

The Children's Act: A valuable tool in realising the rights of children with disabilities*

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OPSOMMING

Die Kinderwet: 'n Waardevolle instrument om kinders met gestremdhede se regte te verwesenlik

Statistiek in verband met kinders met gestremdhede is verdoemend. In die ontwikkelende wêreld woon 98% van hierdie kinders nie skool by nie en 30% van die wêreld se straatkinders het een of ander gestremdheid. In hierdie bydrae word aangetoon dat die Kinderwet 38 van 2005 ver gaan om 'n statutêre raamwerk te skep ten einde kinders met gestremdhede se grondwetlike regte te verwesenlik. Die Suid-Afrikaanse Regskommissie (soos dit toe geheet het) het vanuit die staanspoor ten doel gehad om in die nuwe Kinderwet veral vir kinders in besonder moeilike omstandighede, soos kinders met gestremdhede of kroniese siekte, voorsiening te maak. Hierdie doel word verwesenlik in die talle bepalings van die Wet wat vir omvattende strategieë voorsiening maak om onder andere ook kinders met gestremdhede in verskillende omstandighede en fasiliteite te akkommodeer. In vergelyking met ander lande op die kontinent, is die Suid-Afrikaanse wet toonaangewend. Die grootste uitdaging is om die teorie nou in werklikheid te omskep sodat daar vir kinders met gestremdhede fasiliteite geskep word om onder andere vir vroeë kinderjare-ontwikkeling, gedeeltelike sorg, voorkoming en vroeë ingryping en kinder- en jeugsorgsentrums voorsiening te maak.

1 INTRODUCTION

Statistics relating to persons with disabilities, known in some quarters as the world's largest minority, and especially children, are damning. Of children with disabilities in the developing world, 98 per cent do not attend school, while an estimated 30 per cent of the world's street children live with disabilities.¹ It is my submission that the Children's Act² goes a long way to accommodate the needs

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1 United Nations *From exclusion to equality: Realizing the rights of persons with disabilities* (2007) 1.

2 38 of 2005. The Children's Act is not the only statute that aims at protecting people with disabilities (see the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 and the Employment Equity Act 55 of 1998 to name a few examples), but with regard to children's rights, is the most important.

of children with mental and physical disabilities and in fact provides the legislative framework³ to realise their constitutional rights.⁴ This contribution explores the relevant international documents before dealing with the applicable provisions of the Children's Act separately. The Children's Acts of various other African countries are compared with the South African Children's Act to evaluate its compliance with international and regional standards.

2 INTERNATIONAL INSTRUMENTS

2.1 United Nations Convention on the Rights of the Child

The 1989 United Nations (UN) Convention on the Rights of the Child (CRC) was the first human rights treaty explicitly prohibiting discrimination against children on the basis of disability.⁵ The Preamble to the CRC recognises that in all countries in the world there are children living in exceptionally difficult conditions, and that such children need special consideration. Article 2 of the CRC imposes an obligation on state parties to respect and ensure the rights afforded to children in the CRC without discrimination of any kind, irrespective of, *inter alia*, a child's disability. South Africa ratified the CRC on 16 June 1995.⁶

Article 2 is specifically important in the sphere of the rights of children with disabilities, since its explicit prohibition of discrimination on the ground of disability implies that such children are entitled to all the other rights afforded to children who do not suffer from a disability.⁷ These would include the right of

3 In the absence of comprehensive legislation dealing with the rights of all people with disabilities and in spite of the *White Paper on Integrated National Disability Strategy (1997)* Office of the Deputy President (Nov 1997) ch 4; Büchner-Eveleigh 'n *Kritiese evaluering van wetgewing wat die gesondheid van kinders beïnvloed* (LLD thesis UNISA 2009) 123.

4 See s 9 which deals with the right to equality – so frequently denied to most disabled people, s 10 on the right to dignity, s 27 that is especially relevant to disability equality in the context of socio-economic rights, the special protection afforded to children in s 28 and the fact that s 7(2) obliges government to give effect to all the rights in the Bill of Rights. On the application of the Bill of Rights on disability equality rights, see Bhabha "Disability equality rights in South Africa: Concepts, interpretation and the transformation imperative" 2009 *SAJHR* 218 *et seq.*

5 General Comment 9 "The rights of children with disabilities" (2006) para 2.

6 Sloth-Nielsen "Chicken soup or chainsaws: Some implications of constitutionalisation of children's rights" in Keightley (ed) *Children's rights* (1996) 6. It is interesting to note that the CRC was the first international human rights document ratified by the (then) Government of National Unity. See Sloth-Nielsen and Van Heerden "New child care and protection legislation for South Africa? Lessons from Africa" 1997 *Stell LR* 261 and Mahery "The United Nations Convention on the Rights of the Child: Maintaining its value in international and South African law" in Boezaart (ed) *Child law in South Africa* (2009) 323.

7 Van Bueren *The international law on the Rights of the Child* (1995) 40; Abramson "Article 2. The right of non-discrimination" in Alen *et al* (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2008) para 219 that the first function of the right of non-discrimination is to protect people from assaults on their human rights, and para 221 that it is an absolute umbrella right allowing limitations on sectoral rights based on the right-holder's specific type and degree of disability. See para 226 that the enjoyment of sectoral rights depends upon resource allocation which is a major source of hardship to people, including children, with disabilities. Cf Combrinck "The hidden ones: Children with disabilities in Africa and the right to education" in Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 308.

access to institutions, services and facilities responsible for the care or protection of children that conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision (article 3(3)); the right to life, survival and development (article 6); the right, in the case of a child who is capable of forming his or her own views, to express those views freely in all matters affecting the child (article 12(1)); the right to the development of institutions, facilities and services for the care of children as part of appropriate assistance to their parents and legal guardians (article 18(2)); the right to a periodic review of the treatment to a child who has been placed by competent authorities for the purposes of care, protection or treatment of his or her physical or mental health and all other circumstances relevant to his or her placement (article 25); the right to education (article 28); and the right to have education directed to a child's personality, talents and mental and physical abilities to their fullest potential (article 29(1)(a)).

Apart from the general rights highlighted above, article 23 is specifically dedicated to the rights of children with disabilities.⁸ It consists of four paragraphs: The first paragraph requires state parties to recognise that a physically or mentally disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.⁹ The second paragraph encapsulates the right of the disabled child to special care and requires state parties to encourage and ensure the extension of assistance, for which application is made and is appropriate to the child's condition, to the child and those responsible for his or her care or protection. The extension of assistance, however, is made subject to available resources.¹⁰ The third paragraph recognises the special needs of a child with a disability and requires that assistance as indicated in the second paragraph, must be provided free of charge – whenever possible – and must be designed to ensure that a child with a disability has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner which is conducive to the child achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development. The final paragraph promotes international co-operation to improve state parties' capabilities and skills and to widen their experience.

Article 23 has been criticised as giving children with disabilities no absolute right to assistance, as access to services is made subject to conditions such as whether children are eligible and apply for such services, and is subject to available resources.¹¹ It has been argued that the other provisions of the CRC, such as those highlighted earlier, hold more promise for the vindication of the rights of children with disabilities.¹² There is little doubt that a major source of hardship to people, and especially children, with disabilities comes from the fact

8 No reservations or declarations have been entered specifically to a 23 of the CRC: General Comment 9 (2006) para 4.

9 According to General Comment 9 para 11 "[t]he core message of this paragraph is that children with disabilities should be included in the society".

10 See General Comment 9 para 14(a).

11 LeBlanc *The Convention on the Rights of the Child: United Nations lawmaking on human rights* (1995) 103; Combrinck in Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* 307.

12 Combrinck in Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* 307.

that their enjoyment of sectoral rights depends upon resource allocations. It has been suggested that one way to increase allocations is by adopting "reasonable accommodation" laws and policies. Reasonable accommodation requires the state to give more social goods to disabled persons, and where this entails material resources, amounts to a type of non-discriminatory affirmative action.¹³

State parties are required to submit an initial report, followed by periodic reports, to the UN Committee on the Rights of the Child which gives an indication of measures taken to give effect to the rights of children embodied in the CRC. As far back as 1996, the Committee on the Rights of the Child summarised the general concerns that arose from its examination of state parties' reports with regard to article 23. The Committee on the Rights of the Child recognised the prevalence of certain negative attitudes which hamper the implementation of the rights of disabled children, such as their isolation from society. It suggested that the promotion of these children's rights should be further advanced through, for instance, support to parents' organisations and to community-based services and a sustained programme for moving children from institutions to a good family environment.¹⁴

In their reports to the Committee on the Rights of the Child, state parties have to provide information on a range of aspects relating to article 23. This includes information on the measures taken to ensure an effective evaluation of the situation of disabled children, including the development of a system of identification and tracking of disabled children, the establishment of any appropriate monitoring mechanism, the assessment of progress and of difficulties encountered, as well as any targets set for the future. It also requires information on the consideration given to the inclusion of disabled children together with children without disabilities in institutions, services and facilities, including within the education system.¹⁵

It is interesting to note that in the process of drafting article 23, the drafters expressed fundamental philosophical differences of opinion on specific provisions of the article. Some believed that the care of disabled children were the responsibility of governments and that care should be provided free of charge. Others argued that parents and close relatives have the primary responsibility but that the state and private organisations might be called on to provide certain services. A third group believed that the state should be involved substantially but that the CRC should recognise the needs of poor countries in providing assistance to disabled children and should mandate some forms of assistance for these children. Article 23 in its current form appears to be a compromise of these divergent points of view as it establishes the basic principles that are to guide assistance to disabled children within the context of available family resources augmented by national and international assistance.¹⁶

13 Abramson in Alen *et al* (eds) *A commentary on the United Nations Convention on the Rights of the Child* 123–124.

14 See Hodgkin and Newell *Implementation handbook of the Convention on the Rights of the Child* UNICEF (2007) 300.

15 *Idem* 295.

16 LeBlanc *The Convention on the Rights of the Child: United Nations lawmaking on human rights* 103.

2.2 Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities (CRPD) adopted in December 2006 and opened for signature on 30 March 2007,¹⁷ represents an international response to the long history of discrimination, exclusion and dehumanisation of persons with disabilities.¹⁸ The CRPD complements existing international human rights treaties. It does not recognise any new human rights of persons with disabilities, but rather clarifies the obligations and legal duties of states to respect and ensure the equal enjoyment of all human rights by all persons with disabilities.¹⁹ As far as children with disabilities are concerned, the CRPD builds upon and elaborates on the provisions of article 23 of the CRC.

Although the CRPD applies to all persons with disabilities,²⁰ which would include children, the rights of and protection for children with disabilities are specifically highlighted in various parts of the CRPD. The Preamble, for instance, recognises that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, while article 3(h) incorporates, as a substantive principle, respect for the evolving capacities of children with disabilities and respect for the right of such children to preserve their identities. Article 7 is solely devoted to children and places additional obligations on state parties, similar to provisions in the CRC,²¹ in the following terms:

- “1. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
2. State parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right.”

A range of other obligations are imposed on state parties in respect of children with disabilities, such as the adoption of child-focused legislation and policies (article 16); securing registration of births and the rights of children to a name, nationality and to know and be cared for by their parents (article 18); ensuring that children have equal rights with respect to family life and that they are not separated from their parents against their will (article 23); ensuring that children are not excluded from free and compulsory education and that education is

17 Eighty-one states signed the Convention on that day, the highest number of signatures of any human rights convention on its opening day: Combrinck in Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* 310.

18 The International Covenant on Economic, Social and Cultural Rights (1966) is also important in relation to the human rights of persons with disabilities because disability is often linked to economic and social factors, but in the context of children's rights, less important than the three key instruments discussed in this contribution. The same holds true for many other international and regional instruments: see Quinn and Degener *Human rights and disability. The current use and future potential of United Nations human rights instruments in the context of disability (sd)* 37 *et seq.*

19 United Nations *From exclusion to equality: Realizing the rights of persons with disabilities* (2007) 5.

20 A 1 of the Convention denotes persons with disabilities as 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. See also Bhabha 2009 *SAJHR* 226–229.

21 Cf aa 3 and 12 of the CRC.

delivered in the most appropriate language and means of communication, especially in the case of children who are blind, deaf or deaf-blind (article 24); providing health services to children to minimise and prevent further disabilities (article 25); and ensuring that children have equal access with other children to participation in play, recreation and leisure and sporting activities (article 30).

The CRPD's approach to disability also emphasises the significant impact that attitudinal and environmental barriers may have on the enjoyment of persons with disabilities of their rights. For instance, a child with an intellectual disability might have difficulties in school because of teachers' attitudes toward him or her, inflexible school boards and possibly parents who are unable to adapt to students with different learning capacities. Changing these attitudes and environments that make it difficult for disabled persons to participate fully in society therefore becomes vital.²²

In order to enable persons, including children, with disabilities to attain and maintain maximum independence, their full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life, state parties are required, in terms of article 26, to organise, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services. These services and programmes are to begin at the earliest possible stage, based on a multidisciplinary assessment of individual needs and strengths. State parties are also required to promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services.

In respect of legal capacity, article 12 requires state parties to provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. These safeguards are to ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the disabled person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent authority.

In terms of the Optional Protocol to the CRPD, the Committee on the Rights of Persons with Disabilities is empowered to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by a state party of the provisions of the CRPD.

The CRPD has been hailed as the most rapidly negotiated human rights treaty in the history of international law, and it does create a basis for some optimism in this regard.²³

2.3 African Charter on the Rights and Welfare of the Child

South Africa, as a member state of the African Union (or Organisation of African Unity as it was then called), is also a party to the African Charter on the Rights and Welfare of the Child (ACRWC),²⁴ adopted in 1990. The ACRWC

22 United Nations *From exclusion to equality: Realizing the rights of persons with disabilities* (2007) 13.

23 Combrinck in Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* 310.

24 OAU Doc.CAB/LEG/24.9/49 (1990). This was the first so-called regional human rights instrument that focused exclusively on the rights of the child. See Van Bueren *The international law on the rights of the child* 22.

came into force on 29 November 1999, almost ten years later.²⁵ South Africa has ratified the ACRWC on 7 January 2000. It is regrettable that this regional document has battled to gain the attention and support it deserves from African countries.²⁶ The ACRWC is a valuable document which acknowledges and enhances children's rights on the continent.²⁷

Article 3 of the ACRWC sets out the principle of non-discrimination on various grounds – similar to the CRC, but unfortunately omits disability as a ground in respect of which a child may not be discriminated against. However, it is doubtful that this means that such children may be the subject of discrimination as the first part of article 3 confers the right to non-discrimination to “every child”.²⁸ Article 4(1) articulates the best interests of the child standard in very strong terms,²⁹ while article 4(2) provides for child participation in all proceedings affecting the particular child.

Article 13, conferring rights upon disabled children,³⁰ to a certain extent mirrors the provisions of article 23 of the CRC, although it is less detailed. Both instruments contain the limitation that protection for disabled children is subject to available resources. On a positive note assistance under the ACRWC is not dependent on the circumstances of the parent or caregiver – as is the case under article 23 of the CRC. It has been argued that this could be to the advantage of a disabled child as states are allowed to consider the circumstances of the child's situation and not those of his or her parents. This could imply a higher level of protection, since it widens the group of persons eligible for state assistance.³¹

The list of facilities and services to which a disabled child should have access does not contain education, health care services and rehabilitation services which are provided for in the CRC. Education is, however, dealt with under article 11 of the ACRWC, but it has been pointed out that the omission of a reference to education in article 13 is regrettable because the educational needs of children with disabilities are different from children without disabilities.³² Article 13 contains an additional provision not found in article 23 of the CRC. Paragraph 3 aims to strengthen mobility for children with disabilities and their access to public institutions and facilities.³³

25 See also Viljoen “The African Charter on the Rights and Welfare of the Child” in Boezaart (ed) 331.

26 On the basis of a 47(3) of the ACRWC, the treaty has come into operation 30 days after the reception of the ratification by the 15th member state, which took nine years. See Memzur “The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?” 2008 *SA Publiekreg/Public Law* 1.

27 See Chirwa “The merits and demerits of the African Charter on the Rights and Welfare of the Child” 2002 *The Int J of Children's Rights* 157; Davel “The African Charter on the Rights and Welfare of the Child, family law and children's rights” 2002 *De Jure* 281ff.

28 Combrinck in Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* 310.

29 Even stronger than the CRC: Davel 2002 *De Jure* 283.

30 The article refers to “handicapped” children.

31 Combrinck in Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* 311.

32 *Ibid.*

33 The paragraph even includes access to public highways. It reads as follows: “The State Parties to the present Charter shall use their available resources with a view to achieving progressively the full convenience of the mentally and physically disabled person to movement and access to public highways, buildings and other places to which the disabled may legitimately want to have access to.”

The direct operation of the ACRWC has been weakened by shortcomings in its implementation mechanisms. However, this does not detract from the fact that it contributes substantially to the evolving body of international human rights principles pertaining to children with disabilities. Moreover, African courts on a national level may be able to draw on this body of principles as an interpretative aid.³⁴

3 APPLYING THE CHILDREN'S ACT TO CHILDREN WITH DISABILITIES

3.1 General principles

From the onset of the Law Commission's endeavours to develop a new model for a children's code for South Africa, it was agreed that throughout the proposed model mention has to be made of children in especially difficult circumstances, such as children with disabilities or suffering from chronic illness.³⁵ The Children's Act now provides the primary legal framework for the realisation of every child's constitutional rights, such as family care, parental care or appropriate alternative care, social services, protection from maltreatment, neglect, abuse or degradation and that the best interests of a particular child are of paramount importance in every matter concerning that child.³⁶ It is an explicit objective of the Act "to recognise the special needs that children with disabilities may have".³⁷ It is therefore not surprising that the rights of children with disabilities are addressed upfront in chapter 2 under the General Principles of this particular Act. Section 6(2)(d) dictates an approach upholding the basic principle of non-discrimination that goes to the root of our Constitution³⁸ and international law.³⁹ The Act states unequivocally that a child must be protected from unfair discrimination on the ground of his or her disability or the disability of a family member of the child. Sections 6(2)(e) and (f) unveil the application of the twin principles relating to child development.⁴⁰ On the one hand children should be encouraged to maximise their potential. On the other hand it is recognised that children are vulnerable and that they need protection. Children with disabilities are extremely vulnerable and they particularly need an enabling environment due to the special needs they might have: section 6(2)(f) mandates that a child's disability must be

34 Combrinck in Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* 312. It is agreed with Viljoen in Boezaart (ed) 332 that international child law does not replace but rather supplements the protection of children at the national level.

35 South African Law Commission *Issue paper 13 Project 110 Review of the Child Care Act* (April 1998) § 2.6 at 10, § 4.2.6 at 26–27 and § 4.2.7 at 27–28, in line with Rule 15(3)(b) of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (which was adopted by the UN General Assembly on 20 December 1993), which provides for a duty on the state to create a legal basis aimed at achieving the objectives of full participation and equality. Disability matters pertaining to children have to be dealt with within mainstream legislation.

36 S 2(b) of the Children's Act. All references to sections will be to that of the Children's Act unless stated otherwise. See ss 28(1)(b), 28(1)(c), 28(1)(d) and 28(2) of the Constitution of the Republic of South Africa, 1996.

37 S 2(h).

38 See eg ss 1, 7, 9 and 10 of the Constitution.

39 See para 2 above.

40 South African Law Commission *Issue paper 13 Project 110 Review of the Child Care Act* (April 1998) § 2.1 at 7.

recognised and an enabling environment must be created to respond to the child's special needs. When the Act lists the factors that must be considered when applying the best interests-standard in section 7,⁴¹ any disability that a child may have is specifically stated.⁴²

Section 11 is *in toto* dedicated to the rights of disabled children and children with chronic illness. Section 11(1)(a) obliges due consideration to providing children with disabilities with parental care, family care or special care when that is appropriate. The case in which the Centre of Child Law applied for a curator *ad litem* to be appointed for a 15 year-old boy with psychiatric problems, ADHD, dysthymic disorder, severe MR and an abnormal EEG for whom no suitable accommodation could be found after Weskoppies Hospital refused to admit him into their care as a mental health care user, immediately comes to mind.⁴³

Section 11(1)(b) also obliges the participation of disabled children in social, cultural, religious and educational activities, recognising the special needs that such a child may have. This is an extremely bold step, considering that the education system currently fails to provide sufficient access to basic education for learners with disabilities: The *Citizen* reported on 10 June 2010⁴⁴ that the Western Cape Forum for Intellectual Disability filed papers in the Cape High Court to order the Western Cape provincial and national governments to take "reasonable measures" to meet the educational needs of severely disabled children. According to the Forum's Chairperson, the state had set up and funded special schools for children with moderate to mild disability, with an IQ of 35 to 70. However, children with an IQ of less than 35 were not admitted to the special schools, and according to her, the state made no direct schooling provision for them, even though their needs were greater.⁴⁵

Very importantly, section 11(1)(c) also obliges the provision of conditions that ensure children's dignity, promote self-reliance and facilitate their participation in the community. Besides the right to life, the right to dignity is perhaps the most basic of all fundamental rights, however, disabled children are sometimes subjected to surgery without their consent.⁴⁶ In this context, section 11(3) becomes of utmost importance, because it provides that a child with a disability has the right not to be subjected to medical, social, cultural or religious practices that are detrimental to his or her health, well-being or dignity. The scope of section 11(3) is thus broader in its protection than section 12 due to the fact that medical practices are covered as well. It is suggested that the procedures provided for in the Sterilisation Act 44 of 1998 concerning children will have to be revisited in

41 See Davel "General principles" in Davel and Skelton (eds) *Commentary on the Children's Act* (2007) 2-4 to 2-8 on the best interests standard and 2-9 to 2-12 on the paramouncy thereof.

42 S 7(1)(i).

43 *Centre for Child Law v MEC Health and Social Development, Gauteng* North Gauteng High Court case no 37850/2010. Also reported in *The Citizen* of 17 June 2010: "Advocate fights for ill teenager" and in *Legalbrief* of 17 June 2010: "Court appoints curator for boy with special needs" 4-5.

44 In an article titled "Court challenge on disabled kids' education".

45 Also reported in *Legalbrief* 10 June 2010 "Disabled kids' education under the spotlight" 6; *Legalbrief* 14 June 2010: "Intellectually disabled children centre of court challenge" 2 and in *Die Burger* 14 June 2010 "Regering se plig oor skoling in hof getoets" 2.

46 <http://bit.ly/bQ3b2k> (accessed on 28 September 2010).

the light of this and other provisions, such as section 10 on child participation, of the Children's Act.

Lastly, section 11(1)(d) obliges providing the child and the child's care-giver with the necessary support services. However, research studies in Gauteng and Mpumalanga revealed that more than 50 per cent of children who are eligible for care dependency grants do not receive these grants.⁴⁷

In the chapter on "General Principles" section 13 deals with information on health care.⁴⁸ It is suggested that "information regarding his or her health status" and "information regarding the causes and treatment of his or her health status" in section 13(1)(b) and (c) include disability as part of health status.⁴⁹ Section 13(2) explicitly provides that the information provided for children in terms of this section must be relevant and in a format accessible to children, giving due consideration to the needs of disabled children.

3 2 Early childhood development (ECD)

The Children's Act endorses a holistic approach and seeks to accommodate children of all ages. Early childhood years represent the most critical phase in the life cycle of human beings and even more so in the case of children suffering from some or other disability.⁵⁰ It is essential that each and every child is during these tender years provided with the basic necessities such as sufficient nutrition and brain stimulation to be prepared for successful learning, to reduce the need for remedial services and avoid developmental delay.⁵¹ Early childhood development means the process of emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of children from birth to school-going age.⁵² Chapter 6 of the Children's Act aims to ensure that all children have equal access to early childhood development services as it is an essential social service to ensure the realisation of children's rights during early childhood.⁵³

The Children's Act envisages a comprehensive national strategy aimed at securing a properly resourced, coordinated and managed early childhood development

47 Department of Social Development "Strategy for the integration of services for children with disabilities" (draft August 2009) 32.

48 S 13(1) provides that every child has the right to
 "(a) have access to information on health promotion and the prevention and treatment of ill-health and disease, sexuality and reproduction;
 (b) have access to information regarding his or her health status;
 (c) have access to information regarding the causes and treatment of his or her health status; and
 (d) confidentiality regarding his or her health status and the health status of a parent, care-giver or family member, except when maintaining such confidentiality is not in the best of the child".

49 Jamieson and Proudlock *From sidelines to centre stage: The inclusion of children with disabilities in the Children's Act* A Children's Institute Case Study, University of Cape Town (2009) 43.

50 General Comment 9 para 56; Jamieson and Proudlock 7.

51 Department of Social Development *Guidelines for early childhood development services* UNICEF (2006) ch 1 at 13 (note Appendix K at 95 of this publication listing "Rights of children with disabilities"); Du Toit and Mbambo "Early childhood development" in Davel and Skelton *Commentary on the Children's Act* § 6-1.

52 S 91(1).

53 Du Toit and Mbambo in Davel and Skelton *Commentary on the Children's Act* § 6-2.

system that gives due consideration to children with disabilities.⁵⁴ The Minister of Social Development *must*⁵⁵ develop this early childhood development strategy after consultation with interested persons and the Ministers of Education, Finance, Health, Provincial and Local Government and Transport. The section thus recognises the inter-sectoral nature of early childhood development service provision.⁵⁶ This in itself is a step in the right direction because early childhood development was in the past captured in a silo-approach to programmes and service delivery to disabled children in at least three different departments, namely Health, Social Development and Education.⁵⁷ The Children's Act goes one step further and directs that the funding of early childhood development programmes be prioritised to make these programmes available to children with disabilities.⁵⁸ An early childhood development programme must be appropriate to the needs of the children to whom the programme is provided, and therefore children with a disability and/or special needs should be well taken care of.⁵⁹

3.3 Partial care facilities

Where children are living with parents or family members but the parents or family need additional support for part of the day, partial care may be of assistance. It is often the case that such assistance is needed in the care of disabled children due to the requirement for constant care and supervision of these children. Partial care is provided when a person, with or without reward, takes care of more than six children on behalf of the parents or care-givers during specific hours of the day or night or for a temporary period.⁶⁰

Similar to the provisions pertaining to early childhood development,⁶¹ the Children's Act envisages that the Minister of Social Development develops⁶² a comprehensive national strategy aimed at ensuring an appropriate spread of partial care facilities throughout the Republic, giving due consideration to children with disabilities.⁶³ Like in the case of early childhood development programmes, the funding of partial care facilities *must*⁶⁴ be prioritised and must be made

54 S 92(1). See the acknowledgement of the fact that children with disabilities should be accommodated in ECD services: Department of Social Development *Guidelines for early childhood development services* 14–15.

55 The wording of the Act.

56 Du Toit and Mbambo in Davel and Skelton *Commentary on the Children's Act* § 6–7.

57 “Strategy for the Integration of Services for Children with Disabilities” *op cit* 10; Department of Social Development *Guidelines for early childhood development services* ch 2 at 19.

58 S 93(4)(b). This implies that steps must be taken to train more ECD practitioners in skills to support and accommodate children with disabilities: Inter-departmental Technical Task Team *Strategy for the Integration of Services for Children with Disabilities* (Revised Draft, August 2009) 31.

59 S 94(3). The norms and standards are provided for in reg 23 read together with Part II of Annexure B of the Consolidated Regulations pertaining to the Children's Act, 2005. See Department of Social Development *Guidelines for early childhood development services* 14 on the need for special programmes to meet the specific needs of children with disabilities.

60 S 76, but it excludes the care of a child by a school, a school hostel or a hospital. See Mahery “Partial care” in Davel and Skelton (eds) *Commentary on the Children's Act* § 5-4.

61 See the above paragraph.

62 After consultation with interested persons and the Ministers of Education, Finance, Health, Provincial and Local Government and Transport.

63 S 77(1): “must”.

64 The wording of the Act.

accessible to children with disabilities.⁶⁵ When providing for the norms and standards that partial care facilities have to adhere to, the Children's Act stipulates additional requirements that partial care facilities for children with disabilities (or chronic illness) have to provide. These facilities must⁶⁶ be

- (a) accessible to children with disabilities;
- (b) meet the needs of children with disabilities; and
- (c) employ suitably trained staff and provide training on
 - (i) the needs, health and safety of disabled children;
 - (ii) appropriate learning activities and communication strategies for such children; and
 - (iii) basic therapeutic interventions.⁶⁷

The Act leaves the door open for a specific facility to provide special programmes appropriate to the developmental needs of the children in that facility,⁶⁸ thus catering for children with special needs.⁶⁹

3 4 Prevention and early intervention programmes

The Children's Act⁷⁰ demands a proactive orientation in providing for the care, protection and safety of children. "Prevention" and "early intervention" are therefore compelling concepts in the quest to act before harm is caused or at least intervene before the worst happens.⁷¹ In general terms, the Act aims at achieving this by firstly providing for the development of national and provincial strategies for the provision and funding of these services⁷² and, secondly, by providing for the norms and standards relating to the quality of these services.⁷³ It is important to note that in listing the outcomes that prevention and early intervention programmes are meant to achieve, the Act states that these programmes must focus on, *inter alia*, developing appropriate parenting skills and the capacity of parents and care-givers to safeguard the well-being and best interests of children with disabilities.⁷⁴ When dealing with the funding of prevention and early intervention programmes it is also emphasised that priority must be given to making these programmes available to children with disabilities.⁷⁵

3 5 Children in need of care and protection

Although some children are adequately cared for by their parents,⁷⁶ this is unfortunately not always the case. Often, children with mental or physical

⁶⁵ S 78(4)(b).

⁶⁶ The wording of the Act.

⁶⁷ S 79(3).

⁶⁸ S 79(4).

⁶⁹ Unfortunately there seems to be no synergy between provinces when it comes to partial care facilities: *Strategy for the Integration of Services for Children with Disabilities* 31.

⁷⁰ Ch 8.

⁷¹ Frank "Prevention and early intervention" in Davel and Skelton (eds) *Commentary on the Children's Act* § 8-2; *Strategy for the Integration of Services for Children with Disabilities* 32.

⁷² Ss 145–146.

⁷³ S 147; Frank in Davel and Skelton (eds) *Commentary on the Children's Act* § 8-3.

⁷⁴ S 144(1)(c).

⁷⁵ S 146(4)(b). The norms and standards are provided for in reg 52 read together with Part IV of Annexure B of the Consolidated Regulations pertaining to the Children's Act, 2005.

⁷⁶ General Comment 9 para 41: "Children with disabilities are best cared for and nurtured within their own family environment provided that the families are adequately provided for in all aspects."

disabilities are removed from their parents due to the parents' inability to care for these children or the parents' unwillingness. In some cases where prevention and early intervention were not successful or altogether non-existing, poor and inconsistent parenting may have contributed to the mental disorder. In such cases the children may be children in need of care and protection, often requiring alternative care.⁷⁷ If a children's court finds that a child who is in need of care and protection has a physical or mental disability, the court may order that the child be placed in a facility for the care of children with disabilities, if it is in the best interests of the child to be cared for in such a facility.⁷⁸ The purpose of this subsection is to ensure that where a disabled child is in need of care and protection and has to be removed, they are placed in "facilities" that have appropriate therapeutic programmes designed to meet their special needs.⁷⁹

The Act ensures accessibility for disabled people, including children, to children's courts by providing that the children's court must be held in a room that is accessible to disabled persons and persons with special needs.⁸⁰ The Act also ensures that children with disabilities have the opportunity to express their views in children's courts proceedings.⁸¹

3 6 Child and youth care centres

Section 191 of the Act, providing for child and youth care centres, introduces a new concept of residential care for children.⁸² The term "child and youth care centre" moves away from categorising facilities to avoid the stigmatisation caused by placing children in certain facilities to deal with their "problems".⁸³ A child and youth care centre is a facility for the provision of residential care to more than six children outside the child's family environment in accordance with a residential care programme suited to the children in the facility.⁸⁴ Such a child and youth care centre may in addition to its residential care programmes provide for appropriate care and development of children with disabilities.⁸⁵ It is submitted that section 191(2)(i), which provides for "the reception, development and

77 See s 150 of the Act. See Matthias and Zaal "The child in need of care and protection" in Boezaart *Child law in South Africa* 163 168 *et seq*; Jamieson and Proudlock *From sidelines to centre stage: The inclusion of children with disabilities in the Children's Act* 8.

78 S 156(1)(g).

79 Matthias and Zaal "Children in need of care & contribution orders" in Davel and Skelton (eds) *Commentary on the Children's Act* § 9-29. Under these circumstances the state bears the primary duty to care for these children: *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 77.

80 S 42(8)(d). See Jamieson and Proudlock *From sidelines to centre stage: The inclusion of children with disabilities in the Children's Act* 30-36 for the history behind this subsection of the Children's Act.

81 S 61(1)(a): "allow a child involved in the matter to express a view and preference in the matter if the court finds that the child, given the child's age, maturity and stage of development and *any special needs that the child may have*, is able to participate in the proceedings and the child chooses to do so" (own emphasis).

82 Skelton "Child and youth care centres" in Davel and Skelton (eds) *Commentary on the Children's Act* 13-7.

83 Skelton in Davel and Skelton (eds) *Commentary on the Children's Act* 13-7.

84 See s 191(1) for the facilities that are excluded in the definition of child and youth care centres. Under these circumstances *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 77 again becomes relevant, see n 79 above.

85 S 191(3)(a).

secure care of children with behavioural, psychological and emotional difficulties" is of particular importance in relation to mentally disabled children and children suffering from some or other conduct disorder. The Minister of Social Development⁸⁶ *must* develop a comprehensive national strategy aimed at ensuring an appropriate spread of child and youth care centres throughout the Republic providing the required range of residential care programmes in the various regions, giving due consideration to children with disabilities (or chronic illness).⁸⁷

3 7 Drop-in centres

Where children are living on their own or living on the street and fending for themselves, assistance provided to them through drop-in centres becomes relevant.⁸⁸ A drop-in centre is a facility providing basic services aimed at meeting the emotional, physical and social development needs of vulnerable children.⁸⁹ The Minister of Social Development⁹⁰ *must* develop a strategy aimed at ensuring an appropriate spread of drop-in centres throughout the Republic, giving due consideration to children with disabilities (or chronic illnesses).⁹¹ The MEC for social development may, from money appropriated by the relevant provincial legislature, provide and fund drop-in centres for a particular province.⁹² However, the funding of drop-in centres must be prioritised and made accessible to children with disabilities.⁹³

3 8 National Child Protection Register

Unfortunately, disabled children are even more vulnerable than other children and therefore often the victims of abuse.⁹⁴ In developing countries they are 4 to 10 times more likely to suffer from violence than children without disabilities.⁹⁵ Studies show that up to 80 per cent of girls with disabilities have experienced sexual abuse.⁹⁶ Media reports very recently unveiled the sexual abuse of children in a school that caters for blind, deaf and physically disabled learners in Pretoria.⁹⁷

86 After consultation with interested persons and the Ministers of Education, Health, Home Affairs and Justice and Constitutional Development.

87 S 192(1). *Strategy for the Integration of Services for Children with Disabilities* 34 states that "[r]espite care services are provided by Child and Youth Care Centres, registered and funded according to the Children's Act...". However, the curator's report does not reveal the availability of such a centre: Report of the curator *ad litem* in the case of *Centre for Child Law v MEC Health and Social Development*, Gauteng North Gauteng High Court case no 37850/2010 234 - 326.

88 Ch 14 of the Act; Skelton "Drop-in centres" in Davel and Skelton (eds) *Commentary on the Children's Act* § 14-2.

89 S 213(1).

90 After consultation with interested persons and the Ministers of Finance, Health, Provincial and Local Government and Transport.

91 S 214(1). The norms and standards are provided for in reg 91 read together with Part VI of Annexure B of the Consolidated Regulations pertaining to the Children's Act, 2005.

92 S 215(1).

93 S 215(4)(b).

94 General Comment 9 para 42; Stöpler *Hidden shame: Violence against children with disabilities in East Africa* Stichting Terre des Hommes Nederland (2007) 12; Jamieson and Proudlock *From sidelines to centre stage: The inclusion of children with disabilities in the Children's Act* 7.

95 Stöpler *Hidden shame: Violence against children with disabilities in East Africa* 9.

96 *Idem* 12.

97 "Sex abuse: 3 teachers might be struck off roll" *The Times* 16 Aug 2010; "Teachers fired for sexual abuse" *Legalbrief* 17 Aug 2010.

It appeared that teachers and general staff in this instance had sexually abused learners and that the abuse had taken place over years. Part two of Chapter 7 of the Children's Act deals with the establishment of a National Child Protection Register. The Director-General must keep and maintain this Register⁹⁸ consisting of Part A and Part B.⁹⁹ Part A of the register is intended to be the so-called "child register", and its goals extend to both child protection service delivery, as well as forming the basis of a national monitoring system for victims of abuse and neglect.¹⁰⁰ It is therefore important that, for planning and delivering services for children with physical or mental disabilities, the state needs to properly assess the need and make provision for these children. For this reason the Act provides that the record contained in Part A must detail the fact that the child concerned has a disability, if that is the case, and the nature of the disability.¹⁰¹ Part B of the register is a record of persons who are unsuitable to work with children and the purpose thereof is to protect children against abuse from these persons.¹⁰² The names of the three teachers that were found guilty of sexually abusing disabled learners in the above-mentioned case will be entered in the "perpetrator" part which will prevent them from being employed in positions where they have ready access to children in future.¹⁰³

4 REFLECTIONS AND THE WAY FORWARD

Compared to other countries on the continent, the South African Children's Act seems to be a "perfect" model. Some countries, like Nigeria,¹⁰⁴ have hardly any provisions catering for children with disabilities in the relevant legislation. Other countries, like Botswana,¹⁰⁵ Ghana¹⁰⁶ and Tanzania¹⁰⁷ provide for the fundamental

98 S 111(1).

99 S 111(2).

100 See s 113 for the purpose of Part A of the Register; Sloth-Nielsen "Protection of children" in Davel and Skelton (eds) *Commentary on the Children's Act 7-12*.

101 S 114(1)(a) read together with s 114(2)(a)(iii); s 114(1)(b) read with s 114(2)(b)(iii) and s 114(1)(c) read together with s 114(2)(c)(iii).

102 S 118.

103 See s 119 for the information that must be reflected in Part B of the Register. Cf *Strategy for the Integration of Services for Children with Disabilities* 34.

104 The Nigerian Child's Rights Act of 2003 has only one section (s 178(8)) referring to children with special needs: "Where a State Government provides accommodation for a child under its care, it shall, so far as is reasonably practicable, ensure that the accommodation is suitable for his particular needs."

105 The Laws of Botswana ch 28:04 Children's Act in s 52 (the child with disabilities' dignity, self esteem and self-reliance and participation in social cultural, religious and educational activities) and s 42 (non-discrimination and children in need of care and protection).

106 Ghana Children's Act 560 of 1998 in s 3 (non-discrimination with specific reference to disability) and s 10 (dignity and education). (A definition of a "child with a disability" is provided in s 124: "a child who suffers from abnormalities or loss of physiological functions, anatomic structure or psychological state and has lost in part or wholly the ability to engage in activities in a normal way and is as a result hampered in normal functions in certain areas of social life". The education of children with disabilities is also provided for in s 16 of Act 715 Persons with Disability Act, 2006.

107 Neither the Children and Young Persons Act which contains 7 sections nor the Adoption of Children Act Chapter 335 [Subsidiary Legislation] mentions anything about children with disabilities. The new Law of the Child Act of 2009 contains a few provisions that are relevant in this context: s 5(2) on non-discrimination, *inter alia* based on disability; s 8(1)

human rights of children with disabilities, while Kenya, a jurisdiction that has adopted progressive legislation on children's rights, goes further in providing for children with disabilities more comprehensively.¹⁰⁸

The Children's Act goes a long way in realising the rights of children with disabilities. Unfortunately a statute can not, in and of itself, change the lives of children. This requires planning and provisioning by government to ensure that children have access to the services that the law promises to them. Political will and real commitment are necessary.¹⁰⁹ The Department of Social Development is currently working on a *Strategy for the Integration of Services for Children with Disabilities* to integrate service delivery to people with disabilities. At this stage it is not clear whether this policy document will include the various national strategies envisaged by the Children's Act, but a National Policy Framework¹¹⁰ for the implementation of the Act is incorporated in the document.¹¹¹

Children with disabilities face exclusion from mainstream services if their specific needs and requirements are not met. The curator's report made no mention of a single existing child and youth care centre in Gauteng, in spite of the clear provisioning in section 191 of the Children's Act.¹¹² Unfortunately, should a children's court find that a child is in need of care and protection, there are few children's homes or places of safety with physical environments that are accessible or with suitably-trained staff to cater for the needs of children with disabilities.¹¹³ The lack of the envisaged facilities could lead to institutional discrimination and multiple infringements of children's human rights at the level of service delivery. "These gaps in the social welfare system mean that many children with disabilities get no protection, sub-standard protection, or, worse still, find themselves subject to secondary abuse."¹¹⁴ It has been suggested that government's failure to implement its laws is a systemic problem that could be ascribed to a lack of priority and a lack of resources.¹¹⁵ Perhaps another co-ordinated campaign and the same concerted efforts that led to the provisioning for children with disabilities in the Children's Act are called for to oversee the implementation thereof.¹¹⁶ Only time will tell whether our government's commitment to children is as strong in practice as it is in theory.

on dignity; and s 8(2) on equal opportunities. Cf Stöpler *Hidden shame: Violence against children with disabilities in East Africa* 33 and 35 .

108 The Children Act 8 of 2001 provides a definition of "disabled child" in s 2, forbids discrimination based on disability in s 5, guarantees the dignity of these children in s 12, provides for suitable facilities and staff to accommodate the special needs of children with disabilities in ss 7, 17 to 19, 25(2)(f) and 76(3)(b). In terms of s 107 it is possible to appoint a guardian beyond a child's eighteenth birthday if the child suffers from a mental or physical disability. Cf s 186 on guarantees to a disabled child accused of an offence.

109 General Comment 9 para 1.

110 46ff.

111 Recommendation 9a at 78 pertaining to early childhood development and recommendation 12b on residential facilities have some bearing on the issues addressed in this contribution. However, at the time of writing this article, research could not reveal any of the "comprehensive national strategies" that the Children's Act refers to so explicitly.

112 See fn 87 above.

113 Jamieson and Proudlock 8. The same hold true for many countries in Africa: Stöpler *Hidden shame: Violence against children with disabilities in East Africa* 22.

114 *Ibid.*

115 Stöpler 24.

116 Jamieson and Proudlock 1-3.