disabilities, and developing policies and legislation to that end. The vision of the INDS is ‘a society for all’, with integration of disability issues in all government strategies, planning and

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47Department of Basic Education Strategic Plan 2011-2014.  
49Dept of Basic Education 2011-2014 (n 47 above).  
50INDS (1997) (n 2 above).  
52Bhabha F ‘Disability equality rights in South Africa: concepts, interpretation and the transformation imperative’ (2009) *South African Journal on Human Rights* (25) 222. Although the Office on the Status of Persons with Disability was initially set up to monitor and co-ordinate activities, these functions have since been taken on by the Department of Women, Children and Persons with Disabilities.
programmes, supported by a co-ordinated management system.\textsuperscript{53}

The INDS identifies priority policy areas, with objectives, strategies and mechanisms for each of these. For education, the INDS recommends the ‘inclusion of learners with special needs in education and training within a single equitable education system’ at all levels of education, including ECD.\textsuperscript{54} It acknowledges that ‘early childhood development and learning provides children with disabilities with access to early intervention and socialisation from an early age’.\textsuperscript{55} Policy objectives include the facilitation of equal access to education and capacity-building for all stakeholders, including parents and teachers.

Within the priority area of child health care, the INDS recommends that measures are taken to ensure ‘comprehensive free health care for all children with disabilities under six, including free assistive devices and rehabilitation services’.\textsuperscript{56} Policy objectives for rehabilitation include enabling ‘people with disabilities to reach and maintain their optimal physical, sensory, intellectual, psychiatric and/or social functional levels’\textsuperscript{57} through training of personnel and inter-sectoral collaboration. Policy objectives for social security are also identified, and there is acknowledgement of difficulties related to varying definitions of disability and medically-oriented assessment criteria.\textsuperscript{58}

A former Secretary-General of Disabled People South Africa, Mike du Toit, gives the rationale for the decision not to adopt a Disability Act in South Africa:

“We looked at the different models around the world and we decided, rather than going the route of the disability act, we would try for what in our view was one better, and that was real integration. So what we have is that in every piece of legislation, whether it be on culture, language, education, labour relations, or economic empowerment, disability is specifically

\textsuperscript{54}INDS (1997) (n 2 above) 38.
\textsuperscript{55}INDS (n 2 above) 38.
\textsuperscript{56}INDS (n 2 above) 26.
\textsuperscript{57}INDS (n 2 above) 27.
\textsuperscript{58} INDS (n 2 above) 53.
included and the way that act will address disability is spelt out.\textsuperscript{59}

Some have felt that the choice not to have legislation that specifically addresses their needs (such as the Americans with Disabilities Act) has hindered the realisation of the rights of disabled adults and children.\textsuperscript{60} However, I would argue that the Children’s Act\textsuperscript{61} provides a good example of how the rights of those with disabilities can be foregrounded in legislation for a particular group (in this case children), thus reflecting the values and vision articulated by the INDS. In my view, a stand-alone act for persons with disabilities would be likely to contribute to the perception of disabled adults and children being a separate group in society.

5.2.2 Equality Act

The Constitution promotes equality and prohibits discrimination on various grounds, including age and disability and requires that enabling legislation be adopted to underpin substantive equality.\textsuperscript{62} To this end, the Promotion of Equality and Prevention of Unfair Discrimination Act (hereinafter referred to as the Equality Act)\textsuperscript{63} has been promulgated. In giving effect to the letter and spirit of the Constitution, this Act provides for measures to facilitate the eradication of unfair discrimination, and to raise awareness on the importance of promoting equality and overcoming unfair discrimination. It also provides remedies for victims of unfair discrimination and those whose right to equality has been infringed, as well as measures to advance persons disadvantaged by unfair discrimination.\textsuperscript{64}

The Equality Act has been described as 'transformative law', aiming to create a more egalitarian society as well as change the hearts and minds of South Africans so that

\textsuperscript{60}Heap M Lorenzo T & Thomas J ‘We’ve moved away from disability as a health issue, it’s a human rights issue: reflecting on 10 years of the right to equality in South Africa’ (2009) \textit{Disability and Society} 24(7) 857-868.
\textsuperscript{61}Children’s Act 38 of 2005.
\textsuperscript{62}Constitution (n 39 above) s 9(4).
\textsuperscript{63}Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Equality is defined in the Act as including ‘the full and equal enjoyment of all rights and freedoms as contemplated in the constitution and includes de jure and de facto equality and also equality in terms of outcomes (s1 (ix)).
\textsuperscript{64}Equality Act (2000) (n 63 above) s2.
sexism, racism and disablism become foreign to the public discourse. The Preamble to the Act acknowledges the existence of systemic inequalities and unfair discrimination brought about by the country’s history of colonialism, apartheid and patriarchy; it stresses the need to take measures at all levels to eliminate such discrimination and inequalities. The Act details what constitutes unfair discrimination on the ground of disability and in prohibiting it, requires both elimination of obstacles that restrict the opportunities of people with disabilities as well as reasonable accommodation of their needs.

The Equality Act is of critical importance for people with disabilities and an important tool for combating discrimination against them.

'Where discrimination occurs, the Act provides a mechanism for people with disabilities to challenge it through the courts. It does not, however, absolve the State of its obligations to ensure that its policies, legislation and actions take account of the needs of people with disabilities and promote the attainment of substantive equality.'

It is seen as having paved the way for better access to service delivery for persons with disabilities, such as free health care and disability grants. However, Liebenberg argues that the provisions of this Act 'carry much untapped potential to advocate for effective policy and judicial remedies for children experiencing various forms of systemic disadvantage and socio-economic marginalisation'. She cautions that a one-size-fits-all approach is inappropriate for achieving substantive equality and therefore there is a need to provide a range of interventions that will enable children

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66 The Act states that 'neither the State nor any person' may discriminate unfairly against someone on the grounds of race, gender and disability and 'the State, institutions performing public functions and all persons' have a duty to eliminate discrimination and promote equality in respect of race, gender and disability. Equality Act (2000) (n 63 above) s28(3)(a).

67 This includes denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society; contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility; and failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons. Equality Act (2000) (n 63 above) s9(a)(b)(c).

68 If it is proved in the prosecution of any offence that unfair discrimination on the ground of race, gender or disability was influential in the commission of the offence, for purposes of sentence it must be regarded as an aggravating circumstance.


to participate as equals in society.

In exploring what the right to equality in South Africa's constitutional democracy has meant for disabled people, Heap et al. found that while

'much has been put in place to protect the rights of disabled people in terms of legislative and administrative measures... the felt reality of the implementation of the right to equality and socio-economic rights has yet to be experienced in the everyday social life of the majority of South Africans'.

However, despite the number of human rights abuses against disabled people, the South African Human Rights Commission has received 'surprisingly few complaints' relating to them. Indeed, Thuli Madonsela (the Public Protector) has pointed out that more effort is needed to ensure that legislation and policies are effectively implemented. Her recommendation is that people with disabilities, especially those in rural areas, need to be better educated about the legislation and policies that protect their rights, in order to ensure their active participation in the policy development and implementation process. However, Kok’s critique of the (in)effectiveness of the Equality Act goes far deeper, and he identifies some of the inherent weaknesses of a complaints-driven process. He makes the observation that Courts are better suited to deal with particular wrongs, rather than with more general patterns of systemic disadvantage. Further, the Act is based on the assumption that the 'perpetrator' is a ‘malevolently-motivated individual,’ and that a particular form of discrimination (such as disablism) is the exception, rather than the manifestation of society’s norms and values. Referring to the Equality Act, Kok concludes that 'the law' cannot effectively address discrimination. Thus perhaps it is not surprising that, despite its ambitious goals, this legislation has done little to advance the rights of young children with disabilities.

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71Heap M et al. (2009) (n 60 above) 859.
74Kok A (2008) (n 65 above) 134.
5.2.3 Disability policy and strategy

There have been two disability-specific policies drawn up by the Department of Social Development, which refer to developmental social services with respect to adults and children with disabilities. The first of these, the ‘Disability Policy’ was signed off by the then Minister of Social Development, Mr Z. Sweeney, but is undated. The limitations of this document lie in the fact that its status is not clear and it is not linked to any programmes or strategy. Further, there is no budget identifiable for its implementation, nor is there a monitoring framework.

The second disability-specific provision is the ‘National Strategy towards the integration of services to children with disabilities’ which aims:

> ‘to ensure the integration of services for children with disabilities in order to improve their quality of life, creating an enabling environment within which they can have equal and accessible services.’

The Implementation Plan accompanying the Strategy has five strategic themes, viz prevention, early intervention, education and participation, family, care and protection and institutional responses. Those with the greatest bearing on ECD are the second and third strategic themes, the outcomes of which are that the risks and onset of childhood disability is identified and responded to early, and children with disabilities access quality early learning and education and participate fully in their households and communities. Among the interventions envisaged are screening, provision of information for parents and early intervention and support for children with disabilities and their families. The Strategy also addresses the need to ensure that early learning and development programmes provide quality and accessible programmes to children with disabilities.

The Strategy is comprehensive in nature, and its approach to ECD addresses some of the major components of the ‘essential package’, viz opportunities for early learning, health services (particularly screening and early identification and intervention) and

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75Its aim reflects that of the INDS within the sector, viz ‘to guide and inform the mainstreaming of disability in the development of all policies, strategies and integrated service delivery programmes of Department of Social Development’. The policy outlines a number of key principles such as barrier-free access and universal design and recognition of the family as an important support system. It notes that disability can be mainstreamed into services for youth and children through activities such as provision of parenting skills for parents of children with disabilities and supporting the provision of ECD programmes for children with disabilities. Copy on file with the author.

parental support programmes. It is to be commended for its raising of key challenges around resource mobilisation in the form of human resources and funding of NGOs providing disability-related services.

However, overall the current version of the Strategy is poorly written, with numerous editing mistakes, incomplete referencing, and lack of a coherent and logical approach. Further, its structure is such that it does not correspond to other frameworks (such as the ‘essential package’), and it does not identify key opportunities for promoting integration of children with disabilities within different sectors. In its current form, therefore, the Strategy offers little for engaging with ECD-related initiatives. For example, in its Strategic Plan 2011-2014 the Department of Social Development has prioritised the scaling up of ECD services for children age 0-4 years. However, no clear indication is given as to how this is to include children with disabilities and no reference is made in this plan to the ‘Strategy for the integration of services to children with disabilities’.78

Given that it encompasses different elements, rights relating to ECD lie in a number of different sectors. The following section deals with the right to social services, which is the responsibility of the Department of Social Development. Thereafter, I deal with the right to social security (Social Development), health and nutrition (Department of Health) and early learning (Department of Basic Education).

5.3 The right to social services

Children’s right to social services in guaranteed in the Constitution (s28(1)(c)). Discussion of this right focuses on three different provisions by the State, viz the Children’s Act, a five-year plan for integrated ECD services and guidelines for ECD services.

77 A comprehensive critique of the Strategy was submitted to the Department of Social Development by the ECD sub-group of the Campaign on the Right to Education in October 2013. A copy is on file with the author.
78 Dept of Social Development (2013) (n 38 above).
5.3.1 Children’s Act

(a) Background and orientation of the Act

The Children's Act has been described as 'South Africa's response to the practical issues confronting children in their day-to-day lives'. It is the primary legal framework for the realisation of the constitutional rights of children, as it gives effect to children's rights to family care, parental care or alternative care, to social services and to protection from maltreatment, neglect, abuse or degradation. It was initiated after ratification of the CRC and African Charter and is seen as a means of domesticating these treaties. Inherent in the vision of the South African Law Reform Commission (SALRC) in drawing up this statute were two principles, viz enabling children to grow and develop within a family environment, and protecting them in vulnerable situations.

The Act brings together legal provisions that were previously in a range of different laws. Its general principles embody a coherent and comprehensive approach to legislation affecting children, and include respect for the child's inherent dignity, protection from unfair discrimination, recognition of the child's need for development and recognition of a child's disability and the need to create an enabling environment to respond to their special needs. These principles are intended to ensure that the needs of the most vulnerable children are taken into account, by guiding decision-makers on appropriate allocation of scarce social resources and services to children who are most at risk of suffering harm. Further, the Act creates a legal obligation to put the best interests of the child first in every matter concerning the child, giving a list of factors that must be considered whenever this standard is applied.
The Children’s Act embodies a proactive orientation, which is relatively new in the legislative terrain. The emphasis is on strengthening the family and community in their roles of protecting the child, and activating the system where risks of problems are observed to be present. In situations where families are unwilling or unable to care for their children, the Act provides for State alternative care. The Act’s provisions on prevention and early intervention place obligations on service providers to act when they become aware of signs of problems, rather than waiting for the problems themselves to occur. The mandate is one of ‘vigilance towards risk, foresight and forethought, and an orientation towards early action before smaller problems escalate into larger ones’. This is focused on the ultimate outcomes that we wish to achieve for children, viz:

'... they can fully assume their responsibilities within the community as well as that the child, for the full and harmonious development of his or her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding.'

Another feature of the Children’s Act is that it is rights-based, embodying a shift from a charity-oriented approach to one that recognises that children have a constitutional right to social services and that the State bears the primary duty to ensure that these are provided. This does not mean, necessarily, that the State has to provide the services itself, but it is obliged to ensure that the services are provided and accessible to all vulnerable children. This requires good partnerships between government and NPOs, as they are key role players by virtue of the direct services they provide, frequently as the first point of contact with children.
Finally, the Act adopts an equity-driven orientation, with areas of service delivery having provisions relating to strategy, provisioning and norms and standards. These place a duty on the national Minister and provincial MECs for Social Development\textsuperscript{94} to ensure that in every province there is a sufficient spread of services as well as updated records to facilitate effective planning, monitoring and budgeting for these services.\textsuperscript{95}

(b) Disability provisions in the Children’s Act

From its inception, it was agreed by the SALRC that the new legislation for children would make mention of children in especially difficult circumstances, including children with disabilities. The Commission was deeply aware of the exclusion from society experienced by children with disabilities and their lack of access to basic services, including ECD\textsuperscript{96}, and made several recommendations towards ensuring that children with disabilities were enabled to live with their families. Among these was that parents should be empowered to care for their children at home. This could be achieved through provision of accessible health and rehabilitation services, accessible schools, provision of assistive devices and support programmes for parents.\textsuperscript{97} Although not all of these recommendations were incorporated,\textsuperscript{98} the Act adopts the social model of disability in addressing factors which limit the ability of children with disabilities to participate in different spheres of life.\textsuperscript{99} It provides that barriers must be removed and the necessary support provided so that children with disabilities are

\textsuperscript{94}This is the Member of the Executive Council, the provincial counterpart to the national Minister of Social Development.

\textsuperscript{95}s4(2) indicates that all spheres of government must take reasonable measures i.e. Treasury and provinces must prioritise implementation of the Act when making decisions about resource allocation. Budlender D et al (2011) (n 93 above).

\textsuperscript{96}There is also a lack of ECD services for children with disabilities and... existing ECD facilities are inaccessible for children with disabilities. Where ECD services for children with disabilities do exist, they are often attached to special schools, outside of communities and provinces requiring that a child as young as three years has to attend boarding facilities. Also, the majority of children with disabilities within ECD centres are presently accommodated in informal community-based day care centres run by parents of disabled children.’ (para 13.4.5) The SALC dedicated a whole section of Discussion Paper 103 to children with disabilities, drawing from the experiences of countries such as Vietnam, Canada and USA to explore appropriate responses.

\textsuperscript{97}These were to include children’s rights, knowledge about existing services and facilities and how they as parents can contribute to the child's development.

\textsuperscript{98}For example, the Commission recommended that children with disabilities should be assisted with provision of transport to school. South African Law Commission ‘Discussion paper 103’ (2001) para 13.4.7.

enabled to have equal access to services and therefore to protection.\textsuperscript{100} Given that one of the objectives of the Act is ‘to recognise the special needs that children with disabilities may have’\textsuperscript{101} it is not surprising that the rights of children with disabilities are specifically addressed within the general principles. Not only is discrimination on the basis of disability prohibited,\textsuperscript{102} the ‘twin principles’ relating to child development are applied, viz on the one hand children should be encouraged to maximise their potential, but on the other, they need protection.\textsuperscript{103}

Section 11 contains the most direct provisions of the Act in relation to children with disabilities,\textsuperscript{104} and has been strongly correlated with the provisions for children with disabilities in the CRC and African Charter.\textsuperscript{105} I argue too that they are strongly correlated with the components of the ‘essential package’ of ECD services. The first part of s11 provides for children with disabilities to be provided with the type of care that is needed.\textsuperscript{106} While acknowledging their vulnerability, this is recognition of the right of children with disabilities to grow up in a family environment. Secondly, s11 stipulates that ‘due consideration’ must be given to make it possible for children with disabilities to participate in ‘social, cultural, religious or educational activities, recognising the special needs that they may have’. This provision lays the foundation for ECD, particularly early learning. It is regarded as being a ‘bold step’, given that currently the education system fails to provide sufficient access to basic education for children with disabilities.\textsuperscript{107} Thirdly, children with disabilities must be provided with conditions that ‘ensure dignity, promote self-reliance and facilitate active participation in the community’,\textsuperscript{108} principles which are foundational to ECD, as discussed in Chapter 4 in relation to the Constitution. Fourthly, section 11 also

\textsuperscript{100}References to equality for children with disabilities can be found in s2, 6, 7, 11 and 42 and in most of the provisioning and strategy clauses in each of the service chapters. Proudlock P & Jamieson L ‘The Children’s Act: providing a strong legislative foundation for a developmental approach to child care and protection’ in Proudlock P et al (eds) \textit{South African Child Gauge} (2008) 38.
\textsuperscript{101}s2(h).
\textsuperscript{102}s6(2)(d).
\textsuperscript{103}s2(e)(f). Boezaart T (2011) (n 80 above) p. 271.
\textsuperscript{104}This is also one of the general principles, and thus it should guide all proceedings, actions and decisions involving children with disabilities.
\textsuperscript{105}Davel T ‘General principles’ in Davel C & Skelton A \textit{Commentary on the Children’s Act} Original service (2007).
\textsuperscript{106}Note that the definition of ‘care’ in the Act includes maintaining a sound relationship with the child and accommodating their ‘special needs’.
\textsuperscript{108}s11(1)(c).
includes providing the child and the child's caregivers with the necessary support services to prevent further discrimination and neglect. Some have interpreted such ‘support services’ as referring to Care Dependency Grants, although the terminology suggests that it is not limited to grants. Finally, children with disabilities are protected, through the provision that they have the right not to be subjected to medical, social, cultural or religious practices that are harmful to their health, well-being or dignity. Section 11 thus contains all the elements of ECD for children with disabilities – being treated with dignity, having the necessary support towards participation in community life (including educationally) and having support for the primary carer. Davel cautions however that:

'Although encouraging, it is difficult to see how this subsection will deal with... the lack of ECD services for children with disabilities and all the attitudinal, physical and communication barriers that these children often experience.'

Significantly, in giving ‘due consideration’ to children with disabilities, the Act goes beyond mere platitudes or rhetoric and ‘puts its money where its mouth is’. In provisions for partial care, ECD and prevention and early intervention, the Act identifies two groups for whom funding of services must be prioritised. These are for families who ‘lack the basic necessities of life’ and for making services accessible for children with disabilities. It has been noted that there are no set standards of what constitutes ‘basic necessities of life’; I would argue that neither are there set standards for what constitutes ‘availability’ or ‘accessibility’ of services for ECD services for children with disabilities. Perhaps clarity on this could be sought from recent work done by the SAHRC in the education sector.

Despite this targeted funding, it is not possible to measure spending if (as is currently

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109 Boezaart T (2011) (n 80 above). These are discussed in more detail in Section 5.4 of this chapter.
110 s11 (3).
112 The last section of the provisioning clauses for partial care (s78(4)), ECD (s93(4)) and prevention and early intervention (s146(4)) are almost identical, requiring the prioritisation of services for communities in which families lack the means to provide shelter, food and other basic necessities for their children, as well as for children with disabilities. Partial care must be accessible for children with disabilities, while ECD and prevention and early intervention must be available to them.
113 The ‘4A legal framework’ provides guidance on what action the State must take to meet prescribed legal requirements for availability, accessibility, acceptability and adaptability. SAHRC ‘Charter of Basic Education Rights’ (2012).
the case) information systems do not disaggregate data on children with disabilities.\textsuperscript{114} Lack of appropriate data collection systems for monitoring and planning services for children with disabilities constitutes a violation of the States obligations under the CRC and the CRPD.\textsuperscript{115}

Further, while the Act recognises that partial care, ECD and prevention and early intervention require collaboration between different sectors, it fails to include ‘civil society’ as one of the important stakeholders in the strategies for these services. Parent organisations and disability-related NGOs have an important role to play and need to be consulted in development of strategies for each of these areas. This is one of the obligations of government under the CRPD if programmes are to be fully inclusive of children with disabilities.\textsuperscript{116}

It is evident that children with disabilities have been placed on ‘centre stage’ in the Children’s Act.\textsuperscript{117} However, the implications of this cannot be taken for granted, as shown in the following quote:

‘Children with disabilities or chronic illnesses i.e. extremely vulnerable children, are a priority of this Act. They should be assisted in every way to achieve their potential, regardless of how limited that might be. For instance, a mentally retarded child has the right to learn to enhance his/her dignity by being taught to bath and dress. This is a basic principle, even if this is the limit of development the particular child can reach.’\textsuperscript{118}

Despite acknowledging that children with disabilities are ‘a priority’ the interpretation of what this means is extremely patronizing, and based on the assumption that children with disabilities ‘will not amount to much’! Clearly a great deal more needs to be done to remove stereotypes and attitudinal barriers that persist with regard to children with disabilities.


\textsuperscript{115}See Chapter 3 for more on this, particularly Committee on the Rights of the Child General Comment No. 7: Implementing child rights in early childhood (2005) and Committee on the Rights of the Child General Comment No. 9: The rights of children with disabilities’ (2007).

\textsuperscript{116}CRPD Article 4(3) reflects the State’s obligation to ‘closely consult with’ and ‘actively involve’ persons with disabilities, including children, through their representative organisations.

\textsuperscript{117}Jamieson L & Proudlock P ‘From sidelines to centre stage: the inclusion of children with disabilities in the Children’s Act’ (2009).

\textsuperscript{118}Bosman-Sadie H & Corrie L (2010) (n 93 above) p.26, drawing from SALRC report of 2001 which defined children with disabilities as being among ‘very vulnerable children’.
(c) Early childhood development in the Children’s Act

The historical development of ECD, as described earlier in this chapter, has been shaped by political ideologies resulting in a wide variation in the quality of services. The sector has been plagued by fragmentation and unequal access to services, particularly for black children with disabilities. Until now ECD has not been formally recognised in legislation as a social service. Indeed, ‘few countries have singled out ECD in children's legislation in the way that South Africa has in the Children's Act’. The introduction of legislation to mandate service delivery in the sector has been commended, as policies are often not implemented. The significance of the Children’s Act for ECD lies in its placing of the best interest of the child as the starting point for intervention in children's lives. However, while ‘the view that ECD is the responsibility of parents and families and not the State is no longer tenable’, understanding of the implications of ECD as a legal obligation of the State is still limited, and few local commentaries are available on it.

In contrast to the former Child Care Act, the Children’s Act removes the concept of 'places of care' and focuses on provision of services and programmes, which may be based at home, in the community, or at a centre. This reflects the proactive orientation of the Act, with an emphasis on development of the child and not primarily the places in which children are cared for. Further, it allows for flexibility to provide a wide range of interventions (including community and home-based programmes) with an associated shift in funding (pro-equity) to increase access to services. The Children’s Act addresses care and protection of young children and regulates centre-based provisioning and early intervention programmes. While

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120 The Child Care Act contained provisions for a service at 'places of care', which included crèches, playgroups and after-school services, which could be registered. The primary focus was on the physical structure or premises. du Toit, C & Mambao B (2010) (n 12 above).
122 The integrated approach of NIP is seen by Biersteker to be strengthened by the Children's Act, but the historical lack of mandated policy for provision of ECD services has contributed to ECD interventions not being formalised as a profession in South Africa. Storbeck C and Moodley S ‘ECD policies in South Africa - What about children with disabilities?’ (2011) Journal of African Studies and Development 3(1) 1-8.
124 SALRC (2002) (n 82 above) 205.
125 A place of care was defined as any building or premises for the ‘reception, protection and care’ of more than six children apart from their parents. Child Care Act 74 of 1983 s1 (definitions).
recognising the danger of over-regulation such that community members cannot provide the service, the Act requires that uniform standards of quality be maintained.\textsuperscript{127} However, it is a challenge to balance the need to protect children's rights, with norms and standards for children's safety and quality programmes, and the contextual reality within which services are offered.

ECD issues are covered mainly in three chapters of the Act, viz partial care (Chapter 5), ECD (Chapter 6) and prevention and early intervention (Chapter 8). In the first two of these, the Act regulates ECD centres, services and programmes and provides for norms and standards, while most innovative ECD programmes fall under prevention and early intervention services. (It has been noted that these chapters should ideally be integrated in order to facilitate a comprehensive approach to ECD services.)\textsuperscript{128} In addition to these chapters, there are also several provisions relating to support to the family as a preventive and early intervention strategy to protect children, but these are phrased such that they apply mostly in situations of preventing serious harm and abuse to children, rather than within a context of the developmental services, and for this reason are not included in this discussion.

\textit{(i) Prevention and early intervention}  

Prevention services have not previously been legislated for in South Africa and the report of the SALRC acknowledges the challenges faced in drafting this chapter.\textsuperscript{129} Significantly, the Commission felt that it was important to go beyond a negative problem-focused approach (denoted by the term ‘prevention’), to actively 'safeguarding and promoting the well-being of children'.\textsuperscript{130} As a result, in the Act,

\begin{itemize}
\item \textsuperscript{127}du Toit and Mbmbo present a strong argument as to the value of norms and standards in the ECD sector. Not only do they promote delivery of services by competent staff, they help to promote programmes that are appropriate to the developmental stages of children, environments that are conducive to learning and play, and that are safe and clean. They also provide standards for child: caregiver ratios and training requirements of staff. Norms and standards are also important legally, as they enable Dept of Social Development to monitor programme quality. du Toit C & Mbmbo B (2010) (n 12 above).
\item \textsuperscript{128}Biersteker L ‘Early childhood development: rapid assessment and analysis of innovative community and home based childminding and early childhood development programmes in support of poor and vulnerable babies and young children in South Africa’ (2007).
\item \textsuperscript{129}SALRC (2002) (n 82 above).
\item \textsuperscript{130}The Commission defined prevention and early intervention, seeing prevention activities as occurring at three levels: primary prevention is directed at the general population with the goal of stopping the maltreatment or abuse before it starts. Secondary prevention comprises activities that focus on families where there are children who are known to be at greater risk of maltreatment, in order to prevent the
\end{itemize}
prevention and early intervention programmes include ‘early childhood development’ and ‘promoting the well-being of children and the realisation of their full potential’. The Act describes the kinds of activities that prevention and early intervention programmes should focus on, which include strengthening family relationships and ‘developing parenting skills and the capacity of parents and care-givers to safeguard the well-being and best interests of children with disabilities’. It directs practitioners to involve children and their caregivers in identifying and seeking solutions to challenges.

The SALRC recognised that prevention and early intervention services could only be delivered effectively as part of an integrated, inter-sectoral and inter-departmental framework, and therefore included a recommendation for a legislative provision to be made in this regard. However, this has not been reflected strongly within the Children’s Act, nor within legislation of Health or Basic Education.

Under the Children’s Act, the beneficiaries or targets of prevention and early intervention programmes are ‘families where there are children identified as being vulnerable to or at risk of harm of removal into alternative care’. The intention is to strengthen and build the capacity and self-reliance of families so that they are able to respond effectively to problems, thereby averting statutory intervention. There is thus a narrow focus on the family, although risk factors may be located more broadly in the community within which the family is located. This narrow focus may result in a development of full-scale or ongoing abuse. This is equated with early intervention. Tertiary prevention focuses on dealing with the abuse once it has occurred. SALRC (2002) (n 82 above).

131 s144 (2) (e)(f). As discussed in Chapter 2 of this thesis, the concepts of risk and resilience provide a useful framework for understanding prevention and early intervention.

132 s144(1)(c) The Commission also described the kinds of outcomes that prevention and early intervention programmes should work towards, as well as how such outcomes could be achieved. For example, the right to dignity is a right that must be achieved by prevention and early intervention.

133 The Commission urged that ‘Government departments at all levels, in partnership with the broader public, must plan inter-sectoral preventive strategies which are designed to strengthen family and community life and to promote homes, schools, neighbourhoods and communities which are safe for children and which promote their full and healthy development… Each government department shall draft a plan detailing how they intend to fulfil their mandate of promoting the rights and well-being of children and providing for preventive and early intervention services’. SALRC (2002) (n 82 above) 86.

134 Even where there are policies on prevention (such as in the Dept of Health), these are not effectively linked to identification and early intervention policies and there is a lack of guidelines for these services. Storbeck C and Moodley S (2011) (n 122 above).

135 s143(2)(b).
limited ability to address risk factors.\textsuperscript{136} Further, the definition of prevention does not address the individual child-related factors which may place a child at higher risk for negative outcomes (e.g. very young children and disabled children are often at higher risk for maltreatment).\textsuperscript{137}

The Act provides for improving access to and quality of prevention and early intervention services. It legislates for the development of national and provincial strategies for the provision and funding of these services, acknowledging that it is the responsibility of the provincial MEC for Social Development to ensure that these services are appropriately resourced, co-ordinated and managed. Only programmes complying with established norms and standards will qualify for funding.\textsuperscript{138}

The proactive orientation of the Act is commendable. It implies that in relation to children with disabilities, cognisance is taken of those factors that are primarily responsible for the ignorance and stigma often associated with disability, which results in many children with disabilities and their families being isolated and unsupported. Currently, however, the purposes of early intervention and prevention programmes do not include raising awareness of disability and removing stigma or promoting the full participation and inclusion of children with disabilities in their communities. By not addressing this barrier, the Act does not comply with the CRPD.\textsuperscript{139} In addition, drawing from the bio-ecological model of child development, prevention and early intervention programmes should not only be targeted to children with disabilities and their families, but also to the wider community.

\textbf{(ii) Partial care}

\textsuperscript{136}Frank C (2010) (n 10 above).
\textsuperscript{137}See General Comment 7 (2005) (n 115 above), General Comment 9 (2007) (n 115 above), and Chapter 1 of this thesis.
\textsuperscript{138}Frank presents a compelling argument to support her contention that the development of norms and standards is ‘primarily motivated by the need to ensure the quality of services’. Norms help to ensure that costing frameworks ‘are structured in order to create the conditions necessary to ensure a certain quality of service’, while standards establish benchmarks by which to measure actions. Norms and standards set out how programmes should be assessed. Frank C (2010) (n 10 above). National norms and standards for prevention and early intervention are set out in an annexure to the regulations. Mahery notes that from a rights-based approach, ‘norms and standards protect the child’s right to survival and development as guaranteed by the CRC in Art 6(2). Mahery P ‘Partial care’ in Davel CJ & Skelton A (eds) \textit{Commentary on the Children’s Act Revision Service} 2 (2010).
\textsuperscript{139}CRPD Art 8 Awareness-raising.
The Children’s Act provides for partial care, i.e. situations in which caregivers take care of more than six children on behalf of their parents. In contrast to the previous Child Care Act, which used a premises-oriented mechanism to trigger protective measures relating to childcare, the Children’s Act uses a service-oriented mechanism.140 The Minister for Social Development, working with other departments, must develop a national strategy for partial care which works towards an ‘appropriate spread’ of partial care facilities, giving ‘due consideration to children with disabilities’.141 The Act states that ECD programmes must be provided by partial care facilities that provide for children up to school-going age.

Partial care services have been recognised as falling within the ambit of social services.142 Based on the Constitution, the State is obliged to provide such services or fund NGOs to do so. The wording of s78 is thus problematic, as it indicates that funding is discretionary.143 While the Act requires funding to be prioritised to make partial care facilities accessible for children with disabilities,144 given the wording of 78(1), funding of centres providing programmes for development of children with disabilities is not guaranteed. The Act authorises the use of money received by the province from national Treasury in order to provide partial care, but it does not place a direct duty on the State to provide partial care facilities where there is a need for them. Clearer wording is required to place a direct obligation on the State to provide partial care as currently ‘it is ... unclear whether there is a constitutional obligation on the State to provide partial care facilities and services’.145 Such a duty would require the State to ensure that such services are provided, possibly at no cost, in poor communities where parents and families cannot afford to place their children in partial care facilities.

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140 This change can be attributed to the SALC findings that the premises-oriented definition in the Child Care Act did not adequately trigger the necessary protective provisions relating to partial care because ‘partial care services are potentially infinite in variety, and premises may be in short supply in impoverished communities’. SALC (2001) (n 98 above) 687.
141 s77(1), with cross reference to s11.
142 These range from family support services, protection services and services for especially vulnerable children and children in need of care outside the family environment. Dutschke M and Monson J ‘Children's constitutional right to social services’ in Proudlock P et al. (eds) South African Child Gauge (2008).
143 s78(1) ‘The MEC for social development may... provide and fund partial care facilities and services...’
144 s78(4).
The Act contains norms and standards for partial care, with additional standards set for facilities catering for children with disabilities. It sets out the quality of care required to meet the needs of children with disabilities not only with regard to the facility, but also the staff and programmes provided.\textsuperscript{146} As it stands, s79(3) suggests that partial care for children with disabilities is separate from partial care for other children. Instead of this segregated approach, there needs to be a continuum of services which cater for children requiring a range of levels of support – from low and moderate to high - within an inclusive system, as required by the CRPD\textsuperscript{147}. It follows that if partial care facilities are to be inclusive of children with disabilities, then staff need to have an understanding of the rights of children with disabilities and of how to implement inclusive ECD programmes. Staff will also need to be able to identify barriers to learning and development experienced by children with disabilities in order to provide or access the support needed by the child.\textsuperscript{148} Currently regulations on employment of staff at partial care facilities do not reflect these requirements. The mandatory employment of trainers to train staff on ‘basic therapeutic interventions’ is of particular significance. It is unclear what categories of persons are referred to, and the standards set for the training of trainees are not specified in the norms and standards for partial care.\textsuperscript{149} This may result in inconsistencies between the professional boards of the various social service occupational groups. The question of funding these services and programmes also arises, because they are required for registration even though the government is not mandated to fund them.\textsuperscript{150}

(iii) ECD

According to the Children’s Act, ECD refers to ‘the process of emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of children from birth to school-going age’.\textsuperscript{151} Meeting the all-encompassing needs of children

\textsuperscript{146}s79(3).
\textsuperscript{147}These concerns were raised in a submission to the Dept of Social Development by the ECD sub-group of the Campaign on the Right to Education for Children with Disabilities in October 2011. A copy is on file with the author.
\textsuperscript{148}ECD sub-group (2011) (n 147 above).
\textsuperscript{149}Part 1 of Annexure B.
\textsuperscript{150}Bosman-Sadie H & Corrie L (2010) (n 93 above) 95.
\textsuperscript{151}The Act distinguishes between an ECD service that intends to promote the development of children from birth to school-going age and an ECD programme which is a planned schedule of activities or curriculum (s91(1)). It is interesting to compare this to the original definition proposed by the SALRC,
helps them to develop a sense of identity and self-worth, which is closely linked to Woolman’s interpretation of dignity in the Constitution. While some have welcomed this definition, seeing it as reflecting an understanding of how children develop and become active participants in their own lives from an early age, others have been more critical. A major concern is this definition is limited to learning and support (what some have termed ‘ECCE’), focusing on services provided in centres and not taking into account what is needed at the level of the home to support parenting and young children’s nutrition, learning and protection. Indeed, Ebrahim et al. argue that the Children’s Act ‘privileges centre-based provision’, thereby overlooking the importance of ECD as primarily family and community support as envisaged in the White Paper on Education and Training. Besides adopting a narrow view of ECD, the bias of the Act towards centre-based services is of particular concern with respect to children with disabilities, because parent education programmes, toy libraries and other outreach programmes provide important learning opportunities and parental support for children who are not able to access centres. Even if a centre-focused approach is to be taken, these services should be viewed as key structures not only for early childhood education but also as a means for outreach, such that all the components of the ‘essential package’ are available to vulnerable children and their families. This requires that ECD practitioners are recognised as a category of community worker (such as community health workers), and that there is determination of critical knowledge and skills for all personnel operating in a context where there are poor and vulnerable children, as well

which was: ‘Early childhood development means the process of emotional, mental, physical and social growth and development of children aged between birth and 9 years.’ SALRC (2002) (n 83 above). Among the changes are the additions of ‘sensory’ and ‘communication’ development, which were specifically proposed by the Disability Task Team of the Children’s Bill Working Group, to promote the development of children with visual and hearing impairments. Copy on file with the author.

See Chapter 4 section 4.3.3 for a discussion on provisions for dignity in the Constitution. (n 10 above).

Early childhood care and education.

Even in the discussions held by the SALRC, there seems to be an implicit assumption that ECD equates with ECCE or programmes of learning for young children. SALRC (2002) (n 83 above).


The White Paper on Education and Training defines ECD as ‘an umbrella term which applies to the processes by which children from birth to nine years grow and thrive, physically, mentally, emotionally, morally and socially. ECD programmes include a variety of strategies and a wide range of services directed at helping families and communities to meet the needs of children in this age group. The care and development of young children must be the foundation of social relations and the starting point of human resource development strategies from community to national levels. Dept of Education (1995) (n 31 above) para 73.
as specialist knowledge and skills for ECD.158

Under the Children’s Act, government has the responsibility to develop a national strategy towards providing a properly resourced, co-ordinated and managed ECD system, with an appropriate spread of services throughout the province and country, giving ‘due consideration’ to children with disabilities.159 This is an important provision for NGOs and others concerned with service delivery, especially organisations seeking funding and registration. Further, the information included in the records, strategies and profile required by the Act (in s92) may be used to monitor government’s fulfilment of its obligations under the Act.160 Such monitoring is important to ensure timeous implementation, with clear time frames and budgets for service delivery.161

The Act requires all ECD programmes to be registered, providing for assessment before registration can take place.162 Assistance in the form of ‘technical expertise, promotion of inclusive ECD programmes, and forming of partnerships, as well as financial assistance’163 may be given to enable providers to fulfil the conditions required for registration. This suggests that providers of ECD services will be supported to include children with disabilities in their programmes. Norms and standards for ECD should be consistent with those of inclusive education, focusing on removal of barriers to learning and development and providing an environment within which all children can learn.

While the Act (in its provisioning clause) targets particular groups, its strategy does not specifically state that it is to be inclusive of civil society structures, such as parent organisations and disability-related NGOs. These groups have an important role to

159s92 (1).
161This recommendation was made in a submission to the Dept of Social Development by the ECD sub-group of the Campaign on the Right to Education for Children with Disabilities in October 2011. A copy is on file with the author.
162This is in order to monitor the quality of each programme and compliance with norms and standards. Attention is paid not only to the suitability, but also training and competence of personnel.
play and need to be consulted in development of the strategy. In order to be in line with the CRPD, the Act should promote the participation of such groups.

In funding ECD services, the Act states that priority must be given to poor communities and making services accessible to children with disabilities. Although it theoretically enables the MEC to prioritise funding of ECD on a rational basis in respect to certain priorities and the provincial strategy, the Act gives the MEC for Social Development the discretionary power to provide and fund ECD services. Further, this limited directive to fund refers only to early learning and care services, not ECD more broadly. It thus reflects the limitation of the Children’s Act in defining ECD widely, but only regulating early learning and care facilities with no regulation of other ECD services.

The regulations for ECD state that the ‘qualifications, skills and training’ required for running an ECD programme include ‘the ability to provide ECD programmes that are appropriate to the needs of the children to whom the services are provided, including children with disabilities…’ This is commendable. However, a problem arises with respect to monitoring implementation. If children with disabilities are to be included in ECD programmes, one would expect monitoring to identify what is expected and when standards are not being met, conducted by someone with knowledge and expertise in the inclusion of children with disabilities. However, this is not currently included in the regulations.

Despite the provision in the Children’s Act that ECD services should be prioritised for children with disabilities, there is as yet no national strategy in place to promote their

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164 For more information on funding of NGOs providing ECD services for children with disabilities see Situation Analysis (2012) (n 114 above) 77.
165 s93 (4).
166 s93 (1)
168 s 27
169 A submission made to the Department of Social Development for amendments (in bold) to the regulations included the following ‘2) The assessment and monitoring… must be executed in consultation with a person with experience of inclusion of children with disabilities in ECD (3) The assessment and monitoring… must… be executed… by a social service professional with experience in ECD, in consultation with a person with experience in inclusion.’ ECD sub-group on the Right to Education for Children with Disabilities ‘Submission to the Development of Social Development on the Children’s Act’ (2011). This submission was endorsed by twenty disability-related organisations. Copy on file with the author.
access to these services. Further, the funding model being used by the Department of Social Development, is not responsive to the needs of children with disabilities. This is discussed in more detail in Chapter 6.

(d) Role of municipalities

Under the Municipal Systems Act 32 of 2000, municipalities are mandated to deliver ‘basic municipal services’ to local communities within their jurisdiction. These include water, sanitation, electricity and housing - services which are ‘necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment’.170 Interestingly, although mentioned in the Constitution,171 responsibility for childcare facilities is not referred to in this Act.

Integrated Development Plans (IDPs)172 are central to the integrated planning process, around which the full range of municipal functions are co-ordinated. They contain many possibilities for promoting the rights and well-being of children as part of a municipality's developmental role. Indeed, IDP processes are one of the key vehicles for funding ECD programmes.173 One of the challenges facing municipalities, however, is that they are subject to numerous by-laws, including those relating to childcare facilities.174 These will have to be amended to ensure that they are consistent with the Children’s Act.175

The Disability Framework for Local Government provides a guide for ‘mainstreaming’ disability into sector plans, including IDPs, and promoting universal access to basic services.176 It contains a monitoring and evaluation framework, which

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170Chapter 1 Definitions.
171Part B Schedule 4.
172An IDP is a multi-sectoral strategic plan, which provides a framework for development of a particular area. It aims to co-ordinate local and other spheres of government, towards improving the quality of life for residents of local communities. The plan takes into account existing conditions and problems, as well as the resources available. Every municipality has to produce an IDP and is responsible for co-ordinating its implementation. Todes A ‘Regional planning and sustainability: limits and potentials of South Africa's Integrated Development Plans’ (2006).
175For example, the Municipal Systems Act addresses integrated development planning, guiding decisions regarding management and development of municipalities.
includes ensuring that budgetary allocations for disability-related work are used efficiently and effectively, and requires disability-disaggregated budget reports. Although there are indicators for basic service delivery for 'people with disabilities' none of these are child-specific (such as access to early learning opportunities or educational facilities), reflecting the tendency for disability-specific policies to be biased towards adults with disabilities.

Although much narrower than initially recommended in the report of the SALC, provisions of the Children's Act with respect to the role of municipalities suggests that they ‘could make an extensive and multifaceted contribution to its implementation’. Indeed, municipalities are best placed to understand, assess and address many of the basic needs of the children in the communities that they serve. Under the Constitution, all levels of government, but municipalities in particular, are responsible for administration of childcare facilities.

The Children’s Act provides for the provincial head of Social Development to assign to municipal managers functions related to registration of ECD programmes, if they are satisfied that the municipality complies with the requirements and has the capacity to perform these functions. If the delegation of responsibility for ECD services and

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177These include prevalence of disabilities in the province and municipality, service delivery models that enable people with disabilities to access service delivery to be developed, piloted and replicated, disability policies adopted by local government entities, e.g. IDPs, including disability as a cross-cutting issue.
178This was one of the findings of the situation analysis recently conducted on children with disabilities in the country. Situation Analysis (2012) (n 114 above).
179In its discussion paper 103, chapter on ‘prevention and early intervention services for children and their families’, SALC cited the UK Children Act of 1989 and Children (Scotland) Act of 1995. These identify the role of the local authority as including responding to requests by carers to carry out assessments to ensure that they (the local authority) provide appropriate services to the needs of disabled children. SALC also cited the Ugandan Child Statute (of 1996) which requires every local government council from village to district level to ‘safeguard and promote the welfare of children within its area’. This includes maintaining a register of children with disabilities in order to provide necessary assistance to them. SALC identified a number of very specific roles of local government with respect to prevention and early intervention, which included safeguarding and protecting the welfare of children in its area; ensuring integrated development planning in respect of child care facilities within its area; needs analysis of children, providing home visiting for all new-born babies keeping a register of the number of children, including the number of children with disabilities... in order to 'give them assistance to enable them to grow up with dignity among other children and to develop their potential and self-reliance. These children within the area of its jurisdiction are the special responsibility of the local authority, who must see to it that they have access to basic nutrition, shelter, basic health care services and social services. SALC (2001) (n 98 above) 321.
programmes is set at municipal level, it is critical to ensure sustained competency to implement effectively. The assignment of some ECD-related functions to municipalities means that both the provincial head of Social Development and municipality need to take responsibility for budgetary allocations as well as monitoring and evaluation of ECD programmes and services.

Provisions of the Children’s Act create opportunities for involvement of municipalities in various services for children. These include responsibility for the registration, monitoring and enforcement of standards for partial care and ECD services. Before assigning functions however, the provincial head of the Department of Social Development needs to be satisfied that the municipality complies with the prescribed requirements to perform such functions and has the capacity to do so. Because capacity is such an important consideration in the assignment of functions to municipalities, it makes sense to begin the delegation in metropolitan municipalities. However, developing a child-centred approach at municipal level requires a change of mind-set, not only in terms of local government structure, but also in terms of finance and resource allocations. This is an on-going challenge to be addressed.

‘With the necessary will and resources, each municipality can and should have a focus on children as a feature of its planning and services. This… requires joint planning and action between all spheres of government and between civil society and government role-players in implementation of the Children's Act.’

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182 No designations have happened as yet, and talks are still underway between Dept of Social Development and the South African Local Government Association.
183 These concerns were raised in a submission to the Department of Social Development by the ECD sub-group of the Campaign on the Right to Education for Children with Disabilities in October 2011. A copy is on file with the author.
184 Children’s Act (n 61 above) s102.
185 These requirements are listed in regulation 29 and include availability of suitably qualified staff, the ability to render assistance to build capacity, adherence to prescribed norms and standards and has the capacity to manage assigned functions.
186 The Act does not indicate if the Dept of Social Development would transfer funds to a municipality in order to perform designated functions. Functions that do not need to be assigned are the implementation of structural, health and safety standards in child and youth centres and partial care facilities, and powers of inspection for all children's facilities. UNICEF (2011) (180 above).
187 By virtue of being based in metropolitan areas, these municipalities have greater access to skilled personnel and other resources.
5.3.2 National Integrated Plan for ECD (NIP)

The National Integrated Plan for Early Childhood Development in South Africa 2005-2010 (NIP) was developed by the Departments of Social Development, Health and Basic Education (known as the ‘social service cluster’) in response to a directive from Cabinet in 2004. As the government’s roadmap towards developing an integrated system of service delivery, the vision of NIP was:

‘to create an environment and opportunities where all children have access to a range of safe, accessible and high-quality ECD programmes that include a developmentally appropriate curriculum, knowledgeable and well-trained programme staff and educators and comprehensive services that support their health, nutrition and social well-being in an environment that respects and supports diversity.’

NIP was based on recognition of the importance of collaboration between government departments, parents and NGOs. It sought to improve co-ordination between ECD programmes being implemented by different government departments, with the Department of Basic Education named as the lead department. The primary components of NIP were Integrated Management of Childhood Illnesses (IMCI), immunisation, nutrition, referral services for health and social security grants, early learning stimulation, and the development and implementation of psychosocial programmes. It was underpinned by the principles of excellence, equity and accountability, with clear standards for programme quality. NIP catered for the age cohort 0-4, with a particular focus on vulnerable children, including ‘children with physical disabilities and incurable diseases’.

NIP sought to move from the limited view of ECD services as being in crèches and preschools, to include many different sites of care, including homes. It recognised
that there is no single model or programme that is appropriate to meet the range of ECD needs of families and therefore a range of options need to be explored. It was to be implemented through a phased approach, from increasing centre access and quality in registered centres, to increased access and quality in unregistered centres. Despite this broad focus, however, it has been difficult for government to shift from centre-based services, which still receive most of the ECD budget and departmental attention. Biersteker attributes this to the fact that government personnel are most familiar with centres and do not understand the concept of integrated ECD. In addition, most arguments in support of ECD are around improving educational outcomes, and as a result the focus is on preschool services.\textsuperscript{196}

Although it has been lauded as a positive initiative to co-ordinate and integrate the educational and developmental needs of children, NIP gave little attention to the needs of children with disabilities. There are several reasons as to why these needs were not fully addressed, despite disabled children being identified (together with those with ‘incurable diseases’) as a vulnerable group. First, the definition of ‘disability’ in NIP does not acknowledge barriers that exclude certain children and therefore did not include strategies to remove or minimise these barriers. Secondly, the plan lacks provision for screening and early identification of disability (in children from birth to three) nor does it provide for early intervention towards children with disabilities developing to their maximum potential.\textsuperscript{197} Thirdly, in addressing the human resource needs for ECD, NIP referred to parents, caregivers and community development workers.\textsuperscript{198} However, no mention was made of community-level workers focusing on disability. Similarly, while there was recognition of the need to improve the average level of training of ECD practitioners their role in providing support to families of children with disabilities was not mentioned.

It must be noted that the State has just adopted a ‘new NIP’, viz the ‘South African...
Integrated Programme of Action for Early Childhood Development – moving ahead 2013-2018’.¹⁹⁹ The opportunities for inclusion of children with disabilities within this revised plan are alluded to in the Conclusion (Chapter 6) of this thesis.

**5.3.3 Guidelines for early childhood development**

The ‘Guidelines for Early Childhood Development Services’²⁰⁰ were drawn up by the Department of Social Development in 2006. They reflect a recognition that children with disabilities need to have access to services, and stipulate that premises and equipment must be ‘disability friendly’. The Guidelines include a list of rights of children with disabilities in ECD settings.²⁰¹ In addition, they recommend that parents of children with disabilities should receive information on local services and treatment from which their child would benefit. Further, practitioners must be trained in ECD and management of programmes and facilities for young children, including skills to accommodate children with disabilities:

> 'If children with disabilities are admitted to ECD centres they must be helped to participate in or enjoy the activities provided. Support needs to be given to families to bring children with disabilities to ECD centres. They need to be informed that these centres have admission policies that welcome and accommodate their children...’²⁰²

The definitions section of the Guidelines includes ‘children with disabilities’, which is equated with ‘children who have an impairment’. This understanding of disability is limited in that it gives no acknowledgement of barriers to learning and development that may exclude a child with an impairment from access to and participation in ECD services.

**5.4 The right to social security**

Comprehensive social protection includes both social transfers and social services. The Social Assistance Act²⁰³ gives effect to the constitutional right of access to social

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²⁰¹Appendix K.
security for people who are unable to support themselves and their dependents and to children’s right to social services.\textsuperscript{204} It is a means of reducing income poverty among poor and vulnerable South Africans. The government recognises that, as children with severe disabilities need substantial care and attention, a parent may need to stay at home or employ a caregiver to care for the child. Such children may also need medication, assistive devices or to receive rehabilitation services such as physiotherapy. These extra costs can put strain on families that are already struggling in situations of poverty.\textsuperscript{205} The Act therefore provides for social assistance for children with disabilities in the form of the Care Dependency Grant (CDG). This is a non-contributory monthly cash transfer, payable to a caregiver of a child who ‘requires and receives permanent care or support services due to his or her physical or mental disability’.\textsuperscript{206} To qualify for it, the child is required to undergo a medical assessment and the parent must pass an income or means test. As of May 2013, the value of the CDG is R1 260/month.\textsuperscript{207}

The rollout of social grants under the Social Assistance Act has been described as ‘one of the success stories of post-apartheid South Africa’ and has made a great impact on addressing poverty in the country.\textsuperscript{208} However, due to the lack of accurate child disability prevalence data, it is not possible to calculate a take-up rate for CDG.\textsuperscript{209} Data from the Social Security Agency of South Africa (SASSA) indicates that there has been a consistent and gradual increase in the number of CDG beneficiaries,\textsuperscript{210} which is largely attributable to a growing awareness of this grant together with widespread poverty and unemployment.\textsuperscript{211} As of mid-2012, close to 120 000 children were receiving the CDG.\textsuperscript{212} A national study into the profile of children

\textsuperscript{204}Constitution (1996) (n 39 above) s27(1)(c) and s28(1)(c) respectively.
\textsuperscript{206}Social Assistance Act (n 203 above) s7(a).
\textsuperscript{207}US$ equivalent is about $126/month.
\textsuperscript{208}Heap M et al (2009) (n 60 above) 862.
\textsuperscript{209}A localised study by Solarsh reported that only 50% of children eligible for CDGs received them. Solarsh B ‘Report on the evaluation of the Valley Trust Rehabilitation Programme. Community Rehabilitation Workers in rural South Africa – addressing the issue of disability’ (2005).
\textsuperscript{211}Community Agency for Social Enquiry (CASE) ‘Investigation into the increase in uptake of disability and care dependency grants since December 2001’ (2005).
\textsuperscript{212}US$ equivalent is about $120/month. SASSA SOCPEN database, by special request. Cited in Hall K & Lake L ‘Children count: the numbers’ (2012) in Hall K et al. (eds) South African Child Gauge (2012).
in receipt of these grants found that the most frequently mentioned reasons for receiving this grant were intellectual impairments (26%), physical impairments (23%) and speech, intellectual and emotional impairments (10%).

SASSA has made significant progress in reducing the time for processing grant applications, and improving the appeals procedure for those that have been rejected. Currently, the processing time for the CDG is a month, with delays mainly resulting from lack of availability of medical doctors to conduct assessments.

Research has found that access to a grant can improve the health status of both the beneficiaries and other household members by improving their nutrition and access to health services. In their review of the profile of CDG recipients, de Koker et al. reported that close to 80% of recipients receive a grant as their only income.

A study, based in two provinces of the country, found that disability-specific grants have played a significant role in equalising the living situations of households with disabled members, compared to those without disabled members. However, despite the improvement in terms of financial resources, other measures of poverty (particularly education and employment) remain unequal for persons with disabilities.

'Assuming equality in terms of economic status between households with and without a disabled member, it remains alarming that access to education should remain so inequitable; with a significantly larger proportion of school aged children in both the Eastern Cape and Western

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214 Although it did not specifically include CDGs, a study into grants for disabled adults (the Disability Grant) provides insights into the system of administration. It found there to be ‘general problems of access to the grant system because of administrative inadequacies, illiteracy, poverty and disempowerment. These are huge obstacles for poor and disabled people, who are already shouldering a great burden of disadvantage’. Goldblatt B ‘Gender, rights and the disability grant in South Africa’ (2009) Development Southern Africa 26(3) 378.
216 de Koker C, de Waal & Voster V (n 213 above).
217 These researchers found that 98% of all CDG households indicated that the CDG has improved the general health of the household either a lot (65%) or a little (33%). The majority (78%) reported that the main item purchased with the help of the CDG that led to improved household health is better quality food. Indeed, food is the first item purchased by 74% of grant recipients, followed by school fees (6%), and electricity and services (6%). 56% of CDG recipients reported that most of the grant money is spent on food. Additional expenses incurred as a result of the child’s disability were reported by recipients as being medical expenses as well as therapy or treatment. Other additional expenses included nappies or special food.
Grants clearly benefit a group of people experiencing disadvantage, but research shows continuing exclusion of people with disabilities from the wider society. Without access to education and employment, the problem is likely to be exacerbated and dependency on grants perpetuated. A more lasting solution would be to ensure that adults and children with disabilities have access to services, thus increasing their self-sufficiency and making the grants themselves redundant. This requires improving the socio-economic situation of the poorest members of society.

To what extent does the Social Assistance Act realise the rights of young children with disabilities to ECD? For those who have access to the CDG, this has clearly contributed to equalising income and standard of living through improved access to food and health services. However, available evidence suggests that the CDG does not necessarily increase access of young children with disabilities to opportunities for early learning. The assessment process for the CDG is based primarily on determining the severity of the child’s health condition or impairment by means of an ‘objective’ assessment by a medical practitioner. There is a lack of consistent and in-depth assessment of activity limitations, participation restrictions or social aspects of the child's relationship with his or her environment. Failure to acknowledge factors other than the impairment in the determination of disability perpetuates the tendency to see the CDG as the only intervention required by children with disabilities, whereas there is a critical need also to focus on equalisation of opportunities through play, early learning and access to health and rehabilitation services. If this is not done, it is likely that dependency on grants will be perpetuated.

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220de Koker et al. found that only 24% of children aged 0-6 in receipt of CDGs were attending a crèche or child-minding group. de Koker et al. (2006) (n 213 above).
221The Dept of Social Development identified the following concerns with regard to assessments for social security for adults and children with disabilities: lack of uniformity of assessment tools across provinces, lack of clarity of eligibility criteria for children, the subjective nature of assessment in the determination of eligibility, the need for assessors to be trained, lack of awareness of availability of grants particularly in rural areas and corruption around grant administration and payment processes. Office on the Status of Disabled Persons ‘Impact of government policies towards persons with disabilities’ (2003).
222Bhabha F (2009) (n 52 above). Guthrie T ‘Children/family’ (2004) in Olivier M et al. (eds) Introduction to social security. The International Classification of Functioning, Disability and Health (ICF) for Children and Youth is discussed in more depth in Chapter 2 of this thesis.
223Situation Analysis (2012) (n 114 above).
Access to social security should therefore not be seen in isolation, but as a mechanism for building the capacity of the disabled child to survive and develop, and the ability of households to extend their livelihood strategies, including increasing access to community activities and social networks.\footnote{Situation Analysis (2012) (n 114 above) 57.}

It must be noted that the Department of Social Development has indicated its intention to introduce legislation for a common tool to assess disability in the administration of the CDG.\footnote{Dept of Social Development Strategic Plan 2010-2015.} It is anticipated that this will provide an opportunity to move away from a medically-oriented model of disability to one which is based on the ICF for Children and Youth, reflecting the dynamic and complex nature of disability and the contextual factors by which it is shaped.

**5.5 The right to health and nutrition**

There are a number of legislative provisions within the health sector which have a bearing on ECD for children with disabilities. These are discussed here in relation to primary health care, nutrition and rehabilitation.

**5.5.1 Primary health care**

(a) National Health Act

Central to the government’s provision of health services has been the transformation of the public health care sector to a single health system for the country, with a district-based service providing primary health care (PHC).\footnote{The National Health Act 61 of 2003 aims to realise health-related rights in the Constitution by providing a framework for a quality uniform health system. The Act outlines the laws that govern national, provincial and local government with regard to health services.} This encompasses a continuum of services, viz promotive, preventive, curative, rehabilitative and palliative care. The National Health Act establishes the legislative framework to for providing equitable health services ‘within the limits of available resources’.\footnote{National Health Act 61 of 2003 s3(1)} The Act has been criticised for its failure to give substance to the State's obligation to prioritise children's rights because it does not define the package of services that the State should provide to realise children’s rights to 'basic health services' and 'basic
nutrition’. As a result, there is little direction given to health managers and health personnel in considering children's best interests in decisions around planning, budget allocation and service delivery.

The Act provides for free health services for pregnant women and children under six years at all three levels of public health care provision, viz primary (clinics, health centres and district hospitals), secondary (regional hospitals) and tertiary level (provincial and central hospitals). Public health care provision includes all inpatient and outpatient hospital services such as diagnosis and treatment, specialised services, rehabilitation and provision of assistive devices. Despite this effort to improve accessibility of health services, research has found user fees to be only one factor preventing access to health services for children. Other factors include long distances to health facilities (thus incurring travel expenses) and medicines not being available as required. The large numbers of people using State health services, combined with limited staffing, result in long waiting periods and compromised quality of care. Further, preventive services are frequently crowded out by the demands of delivering curative services. Further, district hospitals (which would be used by most people) have been found to be least physically accessible for persons with disabilities, while tertiary hospitals have the highest scores for accessibility. Almost half of all hospitals do not have an accessible toilet for people with disabilities.

(b) Re-engineering PHC

Since 2010, the Department of Health has undertaken a process of ‘re-engineering primary health care’. A discussion document issued by the Department contains a

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229 In 2003 Free Health Care was extended to include children older than six with moderate to severe disabilities.
230 Measures of accessibility related to three domains, viz physical access, informational access and financial access.
232 Schneider M, Couper J & Swartz L ‘Assessment of accessibility of health facilities to persons with disabilities’ (2010). This is despite the National Building Regulations of 1986 which make accessibility of buildings a legal requirement.
233 Department of Health ‘Re-engineering Primary Health Care in South Africa: a discussion document’ (2010). This was adopted by the National Health Council in January 2011 although the Dept of Health has not yet released any formal policy document or guidelines in relation to it.
proposed package of PHC services, with norms and standards. Described as ‘one of the most significant health sector reform initiatives in South Africa in recent times,’ the Re-engineering Strategy is seen as the foundation of reform and the basis for building a restructured and effective health system because it focuses on the 'architecture' of the health system as a whole in addressing the quadruple burden of disease. Effective implementation requires a properly functioning district health system, with administration and decision-making powers delegated to semi-autonomous and accountable district health authorities.

‘If implemented as it is being currently imagined, it [the Strategy] has considerable potential to revitalise or re-engineer a comprehensive, community-based health service delivery model which was originally envisaged for the country post-apartheid.’

The ‘re-engineering of PHC’ is one of several initiatives to improve health services, and has three prongs, viz strengthening of the district health system, greater emphasis on delivery of community-based services and a focus on the social determinants of health. It includes three programmes, viz primary health care outreach teams, school health teams and district clinical specialist teams (DCSTs). It is anticipated that a renewed focus on primary health care will improve access to health services and address persisting inequalities in the health sector, especially in rural areas. It

235 Identification of a PHC package is seen as a key strategy to improving health system effectiveness and equitable distribution of resources. Benefits are that the package sets out a vision for service delivery, acting as a guide to managers, staff and communities about services that should be provided. They also allow for comparison of similar types of facilities and assist with monitoring and evaluation. They can also form the basis of requests for additional resources. Dept of Health (2010) (n 234 above).
237 See Chapter 1.
238 Several commentators note that although this is a requirement of Chapter 5 of the National Health Act, it is as yet unimplemented. Chopra M et al. ‘Achieving the health Millennium Development Goals for South Africa: challenges and priorities’ (2009) The Lancet (374) 1023-1031. Schaay N et al. (2011) (n 236 above).
239 Schaay N et al. (2011)(n 236 above) 6.
240 The others are implementation of the National Health Insurance as a means of financing universal coverage of health services and renewed focus on quality assurance and improvement. Dept of Health Strategic Plan 2010/11-2012/13 21.
241 Schaay N et al. (2011) (n 236 above).
243 There is one team in each district, focusing on improving maternal and child health, also chronic illness and HIV/AIDS. They comprise: obstetrician and gynaecologist, paediatrician, family physician and anaesthetist as well as midwife, paediatric nurse, primary healthcare nurse. Bamford LJ (2013) (n 242 above).
will also be a means of strengthening referral systems to manage patients at regional and district levels. (Currently tertiary hospitals offer all levels of care, which compromises quality of care and results in over-expenditure at this level.)

There are several provisions of the Re-engineering Strategy which are of particular importance for health services for children with disabilities. First, clinic-based services include postnatal care, which includes screening of newborns for developmental impairment and genetic disorders. The Integrated Management of Childhood Illness (IMCI) is used as the basis for management of illness as per algorithms and national protocols. Referred to by the Minister of Health as ‘the cornerstone of child health service provision at PHC level’, IMCI is a principal strategy to improve child health, especially in poor communities.

‘IMCI addresses the comprehensive health and development needs of children under the age of 5 years in an integrated way and concentrates on the accurate identification and management, in outpatient and home settings, of the medical conditions that more frequently cause morbidity and mortality.’

An important development with respect to child health has been the ‘Campaign for Accelerated Reduction in Maternal and Child Mortality in Africa’ (CARMMA), which was launched in South Africa in May 2012. Among the priorities on which it focuses are improved child survival rates through increasing immunisation and vitamin A coverage, and strengthening IMCI in all PHC facilities.

As an intervention in response to the crisis of high maternal and child deaths in the country, the primary foci of IMCI are prevention (primarily through immunisations) and curative care. It has a major emphasis on curative treatment of common illnesses of childhood (such as diarrhoea, pneumonia and HIV). However, there is no clear directive given when ‘cure’ is not effective and a child develops a permanent impairment (such as hearing loss). The IMCI protocol contains a section on 'special

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244 Mohapi M & Basu D 'PHC re-engineering may relieve overburdened tertiary hospitals in South Africa' (2012) South African Medical Journal (102) 79-80. It has been noted that although a lot of resources are being channeled into tertiary services, the government needs to re-examine the distribution of these across different levels of care. Chopra M et al. (2009) (n 238 above).
247 It has been promoted by WHO and UNICEF since the mid 1990s.
risk factors’ (which include mother’s death, prematurity or low birth weight, teenage mother, birth defect), but there is very little guidance on how to deal with them.249 There is no mention of therapists as a possible option for referral, although they are included on the Chart of Developmental Milestones in the Road to Health Booklet. Having been effective in reducing child mortality, it is anticipated that the ‘Care for Development’ component of the IMCI at community level, will be expanded as a potential early intervention tool.250

Secondly, the Re-engineering of PHC details community-based services to support people with non-communicable diseases. This includes conducting of household visits to identify chronic diseases and disabilities, oral health or visual or hearing impairments. There is also identification and management of common health problems and the provision of basic stroke support and rehabilitation services. Community-based services are to include identification of at-risk households and individuals and promoting of information and support on appropriate home care, such as infant and young child feeding.251 However, services focusing on chronic diseases do not make reference to the disabling effects of different conditions, nor do they refer to specific conditions affecting children. Although consideration is given to psycho-social support in the management of common health problems, there is no reference to rehabilitation in the process. Similarly, services in response to violence and injuries do not include rehabilitation. The focus of mental health seems to be on psychiatric conditions (with reference made to trauma, abuse, depression, anxiety and substance abuse), whereas mental health, according to the Mental Health Care Act,252 also includes adults and children with intellectual impairments.

How can re-engineering of PHC further the rights of children with disabilities? The focus on primary level services has the potential to improve access to health for children with disabilities, through community health workers. Although there is no specific focus on rehabilitation, it is anticipated that the work of the DCSTs will

249 The options given are to refer to a social worker, to an appropriate support group, and/or for a child support grant.
251 See Department of Health ‘Infant and young child feeding policy’ (2007).
252 Mental Health Care Act 17 of 2002.
ensure better management of primary health facilities thereby improving quality of services and referral. In addition, greater use and expansion of the ‘Care for Development’ component of IMCI at community level provides an important potential tool for early intervention.253

(c) Strategic Plan on Maternal, Newborn and Women’s Health and Nutrition

The Strategic Plan on maternal, newborn, child and women's health (MNCWH) and nutrition 2012-2016 includes under ‘child health’, early identification of HIV status. However, it does not include other conditions such as cerebral palsy or hearing loss.254 In addition, no reference is made to screening, early identification and intervention services. Under 'long term health conditions in children' there is focus on care, with omission (on the PHC continuum) of rehabilitation services which work towards improved independence and child development. In its priority intervention for community-based mother and child services, there is ‘support for ECD centres’.255 While this is commendable it raises the question as to why services should be limited to centres, as opposed to supporting other ECD settings such as homes and outreach services, particularly as many children with disabilities do not access centre-based services.

5.5.2 Nutrition

As part of the Primary Health Care package, the Department of Health has established the Integrated Nutrition Programme.256 It has a major focus on breastfeeding and the reduction of under-weight, stunting and wasting among children under five years of age. While the programme targets young children, no particular consideration is given to the nutritional needs of children with disabilities.

The aim of the Infant and Young Child Feeding Policy is to ‘improve the nutritional

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254For more details see its provisions for preventive services 20.
255Department of Health ‘Strategic Plan on maternal, newborn, child and women's health (MNCWH) and nutrition 2012-2016’ 28.
256http://www.doh.gov.za/docs/policy/norms/part2c.html. Its vision is ‘optimum nutrition for all South Africa. It is recognised that nutrition is multi-sectoral and complex. Nutrition status is improved through a mix of direct and indirect nutrition interventions implemented at various points of service delivery such as clinics, hospitals and communities and aimed at specific target groups.
status, growth, development and health of young children by protecting, promoting and supporting optimal safe feeding practices’. One of the objectives of this policy is ‘to provide guidance on feeding infants and young children in exceptionally difficult circumstances’, which includes ‘children whose mothers are incapable of caring for them due to ill health or mental disabilities’. Although this phrasing is ambiguous with regard to whose ‘ill health or disability’ is being referred to, the definitions section gives clarity on this. According to the policy, ‘children in difficult circumstances’ includes ‘infants and young children with mothers who have physical or mental disabilities’. Children with disabilities themselves are not included in this definition and thus would not be targeted unless they are identified through another lens, e.g. under-weight or stunting. Ignoring research to the contrary, as well as the country’s own obligations under international law and the Constitution, nutrition policies of the Department of Health do not acknowledge childhood disability as a risk factor for under-nutrition and compromised development.

5.5.3 Rehabilitation

The Mental Health Care Act aims to regulate mental health care services such that ‘[it] makes the best possible mental health care, treatment and rehabilitation services available to the population equitably, efficiently and in the best interest of mental health care users within the limits of the available resources’. The Act provides for co-ordinated access to mental health care, treatment and rehabilitation services for mental health care users (which includes persons with intellectual disabilities) and integrates mental health care services into general health services. The Act defines ‘mental illness’ as well as ‘intellectual disability’ with the former being identified through diagnosis and the latter functional impairment. Both groups are referred to as

259 Engle P et al. (2007) ‘Strategies to avoid the loss of developmental potential in more than 200 million children in the developing world’ The Lancet (369) 229-42.
260 Mental Health Care Act 17 of 2002 s3(a)(i). It is intended ‘to provide for the care, treatment and rehabilitation of persons who are mentally ill...’ (Preamble).
261 Mental illness’ means a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis. ‘Severe or profound intellectual disability’ means a range of intellectual functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self care and requiring constant aid and supervision, to severely restricted sensory and motor functioning and requiring nursing care’.
mental health care users' or ‘patients,’ assuming a medical conception of disability, emphasising the presence of a medical condition. To confirm diagnosis, an objective assessment by a medical practitioner is required, with little consideration of social aspects of the person's relationship with the environment. Further, the focus of rehabilitation within the Act is on those with 'severe and profound' intellectual disabilities, with an emphasis on 'care' rather than independence, with little focus on prevention or development. The Act makes no distinction made between children and adults, or between habilitation and rehabilitation.

Rehabilitation services rendered by the Department of Health are guided by the National Rehabilitation Policy and aim to help adults and children with disabilities to attain maximum independence and full inclusion in all aspects of life. Rehabilitation is seen as a means of achieving equalisation of opportunities and protecting the rights of adults and children with disabilities. The goal of the policy is to improve access to rehabilitation services, thereby ensuring the right of all citizens of access to health services. The Rehabilitation Policy affirms that community-based rehabilitation (CBR) is the ‘philosophy or strategy’ on which rehabilitation services are based, and therefore CBR principles are applicable at all levels of service delivery, towards promoting accessible, affordable and appropriate services. The Policy identifies a number of different components of rehabilitation (including prevention of disability, identification and diagnosis of different conditions, medical and educational rehabilitation), which involve various government departments working collaboratively. Provision of assistive devices is also part of rehabilitation and constitutes a key mechanism to ensure that disabled adults and children can participate as equals in society. The Department of Health has issued guidelines on standardisation of provision of assistive devices, intended to address the problem of

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262 The medical and social models of disability are discussed in more detail in a previous chapter of this thesis, as is the International Classification of Impairment and Disability for Children and Youth (ICF-CY), which includes elements of both models.
263 Bhabha F (2009) (n 52 above) 229.
265 The equalisation of opportunities, empowerment and social integration of people with disabilities, together with a focus on community development, are critical aspects of CBR. Documentation of the challenges of CBR emphasise that this approach is multi-faceted and cannot be simply reduced to rehabilitation outreach. Rule S, Lorenzo T & Wolmarans M ‘Community-based rehabilitation: new challenges’ in Watermeyer B et al. (eds) Disability and social change: a South African agenda (2006) 273-290
the lack of uniformity across provinces in the provision of assistive devices, and to
give directives for assessing for, issuing and repairing of various devices.266

Although the Strategy for re-engineering of PHC identifies rehabilitation as one of its components (with goals for CBR articulated at the levels of community, clinics and community health centres, where it is envisaged that therapists will be deployed)267 there is currently no national strategy for CBR. A policy response to the country’s shortage and inequitable distribution of rehabilitation professionals268 by the Department of Health has been the introduction of community service.269 Although this move is to be welcomed, ongoing challenges include high turnover of staff, lack of continuity of services, and inadequate supervision and support of community service therapists in remote areas. Further the ‘transient nature’ of these therapists and their lack of accountability has contributed to a breakdown of trust between them and the families that they serve.270

In summary, the legislation, policies and strategies of the Department of Health have gone some way to improving access to health services for children with disabilities (e.g. through the introduction of free health care and community service therapists).271 Great emphasis has been placed on improving maternal and child health through servicing of immediate medical needs and the reduction of mortality.272 Although the Re-engineering of PHC has been recognised as an opportunity for fulfilling the rights of children with disabilities,273 the Department of Health is yet to prioritise early intervention, habilitation and rehabilitation as part of health services. Current legislative, policy and strategy provisions do not provide adequately for routine and/or early screening for disabilities such as hearing loss274 and the District Health

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268The nature and scale of this problem is described in more detail in the Situation Analysis (2012) (n 114 above).
269This is the requirement that newly qualified therapists work in a disadvantaged area for one year. Jacklin L ‘The future is in our hands’ in Stephen CR & Bamford LJ (eds) Saving children 2010-2011 A seventh survey of child health care in South Africa (2013) 46.
270Jacklin L (2013) (n 269 above) 49.
272Chopra M et al. (2009) (n 238 above) 1028.
System is not adequately equipped to deal with children who are at high risk for impairment and disability.\textsuperscript{275} As a result, the right to early identification and intervention and habilitation and rehabilitation for young children with disabilities is not being realised.

### 5.6 The right to education

#### 5.6.1 Legislation

Section 29 of the Constitution provides that everyone has the right to a basic education and to further education, which the State, through reasonable measures, must make progressively available and accessible.\textsuperscript{276} The South African Schools Act\textsuperscript{277} is the principal legislation governing the education system in the country. The legislature has interpreted ‘basic education’ as including one year of pre-school (for six year olds) and up to Grade 9. As discussed earlier in this thesis, ‘basic education’ could refer either to a specific period of education (e.g. primary school) or to a standard of education (i.e. its quality or adequacy). Because the Act has adopted the former view, it is outside the scope of this study, viz children with disabilities below the age of four.

The National Education Policy Act\textsuperscript{278} regulates the drafting, monitoring and evaluation of education policies and is intended to give effect to education-related rights in the Constitution.\textsuperscript{279} It is directed towards an education system which contributes to the full personal development of every learner, as well as development of the nation as a whole. Its endeavour to ‘ensure that no person is denied the opportunity to receive an education to the maximum of his or her ability as a result of physical disability’\textsuperscript{280} has since resulted in the adoption of Education White Paper 6,\textsuperscript{281} which is discussed in the following section.

\textsuperscript{275}Situation Analysis (2012) (n 114 above).
\textsuperscript{276}Constitution (1996) (n 39 above) s29(1).
\textsuperscript{278}National Education Policy Act 27 of 1996.
\textsuperscript{279}These are the right of every person to be protected against unfair discrimination within or by an education department or education institution on any ground whatsoever and the right of every person to basic education and equal access to education institutions s4(a)(i)(ii).
\textsuperscript{280}s4(d).
\textsuperscript{281}Dept of Education (2001) (n 48 above).
5.6.2 Policies impacting on ECD and children with disabilities

There are two education-related policies which have implications for young children with disabilities – the policy on ECD (White Paper 5) and the policy on inclusive education (White Paper 6).

(a) Education White Paper 5 Early Childhood Development

Despite its title of ‘Early Childhood Development,’ Education White Paper 5 focuses primarily on the Reception Year (Grade R), as an additional year of compulsory schooling for six-year olds. Although this focus places it outside of the scope of this study, White Paper 5 has some bearing on early learning for children with disabilities. It acknowledges that children with disabilities historically had limited access to ECD services and that early identification and intervention is necessary for their development. However, it does not provide any strategy as to how this could be addressed. Further, because the White Paper gives clear preference to a school-based Reception Year, it has contributed to depletion of community-based and home-based services, with those that remain viable dependent on increased fees. This has resulted in children of poor families being further marginalised from access to early learning services.

(b) Education White Paper 6: Towards an inclusive education and training system

In 1997, a joint Commission was set up to investigate the situation of children with disabilities with respect to education, and to make recommendations. The report emerging from this investigation encompassed all levels of education, including ECD. Indeed, the position of the Commission was that ‘the foundation for inclusive education should be formed in the ECD band.’ As part of its situation analysis, the Commission noted that lack of early intervention services and facilities constituted the most severe barrier to learning and development in ECD, although other poverty-

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283para 2.2.6.
285It comprised of both the National Commission on Special Needs in Education and Training (NCSNET) and National Committee on Education Support Services (NCESS).
287Dept of Education (1997) (n 3 above) 118.
related problems (such as poor nutrition) were acknowledged as undermining development of young children and contributing to an increased likelihood of impairment. Its report recommended a preventative and developmental approach to support, with early identification and intervention taking place specifically at the ECD level, where much potential damage can be averted. It envisaged that in the 0-3 and 3-6 age groups, there would be a major focus on identifying and addressing medical, psychological and social problems. Further, the Commission emphasised the role of parents in establishing informal day care centres and specialised centres of learning, with NGOs playing a critical role in identifying and supporting learners at risk. The Commission made several other recommendations, which are still relevant in the current context. These include the integration of ‘special and ‘ordinary’ education services into a single system which is able to recognise and respond to diversity in the learner population. It also envisaged specialised centres of learning providing support to mainstream ECD programmes. With regard to curriculum, it stressed that it must be responsive to differences among learners and ‘ensure that all learners engage effectively in the learning process’.  

Released in 2001, Education White Paper 6 sought to develop State education policy to address the ‘apartheidisation of special needs education’ and to give effect to the Constitution through an education system that achieves substantive equality, respects the human dignity and equal worth of every learner and guarantees their right to basic education. ‘Inclusive education’ was based on the premise that all children have learning needs, respect for diversity in learning abilities, and acknowledgement that all children can learn if they have the necessary support. It has been described as ‘a discourse driven by the substantive equality imperative of recognising as well as responding affirmatively to diversity’. 

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288 Dept of Education (1997) (n 3 above) 60.
292 Dept of Education (2001) (n 48 above) 16-17. The recognition that many barriers to learning result from the inability of the system to recognise and accommodate the diverse range of learning needs was a major shift from the assumption that difficulties in learning are intrinsic to the learner.
293 Ngwenya C & Pretorius L (2012) (n 290 above) 103.
The ultimate goal of inclusive education is the provision of an education system which maximises the capacities of all learners and enables their participation.294 White Paper 6 contains a 20-year timeframe with short, medium and long-term goals, to progressively realise this goal. In accordance with available resources, the number of full-service and special schools is to be increased progressively until there is adequate provision for all learners.295

In its assertion that all children need education, the White Paper has contributed to realising the rights of children with disabilities to education, and was used as the basis to advocate for equal financial provision in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*.296 Clearly, however, the focus of this policy is the primary level of education, with little, if any acknowledgement of the pre-school years and the importance of early identification and early intervention for young children with disabilities.297 Indeed, ECD is largely absent from White Paper 6. This is indefensible in light of the substantial input and direction given by the Commission. It is thus evident that this policy does not comply with the requirements of the CRPD that States parties ‘shall ensure an inclusive education system at all levels’.298 Much work needs to be done in order to ensure that Article 24 of the CRPD (Education) is translated into legally-enforceable provisions, and that inclusive education is provided at all levels of the education system.

**5.6.3 Strategy to support children with disabilities in early learning**

Although the importance of establishing mechanisms to enable early identification and intervention for learners with disabilities was included in the report of the

295 Dept of Education (2001) (n 48 above) 17-18. The White Paper does not use the term ‘children with special needs’, but instead focuses on learners experiencing barriers to learning. In terms of inclusive primary school provision, the White Paper does not abolish special schools, but seeks to strengthen them and enhance their expertise with the aim of ensuring that children with severe disabilities are accommodated appropriately. It envisages the conversion of special schools into Resource Centres, catering for learners requiring high levels of support, and providing support for inclusion to mainstream schools in the surrounding community/district.
296 *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC).
297 In one of the few references made to early childhood, White Paper 6 states that district support teams are to include ‘early childhood and adult basic education centres’ (s 4.3.3.1).
298 Art 24(1).
Commission that informed White Paper 6,\(^\text{299}\) it was only several years after releasing the inclusive education policy that the Department of Education issued the Strategy for Identification, Assessment and Support (SIAS). This was in order to 'to provide clear guidelines on enrolling learners in special schools and settings which acknowledge the central role played by parents and educators'.\(^\text{300}\)

The ‘SIAS process’ envisages screening in early childhood education to ensure early identification of barriers, developmental delays, perceptual problems, disability and health needs. In identifying different sources of support, SIAS identifies government departments including Health and Social Development as well as NGOs, Disabled Persons Organisations (DPOs) and Higher Education Institutions (HEIs). It acknowledges that ECD service providers are also an important stakeholder, conceding that most ECD services focus on ‘immediate basic developmental needs of children,’ with limited knowledge and availability of intervention programmes which can systematically and adequately address barriers to learning which arise from disability and developmental delays.\(^\text{301}\) SIAS has been seen as contributing to increased awareness of the importance of training parents and caregivers to be more knowledgeable in the early identification of problems that may lead to barriers to learning as well as acknowledgement of the role of ECD service providers in informing and equipping schools with information and strategies needed to support children with disabilities.\(^\text{302}\)

However, despite its laudable intentions, Ngwenya and Pretorius have criticised SIAS as a means by which the State is relieved of accountability where the needs of the individual child become too challenging, expensive or 'burdensome'.\(^\text{303}\) They cite

\(^{299}\)Dept of Education (1997) (n 3 above).

\(^{300}\)Dept of Education ‘National Strategy on Screening, Identification, Assessment and Support: School pack’ (2008) 1. The four stages of SIAS are identification of the learner’s profile, identification of barriers to learning and development, assessment of learner requirements and determination of what level and nature of support is needed. Finally, there is action planning, provision and monitoring of additional support. The resource pack for schools includes a set of forms which set out the protocol to be followed to identify and address barriers to learning that affect individual learners at school as well as to identify the responsibilities of different role-players, viz teachers, managers, district-based support teams and parents.

\(^{301}\)Dept of Education (2008) (n 300 above).

\(^{302}\)Storbeck C & Moodley S (2011) (n 122 above).

\(^{303}\)It has been argued that the right to inclusive education has been made conditional upon the level of impairment of the individual child. Byrne argues that this approach underlines many provisions of international law although the CRPD has focused more on creating inclusive environments for children.
Western Cape Forum\textsuperscript{304} to illustrate the State using SIAS to differentiate between children with severe or profound intellectual disabilities, in order to determine the financial support to be provided for their education and whether to make this provision at all. The inference being made by the State was that children who did not meet the criteria set by SIAS were not capable of benefiting from special schools. “Thus for such children, the SIAS Strategy served as a tool for exclusion rather than identifying individualised learner support.”\textsuperscript{305}

This is in contravention of the requirements of the CRPD, viz that children should not be excluded from the education system on the basis of disability, and that they receive the necessary support.\textsuperscript{306}

Within the education sector, the challenge has been for transformation, towards a system which is able to recognise and respond to diversity in the learner population. This requires the creation of barrier-free physical and psycho-social environments, a flexible curriculum and human resource development, intersectoral collaboration and attention given to early identification and intervention. The South African Schools Act falls short of addressing the educational rights of children at all levels. Further, the ECD policy (White Paper 5) does not adequately address the learning needs of young children with disabilities, and the inclusive education policy (White Paper 6) does not adequately address ECD. Although a focus on barriers to learning and how the education system can be transformed to accommodate all learners could lend itself to inclusive ECD, this potential is not being realised through existing policies. However, there are some encouraging indications on the part of the Department of Education of the need to include young children with disabilities in early learning settings\textsuperscript{307} and these provide important opportunities to advocate for full inclusion.

\textsuperscript{304}Western Cape Forum (2011) (n 296 above).
\textsuperscript{305}Ngwenya C & Pretorius L (2012) (n 290 above) 89.
\textsuperscript{306}CRPD Article 24(2) (a) (d).
\textsuperscript{307}For example, the Dept of Basic Education ‘National Early Learning and Development Standards for Children from birth to four years’ (NELDS) (2009) makes reference to ‘children with barriers to learning and development.’ Further, discussions are currently (in October 2013) underway between this Department and disability-related NGOs regarding the draft curriculum for children age 0-4 that has been circulated for comment. Copy on file with the author.
5.7 Conclusion

In the introduction to this chapter, I posed the questions: Do the government’s legal and policy provisions for ECD for children with disabilities fulfil its international human rights treaties obligations; and Do they meet the requirements of the ‘reasonableness’ test?

To some extent, domestic law in the form of the Children’s Act308 reflects the provisions of CRC, specifically chapters on protection of children, ECD, prevention and early intervention, giving ‘due consideration’ in these services to children with disabilities. However, the disconnect between government obligations under international law and the Constitution, and this legislation is evident in the provisioning clauses for ECD, indicating that funding for it is discretionary. Further, the shortcomings of the funding model of the Department of Social Development for ECD has a particularly detrimental effect on children with disabilities. With respect to the National Integrated Plan for ECD309 the Diagnostic Review concluded that:

‘the ECD plan is at risk of not meeting the ‘reasonableness’ requirement because of the implicit exclusion of the most vulnerable children in poverty and those with disabilities. In order to remedy this omission it will be necessary for the revised NIP to articulate a clear and enforceable obligation on the State - national, provincial and local government - that will secure ECD services for the most vulnerable children.’310

In respect of the Department of Health, the child survival agenda has been based on traditional public health principles and evidence-based interventions such as immunisations and promotion of breastfeeding.311 No doubt, these have been critical to reducing infant and child mortality, as reflected in the South African government’s reporting on progress in respect of the MDGs.312 However, the primary foci on nutrition and curative health, as reflected in legislation and policies of the Department of Health, have resulted in limited attention being given to overall child development, including rehabilitation for children with disabilities. Because ECD is a determinant of well-being throughout the life course, the priority to improve survival and health of

308Children’s Act 38 of 2005.
309NIP (2005) (n 190 above).
young children is inextricably linked to the priority to improve ECD. Further, as mortality rates decrease, more children with disabilities are likely to survive, and need to be supported through habilitation and rehabilitation services in order to develop maximum levels of independence.

The campaign to save lives is incomplete if the future prospects of those who survive are constrained by continued adversity, particularly in the poorest countries... the time has come to mobilise science to both increase child survival and promote early childhood development.314

With respect to the Department of Basic Education, a solid foundation was laid by the work of the NCESS/NCSNET, which embraced ECD as the first level of education on which inclusion needs to be based. However, the focus of the inclusion effort has remained almost exclusively on primary schools, with little acknowledgment of the need to build a foundation of inclusion at the pre-school level. Under the CRPD, the State is obliged to ensure an inclusive education system at all levels, such that it provides the necessary individualised support for children with disabilities as well as disability-related training and awareness of professionals. The curriculum for children aged 0-4 must be accessible and appropriate for children with disabilities, so that they can benefit from opportunities provided in early learning settings.315

In summary, the current legislative framework for ECD across different sectors reflects a lack of mandatory obligation on the State to ensure the inclusion of children with disabilities and their access to services, and as a result there is no recourse to pursue their legal entitlements.316 As discussed in detail in Chapter 4, the High Court ruled in Western Cape Forum that failure to assume legal responsibility for provision of legally prescribed services for children with disabilities by the State was unlawful and a violation of their rights.317 The chapter that follows discusses how international

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315A draft framework for the curriculum for children age 0-4 is currently being circulated by the Dept of Basic Education. A submission containing recommendations for the inclusion of children with disabilities in this framework was submitted to the Department by the ECD sub-group of the Campaign on the Right to Education for Children with Disabilities in July 2013. Copy on file with the author.
316 The hallmark of a rights-based framework is that it creates mandatory obligations on the State. Save the Children ‘Child rights programming: how to apply rights-based approaches to programming’ (2002).
law and the Constitution can contribute to realising the rights of children with disabilities to ECD.
CHAPTER 6: CONCLUSION

6.1 Introduction
This research set out to establish what is required of the South African government to comply with its obligations under specified international human rights treaties and the Constitution with respect to ECD for children with disabilities. Given the current situation, in which disabled children are disproportionately affected by inadequate nutrition, health services which are not responsive to their needs and limited opportunities for early learning as well as the devastating effects of poverty, it will require a concerted effort to ensure that their rights and dignity are upheld.

This chapter contains a brief synopsis of the findings of the study, which includes defining the nature and scope of ECD for children with disabilities, and the nature of State obligations. The latter provides the benchmark against which government actions can be measured and towards which they are to be directed. In assessing the progress made by the South African government to date under these obligations, observations will be made as to why this has been limited and how progress towards realising the rights of young children with disabilities can be accelerated.

6.2 Synopsis of the findings
6.2.1 The context and parameters of early childhood development for children with disabilities
In Chapter 1, an overview was provided of the current distressing situation of young children with disabilities in South Africa, shaped by the historical ‘apartheidisation’ of services and based on a medical model of disability.¹ The signing of international human rights treaties and the drafting and adoption of a Constitution for the country signaled the beginning of a new era of recognition of equal rights for all members of South African society. These initiatives of the State sought to overcome the legacy of

¹See Chapter 1, Section 1.1.3 for a description of the current situation of young children with disabilities.
apartheid (the central premise of which was one of exclusion on the basis of race), and included disability as a Constitutional ground for non-discrimination, which came about as a result of the alignment of the disability movement with the movement for democratic change.²

Conceptual frameworks for child development and for childhood disability have been given as a backdrop to the description of the nature and purpose of ECD for children with disabilities.³ Not only is early childhood (defined as the period from birth to four years of age) a period of accelerated growth, during which brain development can be optimally promoted in comparison to any other phase in the life course. It is at the same time a highly sensitive period when permanent damage caused by toxic stress can be averted. Early childhood is an opportunity for early intervention for children with disabilities, and is ideally suited for promoting social inclusion amongst children with disabilities and those without disabilities, particularly in early learning settings. By virtue of its potential to promote optimal development of young disadvantaged children in particular, ECD is presented as a significant means of working towards equity. Further, it has been recognised by international agencies as an ‘investment in the wealth of nations’⁴.

This study has made explicit the content of ECD as components of the ‘essential package’ of services for vulnerable children in South Africa. These include health and nutrition, social services, early learning and caregiver support.⁵ The cross-sectoral nature of these elements informs and provides a focus for much of the critique of current implementation.

6.2.2 State obligations with respect to early childhood development for children with disabilities under international law and the Constitution

In Chapters 3 and 4, the obligations of the State under international law and the Constitution were identified. These are clustered here into three themes, viz the

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²See Chapter 5, Section 5.1.2 for a history of ECD and disability in South Africa.
³This is contained in Chapter 2.
⁵See Chapter 2, Section 2.4 for a more detailed description of each one of these.
context of services for children with disabilities, provisions relating to specific components of the ‘essential package’ and general obligations of the State.

(a) Context of services for children with disabilities

(i) Non-discrimination and promotion of inclusion

Under the treaties discussed in this thesis,^6 and the Constitution, all forms of discrimination against children with disabilities are expressly prohibited.^7 This provision is binding not only on the State, but also on all providers of services for young children. It requires naming disability as a prohibited ground for discrimination in respect of all services rendered under the ‘essential package’, with effective remedies in case of violations. Because discrimination is often a result of stereotypes of disability and prejudices towards children (and adults) with disabilities, awareness-raising campaigns are important to combat these and to ‘promote awareness of the capabilities and contributions of persons with disabilities’.^8

Significantly the international treaties go further than stating what action is to be prohibited. All measures taken by the State in respect of children with disabilities are to be directed towards ‘a full and decent life in conditions that ensure dignity, promote self-reliance and facilitate active participation in the community’.^9 Under the CRPD, the State has the obligation to remove barriers and actively promote the participation and inclusion of persons with disability in society.^10 In line with the twin-track approach,^11 the State must ensure that young children with disabilities have access to all services that are provided to other young children, including registration of birth, immunisations and opportunities for learning and play. In addition, the State must provide services that specifically target children, such as early intervention and habilitation and rehabilitation.^12

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^6These are the CRC, the African Charter and the CRPD, the provisions of which are discussed in Chapters 3 and 4.

^7See Section 2.2.2.

^8CRPD Art 8 (1) (c).

^9CRC Art 23, African Charter Art 13. The CRPD (Preamble (r)) affirms the obligations undertaken by States parties to the CRC.

^10CRPD Art 3(c).

^11As discussed in Chapter 3, this is the approach espoused by the UN for monitoring of the CRPD. It takes account both general services provided for all children as well as those that target children with disabilities. UN ‘Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for human rights monitors’ (2010).

^12CRPD Arts 25 (b) and 26.
This study has demonstrated that the State has a duty to take positive action to ensure that children with disabilities (as members of a disadvantaged group) benefit equally from services offered to the general public, and that this duty is accepted as a cornerstone of human rights jurisprudence. However, this is subject to the principle of reasonable accommodation, based on the particular child’s unique circumstances. Importantly, the burden of proof with respect to 'unjustifiable hardship' is placed on the claimed provider of reasonable accommodation (in the instance of the target group of children described in this thesis, the Departments of Basic Education, Health and Social Development as well as private suppliers of ECD services).

The CRPD includes equality and non-discrimination in the same article, and equality is one of the founding values of the Constitution. However, as discussed in Chapter 3, equal treatment does not constitute equality. Indeed, ‘treating all children the same’ is likely to disadvantage children with disabilities. It is to be expected that particular measures need to be taken to ensure that children with disabilities can participate and benefit equally from services provided for other children, also termed ‘affirmative action’.

(ii) Consideration of the best interest of the child

The principle of considering what is in the best interest of the child necessitate that all decisions regarding care, health and education of children with disabilities must take cognisance of both their short and long-term needs, ascertaining what will best support their life-chances and well-being. Further, all law, policy and services affecting disabled children (as a group) must take this principle into consideration. Parents of children with disabilities must be provided with information as necessary and have the freedom to make choices from a range of options regarding what they consider to be in the best interests of their children. Based on the discussion in Chapter 2, it is evident on scientific, ethical, equity and economic grounds, that

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13 As discussed in Chapter 3, Section 3.1.2.
14 This is detailed with respect to the CRC under the right to non-discrimination on the ground of disability (Section 3.2.2 (a)) and to the CRPD under the rights to equality and non-discrimination and full and effective participation and inclusion in society (Section 3.4.2).
15 See the nature of early childhood and the purposes of ECD for children with disabilities as detailed in Chapter 2, Sections 2.2 and 2.3 respectively.
access to quality ECD services is in the best interests of children with disabilities generally and individual children with disabilities specifically. As the ‘best interests’ of children is a Constitutional standard, the State is therefore constitutionally bound to give effect to ECD services for children with disabilities.

(iii) Respect for the views of the child
This study has brought to the fore the right of every child, including the youngest and the most severely disabled to be respected as a unique person, and as members of families, communities and societies. Under international law, respect for the views of the child requires responsiveness to individual points of view as well as non-verbal forms of communication used by young children to show their understanding and preferences. Children with disabilities must be equipped with and enabled to use modes of communication that enable them to express themselves and their views. This is best provided through early intervention and stimulation for early learning.

(b) Provisions relating to specific components of the ‘essential package’

(i) Health
All of the international treaties discussed in this study and the Constitution endorse children’s right to health. Under international law, health services are to be available, accessible, acceptable and of high quality and ideally form part of a Primary Health Care System. Children with disabilities are to benefit equally from a health system that provides for all other children (e.g. in respect of immunisations, growth monitoring). In addition, the State is to provide early intervention services, including treatment and rehabilitation with the necessary assistive devices, to enable children with disabilities to reach their maximum level of independence and be included in society. Health professionals working with disabled children are to be trained to the highest standard of practice.

16 Constitution s28(2). See S v M (Centre for Child Law as Amicus Curiae) 2008 (3) 232 (CC) paras 112-121 in which Madala J held that the interests of children cannot be viewed in isolation and that a nuanced approach is required in balancing the best interests of the child and the interests of society.
17 The provisions of the CRC, African Charter and the CRPD with respect to the right to health are discussed in Chapter 3, Sections 3.2.3, 3.3.3 and 3.4.3 respectively.
18 CRPD Arts 25 and 26, CRC Art 23.
19 CRPD Arts 25 and 26.
(ii) Education

All of the treaties, and the Constitution, also provide for the right to education.\(^20\) The treaties detail the purpose of education, which is to enable children to develop to their fullest potential.\(^21\) The CRC Committee has recognised that the right to education starts at birth and is closely linked to the child’s right to maximum development.\(^22\) Stimulation for early learning is to be directed towards development of the child’s personality, talents and mental and physical abilities.\(^23\) The State’s obligation under these treaties is to ensure that education is available, accessible, acceptable and adaptable for all children. The CRPD goes further, entrenching the right to an inclusive education system, requiring the provision of non-discriminatory access, reasonable accommodation and individualised support. Thus the education of children with disabilities at all levels must be provided without discrimination and on the basis of equal opportunity, towards the goal of fully supported educational inclusion within the general education system.

(iii) Social services

Under these treaties and the Constitution, the State is mandated to protect children with disabilities from all forms of physical violence and neglect.\(^24\) Harmful social and cultural practices that undermine the welfare, dignity and development of the child are to be eliminated.\(^25\) Support to parents is an important means of protecting children with disabilities, and this includes psychosocial support to assist with the challenges related to parenting a child with a disability.\(^26\)

Two of the treaties have provisions for social protection, with the CRC and CRPD providing for the right to an adequate standard of living, including nutrition.\(^27\) The CRPD specifically acknowledges that there are additional (direct and indirect) disability-related expenses incurred by parents of children with disabilities. With respect to ensuring an adequate standard of living for children with disabilities, States

\(^{23}\)CRC Art 29(1) General Comment No 7 (n 19 above) para 28.
\(^{24}\)CRC Art 27, African Charter Art 16, CRPD Art 16, Constitution s28(1)(d).
\(^{26}\)CRC Art 27, CRPD Art 28.
must implement strategies to reduce poverty and combat its negative effects on children’s well-being. This requires provision of social security to families who are unable to support themselves.28

(iv) Support for caregivers
All of the international treaties acknowledge the essential role of parents as caregivers, and in providing for material and non-material needs of their children. They also recognise that parents need particular support in their child-rearing responsibilities and call upon States to provide this as necessary.29 Assistance to parents in need includes nutrition, clothing, housing and development of childcare services.

It is thus evident that interpretation of international law and the South African Constitution provide important directives to the State in realizing those rights of children with disabilities which correspond with elements of the ‘essential package’.

(c) General obligations of the State
Under international law and the Constitutional Court’s interpretation of the Constitution, the South African government is mandated to take legislative and other measures to progressively realise the socio-economic rights of children within its available resources.30

In summary, this study has established that although there is no single right to ECD contained either in international law (viz the CRC, African Charter or CRPD) or in the South African Constitution, all of these legal instruments have clear and strong provisions relating to both the context of services for young children with disabilities, as well as the content of these services as defined by the ‘essential package’. Discrimination in respect of children with disabilities is prohibited on the part the State and private providers. In addition the values dignity and equality are to be affirmed and nurtured in society. As discussed in Chapter 4, the basis of dignity is the refusal to turn away from suffering, acknowledging of the essential humanity of every person and the need to provides spaces and opportunities in which their potential can

28CRC Art 26, CRPD Art 28.
29The African Charter is particularly strong, see Arts 19 and 20.
30See Chapter 4.5.
be fully developed. That children with disabilities may require particular support to live lives of dignity, self-reliance and to participate in the community is clearly articulated in international law.\textsuperscript{31} Further, the treaties and the Constitution call for the State to take positive action with respect to socio-economic rights of children with disabilities. These rights correspond with components of the ‘essential package’ of services to young vulnerable children, and it is these services which constitute ECD. On this basis therefore, the State has an obligation to provide ECD services that are inclusive of children with disabilities.

6.2.3 Current legislation, policies and strategies providing for early childhood development and children with disabilities

In Chapter 5, this study provided a review of current legislation and policies which are intended to give effect to the rights of children with disabilities to health and nutrition, education, social services and social security. As the array of initiatives detailed within the Health, Basic Education and Social Development Departments show, some progress has been made by the State in fulfilling its obligations. And yet, based on the overview of their situation given in Chapter 1, it is evident that many young children with disabilities continue to experience the indignity of non-realisation of their rights.\textsuperscript{32} It is instructive to reflect on factors that have undermined the effectiveness of legislative and policy provisions and the ability of the State to comply with its obligations under international law and the Constitution.

(a) Limited effectiveness of disability-related legislation and policies

The lack of effective implementation of disability-specific legislation and policies has been attributed to a number of factors, including biases against children with disabilities, which continue to exclude them from consideration in policy processes. Programmes focusing on ‘children’ most often do not take cognisance of the specific requirements of children with disabilities, and those focusing on ‘people with disabilities’ tend to focus on adult-related issues such as employment.\textsuperscript{33} This is compounded by the lack of alignment of legislation and policies on disability with

\textsuperscript{31}CRC Art 23, African Charter Art 13, CRPD Art 7.
\textsuperscript{32}As described in Chapter 1, section 1.1.3.
\textsuperscript{33}This is discussed in relation to the ‘Disability Framework for Local Government’ discussed in Section 5.3.1 (d). See also Situation Analysis (2012).
programmes of action for implementation.34

A recent Situation Analysis of children with disabilities noted the trend of ‘policy change fatigue’, making personnel (particularly in the education sector) reluctant to implement new policies.35 Such attitudinal complacency is exacerbated by the dearth of departmental personnel with experience and knowledge of disability and the ability to champion disability-specific issues.36 The State’s failure in this regard is also manifested in inadequate or inappropriate institutional arrangements and lack of fiscal resources, which have further hindered implementation.37

Although strongly advocated for in the CRPD, there has been limited participation of disabled people and parents of disabled children in policy processes.38 This is a trend that could (in part at least) be attributed to the fact that many disability rights leaders have acquired positions in government, resulting in a loss of momentum and weakening of the disability rights movement.39 Howell et al. also note the potentially contradictory position of the disability rights movement on the one hand to support and give direction to government initiatives and on the other to put pressure on the State to create equal opportunities.40

(b) Data collection and monitoring of services

Disaggregated data is required to ascertain where there is discrimination, and the extent to which children with disabilities are benefiting or are being excluded from social services. International law has consistently stressed the importance of data collection systems for planning and tracking access and quality of services for

34Dube AK ‘The role and effectiveness of disability legislation in South Africa’ (2005). For example, there is no evidence to show that the Departments of Health or Basic Education have aligned their Strategic Plans with the CRPD.
38Dube AK (2005) (n 34 above).
marginalised groups, including young children with disabilities.\textsuperscript{41} Absence and inadequacy of monitoring tools has been linked to the fact that the definition of disability has not been adequately articulated.\textsuperscript{42} Because these systems are not in place, there is a lack of current accurate comparable data, making it very difficult to assess the situation of young children with disabilities in South Africa,\textsuperscript{43} thus further masking the reality of their exclusion.

Indeed, the challenge of data collection is not specific to children with disabilities, as generally ‘the data environment... is not up to the tasks of tracking ECD quality, access and impact’.\textsuperscript{44} There is not even reliable data on children currently enrolled in centres.\textsuperscript{45} There is therefore a need for high-quality and appropriate research to assess the effectiveness of interventions for young children, with disaggregation of data to small-area level and inclusion of age, gender and disability status.\textsuperscript{46} Within the health sector, there is a need to strengthen surveillance, monitoring and assessment of public health programmes, with special attention to factors that could contribute to unequal access.\textsuperscript{47}

(c) Collaboration between sectors

Although there is an acknowledged policy principle of integrated ECD provision,\textsuperscript{48} strategies and programmes aimed at improving the quality of life of children with disabilities continue to operate within silos, with little effective integration across

\textsuperscript{41}See General Comment 7 (2005) (n 22 above). General Comment 9 (2007) (n 26 above).
\textsuperscript{43}Martin P ‘The role of the state: Review of legal obligations to provide comprehensive early childhood development services’ (2012).
\textsuperscript{45}Biersteker L ‘Lessons from South Africa’s National Integrated Plan for ECD’ (2011) Early Childhood Matters November. In an attempt to address this, in July 2013, the Department of Social Development informed a national ECD stakeholders forum that the Department is to undertake an audit of 18 000 ECD sites in the country.
\textsuperscript{46}Biersteker L & Dawes A (2008) (n 44 above) 202. 'These authors stress that systems should be established in all relevant departments to improve data accessibility for analysis and policy tracking internally, across different departments and levels of government, as well as by independent researchers.
\textsuperscript{48}This was seen to be key to realising the vision of the National Integrated Plan for Early Childhood Development 2005-2010.
departments. This is further compounded by a lack of synchronicity between government’s strategies for young children and strategies for children with disabilities. For example, the ‘Strategy for the integration of services to children with disabilities’ is not cited in any of the strategic plans of any of the departments in the social cluster. Ensuring coherence requires that national departments spell out what is required from provinces, recognizing that policy formulation and implementation are interactive processes. This requires an overarching approach that places the child at the centre, asking what ECD benefits can be gained through every contact with young children – whether through health, social development or education.

(d) Funding of services
In Chapter 4 it was argued that allocation of budgets is a means of realising children’s rights. The provisioning clauses of the Children’s Act indicate that funding for children with disabilities must be prioritised with respect to prevention, early intervention, partial care and ECD services. The limitations of this study mean that there could not be a comprehensive analysis of budgeting for ECD services for children with disabilities, but it is instructive to reflect on the implications for children with disabilities of general trends with regard to funding of the ECD sector.

Before exploring the implications for children with disabilities, three characteristics of funding within the ECD sector generally need to be noted. The first is that there is currently inadequate funding for all of the services contained in the Children’s Act, including the most elementary one of protecting children from abuse and neglect and following up on reports of maltreatment. Secondly, it is difficult to track spending

49This is particularly important in the area of early identification, assessment and intervention for young children with disabilities. For example, children with developmental delays and disabilities are likely to be identified through the Department of Health, but then need to be referred to other departments for early intervention. Storbeck C & Moodley S (2011) (n 42 above). Biersteker L ‘Early childhood development: rapid assessment and analysis of innovative community and home based child-minding and early childhood development programmes in support of poor and vulnerable babies and young children in South Africa’ (2007).
50Dept of Social Development ‘National strategy towards the integration of services to children with disabilities’ (2011).
53Children’s Act 38 of 2005 s93(4)(b).
54These are based on the Constitution s28(1)(d). According to Budlender et al., funds allocated by the provincial Departments of Social Development for 2010/11 covers only about 45% of the lowest estimated costs of implementing the Act (based on scaling up actual service delivery levels in 2005) and only 5% of the full cost of services (based on the numbers of children who need the services). This
on ECD services because the ‘essential package’ crosses different sectors and its components have not as yet been costed and/or disaggregated for age and disability.\textsuperscript{55} This is further compounded by the fact that sectors and departments do not budget across a common ECD framework, and there are no clear ECD line items across budgets of different departments.\textsuperscript{56} Thirdly, the bulk of the cost (80\%) of implementing services in the Children’s Act currently falls on provincial Departments of Social Development, which includes transfers to NGOs for delivery of services to various vulnerable groups, including children. Significantly, however, although NGOs are delivering services mandated by the Act, funds paid to them by the State are often delayed and do not cover the full cost of providing these services.\textsuperscript{57} This means that NGOs need to raise funds to cover the shortfall, but even when they are able to do so, it is not sufficient to reach all children or to provide all the services contained in the Act. Consequently, there tends to be focus on responding to crisis situations, to the detriment of preventive services such as ECD.\textsuperscript{58} Further, the definitions of ‘educare’, ECD and the ages of children being targeted have changed over the past 20 years. The sector has only recently acquired a nationally agreed-upon definition and focus, fostered by provisions in the Children’s Act\textsuperscript{59} and the spotlight put on ECD by the National Development Plan.

The State’s approach to funding ECD continues to be through a per-child subsidy to registered ECD centres.\textsuperscript{60} This funding is well targeted to poor children through a means test and is critical to sustaining centre-based programmes in poor communities. However, it does not adequately address the needs of children with disabilities for several reasons. First, the subsidy does not cover the full costs of provision, and therefore centres require fees to be paid.\textsuperscript{61} This means that the poorest children, whose families are unable to pay such fees, are excluded. Further, this funding model does

\textsuperscript{54}Diagnostic Review (2012) (n 52 above).
\textsuperscript{55}Budlender D et al. ‘Funding of Children’s Act-related services’ (2011). These were the key issues dealt with in the NAWONGO ruling as discussed in Chapter 4.
\textsuperscript{57}As discussed in Chapter 5, section 5.3.1.
\textsuperscript{58}Biersteker L (2011) (n 45 above).
\textsuperscript{59}The Diagnostic Review found that almost all ECD facilities charge user fees, which range from between R50-R1 000/month. (Approximately 5-100 US$/month).
not cater for children in unregistered centres (such as children with disabilities attending stimulation centres run by mothers), those living in areas where there are no centres and those who are unable to get to centres due to physical difficulties and/or geographical inaccessibility. In addition, this funding model does not include provisions for ‘weighting’ of children who may have additional needs for support, and therefore require a higher adult: child ratio. This funding model means that children’s chances of receiving services depends on where they happen to live, where NGOs provide services and the ability of their family to pay the necessary fees, and those requiring moderate to high levels of support are unlikely to receive it.

Despite the prioritising of children with disabilities in the provisioning clauses of the Children’s Act, the implications of this have not been clearly demonstrated through a particular strategy, tied to a budget. Further, the State has not as yet given attention to the development of human resources to provide ECD services for children with disabilities, including therapists and ECD practitioners.

6.3 Tapping the transformative potential of international law and the Constitution

As outlined in Chapters 3 and 4, human rights treaties and the Bill of Rights create particular norms with which the State is required to comply, through a range of measures at national level. Notwithstanding the international law and Constitutional basis of the right to ECD for children with disabilities, there have been shortcomings with implementation of such measures, as highlighted in the previous section. This draws us to the core question of this research, viz what is required to realise the rights of children with disabilities to ECD? While legal interventions are important, human rights practice needs to extend beyond these, for as Lord & Stein observe:

‘transformation takes place not only through processes of domestic law and policy change, but more broadly through innovative programming and through the processes of socialization and acculturation’.64

63Because they are trained in standard child development and lack experience working with children with disabilities, many practitioners are reluctant to accommodate children with disabilities in mainstream early learning services. Situation Analysis (2012) (n 35 above) 79.
How then can international law and the Constitution contribute to the realisation of rights of young children with disabilities, not just with respect to compliance with legal requirements, but through ‘innovative programming’ and ‘socialisation and acculturation’? The CRPD in particular has much to offer in this respect, not only with regard to its provisions but also by virtue of the fact that it was developed by the very people it was designed to protect. I suggest four particular ways in which the treaties considered in this study and the Constitution can contribute to making ECD rights a reality for children with disabilities in South Africa.

6.3.1 Strengthening mechanisms for accountability at national and local levels

First, the reporting mechanisms for each of the treaties have been described in Chapter 3, as has South Africa’s delay in submitting the required reports. While non-compliance with reporting at international level is a concern, 65 the serious impact of this at national and local levels has been overlooked. Indeed, the inability or unwillingness of the State to report on compliance with the CRC, African Charter and CRPD raises the question as to whether the State has systems in place to conduct detailed analysis (including budget analysis) of the extent to which the rights of children with disabilities are being realised. For example, at a municipal level are we aware of the experiences children with disabilities and the extent to which their rights are/are not being realised? The findings of this study indicate that adequate information systems with respect to ECD services (health, social services, early learning) for children with disabilities are not in place. This makes it difficult to track whether progress is being made towards improving access such services (i.e. their rights are being progressively realised) and is a further reinforcing of the exclusion of children with disabilities. Such monitoring is an obligation of the State under the respective international treaties.

65The State has lost out on valuable guidance from international child rights experts… and the political momentum that could have been provided through this accountability mechanism. Budlender D & Proudlock P ‘Child centred analysis of government’s budgets 2010-2012’ (2010) 28.
Further, as emphasised under the CRPD, monitoring State implementation is a task in which civil society – especially organisations of disabled people and parents of disabled children – have a particular role. To date, the disability rights movement has made limited use of the opportunity to submit shadow reports on the CRPD to highlight lack of compliance of the State with respect to the rights of persons with disabilities. A more vigilant disability rights movement would certainly expose the non-compliance of the State, and could also ensure that transparent mechanisms of accountability are respected and resourced.

6.3.2 Interpretation by the Courts

To some extent, the South African Courts have acted as a means of holding the State accountable with respect to the rights of children with disabilities. The *Western Cape Forum* case, for example, was instrumental in exposing the shortcomings of the Department of Basic Education with respect to realising the right of children with severe and profound intellectual disabilities to education. It revealed not only the exclusion of these children from mainstream education services and the limited budget allocated to them, but also the weaknesses of the policy frameworks on which it was based. That such a case came to Court and that the Court found in favour of the applicants is laudable, as is the action being taken as a result of the Court interdict that was issued. The Western Cape Department of Education has set up multi-disciplinary teams to support the Day Care Centres that provide for children with severe and profound intellectual disabilities, with each team supporting ten Day Care Centres. This interdict has thus contributed to setting in place an integrated approach to support of children with disabilities.

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66The only known shadow report was that which came from the Umgungundlovu Disability Forum in the province of KwaZulu Natal. Umgungundlovu Disability Forum ‘Shadow Report to the Committee on the Rights of Persons with Disabilities’ (2010). Copy on file with the author.


69Teams consist of a physiotherapist, occupational therapist, psychologist and learning support advisor.

70Minutes of meeting of the ECD sub-group of the Campaign on the Right to Education for Children with Disabilities 6 March 2013. Copy on file with the author.
6.3.3 Coalitions for advocacy

Although the CRPD provides for DPOs to be involved in the monitoring process, Lord & Stein point out that ‘ultimate effectiveness of DPO representation is largely contingent on how well national, regional and international disability groups organise and advocate in the interaction with formal Convention [CRPD] processes’. However, as discussed in Chapter 5, historical factors have contributed to a weakening of the disability sector in South Africa, such that it currently has limited capacity for rigorous monitoring of State action in compliance with treaties such as the CRPD. Further, ‘co-option’ of parent organisations into partnerships with the State, has the danger of compromising their capacity for critique of State action for fear of losing the access to the State funding they do have.

Despite the success in Western Cape Forum, there are few instances in which the child disability sector has been able to pursue litigation and to draw on the Courts to require accountability for State action. This ruling is instructive, therefore, not only as regards the structural interdict issued against the Department of Basic Education, but also by virtue of the process by which the case was brought to the Western Cape High Court. It involved a group of NGOs united in purpose with respect to denial of a particular right of children with severe and profound intellectual disabilities, supported with legal expertise as well as medical and other professionals. This ensured that the Court had before it all the evidence required, including information on the situation of the affected children, as well as the State’s obligations under international law. This clearly demonstrates the potential of international law to shape Court’s interpretation of the State’s obligations and identify where a breach has occurred. It would seem that in the field of ECD, more work needs to be done to develop partnerships between parent organisations (experiencing first-hand the denial of rights of their young children with disabilities) NGOs, and child rights advocates, providing a means of ensuring that the State is accountable for its (non)actions with respect to young children with disabilities.

72 See Chapter 5.1.2. The historical overview of the disability and ECD sectors traces factors that have contributed to weakening leadership of the sector.
73 Western Cape Forum (n 67 above).
6.3.4 Innovative programming

International human rights treaties require States to give effect to these rights through national legislation and a range of other measures.\(^{74}\) While the foundation for non-discrimination and positive action with respect to children with disabilities has been laid in the Children’s Act,\(^{75}\) the challenge is to see this included in all national ECD strategies and programming, such that disabled children are reached by the rollout of services envisaged in the National Development Plan\(^ {76}\) and ECD Programme of Action.\(^ {77}\)

Adopting a rights-based approach to ECD requires that funding of services by the State is mandatory. The recommendation from the Diagnostic Review was for a new funding model which is government-driven and pro-equity, prioritising resources for the most vulnerable children. This implies providing services where there are none, (home visits, community groups and other support for vulnerable parents and families) based on a per-capita allocation, which takes into account additional needs of children with disabilities. This requires:

> ‘a decisive paradigm shift towards a rights-based ECD framework and accompanying funding model that recognises and is capable of realising the State's obligations to provide ECD services, especially those living in poor families, rural areas, informal urban areas and children with disabilities’ \(^ {78}\)

In their chapter, ‘Early childhood development: What are the next steps?’ Albino & Berry identify actions that can be taken to strengthen service delivery for ECD in the areas of nutrition, health, caregiver support, parenting and early learning.\(^ {79}\) The CRPD offers an important ‘educational tool[s] for altering social mores’\(^ {80}\) which could be used in this instance to shape these ‘next steps’ such that they provide children with disabilities with opportunities to develop to their full potential. This requires a constant vigilance at all levels and all sectors, which considers what barriers currently

\(^ {74}\)States are to take ‘legislative and other measures…’CRC Art 4, African Charter Art 1(1), CRPD Art 4(1)(a).
\(^ {75}\)As discussed in Chapter 5, section 5.3.1.
\(^ {78}\)Diagnostic Review (2012) (n 52 above) 8.
\(^ {79}\)Albino N & Berry L ‘Early childhood development in South Africa: what are the next steps?’ in Berry L et al. (eds) South African Child Gauge (2013) 78-81.
\(^ {80}\)Lord JE & Stein MA (2008) (n 64 above) 475.
exist within particular services (which serve to exclude certain children), and how can these be removed, as well as what gaps there are and how can these be filled.

The ECD imperative has been established; the challenge is now to entrench the inclusion imperative. While to some extent this has been done at the legislative and policy level (through the Children’s Act and White Paper 6), we must be vigilant that such provisions do not become the basis themselves for segregation and disability-based discrimination (as described by Ngwenya & Pretorius)\textsuperscript{81}. Further, policy and legislative provisions should never be seen in a vacuum, but rather regarded as part of the broader societal project of social transformation. For example, the impact of social grants is diminished if we do not also give attention to ensuring access of children with disabilities to ECD, education, health and (as adults) employment opportunities. Conversely, denial of access to social services, reinforces their vulnerability and dependency, perpetuating the assumption that they will forever be wards of the State. But inclusion, like reasonable accommodation, is not ‘one size fits all’. This is where the role of parents and children themselves is so important viz that they be involved in shaping policies and services so that they most effectively address their concerns and priorities.

6.4 Conclusion

South Africa is on the cusp of a new dispensation for ECD, with four key elements coalescing, viz political will, research based on the science of early childhood, formulation of policy and growing momentum with respect to disability rights.

ECD has been identified by government as an ‘apex priority’ for particular focus over the next 30 years, part of the vision of the National Development Plan 2012-2030.\textsuperscript{82} A new Programme of Action for ECD\textsuperscript{83} has been drawn up. Not only is it a priority of the ruling party (as articulated by the Minister of Social Development recently,\textsuperscript{84} ECD

\textsuperscript{81}Ngwenya C & Pretorius L (2012) (n 68 above).
\textsuperscript{82}National Planning Commission ‘National Development Plan: vision for 2030’ (2011).
\textsuperscript{83}Note that this is still in draft form and is undated, it is however an update on the draft circulated for comment in September 2012. Copy on file with the author.
\textsuperscript{84}Bathebile Dlamini, Minister of Social Development. ‘Investing in children for optimal development’ Keynote address delivered at the launch of the South African Child Gauge. Cape Town: 10 October 2013.
is underpinned by recent findings in the science of early childhood, which points to the effectiveness of interventions during this unique phase of the lifespan. Further, social research compiled in the 2013 *South African Child Gauge*[^85] provides guidance on what interventions are required to support young children, and how these can be undertaken within existing services.

At the same time, there is growing momentum with respect to disability rights, particularly in the African context. The CRPD is being viewed as ‘a moral compass for change as well as a legal benchmark against which to measure that change’. It therefore provides a ‘development tool’ which can be used to align State obligations under international law with legislation and policies which give effect to the right of children with disabilities to ECD. This is part of the transformative potential of the CRPD – which concerns not only non-discrimination and the inclusion of children with disabilities in ECD services, but the shaping of policies based on equality and dignity for all young children. It thus has the potential to provide significant impetus towards realising the rights of children with disabilities to ECD.

[^85]: The theme is ‘Stepping up to the challenge: prioritising essential services for young children’.
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