

**Holding South Africa Accountable: A Critique of the Reports submitted to
Treaty Bodies Pertaining to the Rights of Children with Disabilities**

By

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Declaration

I declare that '**Holding South Africa Accountable: A Critique of the Reports submitted to Treaty Bodies Pertaining to the Rights of Children with Disabilities**' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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Blind and deaf children

State obligations

Social assistance

Reports to treaty bodies

International legal framework

Abbreviations and Acronyms

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
ANC	African National Congress
CDG	Care Dependency Grant
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DICAG	Disabled Children's Action Group
DPSA	Disabled People South Africa Organisation
DSD	Department of Social Development
DWCPD	Department of Women Children and Persons with Disabilities
ECD	Early Childhood Development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGF	Inter-Governmental Forum
INDS	Integrated National Disability Strategy
NDP	National Development Plan: Vision 2030
NPAC	National Plan of Action for Children 2012 – 2017
PIP	Child Healthcare Problem Identification Programme
SACE	South African Council of Educators
SAHRC	South African Human Rights Commission
SALRC	South African Law Reform Commission

SASL	South African Sign Language
SIAS	National Strategy on Screening, Identification, Assessment and Support
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCHR	United National High Commissioner on Human Rights
UNICEF	United Nations Children's Fund
WCFID	Western Cape Forum for Intellectual Disabilities
WHO	World Health Organisation

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Chapter 1

Introduction

“Children in situations of disability do not need our spontaneous pity or compassion, but rather long term concrete actions, which will promote their full participation in the development process of their countries.”

Ms Agnes Kabore

Chairperson of the ACERWC

1.1 Background and Problem Statement

1.1.1 Introduction

South Africa is signatory to many international human rights treaties that pertain to children with disabilities. In particular, South Africa has ratified the United Nations (hereinafter referred to as the UN) Convention on the Rights of Persons with Disabilities¹ (hereinafter referred to as the CRPD), the Convention on the Rights of the Child² (hereinafter referred to as the CRC) and the African Charter on the Rights and Welfare of the Child³ (hereinafter referred to as the ACRWC). In turn, South

¹ Signed on 30 March 2007, ratified on 30 November 2007
http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en

<Accessed on 02.06.2015>.

² Signed on 29 January 1993, ratified on 16 June 1995
https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en

<Accessed on 02.06.2015>.

³ Signed on 10 October 1997, ratified on 7 January 2000 <http://pages.au.int/acerwc/pages/acerwc-ratifications-table>

Africa has submitted reports to the treaty bodies monitoring these treaties on the implementation of the international instruments over the past two decades. This study seeks to critique the reports in relation to children with disabilities so as to answer the research question posed below.

1.1.2 Understanding Disabilities

To lay the foundation of this study, it is important to understand the meaning of disability and what it includes. Therefore, this subsection is focused on briefly defining the term disability.

The term disability is a very broad one covering many spectrums of disability. Some authors have said that the term 'persons with disabilities' relates to persons with physical or intellectual disabilities, chronic illnesses, visual or hearing impairments and genetic disorders.⁴ Others have said that it is a very difficult concept to define as it covers so many different conditions that can be experienced by anyone of any age, race or sex.⁵

In its Preamble, the CRPD identifies that disability is a developing term that definition relies upon the persons impairment and the environmental barriers that

<Accessed on 02.06.2015>.

⁴ Combrinck H *The Hidden Ones: Children with Disabilities in Africa and the Right to Education* (2008) in Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* p299.

⁵ Combrinck H *The Hidden Ones: Children with Disabilities in Africa and the Right to Education* (2008) p303.

hinder such a person from participating equally in society.⁶ Progress can only be made if the social barriers are dealt with so as to enable disabled persons to reach their full potential in society and live their day-to-day lives without any limitation.⁷

For purposes of this study, the description of disability provided in the CRC Committee's General Comments on the rights of children with disabilities will be relied upon. The description provided is as follows,

'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.'⁸

The lack of recent and reliable statistics in South Africa is a challenge, however the World Health Organisation (hereinafter referred to as WHO) estimates that there are over one billion persons with disabilities in the world⁹. One hundred and fifty million

⁶ The Convention of the Rights of Persons with Disabilities (hereinafter CRPD), Preamble.

⁷ World Report on Disability, WHO, 2011 p4.

⁸ Committee on the Rights of the Child (hereinafter CRC Committee), General Comment no 9 (2006) The Rights of Children with Disabilities, para 7.

⁹ <http://www.who.int/mediacentre/factsheets/fs352/en/> <Accessed 11 May 2015>.

of these are children¹⁰ and 718 409 of them are children living with disabilities in South Africa.¹¹

Children with disabilities are faced with innumerable challenges, some of which are poverty, physical, emotional, psychological and sexual abuse, exploitation, neglect and harmful traditional practices.¹² Along with the aforesaid, children with disabilities often do not have adequate access to health care. These children suffer great rejection from their families and communities due to a lack of education and stereotypes. The basic human rights of many children with disabilities are violated daily whereby they are marginalized, discriminated against, isolated and excluded from society.¹³ It is clear that children with disabilities are faced with various obstacles that prevent them from participating in society and fully enjoying their rights. The most vulnerable groups of persons with disabilities are children with

¹⁰ CRC Committee General Comment no 9 (2006) para 1.

¹¹ Statistics South Africa, Census 2011: Profile of persons with disabilities in South Africa, Report 03-01-59.

¹² DSD, DWCPD and UNICEF *Violence Against Children in South Africa* Pretoria: Department of Social Development/Department of Women, Children and People with Disabilities/UNICEF (2012) p6 Available at www.cjcp.org.za/uploads/2/7/8/4/.../vac_final_summary_low_res.pdf <Accessed 29.03.16>.

¹³ Chilemba EM *The national implementation of international human rights law pertaining to children with disabilities in selected jurisdictions in Africa*. (unpublished LLD thesis, University of the Western Cape, 2014) 2.

disabilities, specifically those with intellectual and psycho-social disabilities as well as deaf persons.¹⁴

The South African National Development Plan Vision 2030 (hereinafter referred to as NDP) notes that disability and poverty go hand in hand and operate in a vicious cycle. Furthermore, the NDP recognizes that persons with disabilities cannot develop to their full potential as a result of various barriers which call for accelerated efforts from the

State to eradicate such barriers.¹⁵

1.1.3 Statement of the Research Problem

South Africa recently submitted reports to three treaty bodies regarding steps taken over the past two decades to implement the rights of children with disabilities. This study is focused on critically analysing the South African reports submitted to the United Nations Committee on the Rights of the Child (hereinafter referred to as the CRC Committee), the African Committee of Experts on the Rights and Welfare of the Child (hereinafter referred to as the ACERWC) and the Committee on the Rights of

¹⁴ First Periodic Country Report to the United Nations Committee on the Rights of Persons with Disabilities on the Implementation of the Convention on the Rights of Persons with Disabilities in South Africa, Draft released for public comment published in the Government Gazette no 38802 GN 445 of 2015, (hereinafter Periodic Report to the CRPD Committee) p20.

¹⁵ National Development Plan: Vision 2030, adopted in 2012 Available at <http://www.poa.gov.za/news/Documents/NPC%20National%20Development%20Plan%20Vision%202030%20lo-res.pdf> <Accessed 25.05.2015>.

Persons with Disabilities (hereinafter referred to as the CRPD Committee) regarding the implementation of the CRC, ACRWC and the CRPD in South Africa. In doing so, the study focuses on all matters pertaining to children with disabilities as well as focusing on particular groups of children with disabilities. This will be done to determine whether or not the State meets the international law obligation of implementing the CRC, ACRWC and the CRPD in South Africa.

The particular groups of children with disabilities to be discussed are as follows. The first group of children to be addressed are those with intellectual and psycho-social disabilities. An intellectual disability is seen as being a disability where the person struggles to adapt to a normal social environment.¹⁶ The person's long term intellectual impairments, when faced with certain societal barriers, hinder their full participation in society on an equal basis with others.¹⁷

Psycho-social disability refers to persons who are consumers of mental health services. The term recognises that a wide range of social, emotional and mental conditions, not necessarily experienced as impairments, are disabling. The term encourages the inclusion of persons who do not identify as persons with disabilities

¹⁶ Wakefield, L & Murungi, N *Domesticating International Standards of Education for Children with Intellectual Disabilities: A Case Study of Kenya and South Africa* (2013) African Disability Rights Yearbook p136.

¹⁷ Wakefield L & Murungi N (2013) p136.

but have been treated as such by being labelled as mentally ill or with any specific psychiatric diagnosis.¹⁸

The second group of children with disabilities to be discussed are those with physical disabilities in need of assistive devices and requiring the provision of assistive devices by the Department of Health. Assistive devices promote the independence of a disabled person. These devices promote a normal lifestyle, improves the quality of life of disabled persons and enhances their prospects of employment, education and participation. Additionally, assistive devices reduce the cost of care and dependency of disabled persons.¹⁹

The third group of children with disabilities to be discussed are those in need of social assistance and the provision of social security by the South African state to the families of children with disabilities, in the form of the care dependency grant (hereinafter referred to as the CDG). The Social Assistance Act²⁰ makes provision for the CDG that is available to parents and caregivers of children with permanent or

¹⁸ IDA CRPD Forum Contribution to the OHCHR thematic study to enhance awareness and understanding of the CRPD, focusing on legal measures key for the ratification and effective implementation of the Convention, August 2008, section 2.q Available at <http://www.kvinnor-funktionshinder.se/getfile.ashx?.swf&CID=28587...> <Accessed 28.05.15>.

¹⁹ National guideline on the standardisation of provision of Assistive Devices in South Africa.

²⁰ Social Assistance Act 13 of 2004.

severe disabilities, on the condition that these children are not permanently cared for in a state institution.²¹

Lastly, the study will focus on the need of deaf and blind children for South African Sign Language (hereinafter referred to as SASL) and braille linguistics. SASL is widely recognized in legislation and policies, however the problem lies not with its recognition, but with accessing and applying it. There is a lack of material and trained persons in SASL which creates a great need for training and development in this area. The CRPD obliges States to promote the linguistic identity of the deaf community and to train professionals in the use of SASL.²² Gaining access to the written word remains one of the greatest challenges of blind persons. Braille is a means of education, employment, pleasure and independence for blind persons. The Departments of Health, Basic Education and Justice and Constitutional Development have created braille awareness programmes and have made educational materials available.²³

1.1.4 Problem Statement

This study is focused on responding to the following questions with the objective of answering the research question below.

²¹ Initial Country Report to the United Nations Committee on the Rights of Persons with Disabilities on the Implementation of the Convention on the Rights of Persons with Disabilities, 2008-2012 (hereinafter Initial Report to the CRPD Committee).

²² CRPD, 2008 art 24.

²³ Initial Report to the CRPD Committee.

What do the relevant international instruments state regarding the obligations of the State with respect to children with disabilities?

What has South Africa reported to the CRC Committee, the ACERWC and the CRPD Committee regarding the implementation of the CRC, ACRWC and CRPD in South Africa for children with disabilities?

What progress has been made to address the problems pertaining to children with disabilities and what gaps remain to be addressed?

1.2 Research Question

To what extent is the State meeting its obligation, in respect of children with disabilities, regarding the implementation of the CRC, ACRWC and the CRPD in South Africa?

1.3 Literature Survey

After engaging with the material available on the topic of the rights of children with disabilities, it is clear that there is a gap in the literature that has paved the way for this paper.

The work of Combrinck²⁴, Beiter²⁵, Kilkelly²⁶, Bekink²⁷, Ngwena²⁸ and Wakefield and Murungi²⁹ discuss the international instruments that are relevant with regard to this

²⁴ Combrinck H *The Hidden Ones: Children with Disabilities in Africa and the Right to Education* (2008). in Sloth-Nielsen J (ed) *Children's Rights in Africa: A legal perspective*.

²⁵ Beiter K D *The Protection of the Right to Education by International Law* (2006).

issue. Although these authors all discuss the applicable legal instruments, from their discussions it is clear that the CRC, the CRPD and the ACRWC all refer to the rights of children generally. The article by Wakefield and Murungi focuses its attention broadly on children with disabilities with some reference to children with severe and profound intellectual disabilities. The article is focused on a discussion of the legislative instruments in place addressing the issue both nationally and internationally as well as a comparative discussion on the right to education of children with disabilities in Kenya.

Kilkelly critically discusses the provisions in the CRC that relate to children with disabilities. The article then delves into the implementation of the CRC provisions and the guidelines given to State's when drafting their reports.³⁰ In her article, Combrinck emphasizes that the history of disability rights in Africa generally has

²⁶ Kilkelly U *Disability and children: The Convention on the Rights of the Child (CRC)* (2002) in Quinn G & Degener T (eds) *Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) Geneva: United Nations p199.

²⁷ Bekink B & Bekink M *Children with Disabilities and the Right to Education: A call for action* (2005) 1 *Stellenbosch Law Review* p132.

²⁸ Ngwena C *Western Cape Forum for Intellectual Disabilities v Government of the Republic of South Africa: A Case Study of Contradictions in Inclusive Education* (2013) *African Disability Rights Yearbook* p139-164.

²⁹ Wakefield L & Murungi N *Domesticating International Standards of Education for Children with Intellectual Disabilities: A Case Study of Kenya and South Africa* p136.

³⁰ Kilkelly U, 2002.

always been neglected.³¹ She also discusses the way in which signatory States are held accountable, one mechanism is to submit reports to the United Nations and other treaty bodies.³²

Wakefield discusses the regional developments regarding the implementation of the ACRWC. Notably, article 13(2) of the ACRWC places an obligation on States to not only provide for the rights and welfare of children with disabilities, but also towards the *care-givers* of children of disabilities.³³ In 2012 the Day of the African Child was based on the theme of '[t]he rights of children with disabilities: The duty to protect, respect, promote and fulfill'.³⁴ State parties were expected to report on their regional measures to realise the rights related to the theme. The ACERWC proposed four activities to be undertaken by states to address the concerns of the rights of children with disabilities. The four activities were to adopt national plans to protect, respect, promote and fulfill the rights of children with disabilities; to review national legislation pertaining to children with disabilities; to strengthen areas of service provision to accommodate children with disabilities, and to introduce accessible complaint mechanisms for children with disabilities and their families.³⁵

³¹ Combrinck H *Disability Rights in the African Regional Human Rights System During 2011-2011* (2013) 1 African Disability Rights Yearbook p366-367.

³² Combrinck H (2013) p366

³³ Wakefield L *Making Progress: The African Committee of Experts on the Rights and Welfare of the Child and the Rights of Children with Disabilities* (2013) 1 African Disability Rights Yearbook p370.

³⁴ Wakefield L (2013) p373.

³⁵ L Wakefield (2013) p373.

In her Opinion Editorial written for the Policy Action Network (hereinafter referred to as PAN), Susan Philpott focuses on the challenges and gaps in the implementation of legislation relating to children with disabilities. The opinion focuses on the Social Assistance Act, Education White Paper 6, the Children's Act and the Free Health Care policy of the Department of Health. With regard to the provision of social security to the care-givers of children with disabilities, one of the main challenges is that social security allocations are still evaluated on the medical model of disability. This means that a significant number of children with disabilities do not qualify to receive the CDG as their disability is not *severe* enough. This is troubling as a vast majority of children with disabilities live in low income households where their basic needs cannot be financially met. Another issue discussed by Philpott is the negative attitude towards children with disabilities in the education and health sectors. She suggests that this is due to a lack of skills and knowledge in catering for children's diverse needs. There is also a lack of effective mechanisms within government departments to target interventions. Furthermore, there is a lack of communication and joint strategizing amongst different government departments to address the issues pertaining to children with disabilities. Moreover, there is a great need for programmes focusing on early identification and intervention for at risk children or those who are already diagnosed with disabilities.³⁶

³⁶ Opinion Editorial written for PAN by Sue Philpott, *Gaps in the implementation of legislative provisions and policy pertaining to children with disabilities in South Africa* March 2013 Available at children.pan.org.za/sites/default/files/publicationdocuments/Children%20with%disabilities%20policy%20%20pracitice. <Accessed on 15.05.15>.

Philpott, in her PhD dissertation, focuses on the international and Constitutional obligations of signatory states in respect of realising the right to early childhood development of children with disabilities. Her focus is solely based on the implementation of early childhood development for children with disabilities.³⁷

In his Doctor of Laws dissertation, Chilemba takes on a human rights approach to disability. He also discusses the obligations that the international laws require states to comply with when implementing the rights of children with disabilities. He does so in the context of South Africa and Malawi.³⁸

Additionally, the rights of disabled children are provided for extensively at the International level in the CRC, the ACRWC as well as the CRPD, the latter in respect of persons and children with disabilities. The discussion of the applicable international standards form the subject matter of Chapter 2.

1.4 Significance of the Problem

It is evident from the literature review that there is no other work that critiques the South African reports to the CRC Committee, the ACERWCand the CRPD

³⁷ SC Philpott *Realising the Right of Children with Disabilities to Early Childhood Development in South Africa* (unpublished LLD thesis, University of the Western Cape, 2013).

³⁸ EM Chilemba *The national implementation of international human rights law pertaining to children with disabilities in selected jurisdictions in Africa*. (Unpublished LLD thesis, University of the Western Cape, 2014).

Committee regarding the implementation of the CRC, the ACERWC and the CRPD. There is a definite need for development in the areas of law that pertain to children with disabilities based on what the South African Government has reported.

Children with disabilities are a marginalized group within the marginalized group of persons with disabilities generally. In a country such as South Africa, as well as at the international level, where everyone is promised basic human rights, the difficulties mentioned above, in section 1.1.3, are disconcerting. This study seeks to contribute towards the realization of the rights of children with disabilities.

1.5 Methodology

This is a desktop study, based on a literature review of both primary and secondary sources of law. The primary sources include national legislation and international conventions on the rights of children with disabilities. The secondary sources include reports, comments, books, case law, and journal articles that discuss and analyse the relevant primary sources with the aim of critiquing the reports submitted to the CRC Committee, the ACERWC and the CRPD Committee pertaining to the implementation of the international treaties in South Africa.

This methodology was chosen due to a wealth of knowledge available on the rights of children with disabilities. The available literature has cross-disciplinary potential and is often more developed in other disciplines, such as education and health, than

law. Whereas, this study is centered on a human rights approach to children with disabilities.

1.6 Chapter Outline

1.6.1 Chapter 1: Introduction

The introduction seeks to establish the background to the study as well as the problem statement and aims and objectives of the research as well as clearly defining and setting the limitations of this study. Furthermore, Chapter 1 provides the reader with an outline of the chapters to follow.

1.6.2 Chapter 2: The Rights of Children with Disabilities under International and National Law

This Chapter takes an in depth look at the rights of children with disabilities by critically analyzing the relevant international instruments relating to the rights of children with disabilities. Additionally, the chapter seeks to determine the obligations created by the international legislation in respect of the South African State.

1.6.3 Chapter 3: South Africa's Reports to the UN Committee on the Rights of Persons with Disabilities

The object of this chapter is to determine what South Africa has stated in its Initial and Periodic Report to the CRPD Committee pertaining to the implementation of the CRPD relating to children with disabilities. In doing so, this chapter will look at what South Africa has done, is currently doing and plans to do in future so as to meet the

international law obligations discussed in Chapter 2. Furthermore, this chapter focuses on the progress made, or lack thereof, of the South African State to provide for the rights of children with disabilities.

1.6.4 Chapter 4: South Africa's Reports to the UN Committee on the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child

This Chapter seeks to critique and analyse the Initial and Periodic Reports submitted to the CRC Committee and the Initial Report to the ACERWC. This is done by contrasting and comparing the Reports, submitted to the CRC Committee and the ACERWC, to that of the Report to the CRPD Committee discussed in Chapter 3.

1.6.5 Chapter 5: Conclusion

The final chapter draws a conclusion with regard to the conducted research and seeks to answer the research question posed in Chapter 1.

Chapter 2

The Rights of Children with Disabilities under International and Regional Law

“Treat us equally. People should judge us for what we can do, not for what we can’t do.”

Ann Kwong, 14 years old

2.1 Introduction

This chapter is aimed at taking an in depth look at the rights of children with disabilities at the international level. In doing so, this chapter seeks to determine the obligations created by the international instruments which bind the South African State. This chapter discusses the international instruments that expressly pertain to children with disabilities. This is done so as to ascertain what the State is obligated to include in national legislation and what is expected from the State at a national level with a view of critically analysing what South Africa has stated in its country reports to the relevant treaty bodies in chapter 3.

2.2 General International Human Rights Instruments Pertaining to Children with Disabilities

2.2.1 Introduction

There are a number of international instruments that pertain to children with disabilities generally. The core instruments will be discussed briefly under this subsection.

At a time when the world was divided, after the Second World War, the UN adopted the Universal Declaration of Human Rights (hereinafter referred to as the UDHR) to guarantee the rights of every individual all over the world.³⁹ Subsequently, the International Covenant on Civil and Political Rights⁴⁰ (hereinafter referred to as the ICCPR) as well as the International Covenant on Economic Social and Cultural Rights⁴¹ (ICESCR) were adopted and became two fundamental human rights treaties.⁴² The ICCPR⁴³ provides for the freedom of the individual while the ICESCR ensures the freedom of the individual by providing for the social support of individuals.⁴⁴ Additionally, the UN adopted the Convention against Torture and Other

³⁹ <http://www.un.org/en/documents/udhr/history.shtml> <Accessed 10.06.15>.

⁴⁰ Signed on 3 October 1994, ratified on 10 December 1998 Available at https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtmsg_no=iv-4&lang=en.

⁴¹ Signed on 3 October 1994, ratified on 12 January 2015 Available at https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtmsg_no=iv-3&src=treaty.

⁴² Liebenberg S *The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa* (1995) 11 S. Afr. J. on Hum. Rts. p360.

⁴³ The Covenant was adopted by the United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966. It entered into force on 23 March 1976, in accordance with article 49, for all provisions except those of article 41; 28 March 1979 for the provisions of article 41 (Human Rights Committee), in accordance with paragraph 2 of the said article 41.

⁴⁴ Gerard Quinn et al. *Human Rights and Disability The Use and Future Potential of United Nations Human Instruments in the Context of Disability* (2002) p48.

Cruel, Inhuman or Degrading Treatment or Punishment⁴⁵ (hereinafter referred to as the Convention against Torture) as well as the Convention on the Elimination of All Forms of Discrimination against Women⁴⁶ (hereinafter referred to as the CEDAW) the latter pertaining to a specific group of persons. Furthermore, the International Convention on the Elimination of All Forms of Discrimination⁴⁷ was adopted by the UN to ensure that all human beings are equal before the law and have an equal enjoyment of the law with a specific prohibition on racial discrimination.⁴⁸

State parties to the aforementioned instruments are obligated to take appropriate measures, including national legislation, to implement the provisions contained in these instruments.

2.2.2 Provision for Non-Discrimination

Although the aforementioned instruments do not deal specifically with children with disabilities, they all contain provisions that relate to children with disabilities. There is

⁴⁵ Signed on 29 January 1993, ratified on 10 December 1995 Available at <https://treaties.un.org/doc/Treaties/2007/11/28/IV-9.en.pdf>.

⁴⁶ Signed on 29 January 1993, ratified on 15 December 1995 Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

⁴⁷ Signed on 13 January 1993, ratified 15 December 1995

Available at https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&lang=en.

⁴⁸ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, Preamble & Article 2.

a general theme of non-discrimination that can be found in the five instruments mentioned above.

The UDHR emphasises that all individuals are equal in dignity⁴⁹, everyone is equally entitled to enjoy the rights contained in this instrument⁵⁰ and everyone is equal before the law without any discrimination.⁵¹ The ICCPR recognizes that rights are derived from the inherent dignity of an individual.⁵² Specific provision is made in the ICCPR for the protection of all persons against discrimination.⁵³ The ICESCR recognizes that the foundation of freedom, justice and peace is the provision of equal and inalienable rights to everyone.⁵⁴ The Convention against Torture emphasises the State's obligation to promote respect for human rights and fundamental freedoms.⁵⁵ In addition, the Convention against Torture prohibits any act causing severe physical or mental pain and suffering based on discrimination of any kind.⁵⁶

⁴⁹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 1.

⁵⁰ Article 2.

⁵¹ Article 7

⁵² UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol 999, p171, Preamble.

⁵³ Article 26.

⁵⁴ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol 993, p3, Preamble.

⁵⁵ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol 1465, p85, Preamble.

⁵⁶ Article 1.

CEDAW prohibits any differential treatment towards women. It emphasizes that women should not be discriminated against and should be treated equally to men in all aspects of the law.⁵⁷ Therefore, CEDAW provides double protection for girl children with disabilities as the girl child may not only suffer discrimination due to her disability, but also as a result of her gender.⁵⁸

2.2.3 Specific Provisions relating to Children with Disabilities

The core human rights treaties mentioned above also contain certain specific provisions that pertain to all persons, including children with disabilities. These specific provisions will be discussed briefly below. Everyone has the right to and is entitled to the provision of social security. In turn, everyone has the right to a standard of living that is sufficient for the health and well-being of the individual and their family; as the family is the natural group unit of society. This right includes the provision of food, clothing, housing and medical care.⁵⁹ Social assistance should be provided particularly while the family is responsible for the care of children.⁶⁰ The UDHR specifically mentions the right to social security, in the event of disability,

⁵⁷ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol 1249, p13, Part II.

⁵⁸ Cornelsen K *Doubly Protected and Doubly Discriminated: The Paradox of Women with Disabilities After Conflict* 19 William & Mary Journal of Women and the Law (2012) p120 Available at <http://scholarship.law.wm.edu/wmjowl/vol19/iss1/6> <Accessed on 29.03.16>.

⁵⁹ Article 22 and 25.

⁶⁰ Article 10.

where the individual lacks a livelihood due to circumstances outside of his/her control.⁶¹

The ICCPR makes specific provision for the right to the highest level of protection measures for children, without any discrimination, from their family unit, society and the State.⁶² The aforementioned instruments also guarantee the right to education that is directed at the full development of the human personality.⁶³ State parties are obligated to develop a system of schooling that caters for all levels of education.⁶⁴

2.3 International Instruments Pertaining to Children with Disabilities

2.3.1 The Convention on the Rights of the Child

The CRC⁶⁵ specifically recognises the human rights of children, who are persons below the age of 18 years. Except in instances where under the law that is applicable to the child, the age of majority is attained earlier.⁶⁶ Children, as a result of their physical and mental immaturity, need special safeguards and assistance.⁶⁷ Therefore, State parties are obligated to ensure that all children, without

⁶¹ Article 25.

⁶² Article 24.

⁶³ Article 26.

⁶⁴ Article 13.

⁶⁵ The Convention on the Rights of the Child (hereinafter CRC) was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. It entered into force on 2 September 1990, in accordance with article 49.

⁶⁶ Article 1.

⁶⁷ Preamble.

discrimination, are afforded special measures of protection and assistance so as to reach their full potential.⁶⁸

a) General Non-Discrimination Provision

The CRC obliges State parties to respect and ensure the rights contained in the Convention to all children within its jurisdiction without discrimination of any form.⁶⁹ Furthermore, State parties must take all appropriate measures to ensure the protection and safety of all children from discrimination or punishment on the basis of disability.⁷⁰ Notably, the CRC has a comprehensive version of the principle of non-discrimination that not only applies directly to the child, but extends to the parents and family of the child.⁷¹

b) Specific Provision for Children with Disabilities

The CRC makes specific reference to children with disabilities in article 23, which is the leading article for the implementation of the CRC for children with disabilities⁷². It is highlighted that children with disabilities should enjoy a full and decent life which

⁶⁸ http://www.unicef.org/crc/index_30225.html <Accessed on 10.06.15>.

⁶⁹ Abramson B *A Commentary on the United Nations Convention on the Rights of the Child: Article 2: The right of non-discrimination* (2008) 40 – Abramson argues that the right to equality and non-discrimination in the CRC is absolute and can, therefore, never be limited.

⁷⁰ Article 2.

⁷¹ Sloth-Nielsen J & Mezmur BD *2+2=5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)* (2008) 16 Int'l J. Child. Rtsp 6.

⁷² CRC Committee, *General comment No. 9 (2006): The rights of children with disabilities*, 27 February 2007, CRC/C/GC/9, Adopted by the Committee at its Forty-third session Geneva, 11 – 29 September 2006. See also Chilemba E (2014) p38.

ensures dignity, the child's full participation in society and promotes self-reliance.⁷³ Furthermore, it is emphasised that children with disabilities have the right to special care and that State parties are under an obligation to provide support to children with disabilities and their families which is appropriate to the child's need and the circumstances of the parents.⁷⁴ In addition, it is said that State parties must provide assistance to children with disabilities and their families freely and must ensure that the child has access to education, health services as well as recreational activities to ensure the child's cultural, social and spiritual development.⁷⁵

c) Other Substantive Rights relating to Children with Disabilities

The CRC Committee identifies the best interests of the child as one of the cardinal principles⁷⁶ for the implementation of the CRC. This principle is vital for the enjoyment of the rights of children with disabilities. The CRC Committee has iterated that with regard to children with disabilities, the principle of the best interests of the

⁷³ Article 23 para 1. See also General Comment No 9, para 11 which states that State Parties must ensure the inclusion of children with disabilities in society.

⁷⁴ Article 23 para 2.

⁷⁵ Article 23 para 3. See also General Comments No 9, para 12. See also Quinn G & Degener T (2002) p120.

⁷⁶ The CRC Committee identifies four cardinal principles for the implantation of the rights contained in the CRC – the best interests of the child. – the child's survival.- The child's development, and –the child's participation. See also Kilkelly U *Disability and Children: The Convention on the Rights of the Child (CRC)* in Quinn & Degener (2002) p94. Also see article 3, which provides that the best of interests of the child shall be a primary consideration in all actions concerning the child.

child should be prioritized above all other considerations, specifically in matters relating to budgeting and service provision.⁷⁷

The CRC recognises the importance of the right to family as far as possible. This includes the right to know and be cared for by the child's parents.⁷⁸ Moreover, a child has the right to preserve its identity, which includes the family relations, without unlawful interference.⁷⁹

A child that has been lawfully deprived of a family environment is entitled to receive special protection and assistance provided by the State. State parties are under an obligation to provide alternative care for the child, keeping in mind the continuity of the child's ethnic, religious, cultural and linguistic background. Alternative care include foster placement, Islamic law kafala, adoption or placement in a suitable institution for the care of the child.⁸⁰

⁷⁷ General Comment No 9, para 30. See also General Comment No 13 (2013) for a detailed discussion of the principle of the best interests of the child. See also Freeman M *A Commentary on the United Nations Convention on the Rights of the Child: Article 3: The Best Interests of the Child* (2007).

⁷⁸ Article 7. See also Kilkelly U *Effective Protection of Children's Rights in Family Cases: An International Approach* (2002) 12 *Transnat'l L. & Contemp. Probs.* P 340, which states that the family is the natural environment for the growth and development of children and should, therefore, be afforded special measures of protection.

⁷⁹ Article 8.

⁸⁰ Article 20.

Every child has the right to an adequate standard of living that is in accordance with the child's physical, mental and social development. The CRC recognizes that the child's ability to develop is influenced largely by living conditions that include the conditions of the parents, family unit, community and broader society.⁸¹ As mentioned above, State parties are obligated to provide assistance to parents if necessary, however the care of the child remains the primary responsibility of the parents or person responsible for the child.⁸²

Closely connected to the State's obligation to provide assistance is the right to social security. Similarly to all children, children with disabilities require care. However, children with disabilities require an even higher degree of care than other children. This higher degree of care is usually closely followed by higher costs. These costs are often linked directly to the child's disability or indirectly to the family in coping with the child's disability.⁸³ The CRC makes explicit provision for the right to social security that is afforded to all children. State parties are under an obligation to take all reasonable steps to ensure the realisation of this right while considering the means and livelihood of the parents of the child.⁸⁴

⁸¹ Hashima P & Limber S *An adequate Standard of Living necessary for Children's Cognitive (Mental) 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* p69-86.

⁸² Article 18 and 27.

⁸³ E.g. Many parents have to leave their jobs to care for the child with disabilities and as a result, lose their income, which is often the only income in the household. See also Phillpott (2013) p58. See also Anderson D (et al) *The Personal Costs of Caring for a Child with a Disability* (2007) Public Health Reports 122(1) p3-16.

⁸⁴ Article 26.

Of great importance to children with disabilities is the right to life.⁸⁵ This is one of the cardinal principles of the CRC. The right to life not only relates to the child's right to be alive and not have life arbitrarily taken away, but it also relates to life expectancy, child mortality, immunization, malnutrition and preventable diseases.⁸⁶ This is especially pertinent to children with disabilities because they are often faced with considerable obstacles.⁸⁷ In addition, children with disabilities are vulnerable and face many stereotypes within society. Vulnerability refers to an individual's susceptibility to negative outcome. The susceptibility is often aggravated by a biological or psychosocial factor, such as disability.⁸⁸ Many families view a child with a disability as being a bad omen and many cultures condone the killing or abandonment of children with disabilities.⁸⁹ As a result, this right not only recognises the violation of the right to life as punishable but also places an obligation on State parties to put an end to these practices by creating awareness relating to children with disabilities.⁹⁰

⁸⁵ Article 6, which provides that State Parties shall ensure to the maximum extent possible the survival and development of the child.

⁸⁶ Sloth-Nielsen J & Mezmur BD (2008) p10.

⁸⁷ General Comment No 9, para 31. See also Kilkelly in Quinn & Degener (2002) 194.

⁸⁸ See Philpott (2013) p31. See also Werner EE *Protective Factors and Individual Resilience* (1990) in Meisels S and Shonkoff J *Handbook of Early Childhood Intervention* p 97-116 for a discussion on vulnerability.

⁸⁹ Lansdown G *It's our World too! A report on the lives of disabled children: Disability awareness in action* (2001) p24.

⁹⁰ Para 31.

In relation to the above, the function of the media is an important one that is recognized by the CRC. This is relevant to children with disabilities as their families have the right to access information and material from diverse international and national sources with a view of promoting the child's cultural, social and health well-being.⁹¹ Furthermore, the CRC guarantees children with disabilities the right to freedom of expression to receive and impart information of any kind through any method chosen by the child.⁹² This places an obligation on the State to recognize the linguistic needs of children with disabilities which includes the need of braille and SASL linguistic development in South Africa.

It is clear from the above that the CRC places great importance on the voice of the child⁹³ and as a result State parties must ensure that the views of the child are considered in all matters affecting the child and the child must be given the opportunity to be heard in all judicial and administrative matters personally or through a representative if necessary.⁹⁴ By involving the child in this way, State parties ensure the inclusion of children with disabilities in decision making that affects them directly as it is common practice that disability policies are put into place

⁹¹ Article 17.

⁹² Article 13.

⁹³ Sloth-Nielsen J & Mezmur BD (2008) p14.

⁹⁴ Article 12, See also Lucker-Babel MF *The Role of the Child to Express Views and to be Heard/Held: An Attempt to Interpret Article 12 of the Convention on the Rights of the Child* (1995) 3 Int. J on Children's Rights p391; Lundy L *Voice is not enough: Conceptualising Article 12 of the UNCRC* (2007) 33 British Educational Research Journal p927.

without participation of those who it affects.⁹⁵ By including the views of children with disabilities, State parties also ensure that policies that are put in place address the real needs and desires of children with disabilities. State parties are also under an obligation to provide children with disabilities appropriate measures to assist in communication that is necessary to express their views.⁹⁶ In addition, the views of the child are also relevant to healthcare. The participation of children in healthcare decisions improves the quality of children's healthcare and has a positive effect on healthcare treatments.⁹⁷

Children with disabilities are five times more likely to be victims of abuse than other children.⁹⁸ The abuse faced by children with disabilities is multifaceted. Many children with disabilities are victims of physical, mental and sexual abuse in their homes, schools, private and public institutions. There are various reasons why children with disabilities are seen as being easy targets for abusers. Often, children with disabilities have an inability to hear or move which increases their vulnerability to abuse. Children with communication or intellectual disabilities are often misunderstood or ignored when complaining about abuse. Many children with disabilities are admitted to private or public institutions where they are isolated from

⁹⁵ Sloth-Nielsen J & Mezmur BD *Surveying the Research Landscape to Promote Children's Legal Rights in an African Context* (2007) 7 African Human Rights Journal p347.

⁹⁶ Para 32, See also Jamieson L *Children's rights to participate in social dialogue* (2010/2011) South African Child Gauge p26.

⁹⁸ Child Welfare Information Gateway *The Risk and Prevention of Maltreatment of Children with Disabilities* (2012) Available at <https://www.childwelfare.gov/pubPDFs/focus.pdf> <Accessed 29.03.16>.

their families which increases their vulnerability and they become easy targets to abusers. Children with disabilities are also often more likely to be subjected to neglect and exploitation due to the fact that they present a physical and financial burden to their families.⁹⁹

Therefore, State parties are under an obligation to take all appropriate legislative, administrative, social and educational measures to prevent the abuse, neglect and exploitation of children with disabilities. In addition, State parties must provide effective procedures for the reporting of such acts and for support to be given to the child who is a victim of abuse and their families.¹⁰⁰ Thereafter, State parties must provide measures to promote the recovery and reintegration of children with disabilities, who have been victims of abuse, neglect or exploitation, in an environment that is ideal for the health and dignity of the child.¹⁰¹ Included in the protection against abuse, neglect and exploitation is the child's right to not be subjected to any form of cruel, inhumane or degrading treatment.¹⁰² State parties must also ensure that there are measures in place to combat child trafficking and child abduction.¹⁰³

⁹⁹ Para 42.

¹⁰⁰ Article 19. See also UNICEF *Implementation Handbook for the Convention on the Rights of the Child* 3 ed (2007).

¹⁰¹ Article 39.

¹⁰² Article 37.

¹⁰³ Article 35.

The CRC ensures the right of the child to the highest standard of health and rehabilitative measures.¹⁰⁴ This includes the obligation placed on State parties to implement systems for early detection of disabilities in infant children as part of health services. There has been research that has identified key factors that impact negatively on the development of a child, which includes nutritional deficiencies, inadequate health, maternal and parental care and low levels of stimulation. These factors may lead to irreversible damage.¹⁰⁵ Health services should be easily accessible to the public. When disabilities are detected late it deprives the child of effective treatment and rehabilitation.¹⁰⁶ Furthermore, when necessary assistive devices must be provided to provide for the full functionality of the child as far as possible. This includes devices that increase mobility and self-reliance, hearing aids, visual aids and prosthetics.¹⁰⁷

Additionally, children with disabilities often need multidisciplinary care as they are faced with multiple health issues. Therefore, health care professionals must work collectively to identify plans for the most effective health care to be provided to the child.¹⁰⁸

¹⁰⁴ Article 24.

¹⁰⁵ Walker SP (et al) *Inequality in Early Childhood: Risk and Protective Factors for Early Child Development* (2011) *The Lancet* 378 (9799) p1-14.

¹⁰⁶ Para 56.

¹⁰⁷ Para 57.

¹⁰⁸ Para 58.

Lastly, with regard to health care, State parties are under an obligation to provide for preventative measures. Many disabilities are preventable, but due to a lack of education and awareness, people are not aware of preventative measures to be put in place to prevent those disabilities that can be avoided. The most effective way to address this issue is for State parties to provide for both the pre-natal and post-natal health care of mothers and to provide awareness programmes to the public.¹⁰⁹

The CRC provides for the right to education for all children on an equal basis.¹¹⁰ This provision asserts the basic need of all children for education and that discrimination on the ground of disability is prohibited.¹¹¹ Education should be geared towards developing the child's personality, mental and physical abilities to its full potential.¹¹² There is a need for the modification of the school system and for the training of educators to enable them to deal with the diverse abilities of children with disabilities.¹¹³

The education of children with disabilities should be geared towards the self-awareness and self-reliance of the child. Children with disabilities should feel

¹⁰⁹ Para 53.

¹¹⁰ Article 28.

¹¹¹ Chowdhury PR *The Right to Inclusive Education of Persons with Disabilities: The Policy and Practice Implications* (2011) 12 Asia-Pac. J. on Hum. Rts. & L. p8.

¹¹² Article 29.

¹¹³ Para 62, the CRC Committee has also provided for the ways in which this right should be enjoyed by children with disabilities. See General Comment No 9 para 30-79.

respected within the classroom environment and should have their voices heard.¹¹⁴ This can be achieved by the implementation of inclusive education by State parties. Due to the fact that children with disabilities are diverse and different to one another, the level of inclusion in schooling is dependent on the individual child's educational needs.¹¹⁵

Furthermore, there is a need for career development for children with disabilities that should begin at an early age. The purpose of this is to provide for the inclusion of the child in society, for self-awareness and self-reliance and to enable the child to function fully within the community and to contribute to society.¹¹⁶

Although no express provision is made for early childhood development, the CRC recognizes that education begins at birth and that there is a need to focus on the purpose of education which is not only to provide stimulation and learning for children with disabilities, but also for participation and play.¹¹⁷ The regular monitoring of young children's growth and development promotes the early diagnosis and appropriate intervention when problems are identified.¹¹⁸

¹¹⁴ Para 64.

¹¹⁵ Para 66.

¹¹⁶ Para 69.

¹¹⁷ Early childhood development is defined as covering the period from birth to school going age. See e.g. Philpott (2013) p24.

¹¹⁸ Shonkoff J & Phillips D (eds) *From Neurons to Neighbourhoods: The Science of Early Childhood Development* (2000) p11.

2.3.2 The Convention on the Rights of Persons with Disabilities

The CRPD is a significant milestone in the international realisation of the rights of persons with disabilities, who constitute more than 650 million of the world's population.¹¹⁹ The development of disability rights in Africa had been at a much slower pace in comparison to other jurisdictions. However, the ratification of the CRPD offered new opportunities for African states to reconsider their national law relating to disability law.¹²⁰

The purpose of the CRPD¹²¹ is to promote and protect the full enjoyment by persons with disabilities, including children with disabilities, of all human rights to ensure their full participation in society on an equal basis with others.¹²² The CRPD recognises that children with disabilities should enjoy their human rights on an equal basis with other children; by guaranteeing non-discrimination, containing a provision specifically geared towards children with disabilities and setting out general substantive rights that also relate to children with disabilities.¹²³ Furthermore, persons with disabilities

¹¹⁹ Ngai J *The UN Convention on the Rights of Persons with Disabilities - A challenge for the Hong Kong way of Equality* (2009) Hong Kong Journal of Legal Studies 3 p79.

¹²⁰ Van Reenen T & Combrinck H, *The UN Convention on the Rights of Persons in Africa: Progress after 5 Years* (2011) SUR 8 p133.

¹²¹ UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106.

¹²² Article 1.

¹²³ Chilemba E (2014) p46.

continue to face violations of their human rights and are confronted with various barriers affecting the full enjoyment of their rights.¹²⁴

a) General Non-Discrimination Provision

Discrimination is defined in the CRPD as any distinction, exclusion or restriction placed on a person due to their disability which has the effect of limiting the enjoyment and exercise of their human rights on an equal basis with others.¹²⁵

The CRPD places an obligation on State parties to ensure the full enjoyment of all human rights and full participation in society by persons with disabilities without discrimination.¹²⁶ This is to be done by implementing or amending existing legislative and other measures to include the rights contained in the CRPD. In addition, State parties must take steps to abolish existing measures that discriminate against persons with disabilities and must take into account the rights of persons with disabilities in all policies.¹²⁷

¹²⁴ Preamble.

¹²⁵ Article 2. See also Article 3(b) which identifies the general principles of the CRPD; Chilemba (2014) p 47. The CRPD implies a higher degree of protection against non-discrimination of children with disabilities.

¹²⁶ Article 4.

¹²⁷ Article 4(1)a-c.

In addition, the CRPD ensures that persons with disabilities are entitled to equal protection and benefit of the law. State parties are under an obligation to provide legal protection to persons with disabilities against discrimination.¹²⁸

b) Specific Provision for Children with Disabilities

Although the CRPD is geared toward the protection of persons with disabilities generally, which includes children with disabilities; it also contains specific provision for children with disabilities as well as the girl child with disabilities.

State parties are under an obligation to ensure that children with disabilities have full enjoyment of their rights on an equal basis with other children. The CRPD provides the highest standard of the right to equality in comparison to other conventions, as it expressly includes the provision of reasonable accommodation as an element of the right.¹²⁹ Furthermore, the CRPD, similarly to the CRC, recognises that in all matters involving children with disabilities, a pinnacle point should be the best interests of the child.¹³⁰ Additionally, the voice of children with disabilities is recognised as being of

¹²⁸ Article 5. See also Chilemba (2014) p 48; Schulze M *Understanding the UN Convention on the Rights of Persons with Disabilities* (2010) Lyon: Handicap International p61.

¹²⁹ Chilemba (2014) p50.

¹³⁰ Byrne B *Minding the Gap? Children with Disabilities and the UN Convention on the Rights of Persons with Disabilities* (2012) in Freeman M (ed) *Law and Childhood Studies: Current Legal Issues Vol 1* Oxford: Oxford University Press p428. See also Chilemba (2014) p53; it is interesting to note that both the CRC and CRPD state that the best interests of the child is 'a' primary consideration, as opposed to saying that it is 'the' primary consideration in matters involving the child. Byrne states that this can be viewed as a reduction and weakening of the principle of the best interests of the child.

great importance. Children with disabilities must be given opportunities to express their views, in accordance with their age and level of maturity, and State parties must provide assistance for the realisation of the right to express their views.¹³¹

As mentioned above, being a vulnerable group within the vulnerable group of children with disabilities, the girl child with disabilities is expressly provided for in the CRPD. Cognisance is taken of the fact that girl children with disabilities are faced with multiple grounds of discrimination and should be given further protection. State parties are under an obligation to take special measures to ensure the full enjoyment of all human rights by girl children with disabilities to ensure their full development, advancement and empowerment.¹³²

c) Other Substantive Rights pertaining to Children with Disabilities

Similarly to the CRC, the CRPD also makes provision for the right to life which places an obligation on State parties to take all necessary steps to protect the right to life of all persons with disabilities.¹³³

Persons with disabilities are protected from cruel, inhuman and degrading treatment as well as all forms of abuse and exploitation in the CRPD which places an obligation on State parties to put measures in place to prevent the violation of these rights. In addition, persons with disabilities may not be subjected to medical

¹³¹ Article 7. See also Bryne in Freeman (2012) p430.

¹³² Article 6.

¹³³ Article 10. See also Chilemba (2014) p55.

experimentation without their informed consent.¹³⁴ Moreover, State parties must take steps to introduce legislation and policies that expressly address abuse and exploitation directed at women with disabilities, including the girl child with disabilities. These steps must make provision for the identification, investigation and prosecution of violations of this right.¹³⁵

To combat stereotypes, prejudices and harmful traditional practices towards persons with disabilities, State parties are under an obligation to adopt measures that effectively raise awareness throughout society and the family unit. These measures must promote the capabilities of persons with disabilities as well as to emphasise the dignity of persons with disabilities.¹³⁶

To ensure that persons with disabilities are able to function fully within society and reach their full potential, State parties are under an obligation to ensure that persons with disabilities have access to information and communication systems in both urban and rural areas. State parties must address and eliminate barriers to accessibility. This includes an obligation to provide training to persons involved in accessibility issues that persons with disabilities face. Express provision is made for professional SASL interpreters to be used to facilitate accessibility.¹³⁷ State parties

¹³⁴ Article 15.

¹³⁵ Article 16(5). See also CRPD Committee, Concluding Observations on Australia (2013) para 38; CRPD Committee, Concluding Observations on El Salvador (2013) para 36(a).

¹³⁶ Article 8.

¹³⁷ Article 9.

must facilitate the acceptance and promote the use of SASL and braille communication systems. Additionally, State parties must provide information to persons with disabilities in an accessible format that is appropriate to the diverse nature of disabilities.¹³⁸

The cultural and linguistic identity of persons with disabilities is of great importance in the CRPD.¹³⁹ State parties must encourage persons with disabilities to take part on an equal basis with others in cultural life. To do this, State parties must ensure that persons with disabilities have access to cultural materials, television programmes and other cultural activities in an accessible format. Furthermore, persons with disabilities must be able to physically access sites of cultural importance and places for cultural performances such as theatres, libraries and museums. Children with disabilities, in particular, must have equal access with other children to participate in recreational activities.¹⁴⁰

¹³⁸ Article 21. See also Chilemba (2014) p56, which states that the CRPD's underlying objective is to emphasize the inclusion of children/persons with disabilities in society.

¹³⁹ Although this is not a new right, it is one of the rights set out in the CRPD that are not expressly mentioned in any other Conventions. Other rights like this, are the right to community living, the right to family centred alternative care and the right to education. See also Lawson A *The UN Convention on the Rights of Persons with Disabilities and European Disability Law: A Catalyst for Cohesion?* (2009) In Amardottir & Quinn p107.

¹⁴⁰ Article 30.

The CRPD makes express provision for the right to nationality and family of children with disabilities.¹⁴¹ All children with disabilities must be registered as soon as reasonably possible after birth so as to acquire a nationality and each child with disabilities acquires a right to know and be cared for by their family.¹⁴²

With regard to the right to family care, the CRPD expressly provides for the right of family care for children with disabilities. State parties must provide support and assistance to children with disabilities and their families as early as possible so as to prevent abandonment, segregation and neglect of the child. Furthermore, State parties must ensure that children with disabilities are not be unlawfully separated from their parents. In respect of alternative care, when a child with disabilities is lawfully separated from their parents, the CRPD emphasises that the child should be placed within the care of the wider family and if this is not possible, then the community in a family setting.¹⁴³

Furthermore, the CRPD recognises the right to an adequate standard of living for persons with disabilities and their families. This includes the right to adequate food, housing and clothing. State parties are under an obligation to provide poverty

¹⁴¹ Article 18.

¹⁴² Article 18(2). See also CRPD Committee, Concluding Observations on El Salvador (2013) para 36(e) with respect to the registration of births of children with disabilities.

¹⁴³ Article 23. This view of the CRPD differs to that of the CRC as it emphasises that children with disabilities must be placed in a family centered alternative care environment. See also Chilemba (2014) p56-57.

reduction programmes and financial assistance to persons with disabilities and their families where necessary.¹⁴⁴

With regard to the right to assistive devices, the CRPD refers to personal mobility and provides that State parties must take all reasonable measures to ensure the greatest level of independence of persons with disabilities. State parties must do this by facilitating access to assistive devices by making them available to persons with disabilities at an affordable cost.¹⁴⁵ Furthermore, in relation to habilitation and rehabilitation, State parties are under an obligation to promote the use of assistive devices at the earliest possible stage to attain and maintain maximum independence of persons with disabilities.¹⁴⁶

The CRPD emphasises that education must be made available to all persons with disabilities on the basis of equal opportunity. Measures must be put in place for inclusive education systems at all levels of education. Children with disabilities are not to be excluded from education and must receive free and compulsory primary education.¹⁴⁷ Individualised support must be provided to persons with disabilities to maximise the person's development with a view of full inclusion of persons with disabilities in society.

¹⁴⁴ Article 28.

¹⁴⁵ Article 20.

¹⁴⁶ Article 26.

¹⁴⁷ Murungi LN *Inclusive Basic Education in South Africa: Issues in its Conceptualisation and Implementation* (2015) 18 Potchefstroom Elec. L.J. p181.

Moreover, State parties are under an obligation to ensure the education of deaf and blind persons by facilitating the learning and use of braille and SASL so as to promote the identity of deaf and blind linguistics. To do so, State parties must effectively train and employ educators who are qualified in SASL and braille.¹⁴⁸ State parties are under an obligation to provide for inclusive education by eliminating barriers to access and learning.¹⁴⁹ Furthermore, the CRPD establishes a basis for choice of education.¹⁵⁰ This choice relates to alternative places of education for children with disabilities. It also means that children with disabilities should have the choice to attend mainstream or special schools. This in turn means that State parties must ensure that all schools are fully equipped to respond to the diverse needs of children with disabilities.¹⁵¹

Persons with disabilities have the right to the highest level of health services. State parties must ensure that persons with disabilities have access to free or affordable health care services on an equal basis with others. This includes the right to receive sexual and reproductive health care which is important to adolescent children with disabilities. Particularly for children with disabilities, State parties must provide for early identification and intervention to prevent further disabilities.¹⁵²

¹⁴⁸ Article 24.

¹⁴⁹ Murungi (2015) p183.

¹⁵⁰ Childemba (2014) p57; See e.g CRPD art 24(a) and (b) which ensures that persons with disabilities are not excluded from the general education system.

¹⁵¹ Murungi (2015) p184.

¹⁵² Article 25.

2.4 Regional Instruments Pertaining to Children with Disabilities

2.4.1 The African Charter on the Rights and Welfare of the Child

Due to unique socio-economic and cultural factors, the situation of the African child is a critical one. As a result of children's physical and intellectual immaturity, they require special protection and care. This is one of the founding principles of the ACRWC.¹⁵³ The ACRWC recognises the importance of human rights and that all children are entitled to all rights and freedoms regardless of their race, sex, ethnic group, religion or other status.¹⁵⁴

a) General Non-Discrimination Provision

All children are entitled to the full enjoyment of all human rights and freedoms contained in the ACRWC without discrimination on any ground.¹⁵⁵ Furthermore, the ACRWC recognises that in all matters affecting the child, the best interests of the child is of primary consideration¹⁵⁶ and furthermore, stresses the importance of

¹⁵³ Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child (hereinafter ACRWC) , 11 July 1990, CAB/LEG/24.9/49 (1990).

¹⁵⁴ Preamble.

¹⁵⁵ Article 3. Notably, although the rights contained in the ACRWC are given to all children, which includes children with disabilities, disability is not a listed ground in the ACRWC. This has been said to be unfortunate as the ACRWC missed the opportunity to affirm the position of children with disabilities. See also Gose M *The African Charter on the Rights and Welfare of the Child* (2002) p48.

¹⁵⁶ Article 4.

African cultural values pertaining to the rights of children.¹⁵⁷ Notably, unlike the CRC which expressly places the obligation against non-discrimination on the State, the ACRWC does not and instead places the obligation on the State as well as other role players.¹⁵⁸

b) Specific Provision for Children with Disabilities

Particular provision is made for children with disabilities in the ACRWC. To ensure dignity, self-reliance and participation in society, children with disabilities have the right to special protection. State parties are under an obligation to take all reasonable steps within available resources to provide assistance to children with disabilities and their care givers. This is necessary to ensure that children with disabilities have access to training, preparation for employment and recreational activities so as to allow children with disabilities to reach their full potential and integration in society.

Additionally, State parties are under an obligation to ensure that children with disabilities have access to public buildings and other places that children with disabilities want access to.¹⁵⁹ One of the cardinal principles of the ACRWC is

¹⁵⁷ Olowu D *Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child* (2002) 10 Int'l J. Child. Rts. p128.

¹⁵⁸ Chirwa DM *The Merits and Demerits of the African Charter on the Rights and Welfare of the Child* (2002) 10 Int'l J. Child. Rts. p159.

¹⁵⁹ Article 13. Notably, the ACRWC art 13 refers to children with disabilities as 'handicapped children'.

equality and non-discrimination, particularly relating to children of both sexes of minority groups and those with disabilities.¹⁶⁰

c) Other Substantive Rights Pertaining to Children with Disabilities

Like the CRC and CRPD, the ACRWC also recognises the right to life and places an obligation on States to ensure the survival, protection and development of all children, including children with disabilities.¹⁶¹

With regard to the right to family care the ACRWC recognises that the child must grow up in a family environment surrounded by love, happiness and understanding for the full development of the child's potential.¹⁶² The family is viewed as the natural unit of society and State parties are under an obligation to support and promote the development of the family unit.¹⁶³ Furthermore, provision is made against the removal of a child from its parental home without due process of the law unless such removal is in the best interests of the child.¹⁶⁴ In instances where a child has been lawfully removed from the parental home, the State is under an obligation to provide alternative care with due regard to the continuity of the child's background.¹⁶⁵

¹⁶⁰ Olowu D (2002) p129.

¹⁶¹ Article 5. See also Philpott (2013) p96.

¹⁶² Preamble.

¹⁶³ Chirwa DM (2002) p167.

¹⁶⁴ Article 19.

¹⁶⁵ Article 25. See also Gose (2002) p39.

The ACRWC has taken a strong stance on the State's obligation to provide for the child when the child's parents cannot. Therefore, State parties are under an obligation to provide the care givers of children with support, when necessary, in respect of the basic needs of the child such as health care, education, shelter and clothing.¹⁶⁶ Social grants are an important source of income in many poor South African households and aid in addressing poverty and inequality.¹⁶⁷ However, it is maintained that the responsibility of the upbringing and development of the child remains the primary responsibility of the child's parents.¹⁶⁸

Seventy two million sub-Saharan African children are not enrolled in primary education with a significant percentage of that being children with disabilities.¹⁶⁹ The ACRWC guarantees that all children have the right to education that is directed at the full development of the child's social, cultural, physical and intellectual abilities. State parties are under an obligation to provide free and compulsory basic education and to take measures to ensure the regular attendance of children at schools.

State parties are expected to put special measures in place in to ensure that the girl child and disadvantaged children have access to education on an equal basis with

¹⁶⁶ Mezmur BD *The African Children's Charter versus the UN Convention on the Rights of the Child: A Zero-sum Game* (2008) SAPR/PL (23) p23.

¹⁶⁷ Budlender D & Woolard I *Income inequality and social grants: Ensuring social assistance for children most in need* (2012) South African Child Gauge p48

¹⁶⁸ Article 20.

¹⁶⁹ Chowdhury PR (2011) p3.

other children.¹⁷⁰ This is commendable as gender discrimination is not often prioritised by international human rights bodies. Unlike its predecessors, the ACRWC is the only international children's rights instrument that makes provision for the pregnant girl child and emphasises the importance of such a child continuing with her education.¹⁷¹ However, it is unfortunate that there is no acknowledgment of the right to early childhood development.¹⁷²

Similarly to the CRC and the CRPD, the ACRWC recognises that children have the right to rest, play and recreational activities. An obligation is placed on State parties to ensure that all children have equal access to recreational and cultural opportunities and activities.¹⁷³ Notably, the ACRWC emphasises that children are autonomous beings. This is significant in Africa, where children are often viewed as having under developed views, unable to make their own decisions and in constant need of protection.¹⁷⁴

All children have the right to attain the best possible physical and mental health. An emphasis is placed on providing maternal health care to expectant mothers and to promote preventative health care and education programmes to ensure the decrease in the infant and child mortality rate.¹⁷⁵ It is critical that adequate nutrition is provided

¹⁷⁰ Article 11. See also Mezmur BD (2002).

¹⁷¹ Chirwa DM (2002) p162.

¹⁷² Philpott (2013) p98.

¹⁷³ Article 12.

¹⁷⁴ Chirwa DM (2002) p160.

¹⁷⁵ Article 14.

at the prenatal stage as research has shown that inadequate nutrition at that vital stage impacts negatively on maternal health which results in foetal growth restrictions and other developmental issues.¹⁷⁶ Many disabilities, especially those of a physical nature, can be diagnosed at a prenatal stage. Providing effective maternal health and early diagnosis of disabilities prepares the family for the reality of raising a child with disabilities. In addition, early detection gives mothers the opportunity to terminate their pregnancies. Furthermore, when disabilities are detected as early as possible it leads to effective intervention measures to be put in place. Research has shown that intervention during the first one thousand days of a child's life is crucial and more successful than late intervention.¹⁷⁷

Where domestic law permits it, State Parties are obligated to adopt specific legislation and programmes to combat the abuse, neglect and maltreatment of children. Measures must be put in place at the national level to protect children from all forms of abuse, specifically physical, mental and sexual abuse.¹⁷⁸ Furthermore, special monitoring procedures must be put in place for children and their families who are victims of abuse.¹⁷⁹ Moreover, measures must be put in place to protect the child from sexual exploitation and sexual abuse.¹⁸⁰ Children are also protected from

¹⁷⁶ Hendricks M Goeiman H & Hawkrige A *Promoting healthy growth: Strengthening nutritional support for mothers, infants and children* (2013) South African Child Gauge p46.

¹⁷⁷ Hendricks M Goeiman H & Hawkrige A (2013) p45.

¹⁷⁸ Murungi LN (2015) p130.

¹⁷⁹ Article 16.

¹⁸⁰ Article 27.

being used in all forms of begging.¹⁸¹ Additionally, State parties are to take measures to prevent the practice of harmful cultural and traditional practices that affect the dignity and welfare of the child, particularly children who are subjected to discriminatory traditional practices on the grounds of their status.¹⁸²

2.5 Conclusion

The international human rights treaties discussed in this chapter, namely the CRC, the CRPD and the ACRWC, embody a vision towards which State parties can aspire. In addition, they also provide the process by which State parties can be held accountable by the international community as well as its' own citizens.¹⁸³

The analysis of the three treaties with regard to the rights of children with disabilities indicates a number of similarities. Firstly, all the aforementioned treaties make provision for the prohibition against discrimination which includes children with disabilities. In addition, these treaties do, to a certain extent, make provision for specific rights afforded to children with disabilities only. Lastly, the three treaties place obligations on State parties with regard to dignity, self-reliance, health, the family unit, protection against abuse and neglect, the provision of social security and education for children with disabilities.

¹⁸¹ Article 29.

¹⁸² Article 21.

¹⁸³ Chowdhury PR (2011) p119.

Chapter 3 takes these themes further by comparing the obligations placed on State parties, as discussed in this chapter, and what South Africa has reported as regards the implementation of the rights of children with disabilities in its Initial and Periodic Report to the CRPD Committee.

Chapter 3

South Africa's Reports to the UN Committee on the Rights of Persons with Disabilities

"A child is only as disabled as their environment and the beliefs of the people around them."

Bala Pillai – Paediatric Physical Therapist

3.1 Introduction

The previous chapter discussed the obligations placed on State parties by the CRC, CRPD and ACRWC in respect of children with disabilities. It was found that there are various similarities among the three treaties as well as some differences. The CRC, CRPD and ACRWC make provision for non-discrimination which applies to all children, including children with disabilities. These treaties also include a number of obligations placed upon State Parties for other human rights that pertain to children with disabilities.

The purpose of this chapter, as well as the following chapter, is to ascertain what South Africa has done, failed to do and plans to do to meet its international obligations and integrate them with national law. This will be done by briefly discussing the mechanisms in place for the monitoring of the implementation of international obligations. Thereafter, this chapter analyses the South African country

report to the CRPD Committee. This will be done with a view to analyse and contrast the South African country reports submitted to the CRC Committee and the ACERWC insofar as they pertain to children with disabilities which are discussed in Chapter 4.

3.2 National Implementation of International Obligations

Human rights instruments place obligations on State Parties to respect, protect and fulfil human rights.¹⁸⁴ State Parties are expected to respect rights by not interfering with the enjoyment of cultural, social and economic rights as well as civil and political rights and by preventing the violation of these rights by third parties. With regard to fulfilling human rights, State Parties are obligated to take appropriate legislative, judicial and administrative measures to ensure the realisation of human rights.¹⁸⁵

The principal obligation that is placed on States is to recognise the rights contained in international treaties. This is done by adopting legislative and other measures to implement these rights.¹⁸⁶ Moreover, State Parties are under an obligation to ensure the justiciability of these international rights. Justiciability refers to judicial measures

¹⁸⁴ Committee on Social, Cultural and Economic Rights *General Comment 12: The right to adequate food* (1999).

¹⁸⁵ Philpott S (2013) p69; See also Rishmawi, M (2006). *Article 4: The nature of states parties' obligations* in A Commentary on the UN Convention on the Rights of the Child Leiden: Martinus Nijhoff Publishers.

¹⁸⁶ Viljoen F *International Human Rights Law in Africa* 2 ed (2012) Oxford: Oxford University Press p517.

for the redress of inequalities and human rights violations or the threat of violations. In States with justiciable constitutional rights, this is achieved by giving their court's jurisdiction to preside over matters that involve the infringement of human rights contained in its own Constitution.¹⁸⁷

It is necessary to have mechanisms in place to monitor State Parties and to hold them accountable. The UN has established such mechanisms to ensure that State Parties comply with international human rights standards. Relevant Committees have been introduced to administer particular treaties. These Committees provide signatory States with reporting guidelines so as to enable the specific State to report on the actions taken to realise the relevant international rights.¹⁸⁸ Although there is a need to improve the reporting mechanisms in place, it is recognised that the enforcement of international law is better achieved through voluntary compliance by State Parties rather than forced compliance.¹⁸⁹

3.3 Country Reports to the UN Committee on the Rights of Persons with Disabilities

South Africa's first country report was scheduled for submission to the CRPD Committee in 2012, but was ultimately submitted in 2014. In compliance with the obligation to periodically submit these reports, South Africa released the first draft

¹⁸⁷ Chilemba E (2014) p88; See also CRC Committee General Comment No 5, paras 24 & 25.

¹⁸⁸ Philpott S (2013) p70.

¹⁸⁹ Hathaway O *Do human rights treaties make a difference?* (2002) *The Yale Law Journal* 111 p1960.

periodic country report on the implementation of the CRPD for public comment in February 2015. This chapter focuses on South Africa's first country report to the CRPD Committee as South Africa has failed to submit its first periodic report at the time of writing.

The purpose of this subsection is to analyse both the initial country report and the first periodic draft report to ascertain which measures South Africa has put in place for the implementation of the rights contained in the CRPD insofar as they affect children with disabilities. However, the initial report has not been considered by the CRPD Committee yet and it unclear as to when it will be considered.

3.3.1. Disability Statistics and the South African National Development Plan: Vision 2030

In its initial report to the CRPD Committee, South Africa acknowledged that disability statistics relating to children in South Africa had been misreported in the 2011 National Census.¹⁹⁰ In addition, the Census failed to provide precise statistics relating to persons with disabilities generally, as the question on disability that was posed to South African residents was replaced by general health and functioning questions.¹⁹¹ Nonetheless, it was found that 2 300 000 people in South Africa have

¹⁹⁰ Specifically statistics of children with disabilities below the age of five years. As a result, the data available excludes children under the age of five entirely.

¹⁹¹ Questions related to disability were phrased as: Does (name) have difficulty in the following- seeing even when using glasses/ hearing even when using a hearing aid/ communication in his

an impairment that significantly affects the enjoyment of their rights. Furthermore, it was confirmed in the initial report that a subsequent national census would be held in 2013 to redress the misreported data relating to children under the age of five. To date there has been no further national census conducted.

South Africa adopted the NDP in 2012. The NDP's objective is to eradicate poverty and inequality in South Africa by the year 2030.¹⁹² With regard to persons with disabilities, the NDP recognises the correlation between disability and poverty and states that:

'Disability and poverty operate in a vicious circle. Disability often leads to poverty and poverty, in turn, often results in disability...Disability must be integrated into all facets of planning, recognising that there is no one-size fits all approach.'¹⁹³

Furthermore, the NDP recognises that persons with disabilities are not able to develop to their full potential as a result of various barriers and therefore, they must have an enhanced level of access to their rights. It is acknowledged that this calls for accelerated efforts to ensure the enjoyment of all rights by persons with disabilities.

language/ walking or climbing steps/remembering or concentrating/ with self-care such as washing, dressing or feeding?

¹⁹² <http://www.gov.za/issues/national-development-plan-2030> <accessed on 14.09.15>.

¹⁹³ NDP , p42

With regard to defining 'disability', South Africa has noted that there is work to be done, as national legislation and policies rely on a medical definition which attributes a medical condition as the source of disability. Particular attention has been placed on redefining the term 'disability' so as to ensure that it is in line with the CRPD. Furthermore, there has been accelerated effort placed on finalising the White Paper on an Integrated National Disability Strategy (hereinafter referred to as INDS) which was released in 1997 as well as the implementation of the CRPD.¹⁹⁴

3.3.2 Legislative Measures taken for the Implementation of the CRPD

The 1994 South African elections brought with them a new era for disabled persons in South Africa. The African National Congress (hereinafter referred to as the ANC) held extensive discussions with the disability sector in general and the Disabled People South Africa organisation (hereinafter referred to as DPSA) to determine the best way forward in approaching the protection and promotion of the rights of persons with disabilities.

The Constitution contains a specific provision against the discrimination of persons on the ground of disability.¹⁹⁵ In addition, the Constitution ensures an environment conducive for the enjoyment of all rights by all people, including children with disabilities. The rights most pertinent to children with disabilities include the right to equal access to opportunities, accessibility and protection of the inherent dignity of

¹⁹⁴ Initial Report to CRPD Committee paras 23 – 24.

¹⁹⁵ South Africa (1996) s 9 (3).

the child.¹⁹⁶ Furthermore, the Constitution recognises the relationship between national law and international law. Provision is made for the inclusion of international law at the domestic level. Moreover, the Constitution states that our courts may consider international law when interpreting the Bill of Rights.¹⁹⁷ This includes binding and non-binding international laws.¹⁹⁸

In 2000, South Africa passed the Promotion of Equality and Prevention of Unfair Discrimination Act. The purpose of the Act is to redress past inequalities and provide remedies for the violation of equality. The Act allows for discrimination on the ground of disability while committing a criminal offence to be used in aggravation of sentence.¹⁹⁹ At present the South African Law Commission is in the process of re-evaluating all legislation to ensure that it is compliant with the Constitution's equality clause. South Africa has generally validated the provision of article 4 of the CRPD and has progressively increased access to assistive devices, living support and communication technology for persons with disabilities.

At the time of submitting the initial report, South Africa was in the process of establishing the Department of Women, Children and People with Disabilities (hereinafter referred to as DWCPD) with a view of domesticating the CRPD. However, it was acknowledged that most resources were placed on the formation of

¹⁹⁶ Initial Report to the CRPD Committee para 27.

¹⁹⁷ Van Reenen T & Combrinck H (2011) p 146; See also s 39 (1) (b) of the Constitution.

¹⁹⁸ *S v Makwanyane* 1995 (6) BCLR 665.

¹⁹⁹ S 28 (1).

the DWCPD and as a result focus was rather placed on popularising the CRPD across the government and society, without having a coordinated plan of domestication in place at the time. Notably, in 2014 the Department of Women was relocated to the Presidency, replacing the DWCPD, with its sole focus being on the empowerment of women and gender equality. As a result, it was divested of the responsibility toward children and persons with disabilities which responsibility was transferred to the Department of Social Development (hereinafter referred to as the DSD).²⁰⁰

Conspicuously, these changes were made just prior to the submission of the initial report, in November 2014, to the CRPD Committee. It is the author's view that this has been a great disadvantage to children with disabilities. Previously, with the operation of the DWCPD there were specific resources, urgency and consideration for children with disabilities, whereas now, with the dissolution of the dedicated Department, resources will be shared with various other areas of interest within the DSD. The DSD has no specific department devoted to children with disabilities only.

As a consequence of the disintegration of the DWCPD, the implementation of the CRPD in rural areas of South Africa remains problematic. This is as a result of the impact of traditional beliefs, poverty and low levels of literacy. South Africa has found a need to balance the rights of persons with disabilities and their families living in

²⁰⁰ <http://www.polity.org.za/article/da-denise-robinson-address-by-das-shadow-minister-of-women-in-the-presidency-during-the-budget-vote-debate-on-women-in-the-presidency-parliament-12052015-2015-05-13> <Accessed on 16.09.15>.

rural areas with those who are more vocal in urban areas, as there is a tendency to prioritise the needs of those who are more vocal.²⁰¹

In addition, the first White Paper on mainstreaming the rights of persons with disabilities was released for public comment in February 2015.²⁰² Since then, the Minister of Social Development revealed that the White Paper would be introduced to Cabinet in September 2015 and introduced publicly in November 2015. It was said that the White Paper would be the first step in aligning all legislation and policy with the CRPD. Moreover, the Minister of Social Development stated that South Africa can expect legislation for persons with psychosocial and intellectual disabilities as well as persons with severe and profound communication disabilities.²⁰³ At present there seems to have been no progress made as the White Paper is still to be introduced to Cabinet.

Therefore, there is a need to look closely at the way in which South Africa is generally implementing the CRPD for children with disabilities. This will be done by the subsequent sub-sections of chapter 3.

²⁰¹ Initial Report to the CRPD Committee para 39.

²⁰² <http://www.governmentpublications.lib.uct.ac.za/news/draft-white-paper-mainstreaming-right-persons-disabilities-equality-and-dignity-national> <Accessed 03.02.16>.

²⁰³ <http://legalbrief.co.za/diary/legalbrief-today/policy-watch/policy-disability-rights-white-paper-imminent/#sthash.ji3o6kA1.dpuf> <Accessed 03.02.16>.

3.4 General Implementation Measures for Children with Disabilities

3.4.1 South Africa's Initial Country Report: Article 5 Equality and Non-Discrimination

The South African Constitution requires a focus on substantive, rather than formal, equality. Substantive equality places the focus on a positive-orientated enforcement of the right to equality rather than a negatively-orientated enforcement in which the focus is on discrimination.²⁰⁴ Substantive equality requires an asymmetrical approach to create equality in opportunity by eliminating barriers which hamper the enjoyment of rights by certain groups of persons and by focusing on the equality of results and outcomes.²⁰⁵

There have been a number of cases in which the judiciary has emphasised the pertinence of equality and dignity. In *Prinsloo v Van der Linde & Another*, it was held that to determine unfair discrimination is it necessary to consider human dignity and that to establish a society in which all persons have equal dignity and respect, we must overlook the fact that persons are members of particular groups.²⁰⁶ The case of *WH Bosch v The Minister of Safety and Security* also emphasised the importance of dignity. The judiciary emphasised that there is no justification for the violation or potential violation of the rights of persons with disabilities. Furthermore, this

²⁰⁴ Smith A *Equality Constitutional Adjudication South Africa. Focus: 20 Years of the South African Constitution* (2014) 14 African Human Rights Journal p613.

²⁰⁵ Woolman S & Bishop M *Constitutional Conversations* (2008) Pretoria University Law Press p16 for a discussion on formal and substantive equality.

²⁰⁶ *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 CC.

judgment directed that police stations be made more accessible to persons with disabilities.²⁰⁷ Similarly, the Equality Court directed, in the case of *Lettie Hazel Oortman v St Thomas Aquinas Private School and Bernard Langton*, that the private mainstream school in question readmit the disabled student who used a wheelchair and make the school building and toilet facilities accessible to her.²⁰⁸

South Africa has also taken steps to make equality courts more accessible by introducing The Promotion of Equality and Prevention of Unfair Discrimination Act in 2000 which made all High Courts as well as Magistrates Courts also operate as Equality Courts. There are currently 382 Equality Courts in South Africa.²⁰⁹ However, the South African government has acknowledged that the court system has remained underutilised by persons with disabilities which is evident from the scarcity of disability related judgments produced annually.²¹⁰

Furthermore, it is recognised that there is dissociation between the progressive theoretical legal framework in South Africa and the lack of effective implementation of the disability related laws. Even though persons with disabilities are, in principle, able to access the laws and rights related to them, there are in practice many

²⁰⁷ *WH Bosch v The Minister of Safety and Security & The Minister of Public Works* Case no. 25/2005 (9) Equality Court: Port Elizabeth (unreported).

²⁰⁸ *Lettie Hazel Oortman v St Thomas Aquinas Private School and Bernard Langton* case no. 1/2010 Equality Court: Mpumalanga (Unreported).

²⁰⁹ http://www.justice.gov.za/EQCact/eqc_courts.html <Accessed on 20.09.15>.

²¹⁰ Initial Report to the CRPD Committee, para 52.

obstacles that prevent them from doing so. Some of these obstacles include harmful traditional practices, stigmatisation in society, the interrelatedness of disability and poverty, lack of information, inaccessibility of buildings and transport and communication barriers. Persons with psycho-social disabilities, in particular, experience challenges in both society and the disability community.²¹¹

3.4.2 South Africa's Initial Country Report: Article 8 Raising Awareness of the Rights of Persons with Disabilities

South African society in general still remains largely ignorant of the rights of persons with disabilities, unless personally affected by disability. This attitude is mirrored in the public service sector across the three spheres of Government, where ignorance and stereotypical behaviour detracts from the public service being accessible to persons with disabilities. Awareness campaigns in South Africa generally peak during Disability Rights Awareness Month which is held in November of every year.²¹²

To raise awareness the Department of Basic Education with the Government Communication and Information Service has produced awareness raising television programmes and distributed DVD's on the rights of children with disabilities within the communities they live. In addition, the Departments of Health, Basic Education and Justice and Constitutional Development have developed braille awareness

²¹¹ Initial Report to the CRPD Committee, paras 51 & 55.

²¹² <http://www.gov.za/disability-rights-awareness-month-2015> <Accessed on 21.09.15>.

materials that relate to key legislation, such as the Children’s Act and the Domestic Violence Act.²¹³

3.4.3 South Africa’s Initial Country Report: Article 9 Accessibility

At present, South Africa does not have any regulatory framework that governs the accessibility of persons with disabilities to the physical environment, transport or information and communication technology. In the South African Human Rights Commission’s (hereinafter referred to as SAHRC) report on the accessibility of persons with disabilities it was found that 16 out of 22 national buildings have the following problems,

- i. ‘Inadequate administrative enforcement mechanisms for the approval of public building plans that have resulted in the majority of public buildings being in contravention of regulations.
- ii. Deficient regulatory measures that fail to ensure public safety and fire protection for persons with disabilities.
- iii. Insufficient definition of the specific requirements for particular disabled user groups. Provisions are primarily for disabled users in wheelchairs and those for other users with disabilities are frequently ignored and seldom enforced by Local Authorities.
- iv. International symbols must be clearly exhibited to indicate the existence of and directions to facilities for users with disabilities.
- v. Potential misinterpretation of the terms “suitable” and “sufficient” in certain sections.

²¹³ Initial Report to the CRPD Committee paras 64 & 66.

- vi. Ambiguity in specifications and the absence of cross referencing Part S with other sections, resulting in inconsistencies and misinterpretation.²¹⁴

The SAHRC report acknowledged that the legislative framework focuses mainly on physical barriers that persons with disabilities are faced with.²¹⁵ This is problematic as there is no discourse on other accessibility issues that are pertinent to children with disabilities, such as the accessibility to information and technological communication.

3.4.4 South Africa's Initial Country Report: Article 10 The Right to Life

The right to life creates great controversy when viewed in light of South Africa's Choice on Termination of Pregnancy Act.²¹⁶ The Act allows for the termination of a pregnancy up until the 20th week of gestation if there is a substantial risk that the foetus would suffer from a severe physical or mental disability. The disability sector is greatly concerned with whether or not there is adequate maternal counselling provided to mothers as well with the rights of the disabled foetus.²¹⁷

²¹⁴ SAHRC Report *Towards a Barrier-Free Society: A Report on Accessibility and Built Environments* November 2002 p30 <Accessed on 12.12.15>.

²¹⁵ SAHRC Report 2002 <Accessed on 12.12.15>.

²¹⁶ Act 92 of 1996.

²¹⁷ Submission from the Disabled Children's Action Group (DICAG) to the Portfolio Committee on Social Development on the Children's Amendment Bill [B19B 2006] submitted in August 2007 available at www.ci.org.za/depts/ci/plr/pdf/subs/aug07/DICAG_submission.pdf <Accessed 05.02.16>.

3.4.5 South Africa's Initial Country Report: Article 13 Access to Justice

The South African Bill of Rights provides for equal access to justice through a number of rights. Access to justice defined widely includes having access to legal assistance for disadvantaged persons, including persons with disabilities; the ability to bring a claim before a court; to have a matter heard before a court in a fair and just manner and it implies that one can obtain reparation for human rights violations.²¹⁸

One of the rights pertinent to persons and children with disabilities is the right to an interpreter during trial proceedings. Furthermore, the development of rights for children with disabilities does not meet the pace of technological development in South African courts which could place children with disabilities at a disadvantage during court proceedings.²¹⁹ Moreover, the physical accessibility of public buildings, such as our courts, is extremely important for the effective application of the right of access to justice.

On 27 February 2015 the Minister of Social Development published the draft National Disability Rights Policy for public comment.²²⁰ The DSD has made it clear that one of South Africa's key implementation areas of the CRPD is the right of

²¹⁸ www.era-comm.eu/UNCRPD/kiosk/speakers.../Cojocariu_outline.pdf <Accessed 02.02.16>

²¹⁹ Larson D *Access to Justice for Persons with Disabilities: An Emerging Strategy* (2014) Laws 3 p226.

²²⁰ <http://www.gov.za/documents/national-disability-rights-policy-draft> <Accessed 02.02.16>

access to justice.²²¹ The South African Law Reform Commission supports the development and implementation of this right and the State has a distinct focus on improving the right of access to justice for women and children with disabilities, especially those in domestic violence matters.²²²

Additionally, the Children's Act calls for all proceedings pertaining to children to be conducted in a manner that protects the child from unfair discrimination on the ground of disability and provides an accessible environment to respond to the special needs of the child.²²³ Furthermore, the Act contains rules that provide for appropriate questioning methods for children with intellectual, communication and psychosocial disabilities.²²⁴

Another challenge in South Africa is the availability of appropriate SASL interpreters for deaf persons within the judicial system. SASL has many different dialects which creates various problems among staff of the South African Police Services, prosecutors, court staff, attorneys and advocates. As a result, an appropriate interpreter is not always present during proceedings involving deaf children.

²²¹ Flynn E *From Rhetoric to Action: Implementing the UN Convention on the Rights of Persons with Disabilities* (2011) Cambridge University Press: Ireland p107.

²²² South African Law Commission, Discussion Paper 105, Assisted Decision Making: Adults with Impaired Decision-Making Capacity (Pretoria South African Law Commission, 2004) available at <http://www.doj.gov.za/salrc/dpapers/dp105.pdf> <Accessed on 30.01.16>.

²²³ S6, The Children's Act 38 of 2005.

²²⁴ S52, The Children's Act 38 of 2005.

Furthermore, deaf children who live in rural parts of South Africa are more vulnerable due to a lack of SASL awareness and education.

It is evident that the State has taken cognisance of the importance of the right of access to justice. The State has shown improvement by the creation of special courts such as the Children's Court, the creation of the South African Legal Aid Board and the Proximity of Courts programme which provides periodic circuit courts in rural areas and remote communities.²²⁵ Furthermore, the Criminal Procedure Second Amendment Act²²⁶ allows for the use of an intermediary to present evidence in court on behalf of a child victim. In addition, during 2011 the South African Police Services (hereinafter referred to as SAPS) presented workshops to train and sensitise SAPS employees when dealing with matters involving persons with disabilities.²²⁷ Progress is being made by the State, albeit at a snail's pace.

3.4.6 South Africa's Initial Country Report: Article 15 & 16 Freedom from Exploitation, Violence and Abuse

The South African Constitution states that everyone has the right to be free from all forms of violence and not to be tortured or treated in a cruel, inhuman or degrading way. Furthermore, South Africa signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1993. In accordance with the Constitution and the aforementioned Convention, South Africa adopted the

²²⁵ Initial Report to the CRPD Committee para 127.

²²⁶ Criminal Procedure Second Amendment Act 62 of 2001.

²²⁷ Initial Report to the CRPD Committee para 131.

Prevention and Combating of Trafficking in Persons Act which was assented to in 2013. The Act makes provision against the abuse of vulnerable persons and expressly includes disability in the definition of 'abuse of vulnerability'.

In its report, South Africa acknowledged that persons with disabilities, including children with disabilities, are still exposed to inhumane, degrading and cruel treatment in both the private and public sector. It is thought that this is largely due to the persistent physical and communication barriers existing within society. Moreover, the State has said that there is concern for the poor and ineffective monitoring of conditions and treatment of people in mental health institutions.²²⁸ Research has shown that particular disabilities have a prevalence for abuse and neglect. Children with physical and mental disabilities are more at risk of sexual abuse, whereas children with learning disabilities are more at risk of neglect. Children with various disabilities have shown to have an increased prevalence of both sexual abuse and neglect.²²⁹

The persistent violence, particularly rape and sexual violence, against the girl child with disabilities remains a challenge in South Africa.²³⁰ There are a number of

²²⁸ CRPD para 79.

²²⁹ Deroukakis M *A Retrospective Analysis of Children With and Without Disabilities Attending The Teddy Bear Clinic, Johannesburg* (Unpublished Masters dissertation, University of the Witwatersrand 2010) p5.

²³⁰ ANC Discussion Paper on Gender Based Violence, available at www.anc.org.za/docs/discus/2014/genderz.pdf <Accessed on 15.01.16>.

systemic failures of policies and programmes aimed at protecting children against sexual abuse, intimidation, rape²³¹ and pornography. Some of these failures, among others, are the unreported sexual abuse of children with disabilities in South Africa.²³²

Furthermore, there is no implementation of standardised physiological tests to assist the court in determining the capacity of children with disabilities to report sexual abuse, recall and relate details of the abuse as witnesses. Moreover, there is a lack of access to information on the form of public assistance, support services or facilities provided by the State to children with disabilities and families who care for children with disabilities. Additionally, government services such as police, health, social and justice services, are generally insensitive toward disability and as a result staff providing these services have not been trained to care for or provide support to children with disabilities. ²³³

Despite the State prioritising school-based violence and abuse, the problem remains that the Department of Education has little to no data on the levels of violence in

²³¹ Including child on child rape.

²³² Mathews S *Violence against Children in South Africa: Developing a Prevention Agenda* (2014) South African Child Gauge p28.

²³³ Phasha T & Nyokangi N *School-Based Sexual Violence Among Female Learners With Mild Intellectual Disability in South Africa* (2012) 18 Sage p309-321.

South African schools.²³⁴ In 2007, the National Schools Violence Study, notably the first study of this nature, was conducted by the Centre for Justice and Crime Prevention. The study was directed at 12 794 learners with the aim of acquiring data on the level of violence, including sexual violence, in South African schools.²³⁵ This study was updated in 2012 and comprised of sample groups of 5 939 learners, 121 principals and 239 educators. It was found that more than a fifth of learners had experienced violence at school.²³⁶

Abuse and violence against children with disabilities in boarding facilities attached to special schools remains rife. Interventions by the State in this regard, have been sporadic, inadequate and poorly monitored. The Children's Act makes provision for protective measures for children with disabilities who are in residential care. These provisions include requirements for the DSD to conduct regular audits of these facilities to ensure that the minimum norms and rules are being applied.²³⁷

²³⁴ Omar S, Meinck F & Cluver LD *Physical, emotional and sexual abuse of children in South Africa: Prevalence, incidence, perpetrators, and locations of child abuse victimization in a large community sample* (2014) South African Child Gauge p65.

²³⁵ School-Based Violence Report An overview of School-based Violence in South Africa (2011) South African Council of Educators (hereinafter SACE) available at <http://www.sace.org.za/upload/files/School%20Based%20Violence%20Report-2011.pdf> <Accessed on 10.11.15>.

²³⁶ Burton P & Leoschut L *School Violence in South Africa: Results of the 2012 National School Violence Study* (2013) Centre for Justice and Crime Prevention: Claremont p6.

²³⁷ CRPD para 81.

At the time of reporting, the State said that there had been many complaints of exploitation and abuse of the social assistance grant by the families of children with disabilities. The State has emphasised that further investigation is necessary in this regard to determine ways in which to remedy the abuse of the CDG.

3.4.7 South Africa's Initial Country Report: Article 20 Personal Mobility

The Standardisation of Assistive Devices in South Africa: A Guideline for use in the Public Sector provides for the funding of assistive devices.²³⁸ The policy states that there shall be no discrimination against persons on the grounds of impairment, age, gender, social conditions, financial position, disease or medical condition in the assessment for the issuing of assistive devices. Assistive devices form part of the public sector health services which are offered free of charge to children under the age of 6 years.²³⁹

The provision of assistive devices in South Africa is prioritised in rehabilitation budgets. The waiting period between the application for an assistive device and receiving an assistive device remains a challenge. Studies done in Gauteng, South Africa found that 223 children in the study required assistive devices, however only

²³⁸ The Department of Health *The Standardisation of Assistive Devices in South Africa: A Guideline for use in the Public Sector* (2003) Available at http://www.ruralrehab.co.za/uploads/3/0/9/0/3090989/standardisation_of_provision_of_assistive_devices_in_south_.pdf <Accessed on 23.12.15>.

²³⁹ *The Standardisation of Assistive Devices in South Africa* p 11 para 6.

64 had received assistive devices.²⁴⁰ Another challenge faced by South Africa is that the Western Cape Rehabilitative Centre is the only WHO accredited training centre in wheelchairs in South Africa.²⁴¹ The State has said that there is a view to have a minimum of one of these centres in each province.

Furthermore, the public transport industry creates various challenges for persons with disabilities. These challenges create a significant impact on the choices persons with disabilities make, particularly those in rural or poor communities and children with disabilities who need accessible public transport to get to special schools. The lack of effective public transport mechanisms for children with disabilities has a snow ball effect on the child's right of access to health facilities.²⁴² Apart from the possibility that many families of children with disabilities may lack funds for public transport, there is also a lack of convenient public transport systems, particularly in rural areas.²⁴³

²⁴⁰ DSD, DWCPD and UNICEF (2012) *Children with Disabilities in South Africa: A Situation Analysis: 2001-2011*. Pretoria: Department of Social Development/Department of Women, Children and People with Disabilities/UNICEF p49.

²⁴¹ The WHO *Guidelines on the Provision of Manual Wheelchairs in Less Resourced Settings* (2008) WHO Press: Switzerland p78.

²⁴² *Children with Disabilities in South Africa: A Situation Analysis: 2001-2011* p63.

²⁴³ Leatt A. Shung-King M & Monson J *Healing inequalities: the free health care policy* (2006) in Monson J Hall K. Smith C & Shung- King M (eds.) *South African Child Gauge 2006* Cape Town: Children's Institute University of Cape Town; Nkeli, J. & Associates *Broad overview of the impact and an analysis of the effectiveness and efficiency of disability policy implementation in all spheres of government since 1994*. (2008) Commissioned by Office on the Status of Disabled Persons in the

3.4.8 South Africa's Initial Country Report: Article 21 Freedom of Expression and Opinion, and Access to Information

With regard to the rights of freedom of expression and opinion, the South African state has acknowledged that even though persons and children with disabilities are afforded these rights, the views of society detracts from the value placed on the views and opinions of persons with disabilities.²⁴⁴

Furthermore, with regard to the right of access to information, children with disabilities do not have equal access to accessible formats of information. With a view to remedy this, the Department of Arts and Culture developed Strategic Plan 2011 – 2016²⁴⁵ which includes national braille production needs and a policy strategy.²⁴⁶

The Pan South African Language Board has received a mandate from the Constitution to promote the development, usage and recognition of SASL as the first language of deaf persons in South Africa.²⁴⁷ However, the deaf community remains to be concerned that these Government measures are not sufficient as to promote

Presidency Pretoria; DSD *Strategy for the integration of services to children with disabilities: the right to belong and participate: support services to children with disabilities* (2009).

²⁴⁴ Initial Report to the CRPD Committee Para 183

²⁴⁵ http://www.gov.za/sites/www.gov.za/files/dac%20Strategic-Plan-2011-2016_0.pdf

<Accessed 26.11.15>.

²⁴⁶ Initial Report to the CRPD Committee Para 185.

²⁴⁷ Pan South African Language Board Act 59 of 1995, s8(a).

the linguistic identity of deaf children as there is a lack of available skills-training services for children who require SASL to exercise and access their rights. The development and recognition of SASL remains a challenge in South Africa and has been confirmed, in the report to the CRPD Committee, to be receiving urgent attention.²⁴⁸

3.4.9 South Africa's Initial Country Report: Article 23 Respect for the Family

The right to family is pertinent to the plight of children with disabilities. This right is supported by the Constitution²⁴⁹ as well as the Children's Act²⁵⁰ which enforces the principle of the best interests of the child and his or her family links.

To ensure that the best interests of the child is of paramount importance in all matters affecting the child, the South African state is committed to provide alternative care within the wider family unit as well as in the community in a family setting. This allows for as little trauma and negative effect on the child emotionally and physically. Family based alternative care is seen as a mechanism to prevent the further violation of rights and for the complete development of a child with disabilities.²⁵¹

²⁴⁸ Initial Report to the CRPD Committee Para 186.

²⁴⁹ S28(1)(b).

²⁵⁰ S7 and Chapter 9.

²⁵¹ Assim M & Sloth-Nielsen J *Islamic Kafala as an Alternative Care Option* (2014) 14 African Human Rights Law Journal p327.

Furthermore, in an effort to prevent the breaking up of families, the State makes provision for the CDG for parents of children with disabilities in accordance with the Social Assistance Act²⁵². In addition, the DSD has put a strategy in place to provide orphaned children with disabilities with adequate places of safety to care for their specific needs.²⁵³

Furthermore, in light of the right to respect of the family, s12 (2) of the Constitution provides for the right to bodily and psychological integrity which includes sexual and reproductive rights. It is important that it is noted that these rights are applicable to children with disabilities, particularly the girl child with disabilities. This includes the right of children with disabilities to have access and receive information relating to family planning methods.²⁵⁴ In addition, these rights include the ability of children with disabilities to make choices regarding their reproduction and to be entitled to information regarding sexuality.²⁵⁵ It is evident that the recognition and realisation of sexual and reproductive rights go hand in hand with other rights such as the right to dignity, non-discrimination and protection from abuse.²⁵⁶

²⁵² Act 13 of 2004.

²⁵³ Initial Report to the CRPD Committee para 194.

²⁵⁴ Initial Report to the CRPD Committee para 196.

²⁵⁵ Cook R & Fathalla M *Advancing reproductive rights beyond Cairo and Beijing* (1996) 22 International Family Planning Perspective p115; see also L Freedman I Stephens *Human rights and reproductive choice* (1993) 24 Studies in Family Planning p18.

²⁵⁶ Murungi LN & Durojaye E *The Sexual and Reproductive Health Rights of Women with Disabilities in Africa: Linkages between the CRPD and the African Women's Protocol* (2015) 3 African Disability Rights Yearbook p8.

3.4.10 South Africa's Initial Country Report: Article 24 Education

It is estimated that there are approximately 480 036 children living in South Africa with disabilities who are of a school going age.²⁵⁷ Admittedly, there is no manner in which to keep track of how many of these children are attending schools, how many have been denied access to schooling, how many have dropped out of school and how many have simply never enrolled at all. ²⁵⁸

In terms of South African law, there is a general right to education provided for in the South African Constitution which guarantees everyone the right to basic education.²⁵⁹ Moreover, the right to education is dealt with in the National Education Policy Act²⁶⁰ and the South African Schools Act²⁶¹.

Five White Papers on Education had passed before the ground breaking White Paper 6²⁶² came into being in 2001 which was geared toward special needs education. White Paper 6 acknowledges that there are barriers to the learning and

²⁵⁷ Section 27 Catalyst for Social Justice *Submission on the Right to Education of Persons with Disabilities in South Africa to the Committee on the Rights of Persons with Disabilities* (2015) p6 Available at <http://section27.org.za/wp-content/uploads/2015/03/SUBMISSION-ON-THE-RIGHT-TO-EDUCATION-FOR-PERSONS-WITH-DISABILITIES-IN-SOUTH-AFRICA-TO-THE-COMMITTEE-ON-THE-RIGHTS-OF-PERSONS-WITH-DISABILITIES.pdf> <Accessed 29.03.16>.

²⁵⁸ Initial Report to the CRPD Committee p37.

²⁵⁹ The Constitution of the Republic of South Africa, 1996 s29.

²⁶⁰ Act 27 of 1996.

²⁶¹ Act 84 of 1996.

²⁶² Special Needs Education: Building an inclusive education and training system.

development of children with disabilities and recognises the inability of the education system to accommodate the learning needs of such children. The Paper identifies that children with disabilities are the most vulnerable learners in the South African education system.

White Paper 6 places an emphasis on eradicating barriers to learning, such as negative attitudes and stereotyping of disabled children, an inflexible curriculum, inappropriate languages or language of learning and teaching, inappropriate communication, inaccessible and unsafe built environments, inappropriate and inadequate support services, inadequate policies and legislation, the non-recognition and non-involvement of parents and inadequately and inappropriately trained educators.²⁶³

The right to education of children with intellectual disabilities has become prominent, specifically in the Western Cape, after the judgment of the case of the *Western Cape Forum for Intellectual Disabilities v Government of the Republic of South Africa and Government of the Province of the Western Cape* (hereinafter referred to as the WCFID case). The application concerned the right to education of children with severe and profound intellectual disabilities.

The judgment states that White Paper 6 provides an in depth policy dealing with the right to education of children with severe and profound intellectual disabilities,

²⁶³<http://www.education.gov.za/LinkClick.aspx?fileticket=gVFccZLi%2FtI%3D&tabid=191&mid=484>

<Accessed on 25.02.14>.

however at the time, the policy was not being implemented. The judgment was clear that every child in the Western Cape who is severely and profoundly intellectually disabled must have access to basic education of an adequate quality. The State was given a period of twelve months to take all reasonable measures to realise the right to education of children with severe and profound intellectual disabilities.²⁶⁴

To date, there has been great implementation of the judgment in the Western Cape.²⁶⁵ There have been numerous contributions made by various State Departments. The DSD has provided funding to special care centres for programme implementation as well as transport for children with disabilities who attend special care centres. The DSD has also provided funding for the employment of additional carers at special care centres. The Department of Public Works has provided a substantial amount of funding for infrastructure development at special care centres.²⁶⁶

There has been continuous ongoing negotiation to ensure the implementation of the judgment. Monthly meetings, chaired by the Chief Director of Social Development, have been held between the Western Cape Government and the WCFID. During 2015 there has been an input of a senior official as the chairperson of the Inter-Governmental Forum (hereinafter referred to as IGF) from the Office of the Premier,

²⁶⁴ *Western Cape Forum for Intellectual Disabilities v Government of the Republic of South Africa and Government of the Province of the Western Cape* 2011JDR 0375 (WCC) para 2.

²⁶⁵ WCFID News Letter January 2014.

²⁶⁶ Telephonic discussion with Tessa Wood, Director of WCFID on 30.04.14.

who together with the Chief Director of DSD were tasked to drive the strategic implementation process of the judgment. On 25 February 2015 the “Right to Education: proposed institutional arrangements for successful implementation of the court order” report was adopted. The subsidisation of care centres has increased dramatically from 27 centres (1 109 learners) in February 2011 to 52 centres (1 698 learners) in September 2014. The State subsidy has increased from thirty four million rand to sixty million rand over the same period. However, 22 centres (975 learners) remain unfunded.²⁶⁷

Notably, as the WCFID judgment is only binding on the Western Cape Government, very little is being done at the National level to provide for the education of children with severe and profound intellectual disabilities. The slow integration and application of White Paper 6 and inclusive education nationally is not consistent with the Constitution²⁶⁸, which prescribes that the State must make education a priority and allocate a sufficient budget for this purpose.²⁶⁹

The South African Schools Act²⁷⁰ makes for provision for learning and teaching in SASL. However, the Act implied that SASL was not able to be taken as a subject,

²⁶⁷ WCFID, Annual Report 2014-2015; <http://wcfid.co.za/wp-content/uploads/2015/10/AR-Running-Pgs-new2015.pdf> <Accessed on 26.11.15>.

²⁶⁸ S29.

²⁶⁹ Initial Report to the CRPD para 220.

²⁷⁰ South African Schools Act 84 of 1996 s6(4).

home language or first additional language by learners.²⁷¹ This was first brought the attention of the State and South African citizens by a case involving a young KZN learner Kyle Springate who instituted action against the Minister of Education in 2009. The learner was aggrieved that he was unable to do SASL as a Grade 12 subject. He was successful and as a result the implementation of SASL as a subject was piloted by the Western Cape Education Department at a special school in the Western Cape. The pilot project was a great success which led to the rapid implementation of SASL curriculum at all schools for the deaf in the Western Cape.²⁷²

As the case had raised many questions with regard to the accessibility of education to deaf children, the State drafted a curriculum for SASL which was implemented nationally in 2015. This would similarly enable higher education institutions to include SASL in their teaching curriculum with the aim of having more qualified educators to teach in this medium.²⁷³ Great progress has been made in this regard. In 2015,

²⁷¹ Presentation by Minna Steyn at Linguistics Colloquium at Stellenbosch University on 17 October

2014. Available at

<http://sun025.sun.ac.za/portal/page/portal/Arts/Departments/linguistics/Sign%20Language%20Linguistics%20Colloquium/Minna%20Steyn%20->

[%20The%20new%20SASL%20CAPS%20curriculum%20for%20schools.pdf](http://sun025.sun.ac.za/portal/page/portal/Arts/Departments/linguistics/Sign%20Language%20Linguistics%20Colloquium/Minna%20Steyn%20-%20The%20new%20SASL%20CAPS%20curriculum%20for%20schools.pdf) <Accessed on

03.02.16>.

²⁷² Steyn M *Investigation the course of L1 SASL Development and L2 Afrikaans Learning Development in Young Deaf Children following a New Curriculum with SASL as both LOLT and School Subject* (Unpublished Masters Dissertation, Stellenbosch University 2015) p3.

²⁷³ Initial Report to the CRPD para 241.

SASL was included as a medium of instruction in the foundation phase as well as Grade 9. There is a view to have the first SASL Matric class in 2018.²⁷⁴

The success of the implementation of the SASL curriculum has correspondingly had a positive effect on the recognition and implementation of braille as both a subject of study and as a language of learning and teaching.²⁷⁵

It is clear that the State has taken great cognizance of its obligations in terms of the CRPD and education. Great strides have been made within our education system for the benefit of children with disabilities. However, the author's only criticism is that progress at the national level is being made at such a leisurely pace.

3.4.11 South Africa's Initial Country Report: Article 25 Health

The National Health Act²⁷⁶ identifies persons with disabilities as a designated group whose Constitutional right to health care services must be protected, promoted and respected.²⁷⁷ The Act also provides for research to be undertaken that prioritises the health needs of persons with disabilities and contributes to the prevention of

²⁷⁴ Presentation by Minna Steyn (2014).

²⁷⁵ Initial Report to the CRPD Committee para 243.

²⁷⁶ National Health Act 61 of 2003.

²⁷⁷ National Health Act s 2(c)(iv).

disability. Furthermore, all health services as well as rehabilitative services for children with disabilities are to be provided freely at hospitals in the public sector.²⁷⁸

Protocols have been put in place to facilitate early detection of disabilities in children to prevent and minimize secondary disabilities. However, the protocol²⁷⁹ lacks effective implementation due to a lack of appropriately trained staff and poor living conditions for people who are discharged from hospital. A significant problem, especially for children with disabilities, is that there is no system in place to track and refer children who are either at risk of acquiring a disability or who have a disability to other services such as social assistance, education and early child development (hereinafter referred to as ECD). This problem often leads to secondary disabilities and forces families, who are already over-burdened and strained, into difficult financial positions.²⁸⁰

3.4.12 South Africa's Initial Country Report: Article 26 Habilitation and Rehabilitation

Rehabilitative services are provided by the Department of Health to all persons with disabilities, however poverty remains a barrier to persons with disabilities in accessing these services. This is due to various factors such as inaccessible public

²⁷⁸ National Health Act s 3(a).

²⁷⁹ Human Genetics Policy Guidelines for the Management and Prevention of Genetic Disorders, Birth Defects and Disabilities by the National Department of Health available at http://www.gov.za/sites/www.gov.za/files/humangenetics_0.pdf.

²⁸⁰ Initial Report to the CRPD Committee para 268. See also the Human Genetics Policy Guidelines.

transport for persons with disabilities, lack of access to information, poor referral systems and a shortage of qualified rehabilitative practitioners. Social assistance is a vital contributor to the effective fulfillment of article 26 as poverty remains a major problem for the families of children with disabilities.²⁸¹ Even when these services are provided within communities, poverty is still an issue due to the high costs of public transport, lack of accessible information regarding what services are available and when as well as a poor health service referral programmes.²⁸² Furthermore, in its first country report, the State acknowledged that unequal access to rehabilitative measures within the private and public sector remains a challenge.

With specific reference to children with disabilities it has been found that there has been some progress in building the capacity of rehabilitative therapists in the public sector. However, long waiting lists to receive assistive devices remain a challenge. It has been reported that the NDP which implemented a model of shifting the care, treatment and rehabilitation of children with disabilities to the private sector has not been effective as children with disabilities require well planned state and community interventions.²⁸³

²⁸¹ Sherry K *Disability and Rehabilitation: Essential Considerations for Equitable Accessible and Poverty Reducing Health Care in South Africa* in Padarath A, King J & English R (eds) (2015) South African Health Review 2014/15 Durban: Health Systems Trust p93.

²⁸² Initial Report to the CRPD Committee para 278. See also Eide A Ingstad B *Disability and Poverty- Reflection on research experiences in Africa and Beyond: Original Research* (2013) African Journal of Disability 2(1) p1-7.

²⁸³ Chetty V & Hanass-Hancock J *The need for a Rehabilitation Model to address the disparities of public healthcare for people living with HIV in South Africa* African (2015) Journal of Disability 4(1).

3.4.13 South Africa's Initial Country Report: Article 28 Standard of Living

To provide an appropriate standard of living, the State provides the CDG to the families of children with disabilities who require 24 hour care. Alternatively, should a child with disabilities require less than 24 hour care, the child support grant is available to their families. Notably, the value of the child support grant is significantly less than the CDG. As of 1 April 2015, the child support and CDG were increased to R330 and R1410 per month respectively.²⁸⁴ According to the latest statistical data available 129 296 children with disabilities in South Africa receive the CDG, while 11 907 798 receive the child support grant.²⁸⁵

It is evident that the standard of living of children with disabilities is important to the State and improvement has been made in this regard. In its report, South Africa has noted that there has been a significant increase in those accessing the CDG from 2006 to 2009.²⁸⁶ Furthermore, in terms of the South African Revenue Tax Guide a deduction for disability expenses and disability related expenses can be claimed. Particularly expenses relating to the care of children with disabilities at home or school, transport of children with disabilities to special schools, the acquisition and

²⁸⁴ <http://www.sabc.co.za/news/a/ca91e380476fdb50b2bafa4602d973ea/Socialundefinedgrantsundefinedtoundefinedincreaseundefinedfromundefined1undefinedApril-20152502> <Accessed on 01.12.15>.

²⁸⁵ SASSA *A Statistical Summary of Social Grants in South Africa* (2015) Issue 9; <http://www.sassa.gov.za/index.php/knowledge-centre/statistical-reports?download=359:statistical-report-2-of-2015> <Accessed on 01.12.15>.

²⁸⁶ Initial Report to the CRPD Committee para 318.

insurance of assistive devices and technology required to enable children with disabilities to enjoy daily activities such as electronic braille equipment.²⁸⁷

With regard to food security, the report acknowledges the Constitutional right to have access to sufficient food and water. The State has emphasized that food security is a top priority and in doing so the DSD provides assistance to those who are most vulnerable to food insecurity.²⁸⁸ Moreover, the Department of Basic Education offers the School Nutrition Programme which provides a basic daily meal to indigent children.²⁸⁹

3.4.14 South Africa's Initial Country Report: Article 30 Participation in cultural life, recreation, leisure and sport

A child's development is largely influenced by exposure to culture, art and the community. Not only does this provide the child with a sense of belonging, but it also encourages communication and overall togetherness.²⁹⁰ The Sport and Recreation South Africa organization (hereinafter referred to as SRSA), together with funding

²⁸⁷ Initial Report to the CRPD Committee para 321.

²⁸⁸ Initial Report to the CRPD Committee para 325.

²⁸⁹ The School Nutrition Programme by the Department of Basic Education available at <http://www.education.gov.za/LinkClick.aspx?fileticket=AzMOJpmC/dE%3D> <Accessed 05.02.16>.

²⁹⁰ Smith AB *Recognising Children as Citizens: Can this Enhance Solidarity?* (2012) In Johansson E & Berthelsen D (eds) *Spaces for Solidarity and Individualism in Educational Contexts* Göteborg Studies in Educational Sciences no 318: Göteborg: Acta Universitatis Gothoburgensis p17.

provided by the National Sport and Recreation Act, increased the profile of and funding available to persons with disabilities in sport and recreation.²⁹¹

The National Sport and Recreation Plan provides for the inclusion of special schools in the National Top School Games and the South African Youth Olympic Games. There is currently no specific school sport policy for children with disabilities however, the Ministers of SRSA and the Department of Basic Education have provided for the inclusion of children with disabilities in all programmes.²⁹²

The National School Sports Policy, which encourages the inclusion of children with disabilities in school sports, was drafted in 2011 and made available for public opinion in March 2012. Notably, since the introduction of the policy the number of children with disabilities participating in school sports had decreased from 10 632 in 2008 to 7 854 in 2011.²⁹³ Unfortunately, to date there is no new statistical data available.

As discussed above in section 3.4.3 accessibility to tourism facilities for persons and children with disabilities has improved steadily. Furthermore, in its report, the State

²⁹¹ National Sport and Recreation Act 110 of 1998 s9 and 10(1)(d).

²⁹² The National Sports and Recreation Plan (2012) Available at https://www.westerncape.gov.za/assets/departments/cultural-affairs-sport/nsrp_final_august_2012.pdf. <Accessed 05.02.16>.

²⁹³ Initial Report to the CRPD Committee para 353-355.

has said that all South African National Parks would be audited in 2013 so as to ensure that they are accessible to persons with disabilities.²⁹⁴

With regard to arts and culture, the State has held that the Department of Education trained educators in 2009 to adapt the arts and culture curriculum to include children with disabilities. Furthermore, in 2009 the Department of Arts and Culture conducted an audit of facilities that are administered by the Department and it was found that 92 facilities required upgrading to accommodate persons with disabilities.²⁹⁵ To date it is unclear if the upgrades have been made, however the Department of Arts and Culture has said in its latest annual report that 6 new developmental programmes in arts and culture have been introduced for children with disabilities.²⁹⁶

3.5 South Africa's Initial Country Report: Article 7 Specific Implementation Measures for Children with Disabilities

The South African Human Rights Commission has said that children have a prioritised claim on state resources.²⁹⁷ Notably, the realisation of children's rights are

²⁹⁴ Initial Report to the CRPD Committee para 360-362.

²⁹⁵ Initial Report to the CRPD Committee para 363-364.

²⁹⁶ The Department of Arts and Culture Annual Report 2014/2015 available at www.gov.za/sites/www.gov.za/files/dac-2014-2015-annualreport.pdf.

²⁹⁷ Proudlock P & Mahery P *Children's Rights to Health* in Kibel M Lake L Pendlebury S & Smith C (eds) (2010) *South African Child Gauge 2009/2010* Cape Town: Children's Institute, University of Cape Town p24.

not subject to progressive realisation.²⁹⁸ This is especially true for children with disabilities as these children are vulnerable to exclusion, abuse and inequality.²⁹⁹ The State has said that this vulnerability is often due to failure in service delivery, persistent harmful traditional practices, lack of access to information, lack of early identification and rehabilitation for young children and inadequate training of care givers. The State has highlighted its commitment to realising the rights of children with disabilities with a sense of urgency.³⁰⁰

This has been done by not only implementing specific provision for children's rights in the Constitution, but also by the implementation of the Children's Act. The Act prohibits the discrimination and differentiation of children on the basis of disability.³⁰¹ Furthermore, the State is under an obligation to recognise the special needs of children with disabilities and to provide these children with mechanisms that promote self-reliance, active participation in the community and dignity.³⁰²

²⁹⁸ See Constitution of the Republic of South Africa, s 28.

²⁹⁹ Report by Lansdown G *Disabled Children in South Africa: Progress in Implementing the Convention on the Rights of the Child* (2002) for the International Disability and Human Rights Network p14.

³⁰⁰ Initial Report to the CRPD Committee para 378.

³⁰¹ The Children's Act s 6.

³⁰² The Children's Act s 11.

It is reported that approximately 665 247 out of 1 393 236 children with disabilities between the ages of 0 and 4 attend early childhood development facilities.³⁰³ As discussed in 3.5 above the State has acknowledged that the early identification of children with disabilities and the implementation of effective intervention measures across State departments requires immediate attention. To aid with this issue the South Africa Human Genetics Policy Guidelines for the Management and Prevention of Genetic Disorders, Birth Defects and Disabilities has provided guidance, referral services and rehabilitative services when disabilities or birth defects have been identified.³⁰⁴

In the report, South Africa has expressed its appreciation of the significant role played by organisations for children with disabilities in South Africa. Many of these organisations, such as the Disabled Children Action Group and the Western Cape Forum for Intellectual Disabilities, fill the gaps that are currently not being met by the State.³⁰⁵

To address the aforementioned deficits, Strategic Plan 2012-2015 was developed in consultation with national and provisional State departments as well as stakeholders in the parents, children and disability sectors. The strategy aims to guide the implementation of the Children's Act to ensure the effective mainstreaming of

³⁰³ Report by Prof L Richter *Diagnostic Review of the ECD Sector* (2012) for the Department of Planning Monitoring and Evaluation p47.

³⁰⁴ South Africa Human Genetics Policy Guidelines.

³⁰⁵ Initial Report to the CRPD Committee para 381.

inclusive programmes, particularly ECD, basic education, health, sport and justice. South Africa has also implemented the National Plan of Action for Children 2012-2017. The plan provides a range of guidelines and strategies focusing on a costing model and implementation plan for child abuse, neglect and exploitation, ECD and care services.³⁰⁶

With regard to child participation, the State has noted that children with disabilities are not given participation opportunities on an equal basis with other children.³⁰⁷ The current opportunities provided to children with disabilities to express their views are inadequate and there is not enough attention placed on providing children with severe and profound intellectual disabilities an opportunity to express their views on matter that affect them.³⁰⁸

3.6 Conclusion

It is evident from South Africa's report to the CRPD Committee that there are many flaws within the State service delivery model as well as a lack of coordination within the disability sector. The State does, to a certain extent, accept responsibility and acknowledge its short falls. However, a significant problem is the dissolution of the DWCPD which has resulted in many disability rights issues being bounced from one

³⁰⁶ Available at

http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=283&Itemid=39

<Accessed on 19.12.15>.

³⁰⁷ Initial Report to the CRPD Committee para 385.

³⁰⁸ Lansdown G (2002) p8.

State Department to the next, without real responsibility being taken by any Department for disability rights as a whole.

It is evident from the above analysis that there are common challenges throughout South Africa's Initial Report to the CRPD Committee. Firstly, children with disabilities continue to be a vulnerable group, specifically those in impoverished and rural areas. Secondly, the plight of children with disabilities in impoverished and rural areas requires vigorous, well planned and targeted intervention. Poverty continues to be problematic and stands out as a common issue under the implementation of various articles of the CRPD. The reality is that there are 4.7 million people in South Africa living below the poverty line. One can only imagine the costs of caring for a child with disabilities coupled with the ordinarily high cost of living. This has an impact on all aspects of the child's life and in turn has an impact on the accessibility of services provided by the State. The State has responded by making social assistance available to families of children with disabilities and by attempting to make services more accessible and readily available to children with disabilities. However, the practicalities of this remain difficult.

Thirdly, the lack of access to information and education provided to the families and communities of children with disabilities remains an issue; and lastly, the lack of communication among State departments, among families of children with disabilities and the children with disabilities themselves provides a significant barrier to improved coordination for better service delivery. This lack of information and education indirectly affects the stereotypical behavior of society. The State has

acknowledged the stereotyping and generalization of children with disabilities within society and even within their own families, but has done little if anything to remedy this.

The chapter that follows seeks to analyse the South Africa reports to the CRC Committee and the ACERWC to determine what the South African State has reported to have done, be doing or plans to do to address the disability rights specifically of children with disabilities.

Chapter 4

South Africa's Reports to the UN Committee on the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child

“Disability is a matter of perception. If you can do one thing really well, you are needed by someone.”

Martina Navratilova

4.1 Introduction

The previous chapter discussed and analysed South Africa's Initial and draft of the First Periodic Country report to the CRPD Committee. In doing so, the chapter dealt with the obligation on State Parties to implement international law and took a look at the legislative measures South Africa has put in place with regard to the CRPD. The chapter's focus then moved to the Initial Report and provided an in-depth discussion and analysis of general implementation measures and specific implementation measures taken by the State for children with disabilities.

This chapter seeks to critically analyse the reports to the CRC Committee and the ACERWC. This will be done by considering the similarities of the South African reports to the Committees on the CRC, ACRWC and the CRPD. In addition, the chapter will consider the differences among the reports to the Committees on the CRC, ACRWC and the CRPD. This is done so as to ascertain what South Africa has done and plans to do for disability rights, specifically for children with disabilities.

4.2 South Africa's Reports to the Committees on the CRC and the ACRWC

South Africa's Initial Country report to the CRC Committee was submitted on 4 December 1997. South Africa's Periodic Country Report became due in 2002, but was subsequently submitted on 26 November 2014 as a combined second, third and fourth report for the reporting period of 1998-2012.

With regard to the ACRWC, South Africa submitted its Initial Country Report to the ACERWC in 2014 for the reporting period of 2000-2013. Both Committees on the CRC and ACRWC have provided their concluding observations on the Initial Reports which will be discussed in further detail below.³⁰⁹

4.3 Legislative Measures taken for the Implementation of the CRC and the ACRWC

Both the Initial Report to the ACERWC and the Periodic report to the CRC Committee have noted that South Africa has ratified a number of international conventions and protocols to ensure the implementation of the rights of children with disabilities. Notably, at the time of submitting the Periodic Report to the CRC Committee and the Initial Report to the ACERWC, the State had not ratified the International Covenant on Economic, Social and Cultural Rights as per the CRC Committee's concluding observation number 11³¹⁰ and the ACERWC concluding

³⁰⁹ The CRC Committee will consider South Africa's Periodic Report in late 2016.

³¹⁰ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: South Africa*, 22 February 2000 (hereinafter referred to as the CRC Committee: Concluding Observations).

recommendation number 8,³¹¹ in which the State was encouraged to finalise the ratification of the Covenant. Nonetheless, on 12 January 2015 the decision was taken by the State to ratify the Covenant which was signed by the State in 1994.³¹²

In accordance with CRC Committee's concluding observation number 10³¹³ the State, through the South African Law Reform Commission, has continued to align national legislation with the principles and provisions of the CRC.³¹⁴ This includes the introduction of the new Children's Act³¹⁵ and the Child Justice Act.³¹⁶ Furthermore, in the Initial Report to the ACERWC, it is acknowledged that implementation of the rights of children remain challenging, however the State is making greater investments in the rights to health and education and to vulnerable children such as children with disabilities.³¹⁷

³¹¹ Concluding Recommendation by the ACERWC on the Republic of South Africa Initial Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child (2014) Number 8 (hereinafter referred to as the ACERWC Concluding Recommendation).

³¹² <http://www.sahrc.org.za/home/index.php?ipkArticleID=318> <Accessed 06.02.16>.

³¹³ CRC Committee: Concluding Observations no 10.

³¹⁴ Second, Third & Fourth Periodic Report of South Africa to the UN Committee on the Rights of the Child (2014) Para 3 (hereinafter referred to as the Periodic Report to the CRC Committee). See Also Initial Country Report to the African Committee of Experts on the Rights and Welfare of the Child (2013) Part 2 Para 15 (hereinafter referred to as the Initial Report to the ACERWC).

³¹⁵ Children's Act 38 of 2005.

³¹⁶ Child Justice Act 75 of 2008.

³¹⁷ Initial Report to the ACERWC Part 1 Para 9.

Similarly to the Initial Report to the CRPD Committee, in its periodic report to the CRC Committee and Initial Report to the ACERWC the State has noted that a key achievement in the implementation of the CRC is the introduction of the Department of Women, Children and Persons with Disabilities (hereinafter referred to as DWCPD).³¹⁸ Furthermore, both the periodic report to the CRC Committee and the Initial Report to the ACERWC highlights that the DWCPD is tasked to develop a revised National Plan of Action for Children 2012-2017 (hereinafter referred to as NPAC).³¹⁹ The purpose of the NPAC is to provide a holistic programme for the implementation of legislation and legal instruments for children at regional, national and international levels to better the lives of children.³²⁰

Moreover, the State emphasised that the DWCPD is responsible for the coordination, implementation and reports on the CRC, its Optional Protocol and the NPAC.³²¹ In addition to the NPAC, the State has reported that Provincial and Local Plans of Action for Children will be developed so as to ensure compliance with the Concluding Observation³²² that implementation take place in rural areas and that the State promote the inclusion of community based organisations in the promotion and

³¹⁸ Initial Report to the ACERWC Part 1 Para 6.

³¹⁹ Initial Report to the ACERWC Part 1 Para 6.

³²⁰ <http://children.pan.org.za/node/9436> <Accessed 06.02.16>. See also Initial Report to the ACERWC (2013) Part 2 Para 39.

³²¹ Periodic Report to the CRC Committee Para 29.

³²² CRC Committee: Concluding Observations: South Africa no 12 & 16.

implementation of the CRC, as well as to strengthen the coordination between State Departments.³²³

As discussed in 3.3.2 above, the DWCPD was dissolved just prior to the submission of the initial report to the CRPD Committee and similarly just prior to the submission of the periodic report to the CRC Committee and the Initial Report to the ACERWC. However, in their Concluding Recommendations the ACERWC was aware of the decision to move the coordination of children and persons with disabilities to the DSD. The ACERWC expressed their concern that the lack of a permanent coordinating mechanism to strengthen the implementation of the rights of children with disabilities creates a high risk of not realising the rights of children with disabilities. It was recommended that the State appoint a new coordinating body to ensure the implementation, realisation and monitoring of the rights of children with disabilities.³²⁴

4.4 General Implementation Measures under the CRC and the ACRWC for children with disabilities

4.4.1 Equality and Non-Discrimination

In their review of South Africa's Initial Country Report, the CRC Committee expressed their concern about the vast economic and social disparities within

³²³ Periodic Report to the CRC Committee Para 56.

³²⁴ Concluding Recommendation by the ACERWC Number 12.

communities which adversely affects the implementation of the CRC.³²⁵ Furthermore, the CRC Committee found that insufficient measures had been put in place to address these disparities especially concerning vulnerable groups of children such as children with disabilities.³²⁶

In addressing these concerns in the intervening two decades the State has recognised and responded to the inequalities faced by vulnerable groups of children by developing a number of policies, laws and programmes that prohibit discrimination against all children.³²⁷ Similarly to the Initial Report submitted to the CRPD Committee, the State, in the Periodic Report to the CRC Committee, relies heavily on NDP to redress the inequalities of the past.³²⁸ Notably, in the Periodic Report it is emphasised again, that this was one of the main objectives of the DWCPD; however as mentioned above the DWCPD has since been dissolved.

The Initial Report to the ACERWC emphasises the importance of addressing inequality and the historical marginalisation of children in South Africa. Since 1998 there has been a significant improvement in this regard, especially for vulnerable

³²⁵ CRC Committee: Concluding Observations: South Africa no 9.

³²⁶ CRC Committee: Concluding Observations: South Africa no 18.

³²⁷ Periodic Report to the CRC Committee Para 92.

³²⁸ Periodic Report to the CRC Committee Para 95.

children. The proportion of children with disabilities who have an equal access to education increased by 20% between 2002 and 2010.³²⁹

In contrast to the Initial Report submitted to the CRPD Committee, the Periodic Report submitted to the CRC Committee contains specific provision against discrimination for children with disabilities within Article 2 of the CRC.³³⁰ Some of the policies and laws put in place to remedy inequality and discrimination against children with disabilities include the Children's Act, which requires that all interventions take into account the special needs of children with disabilities³³¹ and the preferential allocation of resources to the needs of children with disabilities; health policies which make provision for free health care and assistive devices to children with disabilities; the CDG which is available to the families of children with disabilities³³² and an inclusive education policy.

Poverty remains a major challenge to the realisation of equality in South Africa. The impact of poverty on children is particularly severe and leads to long-term

³²⁹Initial Report to the ACERWC Part 4 Para 75-76. See Also www.statssa.gov.za/publications/Report-03-19.../Report-03-19-002009.pdf <Accessed 09.02.16>.

³³⁰ Periodic Report to the CRC Committee (2014) Para 77.

³³¹ Children's Act 38 of 2005, s 2(h).

³³² Notably, the Periodic Report to the CRC Committee states that the CDG is available to children with severe disabilities (See Para 98). However, this view is not correct as the Social Assistance Act does not require a child with disabilities to have a *severe* disability in order to have access to the CDG. See section 3.4.14 above.

developmental set-backs.³³³ The Initial Report to the ACERWC indicates that improvements to the equality and poverty of vulnerable children have been brought about by progressive social and economic policies by the State, such as the provision of social assistance and more specifically, the CDG.³³⁴

In the Periodic Report, in contrast to that of the CRPD report where it was not expressly acknowledged, the State acknowledges the lack of coordination among State Departments in the implementation of the right to equality of children with disabilities.³³⁵ Furthermore, the lack of adequate data collection facilities have impacted adversely on the collection of data for the effective monitoring of the implementation of article 2 of the CRC.³³⁶ In addressing these concerns, the State reiterates the importance of the DWCPD to centralise the monitoring and responsibilities relating to the implementation of the CRC.³³⁷

To encourage coordination among State Departments, in the Initial Report to the ACERWC reports that in 2012 the State, together with the Children's Institute based at the University of Cape Town, held the Carnegie Conference which provided a platform for meaningful debate on the inequality of vulnerable children with the aim

³³³ Laryea-Adjei G & Sadan M *Children and Inequality: Closing the Gap* (2012) in Hall K Woolard I Lake L & Smith C (eds) South African Child Gauge Cape Town children's Institute: University of Cape Town p75.

³³⁴ Initial Report to the ACERWC Part 4 Para 77.

³³⁵ Periodic Report to the CRC Committee Para 107.

³³⁶ Periodic Report to the CRC Committee Para 108.

³³⁷ Periodic Report to the CRC Committee Para 111.

of driving forward the objectives and realisation of the NDP.³³⁸ Furthermore, Government wide-monitoring has been centralised by the Department of Performance, Monitoring and Evaluation in the Presidency.³³⁹

4.4.2 The Best Interests of the Child

Unlike the CRPD, the CRC and the ACERWC make express provision for the best interests of the child. Similarly, the principle of the best interests of the child is implemented nationally in the Constitution³⁴⁰, the Children's Act³⁴¹ and the Child Justice Act.³⁴² The Children's Act institutionalises the comment in the CRC General Comment No. 14 that decision makers take special measures when considering the best interests of children with disabilities.³⁴³ The Initial Report to the ACERWC further confirms the legislative measures in place for the realisation of the best

³³⁸ *Towards Carnegie III Substantive Report on the Conference on Strategies to Overcome Poverty and Inequality* by Bannister T Strauss M & van der Berg S for the Stellenbosch University Socio-Economic Rights and Administrative Justice Research Group (2012).

³³⁹ Policy Framework for Government-Wide Monitoring and Evaluation Systems published by the Department of the Presidency 2007 Available at <http://www.dpme.gov.za/publications/Policy%20Framework/Policy%20Framework%20for%20the%20GWME%20system.pdf>.

³⁴⁰ Constitution of the Republic of South Africa, s28 (2).

³⁴¹ Children's Act, s 7.

³⁴² Child Justice Act, s 9.

³⁴³ UN Committee on the Rights of the Child (CRC), *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), 29 May 2013.

interests of the child and notes that all organs of State must consider the best interests of the child when making decisions involving children.³⁴⁴

When considering the best interests of children with disabilities, special factors must be considered to take into account the special needs of the child.³⁴⁵ Examples of these special factors include the capacity of the parent or caregiver to provide for the child's physical and intellectual needs; and the child's physical, emotional, cultural and intellectual developmental needs.³⁴⁶ Furthermore, various State Departments and organisations have put measures in place for ensuring the best interests of the child.³⁴⁷

The judiciary has shown great cognisance of the principle of the best interests of the child and has applied it in various judgments. The judiciary in the case of *Matiso v Road Accident Fund* recognised a customary law adoption on the basis of the best interests of the child for the purpose of recognising the dependants claim.³⁴⁸ In *S v M* it was held that the best interests of the child must be considered when sentencing convicted caregivers.³⁴⁹ In *AD v DW* an unlawful adoption was upheld and the Court

³⁴⁴ Initial Report to the ACERWC Part 2 Para 17 (b).

³⁴⁵ Boezaart T Skelton A *From Pillar to Post: Legal Solutions for Children with Debilitating Conduct Disorder* (2011) in Grobbelaar Du-Plessis I & Van Reenen T (eds) *Aspects of Disability Law in Africa* Pretoria University Law Press p123.

³⁴⁶ Children's Act s 7(c) & (h).

³⁴⁷ Periodic Report to the CRC Committee Annex II E.

³⁴⁸ *Matiso v Road Accident Fund* 2001 (3) SA 1142 (T).

³⁴⁹ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

confirmed that the best interests of the child is of paramount importance in all matters concerning the child and may override other legal considerations when necessary.³⁵⁰ Therefore, it is highly likely that the best interests of the child will play a pivotal role in all matters before the court involving children with disabilities.

4.4.3 The Right to Life, Survival and Development

Unlike the Initial Report to the CRPD Committee³⁵¹, the Periodic Report to the CRC Committee provides little to no insight regarding the right to life, survival and development of children with disabilities specifically. However, the State has taken general measures to ensure the right to life, survival and development such as significant improvement in the monitoring of births and deaths registration.³⁵²

During the early years of a child's life, the behaviour of family and care givers as well as community socioeconomic factors can have high protective or risk factors for the child's survival and development.³⁵³ These factors as well as the relationship with the

³⁵⁰ *AD v DW (Centre for Child Law as Amicus Curia, Department of Social Development as Intervening Party)* 2009 (2) SACR 130 (CC).

³⁵¹ See Chapter 3, section 3.4.4.

³⁵² Statistical Release P0305: Recorded Live Births (2014) Statistics South Africa, Available at www.statssa.gov.za/publications/P0305/P03052014.pdf <Accessed 07.02.16>.

³⁵³ Coulton CJ Crampton DS et al *How Neighbourhoods Influence Child Maltreatment: A Review of the Literature and Alternative Pathways* (2007) in *Child Abuse and Neglect* 31 (11) p1117-1142.

mother can affect the child's development from as early as conception.³⁵⁴ Therefore, both the Initial Report to the ACRWC and the Periodic Report to the CRC Committee indicate that the State has conducted an extensive review of the legal framework for the care and protection of children with an emphasis on prevention and early detection and intervention services.³⁵⁵ Furthermore, similarly to the Initial Report to the CRPD, the State has recognised the importance of health care for pregnant women. In doing so the Periodic Report to the CRC Committee emphasises the need for revised health care policies and legislation for pregnant women to ensure their well-being and to improve the outcome for the unborn child.³⁵⁶

Notably, the CRC and children's rights in general, are silent as to whether or not the rights reserved for children under the Convention are applicable to unborn children. In its' Preamble, the CRC quotes the 1959 Declaration on the Rights of the Child which states that 'the child . . . needs special safeguards and care, including appropriate legal protection *before as well as after birth*.'³⁵⁷ The textual ambiguity of the CRC calls into question the legality of abortion of a disabled foetus. However, in

³⁵⁴ Makoae M *Safeguarding South Africa's Future: The Need for Integrated Prevention Programmes in Child Protection* (2014) Human Sciences Research Council Policy Brief Available at <http://www.hsrc.ac.za/en/research-data/ktree-doc/14039> <Accessed on 07.02.16>.

³⁵⁵ To be discussed in more detail below when the focus turns to the right to a family environment. See also Initial Report to the ACERWC Part 4 Para 104.

³⁵⁶ Periodic Report to the CRC Committee Para 118.

³⁵⁷ Convention on the Rights of the Child, *Preamble* para 9.

the same breath, the possibility of the foetus' right to life is in conflict with the right of pregnant women to choose to abort or not.³⁵⁸

The Initial Report to the ACERWC indicates that the State has made an effort to strengthen data on infant, child and maternal mortality by implementing the Child Healthcare Problem Identification Programme (hereinafter referred to as PIP).³⁵⁹ Child PIP, together with the Perinatal Problem Identification Programme, are software programmes that identify ways to reduce infant and child mortality and by addressing and monitoring infant and child mortality so as to determine avoidable health risks.³⁶⁰ In addition Child PIP provides for early detection and prevention of disability risks while also providing additional support to children with disabilities.³⁶¹

4.4.4 The Protection of the Views of the Child

At the introduction of the Children's Act in 2005-2007 it was nationally and internationally unique in that it was the only law that expressly recognised and

³⁵⁸ *Rights of the Pregnant Child vs Rights of the Unborn under the Convention on the Rights of the Child* (2004) Boston University International Law Journal (22) p166.

³⁵⁹ Initial Report to the ACERWC Part 7 Para 196.

³⁶⁰ PIP available at

http://www.childpip.org.za/index.php?option=com_content&task=view&id=20&Itemid=36 <Accessed 09.02.16>; See also Perinatal Problem Identification Programme available at <http://www.ppip.co.za/> <Accessed on 09.02.16>.

³⁶¹ Stephen CR Bamford LJ (eds) *Saving Children: A Seventh Survey of Child Health care in South Africa* (2011) Pretoria: Tshepesa Press p10.

encouraged the right of the child to express his/her views.³⁶² However, today many African laws and laws elsewhere in the world have followed suit. In all instances involving children, organisations and institutions should be responsive to the child's voice where appropriate, as this allows for the effective implementation of the principle of the best interests of the child discussed in 4.4.3 above.³⁶³

In the Initial Report to the ACERWC it is reported that during 2010 to 2012, 37 284 children were heard in judicial proceedings.³⁶⁴ In *Soller NO v G*³⁶⁵ and *Legal Aid Board v R*³⁶⁶ it was held that children should have their own legal representatives during litigation so as to ensure that the child's view is heard. Our Constitutional Court has recognised and confirmed the need to hear the child's views in *Christian Education SA v Minister of Education of the Government of South Africa*³⁶⁷ and *Minister of Education v Pillay*.³⁶⁸

Similarly to the Initial Report to the CRPD Committee, the Periodic Report to the CRC Committee and the Initial Report to the ACERWC recognises the need for

³⁶² Children's Act, s10. See also Domingo W *For the Sake of the Children: South African Family Relocation Disputes* (2011) Potchefstroom Electronic Law Journal (14) 2 p161.

³⁶³ UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009 para 68.

³⁶⁴ Initial Report to the ACERWC Table 15.

³⁶⁵ *Soller NO v G* 2003 (5) SA 430 (T).

³⁶⁶ *Legal Aid Board v R* 2009 (2) SA 262 (D).

³⁶⁷ *Christian Education v Minister of Education of the Government of South Africa* 2000 (4) SA 757 (CC).

³⁶⁸ *Minister of Education v Pillay* 2008 (1) SA 474 (CC).

children within the school system to express their views.³⁶⁹ In accordance with the CRC Committee's Concluding Observation number 19, the Department of Basic Education has placed attention on the training of teachers to enable learners to effectively express their views. This has been done through a curriculum policy that requires learners to express their views verbally and in writing.³⁷⁰

Therefore, children with disabilities must be given the opportunity to express their views in all settings. Their views should be given due consideration in accordance with their best interests and taking into consideration the child's disability, age and level of maturity.

4.4.5 The Right of Access to Information

In the Periodic Report to the CRC Committee the State has noted many laws, policies and regulations which implement Article 13 of the CRC, such as the Promotion of Access to Information Act³⁷¹ and the Children's Act which provides that every child has the right to seek, receive and impart information regarding his/her health, causes and treatments of health related issues.³⁷²

³⁶⁹ Initial Report to the ACERWC Part 4 Para 106 – 107.

³⁷⁰ Periodic Report to the CRC Committee Para 121.

³⁷¹ Promotion of Access to Information Act 2 of 2000.

³⁷² Children's Act s13.

In addition to legislative measures, many State Departments have developed child friendly methods of presenting information to children regarding their rights.³⁷³ An example of this is the publication of child friendly guides to the Children's Act by the DSD,³⁷⁴ a publication for teens on violence against children developed by the DWCPD³⁷⁵ and the 2001 collaboration between the Department of Justice and Constitutional Development and UNICEF that developed a child friendly guide to the CRC.³⁷⁶ Notably, the author could not ascertain whether or not any of these child friendly guides are printed in braille so as to ensure equal access to information for all children including children with disabilities.

In the Periodic Report to the CRC Committee, the State acknowledges the difficulty in implementing the right of access to information in rural areas and areas of high poverty.³⁷⁷ Rural areas are deprived of resources and infrastructure. Rural areas in South Africa are commonly compared to 'third world countries' within a country that

³⁷³ Periodic Report to the CRC Committee Para 128. See also Initial Report to the ACERWC Annexure 2C (c) and Part 4 Para 110.

³⁷⁴ Guide available at

http://www.justice.gov.za/vg/children/dsd-Childrens_Act_Explained_Booklet3_June2009.pdf

<Accessed 07.02.16>.

³⁷⁵ Guide available at http://www.childlinesa.org.za/index.php/documents-for-download/doc_download/597-violence-against-children-child-friendly-version <Accessed 07.02.16>.

³⁷⁶ Initial Report to the ACERWC Annexure 2C. See also www.unicef.org/rightsite/files/uncrcchilldfriendlylanguage.pdf <Accessed 09.02.16>.

³⁷⁷ Periodic Report to the CRC Committee Para 129.

has urban areas which enjoy predominantly 'first world' resources.³⁷⁸ To combat these challenges the Government Communication and Information System has developed Thusong Service Centres which can be found across all nine provinces. These centres provide free internet access to rural areas.³⁷⁹ In addition, the Department of Communication has committed to increase the number of public libraries in rural areas.³⁸⁰ Furthermore, the Initial Report to the ACERWC provides that various departments and NGO's are involved in children's right advocacy campaigns and programmes to children, their families and service providers. These programmes have been included in departmental agendas and has resulted in training and sensitization of all stakeholders on the rights of children including traditional leaders and communities.

Perversely, unlike the Initial Report to the CRPD Committee, the Initial and Periodic Report to the CRC Committee make no mention of children with disabilities having equal access to information in an appropriate format. However, the Initial Report to the ACERWC makes express mention of the importance of the linguistic rights of children which is enshrined in the Constitution.³⁸¹ Furthermore, the Initial Report to the ACERWC affirms that the Children's Act prescribes that information available to

³⁷⁸ Molawa S *The First and Third World in Africa: Knowledge Access, Challenges and Current Technological Innovations in Africa* (2009) First International Conference on African Digital Libraries and Archives, Africa Institute of South Africa p6.

³⁷⁹ Molawa S (2009) p 12; See also <http://www.thusong.gov.za/about/history/> <Accessed 07.02.16>.

³⁸⁰ Periodic Report to the CRC Committee Para 132.

³⁸¹ Initial Report to the ACERWC Part 2 Para 30.

children must be relevant and in accessible formats giving due consideration for the needs of children with disabilities.³⁸²

Unlike both the Initial Report to the CRPD Committee and the Initial and Periodic Report to the CRC Committee, the Initial Report to the ACERWC notes the two fold meaning behind the right of access to information. That is, it also includes the right of children to not have access to inappropriate, harmful or dangerous information.³⁸³ With the advancement in technological services the State is aware of the ease at which information is accessed and shared on social media and the internet. As a result, the State has implemented State and self-regulations regarding the publication of information that is harmful and exploitative of children such as child pornography.³⁸⁴ The first draft Online Regulation Policy under the Films and Publication Act was submitted for public comment in 2015.³⁸⁵

4.4.6 Right not to be subjected to Torture or other Cruel, Inhuman or Degrading Treatment

³⁸² Initial Report to the ACERWC Part 4 Para 109 (e), See Also the Children's Act s13.

³⁸³ Initial Report to the ACERWC Part 4 Para 115.

³⁸⁴ Koops B.J et al *Should Self-Regulation be the Starting Point?* (2006) in Koops BJ et al (eds) *Starting Points for ICT Regulation: Deconstructing Prevalent Policy One-Liners* The Hague: TMC Asser Press.

³⁸⁵ Draft Online Regulation Policy Available at <http://fpb.org.za/profile-fpb/legislation1/514-draft-online-regulation-policy-2014/file> <Accessed 09.02.16.>

Similarly to the Initial Report to the CRPD Committee, the Initial and Periodic Report to the CRC acknowledges the legislative measures put in place to ensure the implementation of article 37(1) of the CRC and s28 of the Constitution. However, the Periodic Report takes the matter further by acknowledging s28(1)(d) of the Constitution which specifically prohibits torture or other cruel, inhuman or degrading treatment of children.³⁸⁶

Notably, the ACERWC Report is the only report to acknowledge that, despite ratifying the Convention against Cruel Inhuman and Degrading Treatment or Punishment (hereinafter referred to as CAT), little to no implementation of CAT has taken place domestically.³⁸⁷ The concluding recommendations of the ACERWC have urged the State to take all necessary measures for the full realisation of the CAT.³⁸⁸ Children with disabilities, particularly the girl child with disabilities, are at an increased risk of violence, abuse, maltreatment and exploitation.³⁸⁹ This is often due to the reliance and dependence on other people, the isolation of children with disabilities which causes an invisibility of this issue and communication difficulties due to disabilities which result in children not being able to report abuse.³⁹⁰

³⁸⁶ Periodic Report to the CRC Committee Para 149.

³⁸⁷ Initial Report to the ACERWC Part 5 Para 137.

³⁸⁸ Concluding Recommendation by the ACERWC Number 36.

³⁸⁹ Thematic study on the issue of violence against women, girls and disability, Report of the Office of the UN High Commissioner for Human Rights Available at www2.ohchr.org/english/issues/women/docs/A.HRC.20.5.pdf <Accessed 10.02.16>.

³⁹⁰ The African Child Policy Forum (2013) *The African Report on Child Wellbeing: Towards Greater Accountability to Africa's Children* Addis Ababa: African Child Policy Forum p19.

Furthermore, the Initial Report to the CRC Committee confirmed that corporal punishment in all areas affecting children has been abolished. In its Concluding Observations, the CRC Committee expressed its concern that corporal punishment may still be practised in the family setting and in alternative care settings. The State was urged to put measures in place to address this concern and to create awareness and change the cultural mind sets of its citizens with regard to the negative effects of corporal punishment.³⁹¹

The Periodic Report to the CRC Committee reaffirmed that corporal punishment is prohibited in all mainstream and special schools, alternative care settings and early childhood development centres.³⁹² The prohibition against corporal punishment was confirmed in the case of *Christian Education South Africa v Minister of Education*.³⁹³ In January 2016 the SAHRC called for a ban on parental corporal punishment and the amendment of the Children's Act, as all forms of corporal punishment violate the best interests of the child as well as the right against cruel, inhuman and degrading treatment or punishment.³⁹⁴ This development is in line with the concluding recommendation by the ACERWC which called for a prohibition of corporal punishment in all settings, including the home.³⁹⁵

³⁹¹ CRC Committee: Concluding Observations: South Africa no 28.

³⁹² Periodic Report to the CRC Committee Para 150. See also *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

³⁹³ *Christian Education South Africa v Minister of Education* 2000(4) SA 757 (CC).

³⁹⁴ See <http://www.bizcommunity.com/Article/196/717/140409.html> <Accessed 09.02.16> See also <http://ewn.co.za/2016/01/26/SAHRC-clarifies-stance-on-physical-discipline> <Accessed 09.02.16>.

³⁹⁵ Concluding Recommendation by the ACERWC Number 35.

In 2011, the South African Human Rights Commission (hereinafter referred to as the SAHRC) received a complaint that a child had been assaulted at a special school in the Western Cape. The Western Cape Education Department investigated the matter during 2012; and in 2013 the SAHRC met with the family. However, at that stage the family advised that the matter had been resolved.³⁹⁶ As discussed above in chapter 3,³⁹⁷ this complaint is confirmation that corporal punishment and violence remain a concern in special schools. Notwithstanding the prohibition on corporal punishment, the Initial Report to the AWRWC Committee indicates that the practice remains a challenge as the prevalence of corporal punishment in schools has increased.

Furthermore, the South African Schools Act provides that schools, together with governing bodies, must establish codes for positive discipline.³⁹⁸ In 2007 the Western Cape Education Department published guidelines for the drafting of the prescribed code of conduct.³⁹⁹ In response thereto, the DSD has created awareness for positive discipline in its parenting and community capacitation programmes.⁴⁰⁰ In

³⁹⁶ Veriava F *Promoting Effective Enforcement of the Prohibition Against Corporal Punishment in South African Schools* (2014) Centre for Child Law, Pretoria University Law Press p17.

³⁹⁷ See Chapter 3 section 3.4.6.

³⁹⁸ Mestry R & Khumalo J *Governing Bodies and Learner Discipline Managing Rural Schools in South Africa through a Code of Conduct* (2012) South African Journal of Education (32) p99.

³⁹⁹ *Learner Discipline and School Management: A Practical Guide to Understanding and Managing Learner Behaviour Within the School Context* (2007) Western Cape Education Department Available at wced.school.za/.../Learner_Discipline_and_School_Management.pdf <Accessed 08.02.16>.

⁴⁰⁰ Periodic Report to the CRC Committee Para 155.

addition, the State has developed the Education Laws Amendment Act⁴⁰¹ which aims to provide guidance as to search and seizures in the school setting with an express prohibition on violence against children.⁴⁰²

With regard to the specific needs of the African child with disabilities, the Initial Report to the ACERWC expresses concern about harmful customary traditions and practices such as virginity testing, circumcision and the practice of *ukuthwala*.⁴⁰³ *Ukuthwala* is the customary practice of abducting young girls by older men within the community with the intention of coercing the girl and her family into marriage negotiation. Despite legal reform and development in South Africa, the persistent community and traditional practices present challenges to the implementation of protective measures for children. In response thereto, the State is committed to raising awareness, with support of traditional leaders, on the provisions of the Children's Act.⁴⁰⁴ In 2014, the South African Law Reform Commission (hereinafter referred to as the SALRC) developed a reformed policy with regard to the practice of *ukuthwala*.⁴⁰⁵ Moreover, in October 2015 the SALRC published a revised discussion

⁴⁰¹ Education Laws Amendment Act 31 of 2007.

⁴⁰² Mncube V & Harber C *The Dynamics of Violence in South African Schools: Report* (2013) University of South Africa, Muckleneuk: Pretoria p27.

⁴⁰³ Ukuthwala: Let's Stop Stolen Childhoods Report by the Department of Justice (2010) Available at www.justice.gov.za/brochure/ukuthwala/2011ukuthwala.pdf <Accessed 09.02.16>. See Also Initial Report to the ACERWC Part 2 Para 35.

⁴⁰⁴ Initial Report to the ACERWC Part 2 Para 35.

⁴⁰⁵ Discussion Paper 132 Project 138 *The Practice of Ukuthwala* by the South African Law Reform Commission (2014) Available at www.justice.gov.za/salrc/dpapers/dp132-Ukutwala.pdf <Accessed 09.02.16>.

paper on *ukuthwala*⁴⁰⁶ and has called for participants to engage in a discussion on the revised paper as well as legal reform in this regard.

4.4.7 The Right to a Family Environment

There is growing emphasis on the importance of the right to family within the South African policy context. In this regard, the DSD has developed research into the effectiveness of social assistance for the implementation of the right to family. The Department provides social support services to families with the objective of enhancing, strengthening and stabilising the family environment. This is achieved by providing emotional support, appraisal support, informative support and instrumental support in the form of social assistance grants such as the CDG.⁴⁰⁷ In 2011 the DSD introduced a Green Paper on Families. The Green Paper provides measures to support and strengthen the various manifestations of the family in South Africa.⁴⁰⁸

Similarly to the Initial Report to the CRPD Committee, the Periodic Report to the CRC Committee and the Initial Report to the ACERWC notes the legislative measures that have been put in place to safeguard the right to family such as the

⁴⁰⁶ Revised Discussion Paper 132 (2015) Available at <http://www.justice.gov.za/salrc/dpapers/dp132-UkuthwalaRevised.pdf> <Accessed 10.02.16>.

⁴⁰⁷ Framework for Social Welfare Services by the DSD (2013) p 33 Available at http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=515&Itemid=39.

⁴⁰⁸ Green Paper on Families Available at <http://www.thepresidency.gov.za/MediaLib/Downloads/Home/Profiles/PresidentJacobZuma/PressStatements/201212/Green%20Paper%20on%20Families.pdf> <Accessed 09.02.16>.

Children's Act and the Domestic Violence Act.⁴⁰⁹ The aim of these legislative measures are to ensure that parents and caregivers are equipped with the resources needed to fulfil their responsibilities, to provide a safe and nurturing environment for children, and to avoid the removal of children from their families.⁴¹⁰

Furthermore, similarly to the Initial Report to the CRPD Committee, the Periodic report to the CRC Committee and the Initial Report to the ACERWC state that children are to be placed in safe and nurturing alternative care settings for the shortest possible period in instances where it is in the best interests of the child to be removed from the family setting.⁴¹¹ In the case of *C and Others v Department of Health and Social Development Gauteng and others*, the Constitutional Court held that any decision to remove the child from the family environment must be reviewed the following court day so as to provide the family with an opportunity to formulate an argument against the removal.⁴¹²

The right to family of children with disabilities is a vital one for the full development of the child. Children with disabilities are dependent on their parents or caregivers and if removed from their families, they should be placed in an environment conducive to their special needs.

⁴⁰⁹ Domestic Violence Act 116 of 1998.

⁴¹⁰ Periodic Report to the CRC Committee Part 5 Para 10.

⁴¹¹ Periodic Report to the CRC Committee Part 5 Para 10. See Also Initial Report to the ACERWC (2013) Part 6 Para 147.

⁴¹² *C and Others v Department of Health and Social Development Gauteng and others* 2012 (2) SA 208 (CC).

4.4.8 The Right to Education

In the Periodic Report to the CRC Committee and the Initial Report to the ACERWC, the State expressly recognises the challenge of implementing the right to education for children with disabilities and notes that the challenges are being addressed by legal reform and management intervention.⁴¹³

Apart from improving access to education, the State acknowledges that the quality of education remains a challenge. To address this the State has implemented curriculum reform, learner support and strengthened monitoring and evaluation procedures.⁴¹⁴ Furthermore, South Africa's Education Policies and legislation recognise and encourage diversity in school. This implies that the language of learning and teaching is of great value and should be done in a child's home language.⁴¹⁵ Notably, akin to the Initial Report to the CRPD Committee,⁴¹⁶ the Initial and Periodic Report to the CRC Committee provide that SASL and braille have been recognised as official South African languages and have been included in the learning and teaching curriculum.⁴¹⁷ The Initial Report to the ACERWC expressly provides that core work books for children with disabilities have been translated to braille and SASL.⁴¹⁸

⁴¹³ Periodic Report to the CRC Committee Part 7 Para 18. See also Initial Report to the ACERWC Part 8 Para 258.

⁴¹⁴ Initial Report to the ACERWC Part K Para b (i).

⁴¹⁵ Periodic Report of South Africa to the CRC Committee Part 7 Para 20.

⁴¹⁶ See Chapter 3, section 3.4.10.

⁴¹⁷ Periodic Report to the CRC Committee Part K (b) (i).

⁴¹⁸ Initial Report to the ACERWC Part K Para b (i).

With regard to the implementation of inclusive education, the Department of Basic Education has implemented a number of interventions to ensure access to education for children with disabilities. These interventions include White Paper 6⁴¹⁹ and the National Strategy on Screening, Identification, Assessment and Support (hereinafter referred to as the SIAS Strategy).⁴²⁰ The SIAS Strategy guides inclusive education by not categorising or excluding children with disabilities from attending schools according to their level of disability. Instead, the SIAS Strategy is directed at providing early identification and support to children with disabilities.⁴²¹

While every effort is being made to implement to right to education in the primary and secondary school system, the Initial Report to the ACERWC acknowledges that a large gap still exists in the implementation and provision of ECD to children with disabilities.⁴²² In response thereto, the Departments of Social Development and Basic Education are currently developing the national ECD plan of action. The first

⁴¹⁹ As discussed above. See Chapter 3 Section 3.4.10.

⁴²⁰ SIAS by the Department of Basic Education (2008). See also, Draft Policy on Screening, Identification, Assessment and Support by the Department of Basic Education (2014) Available at <http://www.gov.za/sites/www.gov.za/files/SIAS%20Revised%20Final%20for%20Comment.pdf> <Accessed 08.02.16>.

⁴²¹ Dalton EM Mckenzie JA & Kahonde C *The implementation of inclusive education in South Africa: Reflections arising from a workshop for teachers and therapists to introduce Universal Design for Learning* (2012) African Journal of Disability 1(1) p2.

⁴²² Initial Report to the ACERWC Part K Para b (ii).

draft of the policy was released for public comment in March 2014.⁴²³ In 2015, the Department of Basic Education published a national curriculum for children from birth to four years. The aim of this is to provide guidelines to those who develop programmes of teaching and learning for children within this age group.⁴²⁴

4.5 Specific Implementation Measures for Children with Disabilities under the Initial and Periodic Report to the CRC Committee and the Initial Report to the ACERWC

South Africa does not have centralised disability legislation, however with regard to specific implementation measures for the rights of children with disabilities, the Periodic Report to the CRC Committee and the Initial Report to the ACERWC confirm that the State provides a comprehensive care package to children with disabilities by providing social assistance, free health care and access to education.⁴²⁵

However, the State recognises and acknowledges that ECD and the sexual and reproductive health of children with disabilities require further intervention and policy

⁴²³ Early Childhood Development: National ECD Policy by the DSD available at http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=586&Itemid=39 <Accessed 09.02.16>.

⁴²⁴ Department of Basic Education (2015) *The South African National Curriculum Framework for Children From Birth to Four* Pretoria: Department of Basic Education Available at http://www.unicef.org/southafrica/resources_16276.html <Accessed 10.02.16>.

⁴²⁵ Periodic Report to the CRC Committee (2014) Part 6 Para 13. See also Initial Report to the ACERWC (2013) Part 7 Para 203 (a) – (g).

reform. Children with disabilities lack information regarding their sexual health and this, in turn, increases their vulnerability to abuse.⁴²⁶

Furthermore, the implementation of the rights of children with disabilities remains a challenge due to the insufficient and ineffective use of resources.⁴²⁷ In the Initial Report to the ACERWC Committee, the State recognises that many of the challenges faced in the implementation of the rights of children generally, and children with disabilities specifically, are due to structural inequalities. This impacts on the enjoyment of rights and services by historically marginalised children. The State has responded by developing NDP which aims to reduce poverty and inequality.⁴²⁸ Nonetheless, remedying complaints of poor service delivery, especially in rural areas, is a top priority for the State.⁴²⁹

In the Initial Report to the ACERWC, the State acknowledged that despite a strong political commitment to address the inequalities of children with disabilities, a large gap between policy and practice remains.⁴³⁰ The ACERWC recommended in their concluding recommendations that the State take all legislative, administrative and other measures necessary to expedite its efforts in addressing this gap. It was suggested that this be done through awareness raising for the public and capacity

⁴²⁶ Groce N *HIV/Aids and Disability: Capturing the Hidden Voices* (2004) World Bank Group p 2-12 Available at <http://www.aids-freeworld.org/content/view/114/66/> <Accessed on 08.02.16>.

⁴²⁷ Periodic Report to the CRC Committee Part 6 Para 13.

⁴²⁸ See Chapter 3 Section 3.3.1 for a full discussion on NDP 2030.

⁴²⁹ Periodic Report to the CRC Committee Part 6 Para 17.

⁴³⁰ Initial Report to the ACERWC Part 7 Para 207.

building for those who work with children with disabilities.⁴³¹ Similarly to the Periodic Report to the CRC Committee, the State noted in the Initial Report to the ACERWC that the challenges to implementing the rights of children with disabilities include capacity constraints, no clear definition of disability, procedural blockages and a lack of resources.⁴³²

The State has also placed an emphasis on preventative and early health care services for pregnant women, new born babies and children with disabilities. The objective of early intervention and preventative measures is to prevent child disabilities and improve child outcomes.⁴³³ The importance of pre-natal and post-natal care for expectant mothers for the early intervention or prevention of disabilities was discussed above.⁴³⁴ In addition, the Department of Health is currently revising and strengthening the Early Childhood Intervention and Early Hearing Intervention Programmes.⁴³⁵ Moreover, while it is noted that the lives of children with disabilities have improved as a result of the implementation measures discussed above,

⁴³¹ Concluding Recommendation by the ACERWC Number 7.

⁴³² Initial Report to the ACERWC Part 7 Para 207.

⁴³³ Initial Report to the ACERWC Part 7 Para 205.

⁴³⁴ See Chapter 2 section 2.4.1 (c).

⁴³⁵ Initial Report to the ACERWC Part 7 Para 205. See also Early Hearing Detection and Intervention Programmes in South Africa (2007) a Report by the Health Professions Council of South Africa Available at www.hpcs.co.za/Uploads/.../early_hearing_detection_statement.pdf <Accessed 07.02.16>.

conversely many such children are still subjected to stereotypes, generalisation, racism and are victims of geographical inequalities.⁴³⁶

4.6 Conclusion

There are many similarities between the Initial Report to the CRPD Committee, the Initial and Periodic Reports to the CRC Committee and the Initial Report to the ACERWC. Based on the above analysis, it is the author's view that the Initial Report to the ACERWC is more transparent than the Reports to the CRPD Committee and the CRC Committee. The Initial Report to the ACERWC tends to give an honest account of what the State has done and plans to do without hiding its' shortfalls.

The general areas of concern among the three reports to the treaty bodies show similarities in the factors below that present key challenges to the implementation of the rights of children with disabilities.

These factors include the lack of and long waiting periods for assistive devices and the lack of access to public transport which has a domino effect on accessing many other rights for children with disabilities. The reports place a great emphasis on the social assistance support provided to the caregivers of children with disabilities, however there is also a need for and lack of support programmes for caregivers of children with disabilities. Furthermore, there is a lack of adequate protection, awareness and information on the sexual and reproductive rights of children with

⁴³⁶ Periodic Report to the CRC Committee Part 6 Para 14.

disabilities. A common thread throughout the reports to the treaty bodies indicate a lack of braille and SASL services for children who require them. Lastly, the invisibility of violence and abuse against children with disabilities remains a vast challenge as it results in little or no accountability of the offenders.

The following chapter concludes the thesis. The aim of the conclusion is to provide an answer to the research question, 'to what extent is the state meeting its obligation, in respect of children with disabilities, regarding the implementation of the CRC, ACRWC and the CRPD in South Africa', which was posed in chapter 1.

Chapter 5

Conclusion

“Everybody is a genius, but if you judge a fish by its ability to climb a tree, it will live its whole life believing that it is stupid.”

Albert Einstein

The aim of the research was to analyse and critique the South African reports submitted to treaty bodies regarding the implementation of international human rights pertaining to children with disabilities in South Africa. Despite the fact that South Africa is signatory to the CRC, CRPD and ACRWC, the vast majority of children with disabilities in South Africa do not enjoy their rights on an equal basis as other children. This thesis was directed at establishing what South Africa has done and needs to do to ensure the implementation of the CRC, the ACRWC and the CRPD insofar as they relate to children with disabilities.

This chapter serves to conclude the research by focusing on the implementation of the three treaties and discussing South Africa's triumphs and gaps in the implementation of the rights of children with disabilities so as to answer the research question posed in chapter 1.

Based on the analysis of the CRC, ACERWC and the CRPD as well as the reports to the CRC Committee, the ACERWC and the CRPD Committee it is evident that the State has implemented many of its international obligations. However, there are gaps that remain in the implementation of the rights of children with disabilities which will be addressed below.

Great cognisance is taken of the right to equality and non-discrimination in the aforementioned three treaties. The State has recognised and emphasised the importance of this right by implementing national legislation and policies. The State has made stride worthy progress in this regard; however, the lack of community education and the stereotyping of children with disabilities remain a challenge.⁴³⁷ This has been addressed by the State to some extent insofar as educational programmes for the awareness of disabilities have been developed.⁴³⁸ Furthermore, the State has acknowledged the principle of the best interests of the child as a solution to eradicating the inequality and discrimination of children with disabilities.⁴³⁹

Even though the State has taken measures to ensure the implementation of the rights of children with disabilities, poverty remains a challenge to effective implementation and creates a large gap between the implementation and accessibility of rights by children with disabilities. As discussed above, the NDP recognises that disability and poverty go hand in hand and create a vicious cycle of

⁴³⁷ See p21.

⁴³⁸ See p38.

⁴³⁹ See p36.

disability.⁴⁴⁰ Regardless of the availability of services for children with disabilities, the reality is that many of these children live in rural areas where accessibility is an issue. Children with disabilities require a higher degree of care than other children and as a result this may place a larger financial burden upon their parents or caregivers.⁴⁴¹ The State has attempted to remedy this by the provision of the CDG which is available to the families of children with disabilities.⁴⁴² However, as was discussed, the CDG is not available to all children with disabilities as a child will only be eligible to receive the grant if he or she requires 24 hour per day care. Nonetheless, those who do not meet the eligibility requirement may still access the child support grant. However, notably, the monetary values of the two social assistance grants differ substantially.⁴⁴³

The CDG goes hand in hand with the right to family life. The State appreciates the importance of the right to family life of children with disabilities and has put many measures in place to ensure its fulfilment. These measures relate to the CDG, as discussed above⁴⁴⁴ and the provision of alternative care. The State has emphasised that regardless of the provision of the CDG, parental responsibilities and rights remain vested in the parents or care givers of children with disabilities. However, when alternative care measures are needed, the State has ensured that the child

⁴⁴⁰ See p4.

⁴⁴¹ See p26.

⁴⁴² See p57.

⁴⁴³ See p83.

⁴⁴⁴ See p40.

can be placed in the wide family setting so as to ensure the child's care and development.⁴⁴⁵

The State has made advancements with regard to the right to health of children with disabilities by ensuring the provision of free assistive devices to children under the age of 6. However, the lack of access to, and the long waiting period for, assistive devices remains a challenge. Furthermore, the State is aware of the challenges presented by poverty and as a result has attempted to make transport more accessible to children with disabilities in rural areas.⁴⁴⁶ In addition, the State has recognised the link between the right to health and the right to life of children with disabilities. In doing so, the State has acknowledged the significance of maternal care.⁴⁴⁷ The importance of early detection of disabilities and preventative measures have been addressed by the State and this has resulted in policies being put in place to ensure pre-natal and post-natal care to expectant mothers.⁴⁴⁸

A common thread among the three treaties is the mention and recognition of the need for the provision of braille and SASL for children with disabilities. The State has recognised the right to receive and impart information in a language of choice. As a result, the State has emphasised a need for the recognition of braille and SASL for children with disabilities so as to ensure that they are able to communicate, express

⁴⁴⁵ See p44.

⁴⁴⁶ See p102.

⁴⁴⁷ See p103.

⁴⁴⁸ See p30.

themselves and have access to information in an appropriate format.⁴⁴⁹ The State has implemented this by providing training to educators⁴⁵⁰ so as to make provision for SASL as a language of learning and teaching which is in line with the provisions of the CRC, CRPD and ACRWC.⁴⁵¹

A large concern, pertaining to children with disabilities especially, is the lack of effective measures to ensure that they are free from abuse, maltreatment and neglect. Even though the State has put measures in place to implement the right against abuse, in practise there remain gaps in the implementation of this right. Many of these gaps are due to communication challenges of children with disabilities which make reporting of offences difficult and results in impunity for offenders. Problems also arise caused by the isolation of children with disabilities who are admitted to public or private institutions, as this isolation makes children with disabilities even more vulnerable to abuse.⁴⁵² Furthermore, harmful traditional practices remain a challenge to the African child with disabilities. There is a fine line between the recognition and respect of the right to culture and the abuse of the rights of children with disabilities in Africa. The State has attempted to address this challenge by creating awareness for communities and by introducing new policies against harmful traditional practices.⁴⁵³

⁴⁴⁹ See p28.

⁴⁵⁰ See p38

⁴⁵¹ See p41. Also see p117.

⁴⁵² See p29.

⁴⁵³ See p113.

In answer to the research question posed in chapter 1,⁴⁵⁴ the research suggests that the State has made noteworthy progress in implementing the three treaties as they relate to children in South Africa.

There is commendable conformity among the reports analysed in chapter 3 and 4 above. The reports to the CRC Committee, CRPD Committee and the ACERWC display many similarities in what has been reported to have been done in South Africa. It was essential to examine the reports to treaty bodies, rather than just considering South Africa's annual reports, legislation and policies, as the reporting process to treaty bodies comes with a sense of accountability, transparency and morality.

Considerable progress has been made for children generally, but the rights of children with disabilities require further and more rigorous implementation measures. A frustration for the realization of the rights of children with disabilities is largely based on the dissolution of the DWCPD, as the State now lacks a centralized Department to focus its resources and attention on the implementation of the rights of children with disabilities. Furthermore, despite the progressive Children's Act which ensures that South Africa's framework conforms to the CRC, CRPD and ACRWC, insofar as children are concerned; South Africa lacks disability specific legislation.

⁴⁵⁴ To what extent is the State meeting its obligation, in respect of children with disabilities, regarding the implementation of the CRC, ACRWC and the CRPD in South Africa?

The State has demonstrated a desire to ensure the implementation of the rights of children with disabilities and compliance with the CRC, CRPD and the ACRWC. However, the challenges mentioned above are troubling and need urgent attention. The implementation of the rights of children with disabilities in South Africa must be prioritized by the State.

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