

**ACCESS TO JUSTICE FOR CHILDREN WITH DISABILITIES:
THE SOUTH AFRICAN CONTEXT**

by

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Submitted in fulfilment of the requirements for the degree

DOCTOR LEGUM

in the Faculty of Law
University of Pretoria

September 2015

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Annexure G

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ABSTRACT

Research indicates that violence against children with disabilities¹ occurs at annual rates at least 1.7 times greater than for their non-disabled peers. Children with disabilities are also abandoned more frequently than their non-disabled peers and may face increased levels of discrimination, as a result of their disability. An increased likelihood of abandonment, abuse and discrimination highlights the need for the South African justice system to be ready and able to receive children with disabilities and provide them with access to appropriate redress.

Relying on the interrelated nature of the rights contained in the South African Constitution, this research is first and foremost focusing on the rights of the child. Another level of vulnerability is added in respect of the right of children to have access to justice: disability. This is referred to within the scope of this research as the *two-tier vulnerability* principle. This principle necessitates that an approach to address the needs of children with disabilities must be sought with one leg in the discourse of the rights of children and another within the area of the rights of people with disabilities. A combination of the two approaches is applied in assessing South Africa's responses to the rights of children with disabilities to have access to justice. The United Nations Convention on the Rights of the Child, as well as the United Nations Convention on the Rights of People with Disabilities further assist in establishing a framework against which access to justice for children with disabilities in domestic legislation and other measures are tested. This research concludes by comparing South Africa's responsiveness to two other jurisdictions, namely Ghana and Canada, as well as best practices from certain states from the United States of America, and makes recommendations on how to apply the best practices principle.

¹ Hereafter referred to as CWD.



KEYWORDS

Children with disabilities, access to justice, people with disabilities, abuse of children with disabilities, discrimination on the basis of disability, Article 13 of the United Nations Convention on the Rights of People with Disabilities, the Children's Act 38 of 2005, Children's Courts, Equality Courts, accessible court buildings, training of presiding officers.



ACKNOWLEDGEMENTS

I have worked and studied within the discourse of human rights in general since I started my legal career. The plight of the most vulnerable in our society, such as children with disabilities, moved me to conduct this research. It has been a journey which has made me humble, and so much more aware of the work that still needs to be done, in order to address the rights of those most in need.

Working with, and under the supervision of Professor Trynie Boezaart has been inspiring. The manner in which she was able to guide, strengthen, and support this research kept me focussed and driven even where we faced challenges along the way. Her general way of assisting me to believe in my thoughts, views and arguments, whilst simultaneously guiding me towards greater insight is commendable, and I can honestly not express the level of respect I have for her knowledge and student management skills in this limited space. It has provided me with renewed excitement for the field of children's rights, which I wish to contribute towards for the foreseeable future.

I also wish to express gratitude for Dr Grobbelaar-Du Plessis who joined this study at a later stage, and provided invaluable expertise within the disability area of this research. Her insight, contribution and assistance provided me with guidance throughout, and immensely improved this contribution.

To my brothers and in-laws, and parents Louis and Eileen in particular: you have supported and encouraged this research throughout, and understood what it took to strive towards a passion whilst trying to maintain some level of normalcy in everyday life. Your support carried me during this journey. My parents have been beacons of inspiration, and I am proud to follow in my mother's footsteps in obtaining this degree.

Lastly, to my remarkable husband, Paul. You have been my rock, motivation and the captain of this journey, and without you this contribution would not have been possible. Only you know what it took to complete this research, and I dedicate this



contribution, and any possible positive outcome it may have on the lives of children with disabilities, to you.



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LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
ADA	Americans with Disabilities Act
ADRY	African Disability Rights Yearbook
CCTV	Closed-circuit television
CJA	Child Justice Act 75 of 2008
CORC	Committee on the Rights of the Child
CPA	Criminal Procedure Act 51 of 1977
CWD	Children with disabilities
DeafSA	Deaf Federation of South Africa
DOJ&CS	Department of Justice and Correctional Services
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights makes specific reference to non-discrimination
ICF	International Classification of Functioning, Disability, and Health
INDS	Integrated National Disability Strategy
LASA	Legal Aid South Africa
MHCA	Mental Health Care Act 17 of 2002
OCL	Office of the Children's Lawyer
OHCHR	Office of the High Commissioner for Human Rights
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
SABS	South African Bureau of Standards
SAHRC	South African Human Rights Commission
SALC	South African Law Commission
SALRC	South African Law Reform Commission
SAPS	South African Police Service
SASL	South African Sign Language
SASSA	South African Social Security Agency
SOA	Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007



StatsSA	Statistics South Africa
UNCRC	United Nations Convention on the Rights of the Child
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations International Children's Emergency Fund
USA	United States of America
WHO	World Health Organization



Chapter 1: Introduction

- 1.1. Research aim and thesis statement
 - 1.2. Research question
 - 1.3. Research methodology
 - 1.4. Scope of research and limitations
 - 1.5. Context of research
 - 1.6. Overview of chapters
 - 1.7. Conclusion
-

1.1 Research aim and thesis statement

In accordance with the aim of this study outlined below, the main question that the research will address is whether CWD have access to justice in South Africa.

1.2 Research question

In order to address the abovementioned overarching question, it is the objective of the research to investigate access to justice for CWD within the South African context in order to:

- 1.2.1. ascertain South Africa's international obligations in respect of realising the right of CWD to have access to justice;
- 1.2.2. determine whether the current domestic legal framework addresses and responds to the right of this vulnerable group of society to have access to justice;
- 1.2.3. determine whether CWD present a higher risk of being abused and neglected, and if so, whether they will have an increased need to accordingly assert their rights to have access to justice;
- 1.2.4. compare, where relevant, the South African response with the law and practices found in other jurisdictions; and
- 1.2.5. identify deficiencies and discrepancies and make preliminary recommendations on possible improvements to CWD's access to justice.

1.3. Research methodology

The methodology followed in this research will primarily be qualitative in nature. A critical assessment will be made of the current domestic legal framework, not only in relation to the values set by the Constitution of the Republic of South Africa, 1996,¹ but also international law instruments and international trends. A critical analysis of the current South African response could aid in identifying deficiencies, discrepancies and *lacunae* with a view to informing future reform in this field.

The use of comparative law will be restricted to the extent that measures taken by certain jurisdictions may add value to the possible reform required in the South African context. The comparative analysis will accordingly be limited to jurisdictions that may present best practice, or to allow for the contextualisation of particular rights and responses. For instance, where court procedures of a specific jurisdiction allow for a more lenient process in addressing the needs of CWD approaching the court, or where the responses of a jurisdiction may include the creation of a specific quasi-judicial body to allow for non-accusatorial methodologies when addressing matters involving CWD. These comparative examples will inform legal discourse where legal precedent in South Africa is either absent, non-responsive or underdeveloped in law. The relevant comparative jurisdictions, Ghana and Canada, were selected on the basis that they have ratified the most significant international law instruments addressing access to justice for CWD, akin to South Africa. An exception was made in the case of the United States of America (USA) where examples of best practice from a variety of states were deliberated as they present illustrations of how to respond to the rights of CWD, albeit indirectly in most cases. The aim of the comparative analysis is therefore to inform the possible best practice to be adopted in the South African response.²

¹ Hereinafter referred to as the South African Constitution, as reference will be made to other countries' constitutions within the ambit of the comparative part of this research in ch 6.

² In addition to having ratified the most significant relevant international law instruments, these countries also share a dualist approach with South Africa in the application of international law. Besides the reasons provided in chapter 6, these two countries were selected for comparative purposes so as to maximise diversity along the dimension in question, and to allow the research to explore the scope or universality of access to justice for CWD.

1.4. Scope of research and limitations

This research emanates from the presupposed rights of children, as contained in the South African Constitution. Relying on the interrelated nature of the rights contained in the South African Constitution, this research first and foremost focuses on the specific rights of the child. However, another level of vulnerability is added in respect of the right of children to have access to justice: disability. This will be referred to within the scope of this research as the *two-tier vulnerability* principle. The right of CWD to have access to justice will therefore be investigated by means of delineating their rights as children, as well as their rights as people with disabilities.

All rights are intrinsically interconnected and interdependent. In order to assess and explore the rights of CWD to have access to justice, a collection of South African Constitutional rights will be discussed with the aim of forming the baseline of this rights-based approach.³ For example, section 9(2) of the South African Constitution prescribes that everyone should have full and equal enjoyment of all rights and freedoms. Section 9(3) furthermore specifically prohibits the state from unfairly discriminating directly or indirectly against anyone on the grounds of his or her age or disability.⁴ Section 9(4) also operates horizontally, as well as vertically as it states that no *person* is allowed to discriminate against anyone else.⁵

Section 28 of the South African Constitution embodies a list of rights specifically aimed at children. This section includes the right of every child to be protected against maltreatment, neglect, abuse or degradation.⁶ Every child also has the right to family or parental care or to appropriate alternative care where relevant.⁷

³ These will include ss 8, 9, 28, 34, 35 as well as ss 39 and 231 of the South African Constitution.

⁴ S 9(3) of the South African Constitution.

⁵ S 9(3) and (4) of the South African Constitution. The equality clause includes references of the state as well as persons so as to expressly indicate that this right operates horizontally as well as vertically.

⁶ S 28(1)(d) of the South African Constitution.

⁷ S 28(1)(b) of the South African Constitution.

Moreover, section 28(2) states that a child's best interests are of paramount importance in every matter concerning the child. Section 28(1)(h) further determines that every child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result. Section 34 states that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

In respect of and with reference to sections 39 and 231 of the South African Constitution, the definition of access to justice will be derived from international agreements. South Africa has ratified the key international treaties relating to the rights of children, and the rights of people with disabilities respectively.⁸ The definition of access to justice will therefore be limited to the scope of the rights and definitions specifically included in these international agreements.

Much has been written on the rights of children to have access to justice, as well as the rights of people with disabilities to have the same access to justice. The question, however, arises whether the needs of CWD can be addressed through the application of safeguards available for children in general, or through applying measures available for adults with disabilities. It will be illustrated that the unique two-tier vulnerability of CWD necessitates that an approach be sought with one leg in the discourse of the rights of children and another in the realm of the rights of people with disabilities. A *permutation approach* or combination of the two approaches needs to be applied in addressing the rights of CWD to have access to justice.⁹

⁸ UN General Assembly, Convention on the Rights of the Child, 20 Nov 1989, United Nations, Treaty Series, vol 1577 3 hereafter referred to as the UNCRC; UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution/adopted by the General Assembly, 24 Jan 2007, A/RES/61/106 hereafter referred to as UNCRPD. South Africa's ratification of both these agreements will be discussed in par 3.2 hereunder.

⁹ Disability in the context of this research is used as a general added level of vulnerability in relation to the rights of the children. The types of disabilities will therefore not be extensively explored and will only be distinguished to illustrate the lack of response in the case of certain needs presented by CWD. For example, reference will be made to responses which do not cater to certain levels of mobility restrictions, without deliberating on the level of the impairment or restriction.

1.5. Context of research

General human rights advocacy for people with disabilities was formally set in motion with the adoption of the United Nations Declaration of the Rights of Mentally Retarded Persons in 1971,¹⁰ and the Declaration on the Rights of Disabled Persons in 1975.¹¹

South Africa is bound by international law to give effect to children's rights, including the rights of CWD.¹² Through the ratification of the UNCRC, the African Charter on the Rights and Welfare of the Child,¹³ as well as the UNCRPD the South African Government has pledged its commitment towards the fulfilment of the rights of this particularly vulnerable group of society.¹⁴

The UNCRC was the first human rights treaty that contained a specific reference to disability.¹⁵ In 2007 the Committee on the Rights of the Child also issued a General

¹⁰ Proclaimed by General Assembly resolution 2856 (XXVI) of 20 Dec 1971.

¹¹ Proclaimed by General Assembly resolution 3447 (XXX) of 9 Dec 1975.

¹² S 39 of the South African Constitution states that the courts and other legal bodies, when interpreting the Bill of Rights, *must* consider international law and *may* consider foreign law. In *S v Makwanyane* 1995 (3) SA 391 (CC) par 35, former CJ Chaskalson stated that public international law would include binding as well as non-binding law and that both may be used as tools of interpretation. He also included that international agreements and customary international law provide a framework within which the Bill of Rights can be evaluated and understood. In addition, s 233 of the South African Constitution states that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

¹³ The African Charter on the Rights and Welfare of the Child, OAU Doc Cab/Leg/24.9/49, hereafter referred to as ACRWC. The South African Government ratified the ACRWC on 7 Jan 2000.

¹⁴ In addition, the International Covenant on Economic, Social and Cultural Rights makes specific reference to non-discrimination. South Africa has signed this document but has yet to ratify the covenant; GA Res 2200A (XXI), UN GAOR Supp (No 16) 49, Doc A/6316 (1966) UNTS (hereafter referred to as the ICESCR).

¹⁵ See <http://www.ohchr.org/Documents/Publications/HRDisabilityen.pdf> (accessed on 18 Apr 2011).

Comment which in particular referred to the rights and needs of CWD.¹⁶ Combined with the UNCRPD, which expressly addresses the rights of people with disabilities, the rights of CWD have therefore been elevated to an international platform.

In 2006 some 650 million people were estimated to be living with a disability worldwide.¹⁷ Of this number, 150 million are perceived to be children.¹⁸ Research indicates that violence against CWD occurs at annual rates at least 1.7 times greater than against their non-disabled peers.¹⁹ This means that CWD are at greater risk of harm than children who do not have any sort of disability. Moreover, CWD are extremely vulnerable to neglect,²⁰ often because parents and caregivers do not know how to address their children's special needs.²¹ According to the United Nations International Children's Emergency Fund²² 2013 report on the state of the world's children, CWD are also abandoned more frequently than their non-disabled peers. This apparent increased level of neglect may occur as a result of many reasons; one being that caring for CWD may result in numerous expenses.²³

¹⁶ UNCRC/C/GC/9. This comment was made with specific reference to children in conflict with the law. See par 73. Even more recently the African Committee of Experts on The Rights and Welfare of the Child adopted a theme that highlighted the plight of CWD, in commemoration of the 2012 Day of the African Child. See the African Committee of Experts on the Rights and Welfare of the Child's Concept note on the commemoration of the Day of the African Child on 16 Jun 2012 under the theme: "The rights of children with disabilities: The duty to protect, respect, promote and fulfill" available at <http://acerwc.org/involvedwithus/volunteer/> (accessed on 8 Jul 2015).

¹⁷ See <http://www.un.org/disabilities/convention/news061206.shtml> (accessed on 30 Mar 2011).

¹⁸ See <http://www.crin.org/resources/infoDetail.asp?ID=10710> (accessed on 30 Mar 2011).

¹⁹ See <http://www.un.org/disabilities/convention/facts.shtml> (accessed on 26 Mar 2011).

²⁰ The Children's Bureau Washington in the USA indicates in an article published in Mar 2012 that CWD often experience multiple types of maltreatment, with neglect being the most common. It was also found that CWD were more likely to experience neglect than children without disabilities. See <http://www.childwelfare.gov/pubs/prevenres/focus> (accessed on 25 Jun 2012).

²¹ See Jamieson and Proudlock "From sidelines to centre stage: the inclusion of children with disabilities in the Children's Act" (2009) available at http://www.ci.org.za/depts/ci/pubs/pdf/casestudiesevaluations/sidelines_to_centre_stage.pdf 7 (accessed on 8 Jul 2015).

²² Hereafter referred to as UNICEF.

²³ UNICEF "State of the world's children" 2013 available at http://www.unicef.org/sowc2013/perspective_garces.html (accessed on 15 Jan 2014).

In light of CWD's increased risk to be subjected to abuse, maltreatment and neglect, CWD may require and seek legal redress more frequently than their non-disabled peers. For example, in South Africa, where children are abandoned and neglected, alternative care arrangements may possibly have to be made for them, through the involvement of the Children's Court.²⁴ Or, where CWD are sexually abused and the sexual abuse is reported, it may lead to a criminal investigation and prosecution of the perpetrators in the dedicated Sexual Offences Courts.²⁵ This may result in the victim having to become involved in the judicial processes, for instance, by delivering his or her testimony or being questioned and cross-examined by legal representatives.²⁶ Brown²⁷ contends that CWD are at an additional risk for sexual abuse due to the increased likelihood that:

ō they may be separated from their families, accommodated in congregate settings where they encounter multiple caregivers, and are targeted on account of their visible difference+or vulnerability+.

CWD may also face increased levels of inequality and discrimination as a result of their two-tier vulnerability. They may be seen as different or inferior within their communities and be subjected to prejudice, name-calling or face exclusion based solely on their age or disability. In this regard, CWD may seek redress through South Africa's Equality Courts,²⁸ which were specifically established to address hate speech, unfair discrimination or harassment.²⁹

This increased likelihood of abandonment, abuse, neglect and discrimination may therefore highlight the need for the South African justice system to be ready and able to receive CWD and to respond to their needs. As per the above-mentioned statistics, these vulnerable children are more likely to require the assistance of the justice system than their non-disabled peers.

²⁴ See ch 4 of the Children's Act 38 of 2005.

²⁵ See the Judicial Matters Second Amendment Act 43 of 2013 which re-established certain courts to deal specifically with sexual offences. See also the Criminal Law (Sexual Offences) Amendments Act 32 of 2007.

²⁶ See the Criminal Law (Sexual Offences) Amendments Act 32 of 2007.

²⁷ Brown 'Sexual abuse of children with disabilities' (2011) available at <http://www.coe.int/t/dg3/children/1in5/Source/PublicationSexualViolence/Brown.pdf> (accessed on 23 July 2015) 105.

²⁸ See the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Hereafter referred to as PEPUDA.

²⁹ S 21(1) of PEPUDA.

1.6. Overview of chapters

This study is presented in six (6) chapters, following the first one:

Chapter 2: Constitutional protection for CWD

This chapter illustrates the Constitutional principles supporting the rights of CWD to have access to justice. As this study emanates mainly from the specific rights of the child, the focus will be on section 28 of the Bill of Rights of the South African Constitution. In light of the two-tier vulnerability approach, as well as the interrelatedness of the rights contained in the South African Constitution, the right to equality,³⁰ dignity³¹ and access to courts³² will be explored in so far as it illustrates the rights of CWD to have access to justice.

Further to this, sections 39 and 231 will be discussed as the nexus between constitutional obligations and South Africa's responsibility towards international law obligations and agreements.

Chapter 3: International obligations

The purpose of the chapter is to explore South Africa's international law obligations towards the rights of CWD to have access to justice. As per the above, the rights of children to have access to justice will be investigated in order to support a permutation approach.³³ This means that international law instruments will be evaluated firstly, where there is an intersection of these rights, and secondly, it will be explored as it pertains to both the rights of children and the rights of people with disabilities.

This chapter will also serve as a point of departure for the definition of *access to justice* as contained in and restricted to the UNCRPD³⁴ and UNCRC.³⁵

³⁰ S 9 of the South African Constitution.

³¹ S 10 of the South African Constitution.

³² S 34 of the South African Constitution.

³³ See par 1.3 with reference to the permutation approach.

³⁴ Art 13 of the UNCRPD will be assessed as it directly addresses access to justice for people with disabilities.

South Africa's international obligations will be set out and discussed to illustrate the responsibility that rests on all stakeholders involved in fulfilling the rights of CWD to have access to justice. In addition to section 39(1)(b) and section 233 of the South African Constitution, in *S v Makwanyane*³⁶ the Court found that international law, including non-binding international instruments, was an important guide to interpreting the Bill of Rights. This was affirmed in *The Government of the Republic of South Africa and Others v Grootboom and Others*.³⁷ Therefore, not only do international law instruments bind South Africa to develop legislation and programmes to respect and protect rights such as access to justice for CWD, it also serves as a tool to interpreting the rights in the Bill of Rights,³⁸ in this case, those specifically applicable to CWD.

From the investigation of the UNCRC and UNCRPD, a framework will be established against which South Africa's responses to the rights of CWD to access justice, can be measured. This framework will also assist in comparing South Africa to the responses of Ghana and Canada and formulating an original approach on how to elaborate on the original four pillars contained in the UNCRC, when it comes to CWD.

Chapter 4: Domestic response

This chapter will discuss how South Africa is responding to its constitutional as well as international law obligations in respect of realising the right of CWD to have access to justice. As per section 231 of the South African Constitution, international agreements only become law in the country when it is enacted through national legislation. Thus, relevant national legislation will be investigated and the investigation limited to the constitutional and international law obligations placed on South Africa. Legislation and responses will be measured against the framework established from the UNCRC and UNCRPD in the previous chapter, and thereafter

³⁵ Although the UNCRC does not categorically address access to justice rights for children, it elaborates on state responsibilities in respect of services and assistance rendered to children with disabilities.

³⁶ *S v Makwanyane* par 35.

³⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC). Hereafter referred to as *Government of the RSA v Grootboom*.

³⁸ *Government of the RSA v Grootboom* par 26.

evaluated. An analysis of domestic legislation will include an assessment of the Children's Act,³⁹ the Child Justice Act,⁴⁰ the Criminal Law (Sexual Offences and Related Matters) Amendment Act,⁴¹ the Mental Health Care Act,⁴² the Criminal Procedure Act,⁴³ the Promotion of Equality and the Prevention of Unfair Discrimination Act.⁴⁴

More specifically, responses such as the availability of the Children's Court, legal representation of CWD, the role of intermediaries, sign-language interpreters and other assistive measures, as well as appropriate questioning techniques will be assessed and discussed.

Chapter 5: Childhood disability and the abuse and neglect profile

As referred to at paragraph 1.4 *supra*, the amplified risk of CWD to be abandoned, abused and discriminated against will necessitate a judicial response should these potential transgressions be reported. This chapter will explore why CWD may have an increased need for judicial or quasi-judicial redress as a result of their specific vulnerabilities. International and domestic data and statistics will be assessed so as to shed light on the need for a responsive justice system which caters for the needs of CWD. The 2010 South African Census as well as data in respect of social assistance will contribute to this assessment.

Chapter 6: International trends and comparative analysis

Various countries have implemented measures to address the rights of children and people with disabilities to have proper access to justice. Chapter 6 will analyse possible best practices from countries (and where relevant, their individual federal states) as far as they may contribute to the rights of CWD to obtain access to justice. Although most measures will be analysed from either a children's rights or disability-rights perspective, the measures undertaken will inform possible recommendations

³⁹ 38 of 2005.

⁴⁰ 75 of 2008.

⁴¹ 32 of 2007.

⁴² 17 of 2002.

⁴³ 51 of 1977.

⁴⁴ 4 of 2000.

in relation to CWD specifically. A comparison will be made with measures taken by Ghana, Canada and the USA in so far as it may provide guidance on promoting access to justice for CWD. Measures undertaken and legislation adopted by these countries will also be scrutinised against the framework established in Chapter 3, with the aim of determining in what instances South Africa is at the forefront and where its responsiveness to the rights of CWD may be lacking.

Chapter 7: Recommendations and conclusion

In this chapter and against the backdrop of the above, recommendations will be made on how South Africa measures up against the framework established in Chapter 3, and how South Africa may best address the rights of CWD to have access to justice. South Africa's domestic and international law obligations in this regard will be highlighted and best practice models derived from comparative analysis will be recommended. The recommendations will also include a checklist, which may serve as a guide for persons working with CWD when these children attempt to seek redress for violations of their rights, through for instance, the courts.

1.7. Conclusion

It is the aim of this research to illustrate the difficulties encountered by CWD in accessing justice. This contribution will endeavour to detail ways in which these challenges may be overcome. Certain mechanisms and responses will be investigated and best practice models from other countries will be recommended. Training endeavours, facility management as well as empowerment programmes will be some of the recommendations explored in this research. Possible law reform to address these challenges explicitly, and not only through integrating matters into mainstream legislation, will also be addressed in this contribution. CWD are extremely vulnerable members of society and it is the aim of this research to contribute to the human rights discourse in this regard.

Chapter 2: Constitutional protection for children with disabilities

- 2.1. Introduction
 - 2.2. Operational provisions
 - 2.3. Section 9: Children with disabilities' right to equality
 - 2.4. Section 10: The right to human dignity and children with disabilities
 - 2.5. Section 28
 - 2.6. Section 28(1)(h) and the relationship between section 34 and 35
 - 2.7. Section 39
 - 2.8. Conclusion
-

2.1. Introduction

In order to determine the scope of access to justice for CWD, it is necessary to determine whether access to justice for CWD is indeed a justiciable right in terms of South African jurisprudence. On what grounds can it be argued that CWD specifically have the right to have access to justice? Can CWD enforce this right, and if so, against whom?

With the purpose of determining the foundation for this right, it is essential to start with the South African Constitution, which is the supreme law of the country.¹ The South African Constitution was promulgated by the late President Nelson Mandela on 10 December 1996 and it took effect on 4 February 1997, repealing the Interim Constitution of 1993.² The South African Constitution has been lauded as one of the most progressive constitutions in the world. Heyns and Brand³ describe the South African Constitution as perhaps the most sophisticated and comprehensive system of all other constitutions in the world today, with specific reference to socio-economic rights. Other commentators, such as Cohen,⁴ have described the text of the South African Constitution as amid the most progressive ever drafted.⁵ The Bill of Rights in

¹ S 2 of the South African Constitution.

² 200 of 1993.

³ Heyns and Brand Introduction to socio-economic rights in the South African Constitution+ (1998) *Law Democracy and Development* 153.

⁴ Cohen The constitution at a crossroads: a conversation with the Chief Justice of the Constitutional Court of South Africa+ (2014) *Northwestern Journal of International Human Rights* par 2.

⁵ See also generally Klug (ed) *The Constitution of South Africa: a contextual analysis* (2010)113 providing an international assessment of the South African Constitution.

Chapter 2 of the South African Constitution is further described as the cornerstone of democracy in South Africa,⁶ and possibly the backbone of this progressive text. In respect of the status of the South African Constitution, section 2 acknowledges that the South African Constitution is the supreme law of the republic, and law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.⁷

In the pursuit of this determination, certain key areas must be deliberated in respect of the South African Constitution. Chapter 2 will examine whether the South African Constitution protect the rights of CWD explicitly. This will include an assessment of whether the South African Constitution protect the inherent worth of these children to be treated with dignity,⁸ and not to be shunned as a result of their different abilities. Chapter 2 will further investigate whether the South African Constitution address access to justice rights in general, and if so, to what extent. Lastly, the South African Constitution will be examined to determine whether sources outside of South Africa may be consulted so as to provide content to domestic legislation. In *De Reuck v Director of Public Prosecutions*⁹ the Constitutional Court held that constitutional rights are interrelated and interdependent, but from a single constitutional value system. This standard necessitates the consideration of a variety of rights contained in the Constitution, in conjunction with each other.¹⁰ For purposes of endorsing the rights of CWD to have access to justice, specific focus will be placed on the particular rights of children as included in section 28 of the South African Constitution, as well as the right to equality,¹¹ human dignity,¹² life,¹³ and access to courts.¹⁴ These rights will be examined as far as these rights mutually reinforce access to justice for CWD.

⁶ S 7(1) of the South African Constitution.

⁷ S 2 of the South African Constitution.

⁸ The Constitutional Court has applied this constitutional right to children, see *Johncom Media Investments v M* 2009 (4) SA 7 (CC) par 29.

⁹ *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others* 2004 (1) SA (CC) par 406.

¹⁰ *Government of the RSA v Grootboom* par 83.

¹¹ S 9 of the South African Constitution.

¹² S 10 of the South African Constitution.

¹³ S 11 of the South African Constitution.

¹⁴ S 34 of the South African Constitution.

2.2. Operational provisions

In respect of the operational provisions of the Bill of Rights, section 7(1) of the South African Constitution reads as follows:

This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

This section means that the rights of *all* people are included. The South African Constitution compels the State in section 7(2),¹⁵ to respect, protect, promote and fulfil the rights contained in the Bill of Rights.¹⁶ According to Currie and De Waal,¹⁷ this section compels the State by means of four obligations, through positive and negative duties, to adhere to their responsibilities under the Bill of Rights. This may include positive actions such as preventing the violation of human rights, contained in Chapter 2 of the South African Constitution, by a third party.¹⁸ It may also include positive actions such as enacting legislation which serves to enhance the protection of vulnerable members of society, such as CWD. The section 7(2) obligation indicates that should the State fail to uphold these instructions, it may be seen as acting unlawfully and unconstitutionally.¹⁹ In *Christian Education South Africa v Minister of Education*²⁰ the Constitutional Court reiterated that along with the State's specific duty towards children, the obligations contained in section 7(2) represent a powerful responsibility on the State to act. There are though a number of ways through which the State can adhere to this section 7(2) obligation. According to

¹⁵ S 7(2) of the South African Constitution determines that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. In *S v Mhlungu and Others* (CCT25/94) 1995 (3) SA 867 (CC) par 8 the court stated in support of this section, that the South African Constitution should be so interpreted so as not to negate the very spirit and tenor of the South African Constitution and its widely acclaimed and celebrated objectives.

¹⁶ S 7(2) of the South African Constitution.

¹⁷ S 7(2) of the South African Constitution; Currie and De Waal (eds) *Bill of Rights handbook* (2013) 18-23.

¹⁸ S 7(2) of the South African Constitution. See also Liebenberg *The interpretation of socio-economic rights* (2003) in Chaskalson *et al* (ed) *Constitutional law of South Africa* ch 33.

¹⁹ S 7(2) of the South African Constitution; Currie and De Waal (2013) 23.

²⁰ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) par 47.

*Glenister v President of the Republic of South Africa*²¹ the South African Constitution leaves the choice of the means to fulfil these obligations to the State. This means the State can determine on its own accord how to best address its obligations, as long as it is fulfilled. In this regard, the Court did, however, hold that the steps the State takes to respect, protect, promote and fulfil constitutional rights, must be reasonable and effective.²² This was also previously held by the Constitutional Court in *Mazibuko v City of Johannesburg*,²³ where the following was stated:

Ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter in the first place for the legislature and executive – indeed it is desirable as a matter of democratic accountability that they should do so for it is their programs and promises that are subjected to democratic popular choice.²⁴

Linked to section 237,²⁵ which determines that all constitutional obligations must be adhered to thoroughly and devoid of any delay, section 7 becomes a tool for holding the State to account in respect of protecting the rights of CWD, and doing so in a reasonable and effective manner.²⁶ Rautenbach²⁷ argues that since section 7(2) is a constitutional command, the duty on the State exists whether or not authorising legislation in terms of which an organ of State exercises its powers and performs its functions in respect of a specific duty, refers to the duty explicitly, by implication or not at all. This means that where the State may have failed to properly put in place reasonable measures, for example proper and responsive legislation to address the duties prescribed under the Constitution, the State may fail to adhere to section 7(2)

²¹ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 107 and 191. See also Gowa *The status of international treaties in the South African domestic legal system: small steps towards harmony in light of Glenister?* (2011) SAYIL 320.

²² *Glenister v President of the Republic of South Africa* par 189. See also *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) par 44.

²³ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

²⁴ *Mazibuko v City of Johannesburg* par 61.

²⁵ S 237 determines that all constitutional obligations must be performed diligently and without delay.

²⁶ In respect of s 7(3), the South African Constitution stipulates that the rights in the Bill of Rights are subject to the limitations contained or referred to in s 36 or elsewhere in ch 2 thereof.

²⁷ Rautenbach *Constitutional Court decisions on the Bill of Rights* · 2004+(2005) TSAR 180.

of the Constitution. Section 8(1) states that the Bill of Rights binds the legislature in its law-making, the executive in its resource-allocation and initiation of legislation and the judiciary in its decision-making.²⁸ Section 8(2) provides for the direct horizontal application of the Bill of Rights,²⁹ which means that it protects individuals against rights abuses from each other.³⁰ Cockrell³¹ asserts that this is an express stipulation that certain constitutional rights are to apply *directly* against private agencies. Currie and De Waal³² emphasises that whether or not section 8(2) applies horizontally depends on the nature of the private conduct and the circumstances of each particular case. For example, providing for free legal representation in civil matters to a child with a disability if substantial injustice would result otherwise,³³ would constitute a vertical responsibility, whereas, refraining from calling such child derogatory names such as a cripple or a spaz can be enforceable horizontally.³⁴

2.3. Section 9: Children with disabilities' right to equality

Holness and Rule³⁵ argue that the rights to equality and access to justice are often not realisable without accessibility being provided to persons with disabilities.

²⁸ S 8(1), (2) and (3) as well as s 85(2)(d) of the South African Constitution. The latter section determines that the executive exercises its executive authority by preparing and initiating legislation. See also *Glenister v President of the Republic of South Africa* par 190 where the court asserts that the executive has the power to prepare and initiate legislation which may then give effect to the obligations s 7(2) imposed on the state. See also *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) par 69.

²⁹ S 8(2) of the South African Constitution states that the provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right; Currie and De Waal (2013) 45.

³⁰ S 8 of the South African Constitution. In respect of direct horizontal violations s 8(3) enjoins the courts to remedy rights violations against each other.

³¹ Cockrell (ed) *Private law and the Bill of Rights: A threshold issue of "horizontality"* (2013) par 3A8.

³² Currie and De Waal (2013) 49.

³³ S 28(1)(h) of the South African Constitution. A full discussion follows in par 2.6 *infra*.

³⁴ S 9 as well as 28 (1)(d) of the South African Constitution. A full discussion of these sections will follow in para 2.3 and 2.5 *infra*.

³⁵ Holness and Rule *Barriers to advocacy and litigation in the equality courts for persons with disabilities* (2014) *PELJ* 1908.

Equality is a concept with its routes grounded in moral, legal and political idealism.³⁶ Persons with disabilities have historically been denied this right and have been disadvantaged, marginalised, overlooked, discriminated against and invisible in the broader human rights system.³⁷ They have been treated not as equal rights-bearers in their own capacity, but merely as a people deserving of pity, charity and medical attention.³⁸ Similarly, children have also been neglected as rights-bearers until relatively recently, succumbing flagrantly to being the recipients of the welfare approach, also deserving of pity. Barford and Wattam³⁹ assert that children are largely (and akin to people with disabilities) an excluded and marginalised group, and describe the challenges children face as having to combat the effects of *adulthood*,⁴⁰ which can be viewed as the power imbalance between adults and children. Freeman,⁴¹ Eekelaar⁴² and Mnookin⁴³ all support a measure of the welfare approach, whilst simultaneously recognising children as independent and autonomous rights-bearers.⁴⁴

In assessing this approach, and superimposing same onto the position of people with disabilities, the approaches are strikingly alike. People with disabilities too are equal rights-bearers, albeit having to sometimes rely on some or other support or assistance in order to equally partake in society. People with disabilities are also viewed as vulnerable, but that does not mean that they cannot act in their own

³⁶ Albertyn in Cheadle *et al* (eds) *South African Constitutional law: The Bill of Rights* (2003) ch 4 par 4.1.

³⁷ Office of the High Commissioner on Human Rights *Monitoring the Convention on the rights of persons with disabilities guidance for human rights monitors* (2010) available at http://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf (accessed on 14 May 2014).

³⁸ Harris and Enfield (eds) *Disability, equality and human rights: A training manual for development and humanitarian organizations* (2003) 14-18.

³⁹ Barford and Wattam *Children's participation in decision making* (1991) *Practice: Social Work in Action* 99.

⁴⁰ *Ibid.* They argue that adulthood has a similar power dimension as sexism and racism. See also in general Bell *Understanding adulthood: A key to developing positive youth-adult relationships* (1995) available at <http://freechild.org/bell.htm> (accessed on 2 Jun 2014).

⁴¹ Freeman (ed) *The rights and wrongs of children* (1983) 52.

⁴² Eekelaar *The emergence of children's rights* (1986) *Oxford Journal of Legal Studies* 161.

⁴³ Coons and Mnookin *Toward a theory of children's rights* (1978) in Baxter and Eberts (eds) *The child and the courts* 392-398. See also Wald *Children's rights: A framework for analysis* (1979) *University of California Davis LR* 255.

⁴⁴ Human *Teoretiese raamwerk vir die implementering van kinderregte in Suid-Afrika* (2004) *TSAR* 84-93.

interest, or make decisions for themselves. People with disabilities are furthermore in need of some level of protection as a result of their vulnerability and historic disposition for being discriminated against. However, this protection must not rid the person of his autonomy or identity.

Against this background, it is apparent that CWD specifically, in having to face the challenges experienced by both children, as well as people with disabilities, may consequently experience the compounded effect of being denied their equal rights assertion as a result of their two-tier vulnerability. They may face inequality on both levels, from the State as well as other individuals.⁴⁵ Even where the rights of children are recognised, CWD may be denied equal enjoyment as a result of their disability. Similarly, where the child's disability is taken into account and responded to, the service or response may not take into account the child's age. This means that CWD may be denied equality not once, but twice as a result of their particular vulnerabilities. Matshediso⁴⁶ argues that for rights to be effective, it must be recognised by someone other than the right-bearer. Rights such as the right to equality must thus be recognised and respected by, for instance a court, or prosecutor as well as a family member or friend.⁴⁷ Accordingly, the law must determine that vulnerable people such as CWD are not denied an integral right such as equality.

In this regard, section 9 is viewed as one of the founding provisions of the South African Constitution and takes centre stage in addressing the above-mentioned conundrum.⁴⁸ Currie and De Waal⁴⁹ indicate that the South African Constitution has

⁴⁵ See s 8(2) of the South African Constitution in respect of the vertical and horizontal application of the Bill of Rights.

⁴⁶ Matshediso 'The challenge of real rights for disabled students in South Africa' (2007) *SAJHE* 713.

⁴⁷ See par 1.3 *supra* in respect of vertical and horizontal application.

⁴⁸ S 9 of the South African Constitution determines the following: 1. Everyone is equal before the law and has the right to equal protection and benefit of the law; 2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken; 3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; 4. No person may

committed the State to achieve the goal of equality and to ensure that the law benefits and protects *all* people equally.

Section 9 consists of two parts, the first of which addresses the guarantee and promotion of equality and the second which deals with the proscription of unfair discrimination.⁵⁰ Section 9(1) of the South African Constitution stipulates that everyone is equal before the law and has the right to equal protection and benefit of the law. Albertyn⁵¹ asserts that the Constitutional Court has used this section mainly as a basic rationality threshold for observance with the basic right to equality. She also argues that the Constitutional Court has given this section a minimum content and that it refers to protection against arbitrary and irrational treatment by the State. In this regard it is important to consult the Court's approach in determining what constitutes a violation of the right to equality, by assessing the approach taken in *Harksen v Lane*.⁵²

In this decision, the court established a three stage enquiry in order to determine whether the right to equality has been violated.⁵³ Firstly, the question must be asked whether the law or conduct which is being challenged, has differentiated between categories of people. Secondly, it must be ascertained whether the differentiation amounts to discrimination and whether this discrimination amounts to unfair discrimination. Finally, if the discrimination was found to be unfair, it must be established if the unfair discrimination can be justified in terms of section 36⁵⁴ of the South African Constitution.⁵⁵

unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination; 5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

⁴⁹ S 9(1) of the South African Constitution; Currie and De Waal (2013) 213.

⁵⁰ Dlamini 'Equality or justice? Section 9 of the Constitution revisited - Part II+(2002) *Journal for Juridical Science* 16.

⁵¹ Albertyn in Cheadle *et al* (2003) par 4.3.1..

⁵² *Harksen v Lane* 1997 (11) BCLR 1489 (CC) par 53.

⁵³ Currie and De Waal (2013) 216.

⁵⁴ S 36 of the South African Constitution is referred to as the general limitation clause, and determines that the rights contained in the Bill of Rights may only be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the

With regard to the first enquiry in determining any contravention of the equality clause, an enquiry needs to be made into whether there has been a differentiation between individuals or groups.⁵⁶ This preliminary enquiry of section 9 as to whether the impugned provision or conduct in question differentiates between people or categories of people, is viewed as being a threshold test.⁵⁷ This means it is used to establish whether discrimination had taken place or not. If there is no differentiation, then there can be no question of a violation of any part of section 9. Differentiation with regard to section 9 and the threshold test, should, however, not be confused with accommodation of difference with regard to people with disabilities. Differentiation in the context of section 9 is used in the threshold test to determine whether discrimination took place in a specific circumstance. Laws may classify people and treat them differently to others for a variety of legitimate reasons. Not every differentiation will amount to unequal treatment, as it may be impossible for the State to regulate affairs in the country, without differentiation and/or classifications that treat people differently. This means that differentiation, which is not unfair, is mere differentiation. Section 9(1) hence does not prevent different treatment, as long as there is a virtuous and unyielding reason for the different treatment, such as to achieve equal results. This will be seen as mere differentiation as the differential treatment is not unfairly discriminatory.⁵⁸ The validity test for mere differentiation is rationality. In this regard, *Harksen*⁵⁹ determined that differentiation between people or categories of people may serve a legitimate purpose and will only amount to unfair discrimination if there is no rational basis to support such differentiation.

Section 9(2) further determines that equality includes the full and equal enjoyment of all rights and freedoms. This section states that:

limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

⁵⁵ See *Harksen v Lane* par 53.

⁵⁶ *Ibid.* See also Currie and De Waal (2013) 216.

⁵⁷ *Ibid.*

⁵⁸ *Prinsloo v Van der Linde* 1997 (6) BCLR 759 par 22.

⁵⁹ *Harksen v Lane* par 53.

ō to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken.

Gauntlett⁶⁰ argues that where section 9(1) formed the basis of an approach of formal equality, section 9(2) immediately requires an approach of substantive equality, where remedial or restitutionary equality is envisioned. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*⁶¹ Judge Ackerman indicated that substantive equality is envisaged when section 9(2) unequivocally asserts that equality includes the full and equal enjoyment of all rights and freedoms.⁶² The difference between substantive and formal equality in this regard is that substantive equality is set out as measures for the protection of minorities, designed to guarantee genuine effective equality.⁶³ As per Rautenbach,⁶⁴ formal equality refers to comparable cases that are treated differently, whereas substantive equality means that non-comparable cases are treated equally. Albertyn⁶⁵ points out that substantive equality means to put people in a position to participate fully in society, inadvertently pointing towards the removal of barriers preventing individuals to do so. Ngwena,⁶⁶ in

⁶⁰ Gauntlett *vs* equal opportunities enough? (2002) *The Advocate* 1.

⁶¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 Oct 1998) par 62. See also *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) par 46 where it was stated that s 9(2): *is* premised on the recognition that the ideal of equality will not be achieved if the consequences of those inequalities and disparities caused by discriminatory laws and practices in the past are not recognised and dealt with.

⁶² *Prinsloo v Van der Linde; President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC); *Harksen v Lane*; *City Council of Pretoria v Walker*. See also the American decision of *Berg v. University of British Columbia* [1993] 2 S.C.R. 353, 1993 *Carswell BC* 1261 (S.C.C.), at 381 for a specific discussion on the rights of children with disabilities *vis-à-vis* substantive equality. In this matter, the USA Supreme Court held that an *open door* for children with disabilities is not enough. The opportunities provided must be meaningful in light of the opportunities for access provided to people without disabilities. The Supreme Court further noted that such a distinction would allow such institutions to frustrate the purpose of the legislation by admitting students without discrimination, and then denying them access to the accommodations, services and facilities they require to make their admission meaningful. See also Hentelef and Yude *Students with learning disabilities and the right to meaningful access to education* (2010) *Education and Law Journal* 2.

⁶³ Chaskalson *et al* (ed) *Constitutional law of South Africa* (1996) 35-36.

⁶⁴ Rautenbach (ed) *Introduction to the Bill of Rights* (2011) par 1A57.1.

⁶⁵ Albertyn *in Cheadle et al* (2003) par 4.3.1.

⁶⁶ Ngwena *Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue* (2004) *Journal for Juridical Science* 167-197.

reiterating the stance of Albertyn and Goldblatt,⁶⁷ contends that substantive equality is discernible from the formal approach of equality in that it distinguishes that people in dissimilar positions cannot compete with each other equally. This means that in recognising the injustices of the past, current inequalities cannot be tackled by treating all persons equally at all times. This understanding is the key in respect of proclaiming equality before the law for CWD, as working towards equality is seen as an indispensable *process* to allow transformation. It is not just a small alteration or minor adjustment here and there: section 9(2) and equality of results are essential. In order to achieve this equal outcome, substantive equality must be prepared to tolerate disparity of treatment to achieve this goal.⁶⁸ It is not enough to have the laws in place which promote the rights of all people equally; the effects of those laws must be seen to lessen the inherent disadvantage that particular groups experience.⁶⁹

Section 9(2) further provides that in order to promote the achievement of equality, measures such as legislation (and other methods), which are designed to protect or advance people disadvantaged by discrimination, may be taken.⁷⁰ This means special measures may be taken to ensure the protection or advancement of people who have been disadvantaged by discrimination.

Sections 9(3) and 9(4) inform the second dimension of the test referred to in *Harksen* and determine the grounds for unfair discrimination, and specifically prohibit discrimination on the grounds of age and disability.⁷¹ When differentiation as mentioned above amounts to unfair discrimination, a further two-pronged approach must be applied: firstly, has there been direct or indirect discrimination based on a

⁶⁷ Albertyn and Goldblatt facing the challenge of transformation: The difficulties in the development of an indigenous jurisprudence of equality+(1998) *SAJHR* 248-276.

⁶⁸ Currie and De Waal (2013) 213.

⁶⁹ Laws in itself do not ensure equality, but the recognition and active fulfilment of those laws by others (vertical and horizontal role-players) may contribute to results of substantive equality.

⁷⁰ See *Minister of Finance and Another v Van Heerden* (CCT 63/03) 2004 (6) SA 121 (CC) par 32 in this regard, where the Constitutional Court found that differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set by s 9(2).

⁷¹ Ss 9(3) and 9(4) are the only sections which directly address disability in the South African Constitution.

prohibited ground such as age or disability; and secondly, does this discrimination amount to unfair discrimination. According to Currie and De Waal,⁷² this approach requires an assessment of whether the differentiation was based on a specific ground, such as age or disability, where accordingly, unfairness will be presumed. If the differentiation was based on an unspecified ground, the unfairness will have to be established by the complainant.⁷³ Dlamini⁷⁴ asserts that discrimination based on any of the prohibited grounds takes away from a person's basic humanity and is therefore unfair, invidious and unacceptable.⁷⁵ In respect of discrimination which is not unfair, the court in *City Council of Pretoria v Walker*⁷⁶ held that unfair discrimination is discrimination which has an unfair impact on its victims, and which affects its victims in a material way, and that an objective test has to be applied in deciding whether or not discrimination has been unfair.⁷⁷ *Harksen*⁷⁸ also resolved that discrimination will be unfair if it impairs, or may possibly impair the fundamental human dignity of any individual or adversely affects them in any related serious manner.

If discrimination is based on a ground listed in section 9(3) of the South African Constitution, such as age or disability, a rebuttable presumption of unfairness arises.⁷⁹ The onus then rests on the party defending the provision to prove that the action, measure or omission it was based on was in fact not unfair.⁸⁰ Thus, should the discrimination have been found to be unfair in terms of the two previous steps, a determination must be made whether the unfair discrimination can be justified under the general limitation clause.

⁷² Currie and De Waal (2013) 216.

⁷³ *Ibid.*

⁷⁴ Dlamini (2002) 30.

⁷⁵ *Ibid.*

⁷⁶ *City Council of Pretoria v Walker* par 65.

⁷⁷ *Ibid* par 44.

⁷⁸ *Harksen v Lane* par 49.

⁷⁹ S 9(5) of the South African Constitution. See also in general *Prinsloo v Van der Linde* and *Harksen v Lane*.

⁸⁰ In respect of measures such as legislation, unless the discriminatory act or provision is justifiable in terms of s 36 of the South African Constitution, it will not remain unfair, and therefore unconstitutional.

This approach is central in pursuing the realisation of, in essence, most rights of CWD. There *must* be recognition of their different needs in order to respond to their rights. The uniqueness of their two-tier vulnerability inherently means that they are not on an equal footing with children without disabilities, or even adults with disabilities.⁸¹ Thus, differential treatment is inevitable in order to ensure equal rights assertion. The nature of the differential treatment, however, must legitimately contribute to the achievement of a justifiable purpose. One might further argue that section 9 in supporting the substantive equality approach decidedly moves away from a one-size-fits-all approach,⁸² which divergence is important to the scope of this research. It recognises that in the quest of pursuing equality of outcome, people may be treated differently without necessarily being unfairly discriminated against.⁸³ Section 9 thus assists in outlining the basis for achieving the right of CWD to have access to justice.

CWD may not be unfairly discriminated against on the basis of their age or disability. In realising substantive equality of outcome, the difficulties they have faced (and still face) in asserting their rights in general, must be understood and contextualised. As conferred by the Constitutional Court in *President of the Republic of South Africa v Hugo*:⁸⁴ a classification which is unfair in one context may not necessarily be unfair in a different context.⁸⁵ These children may therefore be treated differently, but should the differential treatment result in discrimination, the State or other relevant role-player must prove why such treatment is not unfair.⁸⁶

⁸¹ See par 1.3 with reference to the child's two-tier vulnerability.

⁸² Freedman "Normal versus substantive equality and the jurisprudence of the Constitutional Court: National Coalition for Gay and Lesbian Equality v Minister of Justice" (2000) *Journal for Contemporary Roman-Dutch Law* 314.

⁸³ Bekink and Bekink "Children with disabilities and the right to education: a call for action" (2005) *Stell LR* 135.

⁸⁴ *President of the Republic of South Africa v Hugo* par 74.

⁸⁵ *Ibid* par 41.

⁸⁶ S 8(1) and (2) of the South African Constitution. S 9(3) and 9(4), specifically include references to the state as well as persons so as to expressly indicate that this right operates horizontally as well as vertically. See also *Harksen v Lane* par 50 where it is determined that the impact of the discrimination is measured by taking into account (i) the complainant's position in society and vulnerability, (ii) the nature and purpose of the exercise of power by the respondent, and (iii) with due regard to (i) and (ii) whether the rights and interests of the complainant have been affected *and* whether there has been an impairment of human

Within the realms of the interconnectedness of the rights contained in Chapter 2 of the South African Constitution, section 9 may thus provides the benchmark of rights assertion: equal enjoyment of rights for CWD *despite* their age and disability. This may indicate that differential approaches must be used in order to realise this enjoyment of rights, in reality these elements of vulnerability move away from the risk of misrecognition, a notion that Taylor⁸⁷ describes can only be overcome through the recognition of each other as equals, albeit different from one another.⁸⁸ Fraser⁸⁹ explains misrecognition as social subordination in so far as being prevented from participating in social life as a peer. She also asserts that in addressing this injustice people who have been *misrecognised* must be recognised as full members of society, capable of participating equally with others.⁹⁰

There exists a duty to accommodate difference which underscores a paradigm shift from considering age and disability as subordinate statuses pleading for welfare and pity, to elements merely informing diverse approaches and responses. In this context society's *accommodation* of difference refers to an approach away from the persistent negative stereotypes and prejudices against people and CWD.

2.4. Section 10: The right to human dignity and children with disabilities

The value of human dignity is safeguarded and promoted by the Bill of Rights.⁹¹ Ackermann⁹² argues that the close linkage between equality and dignity makes it impossible to discuss equality without some reference to dignity, and *vice versa*.

dignity or a similar serious consequence+See also Rautenbach *Overview of Constitutional Court judgments on the Bill of Rights* . 2011+(2012) *TSAR*2.

⁸⁷ Taylor *The politics of recognition* (1994) 25-73 available at http://elplandehiram.org/documentos/JoustingNYC/Politics_of_Recognition.pdf (accessed on 2 Jun 2014).

⁸⁸ Fraser *Rethinking recognition*+(2000) *New Left Review* 110.

⁸⁹ Fraser *Rethinking recognition*+(2000) *New Left Review* 113.

⁹⁰ *Ibid.*

⁹¹ S 10 of the South African Constitution, as well as the preamble.

⁹² Ackermann *Human dignity: lodestar for equality in South Africa* (2013) 19.

The right to life and dignity was described by the Constitutional Court as the most important human rights as human beings are entitled to be treated as worthy of respect and concern.⁹³ South Africa's previous dispensations institutionalised discrimination contributed towards depleting the human dignity of black persons for an extended period of time. Although the end of apartheid came about more than two decades ago, Jackson⁹⁴ draws a salient parallel between the policies of apartheid regarding exclusion, and the exclusion of people with disabilities in present-day society. Psychologically this attitude in respect of determining that some persons were, and may still be, less than others, has left an innate responsibility on the current dispensation to ensure that the self-worth of people is restored and that the exclusion of certain members of society must be addressed and repaired.

Section 10 of the South African Constitution states that everyone has inherent dignity and the right to have their dignity respected and protected. Dignity is reflected as the moral premise and essential ingredient of constitutionalism.⁹⁵ Woolman⁹⁶ asserts that human dignity is the respect for the unique set of ends that an individual pursues.⁹⁷ Also in *Makwanyane*⁹⁸ the Constitutional Court stated that the right to human dignity, together with the right to life, was the source of all other rights. The Constitutional Court has also held that the right to dignity is a value that informs the understanding of many, possibly all, other rights.⁹⁹ In assessing the rights of CWD to have access to justice, the element of dignity must thus be seen as ubiquitous when demarcating this right, supporting the nature of inner unity of the provisions in the Bill of Rights.¹⁰⁰

⁹³ *S v Makwanyane* par 328.

⁹⁴ Jackson 'Parallels between apartheid and intellectual disability policy and practice: Implications for citizens and services' (1994) available at <http://www.include.com.au/wp-content/uploads/2011/11/Apartheid.pdf> 1-18 (accessed on 2 Jun 2014).

⁹⁵ Devenish (ed) *A commentary on the South African Bill of Rights* (1999) 81.

⁹⁶ Woolman and Bishop 'Dignity' in Woolman *et al* (ed) (2006) *Constitutional law of South Africa* 36-11.

⁹⁷ *Ibid.*

⁹⁸ *S v Makwanyane* par 84.

⁹⁹ *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) par 35. See also *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) par 68 where Mokgoro J describes human dignity as 'an idea based on deep respect for the humanity of another'.

¹⁰⁰ *Matatiele Municipality v President of the RSA* 2007 (6) SA 477 (CC) par 36. Ncgobo J notes in this matter that the South African Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.

Dignity and a person's identity are further inseparably linked as a sense of self-worth, which is mostly defined by one's identity.¹⁰¹ Human dignity and the determination of an individual's self-worth are in turn central to equality.¹⁰² In *MEC for Education Kwazulu-Natal and Others v Pillay*¹⁰³ Judge Langa stated the following:

Our society which values dignity, equality, and freedom must therefore require people *to act positively to accommodate diversity*. Those steps might be as simple as *granting and regulating an exemption from a general rule or they may require that the rules or practices be changed or even that buildings be altered or monetary loss incurred*.¹⁰⁴

In this matter Judge Langa links a respect for dignity, to the recognition of differences and diversity. This approach is essential when addressing the rights of people, who may have different characteristics and needs from the majority of the population. In order to accommodate people with different needs and characteristics, he indicates that different approaches may be required, all inherently linked to respecting such a person's dignity. In the pursuit of CWD to access justice, this suggestion continues to support the approach that a *one-size-fits-all* advance will fail to cater to the needs of this specifically vulnerable group. Rather, it acknowledges the value and worth of all individuals as respected members of our society.¹⁰⁵ Society must thus adapt its construction to ensure that every child, irrespective of age or disability, can enjoy the human rights that are inherent to their human dignity without discrimination of any kind.

A clear distinction between the dignity and worth that is attributed to all humans and the ways in which we respond to people's different needs require consideration. As with the right to equality discussed above, in order to respect an individual's dignity, one must have some regard for their specific circumstances in order to respond

¹⁰¹ *MEC for Education Kwazulu-Natal and Others v Pillay (Governing Body Foundation; Natal Tamil Vedic Society Trust; Freedom of Expression Institute as Amici Curiae)* 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) par 53.

¹⁰² See, for example, *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) par 59 and *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* par 26.

¹⁰³ *MEC for Education KZN v Pillay* par 53.

¹⁰⁴ *MEC for Education KZN v Pillay* par 75 (own emphasis).

¹⁰⁵ *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and Others* par 28.

appropriately. Woolman¹⁰⁶ asserts that more is required than mere reaction to reverse past indignities and that active transformation is essential to ultimately recognise each and every person's inherent worth. This correlates with the essence of substantial equality, in realising the rights of CWD. More is required than mere tokenism and textual redress, as the pursuit of achieving full and equal rights realisation must be seen to be real and transformative, a result which may only be achieved through the active recognition of the dignity of CWD. They deserve no less than what is offered to their non-disabled peers.

2.5. Section 28

Children in general in South Africa are entitled to all the rights contained in the Bill of Rights, with the exception of the right to vote and the right to stand for public office.¹⁰⁷ Section 28 of the South African Constitution embodies a list of rights specifically aimed at children.¹⁰⁸ These rights are rights children are afforded *in addition to* the rights they have in accordance with the remainder of the Bill of Rights

¹⁰⁶ Woolman in Woolman *et al* (eds) *Constitutional conversations* (2008) 212.

¹⁰⁷ S 19 of the South African Constitution explicitly states that these rights are afforded to every adult citizen, consequently excluding non-citizens and children; see also *Bhe v Magistrate, Khayelitsha* (CCT 49/03) 2005 (1) SA 580 (CC) par 52.

¹⁰⁸ S 28 states the following: "Every child has the right to (a) a name and a nationality from birth; (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; (c) to basic nutrition, shelter, basic health care services and social services; (d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labour practices; (f) not to be required or permitted to perform work or provide services that (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development; (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be kept separately from detained persons over the age of 18 years; and treated in a manner, and kept in conditions, that take account of the child's age; (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and (i) not to be used directly in armed conflict, and to be protected in times of armed conflict. (2) A child's best interests are of paramount importance in every matter concerning the child. (3) In this section "child" means a person under the age of 18 years.+ For purposes of this ch the focus will be on the specific rights where children with disabilities may be more likely to require judicial and/or quasi-judicial intervention. This goes hand in hand with their increased abuse and neglect profile, which will be more fully discussed in ch 5 hereunder. This, however, does not exclude the likelihood that children with disabilities, for instance, have increased difficulty to access services such as birth registration due to certain stigma surrounding their disability.

(such as the right to equality and dignity discussed above), and is a declaration of realisable and enforceable rights.¹⁰⁹ The South African Constitution defines a child as a person below the age of 18 years.¹¹⁰ This means that only persons below 18 years of age are entitled to the protections given by section 28 of the South African Constitution. Section 28 imposes a duty on organs of State to at all times be child-sensitive,¹¹¹ and addresses matters relating to family care,¹¹² protection from abuse,¹¹³ as well as the provision of legal assistance in certain instances.¹¹⁴ By delineating these specific areas of section 28, the outline of the right of CWD to have access to justice can be further shaped. The fact that CWD have specific protections afforded to them under section 28 of the Bill of Rights forms the basis from which they may need judicial recourse and access to justice, so as to have these rights equally enforced.

Section 28(1)(b) of the South African Constitution states that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment. The family component¹¹⁵ is seen as integral to the child's enjoyment of childhood and care within this family must be promoted as far as possible.¹¹⁶ Robinson¹¹⁷ contends that the word 'care' is used to recognise the

¹⁰⁹ Skelton 'Severing the umbilical cord: a subtle jurisprudential shift regarding children and their primary caregivers' (2008) *Constitutional Court Review* 351.

¹¹⁰ S 28(3) of the South African Constitution.

¹¹¹ See *S v M* 2008 (3) SA 232 (CC) par 15 where the Constitutional Court stated that: 'The comprehensive and emphatic language of s 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights.'

¹¹² S 28(1)(b) of the South African Constitution.

¹¹³ S 28(1)(d) of the South African Constitution.

¹¹⁴ S 28(1)(h) of the South African Constitution.

¹¹⁵ *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) par 18 states that s 28(1)(b) gives recognition to the fact that many children are not brought up by their biological parents, that family care 'includes care by the extended family of a child, which is an important feature of South African family life.'

¹¹⁶ *S v M* par 19. Sachs J also observed in par 20 that the state cannot repair a disrupted family life, it can, however, create appropriate conditions for the repair of such family to take place, and seek to avoid conduct which may have the effect of placing the child in peril.

¹¹⁷ Robinson 'Children's rights in the South African Constitution' 2003 *PELJ* 26.

vulnerability of children and that this recognition is owed to the child in order to grow and develop so as to *overcome* his or her vulnerability.

Section 28(1)(b) serves a dual purpose: firstly, to prevent arbitrary external involvements in the family sphere and secondly, to sanction the removal of the child should his or her situation within the family be detrimental to his or her well-being.¹¹⁸

This right may thus be seen as assuring that children are taken care of by their parents, or other family members. However, in the instance where this care is lacking, the State may intervene.¹¹⁹ The *care* referred to in this section must be viewed as a duty, where the responsibility consists of material elements catered for in sections 28(1)(c)¹²⁰ and (d).¹²¹

From *Grootboom*¹²² and *Minister of Health and Others v Treatment Action Campaign and Others*,¹²³ it is understood that the responsibility of caring for a child first rests with his or her parents. The State incurs the responsibility of facilitating this care.¹²⁴ If the child does not receive proper care from the parents, or for some or other reason must be removed from an abusive family environment, the State becomes the main stakeholder in the care and protection of said child.¹²⁵ The child is then placed in

¹¹⁸ Boezaart and Skelton *From pillar to post: legal solutions for children with debilitating conduct disorder* in Grobbelaar-du Plessis and Van Reenen (eds) *Aspects of disability law in Africa* (2011) 121. See also Friedman *et al* *Children's rights* in Woolman *et al* *Constitutional law of South Africa* (2010) 47-18.

¹¹⁹ Currie and De Waal (2013) 605.

¹²⁰ For purposes of this ch, the socio-economic rights contained in s 28(1)(c) will not be addressed specifically as they are deemed to form part of the duty of a parent/caregiver to *care* for his or her child. Par 4.3 *infra*, however, addresses the further linkages between poverty and disability and will therefore highlight certain socio-economic deficiencies in respect of care provided to children with disabilities.

¹²¹ *Allsop v McCann* 2001 (2) SA 706 (C); *Swarts v Swarts* [2002] 3 All SA 35 (T) in respect of which elements may form part of *care*. See also Robinson (2003) 26.

¹²² *Government of the RSA v Grootboom* par 77.

¹²³ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC) (hereafter referred to as *Minister of Health v TAC*). The Court indicated that the state is obliged to ensure that children are accorded the protection contemplated by s 28 that arises when the implementation of the right to parental or family care is lacking.

¹²⁴ S 28 of the South African Constitution; *Government of the RSA v Grootboom* par 78.

¹²⁵ In respect of the removal of children, the Court pointed out in *C v Department of Social Development, Gauteng* 2012 (2) SA 208 (CC) that removal was unconstitutional without a procedure for automatic review of the decision to remove the child. See also Gallinetti *The*

alternative care,¹²⁶ with such care having to be of a comparable standard to care which the child would have had in the family setting.¹²⁷

Certain groups of children, such as CWD are more exposed to risks than their peers. CWD may be abandoned and neglected at a higher rate than their non-disabled peers, which may result in State intervention at an early stage or more regular intervals.¹²⁸ It has been well documented that caring for a child with a disability, especially in severe cases of disability, may be challenging and may lead to hardships not only for the child, but for the family as well.¹²⁹ Depending on the specific disability, as well as the degree of the disability, CWD necessitate exceptional levels of care at increased related costs. It has also been recognized that CWD are often born into low-income families.¹³⁰ Conversely, families who care for a child with a disability often move towards poverty as a result of the financial challenges faced through caring for a child with a disability. State intervention may in such cases be required as a result of families simply being incapable of properly caring for a child with a disability.¹³¹ As was reiterated in *Grootboom*¹³² and *Minister*

wisdom of Solomon: removal of children as part of the child protection system in the Children's Act 38 of 2005+(2009) *Speculum Juris* 54.

¹²⁶ The placement of children in alternative care is regulated by the Children's Act 38 of 2005. Par 4.3 *infra* will further consider these procedures, as there is a high prevalence of children with disabilities being abused and neglected and therefore being found to be in need of care and protection and requiring a Children's Court enquiry, and ultimately a possible placement in alternative care.

¹²⁷ Currie and De Waal (2013) 605.

¹²⁸ Lansdown *Disabled children in South Africa progress in implementing the Convention on the rights of the child*+(2002) *International Disability and Human Rights Network* 8 stating that the birth of a disabled child doubles the likelihood of abandonment.

¹²⁹ Kuhlthauet *et al* *Financial burden for families of children with special health care needs*+(2005) *Maternal Child Health J* 207-18; also see in general Fawcett *et al* (eds) *Supports and services for adults and children aged 5-14 with disabilities in Canada: An analysis of data needs and gaps* (2004).

¹³⁰ Anderson *et al* *The personal costs of caring for a child with a disability: a review of the literature*+(2007) *Public Health Rep* 3-16.

¹³¹ Parents of children with disabilities are often unable to successfully maintain employment as a result of the differentiating demands of caring for a child with a disability. This places a financial burden on families as employers are often intolerant and/or unaware of exceptional caregiving stresses experienced by their employee. In this regard See Roundtree *et al* *Exploring the complexities of exceptional caregiving*+(2007) *Boston College: Center for Work and Family* 3; available at http://www.bc.edu/content/dam/files/centers/cwf/research/publications/pdf/exceptional_care_giving_ebs.pdf (accessed on 2 Jun 2014).

¹³² *Government of the RSA v Grootboom* par 77.

of *Health v TAC*,¹³³ once the care that is to be provided to children by their parents is lacking, the State incurs a responsibility.¹³⁴ The highly prevalent indigence of the caregivers of CWD may therefore trigger the mandatory duty of the State to ensure that these children's rights are protected.¹³⁵ In respect of section 28(1)(b), the State therefore needs to be child and disability sensitive relating to its duties.¹³⁶

Section 28(1)(d) of the South African Constitution further states that each and every child has the right to be protected against maltreatment, neglect, abuse or degradation. *Davis et al*¹³⁷ contend that this specific right places emphasis on the duty of the State to protect children from circumstances, which are mentally or physically harmful to the child. The protection element is the basis of section 28,¹³⁸ and the State is a key role-player with regard to the realisation thereof.

The State can however not be the physical watchdog for each child in the country, and thus the first level of responsibility relating to the protection of the child, as with the care of the child, remains with the parents.¹³⁹ Pieterse¹⁴⁰ regards this as the

¹³³ *Minister of Health v TAC* par 79.

¹³⁴ *Minister of Health v TAC* par 79 states specifically in respect of the provision of Nevirapine: 'Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the state to make health care services available to them'. See also Stewart 'The Grootboom judgment, interpretative manoeuvring and depoliticising children's rights' (2011) *SAPL* 105; Liebenberg 'Taking stock: the jurisprudence of children's socio-economic rights and its implications for government policy' (2004) *ESR Review* 4.

¹³⁵ See ch 5 for a full discussion on the prevalence of neglect amongst children with disabilities. This chapter will illustrate that the state's intervention in respect of children with disabilities may be more frequently required than with their non-disabled peers.

¹³⁶ In both *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) and *Centre for Child Law v MEC for Education, Gauteng* 2008 (1) SA 223 (T) the court has held that children not living with their parents have an immediate claim from the state for the fulfilment of their socio-economic rights.

¹³⁷ *Davis et al* (eds) *Fundamental rights in the Constitution: commentary and cases* (1997) 270.
¹³⁸ The court in *M v S (Centre for Child Law as Amicus Curiae)*, 2008 (5) BCLR 475 (CC) pointed out that the South African Constitution in itself is unable to isolate children from the shocks and perils of harsh family and neighbourhood environments. The court however indicated that the purpose of the law was rather to create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives.

¹³⁹ In *Government of the RSA v Grootboom*, the Constitutional Court reiterated that the primary duty of caring for children lies with the parents or families of the children.

¹⁴⁰ Pieterse 'Coming to terms with the judicial enforcement of socio-economic rights' (2004) *SAJHR* 383-417, 406-407.

State only being involved in the facilitation of structures within which such individual self-realisation can take place. In other words, parents and families must be given the tools to realise their responsibilities towards children. The State must nonetheless provide the legal and administrative infrastructure necessary to ensure that children are afforded the protection contemplated by section 28.¹⁴¹ Sloth-Nielsen¹⁴² asserts that in the light of *Grootboom*, the State not only incurs a responsibility to protect children through means such as legislation, but it also incurs a responsibility in respect of the *prevention* of the abuse and neglect of children.

Aside from the protections afforded to all children in section 28(1)(b) and (d), section 28(2) goes further in stating that a child's best interests are of paramount importance in every matter concerning the child. According to Mills,¹⁴³ The best interests of the child principle is not a new concept, and can be traced back to South African law reports as early as 1893. After the coming into operation of the South African Constitution, Sloth-Nielsen noted that the best interest constitutional principle will become a benchmark for reviewing all proceedings in which decisions are taken regarding children.¹⁴⁴ Section 28(2) has been described as an expansive guarantee that a child's best interests will be paramount in every matter concerning that child,¹⁴⁵ and has been declared a stand-alone and enforceable right on its own.¹⁴⁶ Friedman *et al*¹⁴⁷ assert that section 28(2) is designed to address the

¹⁴¹ The court in *Government of the RSA v Grootboom* indicated that the state's obligation would be to pass laws and create enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children. See par 78.

¹⁴² Sloth-Nielsen 'The child's right to social services, the right to social security, and primary prevention of child abuse: some conclusions in the aftermath of *Grootboom*' (2001) *SAJHR* 227.

¹⁴³ Mills 'Failing children: the courts disregard of the best interests of the child in *Le Roux v Dey*' (2014) *SALJ* 847.

¹⁴⁴ Sloth-Nielsen in Keightley (ed) *Children's rights* (1996) 25.

¹⁴⁵ *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) par 29.

¹⁴⁶ *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC) par 17 stating that s 28(2) creates a right that is independent of those specified in s 28(1) of the Bill of Rights. See also Currie and De Waal (2013) 619 stating that s 28(2) is both a principle and a right.

¹⁴⁷ Friedman *et al* 'Children's rights' in Woolman and Botha (eds) *Constitutional law of South Africa* (2006) 47-40 to 47-41. They are also of the view that s 28(2) is a rather unusual section as it is the only section in the South African Constitution that applies to a group of people in relation to all aspects of their lives. See para 47-55.

vulnerability of children, and ensuring that their rights do not habitually have to give way to the competing rights of others.¹⁴⁸

The courts have also indicated that section 28(2) does not create an exhaustive list of what constitutes as being in the best interests of the child.¹⁴⁹ The concept therefore remains flexible.¹⁵⁰ In *AD v DW*¹⁵¹ the court further pointed out that the best interests principle must not be examined in the abstract, and must be specific to each specific circumstance. This may consequently indicate that what may serve the best interests of CWD, may differ from what must be taken into account considering their non-disabled peers. A one-size-fits-all approach in respect of determining the best interests of children in general will once again not suffice. Section 28(2) must be interpreted to address the needs within the specific context of CWD, when matters which concern them are addressed.¹⁵² In order for the State to fulfil its constitutional obligations towards CWD in terms of sections 7 and 28 the State must also become disability-sensitive with the purpose of fully considering the rights of CWD and accordingly determine what may constitute as being in their best interest.

2.6. Section 28(1)(h) and the relationship between section 34 and 35

The right to equal justice before the law is an essential principle in the South African democratic dispensation. Hurter¹⁵³ contends that this right inevitably translates into

¹⁴⁸ Visser asserts that this principle provides a court with a wide discretion on what the best interests of a child are and how effect should be given to these interests. He also indicates that although this may be good for children, it may be challenging for those who have to make decisions involving children or lawyers required to give realistic advice. See Visser *Some ideas on the best interests of a child* principle in the context of public schooling+ (2007) *THRHR* 462.

¹⁴⁹ *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC) para 428-429.

¹⁵⁰ Erasmus contends that contextual nature and inherent flexibility of the s 28 is, however, also the source of its strength+. This, he asserts is as a result of the fact that the list of factors competing with each other to make out the core of the best interests+principle is not exhaustive and will depend on each particular factual situation. See Erasmus *There is something you are missing; What about the children? Separating the rights of children from those of their caregivers*+(2010) *SAPL* 128.

¹⁵¹ *AD v DW* 2008 (3) SA 183 (CC) par 55.

¹⁵² In *S v M* par 23 Sachs CJ pointed out that the contextual nature and inherent flexibility of s 28(2) is also the source of its strength.

¹⁵³ Hurter *Access to justice: to dream the impossible dream?*+(2011) *CILSA* 413.

equal access to justice.¹⁵⁴ Against the backdrop of section 8(1), which states that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state, this provision refers to law as it relates to positive law, which inherently includes statutory law, common law and customary law.¹⁵⁵

Section 28(1)(h), section 34 as well as section 35 reflect some form of constitutional assurance in respect of access to justice. Section 28(1)(h) determines that every child has the right to a legal practitioner assigned to the child by the State, and at State expense, in civil proceedings affecting the child, if substantial injustice would otherwise result. Section 34 further determines that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. Lastly, section 35 addresses the rights of arrested, detained and accused persons, and refers to a fair trial.¹⁵⁶ The South African Constitution thus

¹⁵⁴ S 9(4) of the South African Constitution obliges Parliament to enact anti-discrimination legislation.

¹⁵⁵ Robinson (2003) *PELJ* 24.

¹⁵⁶ S 35 of the South African Constitution states the following: 1. Everyone who is arrested for allegedly committing an offence has the right to remain silent; to be informed promptly of the right to remain silent; and of the consequences of not remaining silent; not to be compelled to make any confession or admission that could be used in evidence against that person; to be brought before a court as soon as reasonably possible, but not later than 48 hours after the arrest; or the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day; at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and to be released from detention if the interests of justice permit, subject to reasonable conditions; 2. Everyone who is detained, including every sentenced prisoner, has the right to be informed promptly of the reason for being detained; to choose, and to consult with, a legal practitioner, and to be informed of this right promptly; to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released; to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and to communicate with, and be visited by, that person's spouse or partner; next of kin; chosen religious counsellor; and chosen medical practitioner; 3. Every accused person has a right to a fair trial, which includes the right to be informed of the charge with sufficient detail to answer it; to have adequate time and facilities to prepare a defence; to a public trial before an ordinary court; to have their trial begin and conclude without unreasonable delay; to be present when being tried; to choose, and be represented by, a legal practitioner, and to be informed of this right promptly; to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this

refers to access to legal representation, to courts, other tribunals and fora, as well as a right to a fair civil and criminal trial as some elements forming part of the concept of access to justice.

Access to legal representation plays a central role in realising this right.¹⁵⁷ With reference to children specifically, section 28(1)(h) states that a legal practitioner must be assigned to a child in civil proceedings affecting the child, by the State at its expense.¹⁵⁸ This may only, as stated in section 28(1)(h), be required if substantial injustice would otherwise result. In *Fitschen v Fitschen*¹⁵⁹ the court refused an application in terms of section 28(1)(h) for legal representation of two children, as it was satisfied that no substantial injustice would occur in the denial thereof. In *Du Toit and Another v Minister of Welfare and Population Development and Others*,¹⁶⁰ the court indicated that it was important in matters affecting children, that their interests were fully aired before the court, so as to prevent substantial injustice to them.¹⁶¹ In

right promptly; to be presumed innocent, to remain silent, and not to testify during the proceedings; to adduce and challenge evidence; not to be compelled to give self-incriminating evidence; to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language; not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted; not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted; to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and of appeal to, or review by, a higher court; 4. Whenever this section requires information to be given to a person, that information must be given in a language that the person understands; 5. Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

¹⁵⁷ In the USA, for instance, it has been recognised that, as a minimum in criminal matters involving the loss of freedom of a person, it cannot be considered that such person has adequate access to justice except if the person is provided with legal counsel. See Grey jnr. 'Access to the courts: equal justice for all' (2004) *IIP Electronic Journals* 8.

¹⁵⁸ Zaal 'When should children be legally represented in care proceedings? An application of s 28(1)(h) of the 1996 South African Constitution' (1997) *SALJ* 334; Sloth-Nielsen 'Realising children's rights to legal representation and to be heard in judicial proceedings: an update' (2008) *SAJHR* 495; Du Toit 'Legal representation of children' in Boezaart (ed) *Child law in South Africa* (2009) 96-111.

¹⁵⁹ 1997 JOL 1612 (C). The court was satisfied that the views of the children were addressed in the reports by the psychologist and Family Advocate.

¹⁶⁰ *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC).

¹⁶¹ *Du Toit v Minister of Welfare and Population Development* par 3. See also Sloth-Nielsen 'Children' in Cheadle *et al* (eds) *South African constitutional law* (2002) 526.

*Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk*¹⁶² the court indicated that the State Attorney should appoint an advocate as the *legal representative* for the children in question in terms of section 28(1)(h). Skelton and Proudlock¹⁶³ however, argue that this is not a viable model for future application, due to the inaccessibility of the State Attorney by children in particular.¹⁶⁴ In *Legal Aid Board and Another v R*¹⁶⁵ the court held that the applicant had the power to render legal assistance to a child, at the State's expense, in terms of section 28(1)(h), if the failure to do so would otherwise result in substantial injustice.

According to Brickhill,¹⁶⁶ section 28(1)(h) refers to any matter affecting the child, and not just matters where the child is party to a civil dispute.¹⁶⁷ Further to this, Brickhill also points out that section 28(1)(h) is not to be limited by the State's resource constraints.¹⁶⁸ Section 28(1)(h) also only makes provision for a qualified, legal representative. Carnelly¹⁶⁹ asserts that the appointee should therefore not merely be a practicing attorney or advocate, but he or she should possess additional skills, including the ability to communicate efficiently with the child and to build rapport and a relationship of trust with the child. This requirement is even more important with regard to a child client with a disability. As CWD may inherently need differential

¹⁶² 2005 JOL 14218 (T).

¹⁶³ Skelton and Proudlock %General principles+in Davel and Skelton (eds) *Commentary on the Children's Act* (2013) 2-23.

¹⁶⁴ Sloth-Nielsen %Realising children's rights to legal representation and to be heard in judicial proceedings: an update+(2008) *SAJHR* 504.

¹⁶⁵ *Legal Aid Board v R and Another* 2009 (2) SA 262 (D). See also Friedman *et al* "Children's rights" in Woolman *et al* (eds) *Constitutional law of South Africa* (2010) 39.

¹⁶⁶ Brickhill %The right to a fair civil trial: The duties of lawyers and law students to act pro bono+(2005) *SAJHR* 300.

¹⁶⁷ Sloth-Nielsen and Mezmur %Exploring the domestication of the UNCRC in South African jurisprudence (2002-2006)+ (2008) *International Journal of Children's Rights* 1; Kassan %Children's right to legal representation in divorce proceedings: Proposed guidelines concerning when a s 28(1)(h) legal practitioner might be deemed necessary or appropriate+ in Sloth-Nielsen and Du Toit (eds) *Trials and tribulations, trends and triumphs: developments in international, African and South African child and family law* (2008) 227. *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ Carnelly %The right to legal representation at state expense for children in care and contact disputes . a discussion of the South African legal position with lessons from Australia+(2010) *Obiter* 647. See also Barratt %The child's rights to be heard in custody and access determinations+(2002) *THRHR* 556, as well as Robinson %The right of the child to be heard at the divorce of their parents: reflections on the legal position in South Africa+(2007) *THRHR* 265.

approaches in order to be able to communicate or share their views, the legal representative who is appointed in this regard must have additional skills, to allow for effective communication and building rapport.

Moyo¹⁷⁰ also points out that the right to legal representation in section 28(1)(h) is not only available to children capable of forming and conveying views. This means that a legal representative may be appointed to represent the interests of children facing substantial injustice regardless of whether they have the ability to express their own views.¹⁷¹ In *Soller v G*¹⁷² the court granted a child the right to obtain legal representation in terms of section 28(1)(h) of the South African Constitution. The court explained the important role of the child's legal representative as being placed squarely in the corner of the child and (having) the task of presenting and arguing the child's wishes in Court. The court also saw the significance of the child's legal representative as giving the child a voice without merely being a mouthpiece.¹⁷³ This is a gain for CWD who have developmental disorders and may have trouble to comprehend, or communicate effectively, as the legal representative appointed under section 28(1)(h) will provide them with a voice in matters affecting them.

Section 34 states that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. This section guards the right of access for *everyone*, and is by nature a right that requires active protection.¹⁷⁴ Section 34 does not contain any internal limitation of the right and has been described as foundational to the stability of an orderly society.¹⁷⁵ Section 34

¹⁷⁰ Moyo 'Child participation under South African law: beyond the Convention on the rights of the child?' (2015) *SAJHR* 178.

¹⁷¹ Davel 'The child's right to legal representation in divorce proceedings' in Nagel (ed) *Gedenkbundel vir JMT Labuschagne* (2006) 18, 21.

¹⁷² *Soller v G* 2003 (5) SA 430 (W).

¹⁷³ *Soller v G* para 23-25.

¹⁷⁴ *Beinash and Another v Ernst and Young and Others* 1999 (2) SA 1 16 (CC) par 17.

¹⁷⁵ *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) par 22; *Giddey N O v J C Barnard and Partners* 2007 (2) BCLR 125 (CC) par 15; *Mohlomi v Minister of Defence* 1997 (1) SA 124 CC. See also *Road Accident Fund v Mdeyide* 2007 (7) BCLR 805 (CC); 2008 (1) SA 535 (CC) (4 Apr 2007) at par 138 where the court indicated that the right of access to court under s 34 South African Constitution is of fundamental importance to ensure that concrete expression is given to the foundational value of the rule of law.

thus necessitates the provision of courts or where appropriate, other tribunals, to determine disputes that arise between citizens, and which disputes can be resolved by law.¹⁷⁶ Section 34, however, is silent on the right to *free* legal representation, in contrast to section 28(1)(h), which refers to the State having to foot the bill, should representation be required by the child.¹⁷⁷ According to McQuoid-Mason,¹⁷⁸ section 34 does however oblige the State to provide legal aid in a civil suit to those who are unable to afford it. Brickhill¹⁷⁹ contends that this section confers rights only on civil litigants, who have limited capacity to represent themselves, to free representation in at least some civil matters.¹⁸⁰ Gibson¹⁸¹ contends that legal representation should be free of charge for persons with disabilities in general.

Section 35 further addresses issues relating to criminal matters. This section states that every person who is detained, including every sentenced prisoner and accused person, has the right to have a legal practitioner appointed at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly. Section 35 read with section 28(1)(h) therefore entails that a child with a disability should in most cases be represented by a legal practitioner, paid by the State, in *any* proceeding. The caveat placed on this right in both these instances is the test of

¹⁷⁶ *President of the Republic of South Africa and Another v Modderklip Boerdery(Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) par 39.

¹⁷⁷ Bekink and Brand in Davel (ed) *Introduction to child law in South Africa* (2000) 193 arguing that s 28(1)(h) of the South African Constitution is an extension of s 35(3). See also Zaal and Skelton *Providing effective representation for children in a new constitutional era: lawyers in the criminal and children's courts* (1998) *SAJHR* 541; see also in general Zaal *Do children need lawyers in the children's courts* (1996) *Publication of the Children's Rights Project, Community Law Centre, University of the Western Cape*; Zaal *When should children be legally represented in care proceedings? An application of section 28(1)(h) of the 1996 Constitution* (1997) *SALJ* 334; Sloth-Nielsen and Van Heerden *The Child Care Amendment Act 1996: Does it improve children's rights in South Africa?* (1996) *SAJHR* 649.

¹⁷⁸ McQuoid-Mason *The delivery of civil legal aid services in South Africa* (2000) *Fordham International Law Journal* 112.

¹⁷⁹ Brickhill *The right to a fair civil trial: The duties of lawyers and law students to act pro bono* (2005) *SAJHR* 321.

¹⁸⁰ See also Budlender *Access to courts* (2004) *SALJ* 342 in asserting that the fact that an element expressly required for a fair trial in criminal matters has not been expressly required for a fair civil trial, does not mean that it is by implication excluded in civil trials.

¹⁸¹ Gibson *Article 13 of the Convention on the rights of persons with disabilities - a right to legal aid?* (2010) *Austl J of Hum Rts* 123-131. She indicates that the UNCRPD requires states to provide legal aid to people with disabilities who cannot access private legal assistance.

whether, by not appointing a legal representative, substantial injustice would otherwise result. Skelton¹⁸² argues that in most cases where a child under 18 years of age is on trial, substantial injustice will occur if he or she does not have a lawyer. A child and especially a child with a disability will almost never be able to appoint a practitioner as they will not have the means, ability, or the contractual legal capacity to do so. In order to provide them with access to justice, a legal representative will inevitably have to be appointed by the State so as to protect their rights and interests, as well as to give them a voice.¹⁸³

2.7. Section 39

Section 39 of the South African Constitution deals expressly with the interpretation of the Bill of Rights.¹⁸⁴ Section 39(1) creates the context within which a provision within the Bill of Rights must be given meaning. It states that when interpreting the Bill of Rights, the courts and other legal bodies *must* consider international law and *may* consider foreign law.¹⁸⁵ Subsequent to being accepted back into the global community after the abolition of apartheid, South Africa ratified a number of international agreements, conventions and treaties. International instruments play a significant role in the interpretation of the South African Constitution, especially in areas where domestic law is underdeveloped. The inclusion of a mandatory duty on

¹⁸² Skelton (ed) *Children and the law* (1998) 45.

¹⁸³ A further discussion on the right to legal representation will follow. A discussion on the rules and regulations of the South African Legal Aid Board will also follow in the following chapters. The 2014 Legal Aid Guide 65 states that where the child is not assisted by his parents, the child's means will be considered. Where the child is assisted by his parents, their means will be considered. If the child is assisted by his parents, who exceed the means test and can afford to provide legal representation for the child, yet fail, refuse or neglect to do so, then legal aid will be provided to the child if substantial injustice would otherwise result. In certain of these instances LASA may institute proceedings against the parents to recover these costs. See also the discussion *infra* regarding the Child Justice Act in para 4.2.2. and 4.3.

¹⁸⁴ S 39 of the South African Constitution determines the following: 1. When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. 2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights; 3. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

¹⁸⁵ S 39 of the South African Constitution.

courts to consider international law is seen as important within the realm of international legitimacy, as under the previous dispensation, South Africa and its apartheid government blatantly ignored international standards on fundamental rights.¹⁸⁶ Dugard¹⁸⁷ refers to this section as a *new* within the South African Constitution and an example of how to promote a human rights culture. O'Shea¹⁸⁸ argues that the mandatory requirement of courts to consider international law means that courts do not have a choice in the matter. They have to consider relevant international norms and consider applying them to the provisions being interpreted. He also asserts that international law is likely to always form part of the inquiry into the interpretation of the Bill of Rights.¹⁸⁹

Cockrell¹⁹⁰ contends that section 39(1)(a) will find application in matters where a *gap* exists in the law in so far as the existing rules and principles do not offer guidance for the specific situation. In *S v Makwanyane*¹⁹¹ former Chief Justice Chaskalson pointed out that public international law would include binding as well as non-binding law¹⁹² and that both may be used as tools of interpretation. He also concluded that international agreements and customary international law provide a framework within which the Bill of Rights can be evaluated and understood. In *AZAPO v President of the RSA*¹⁹³ the court distinguished between enforcing international law and interpreting the South African Constitution in the light of international law. It stated that lawmakers of the South African Constitution should not lightly be presumed to have authorised any law which might constitute a breach

¹⁸⁶ Dugard *International law and the final constitution* 1995 *SAJHR* para 241-251; Carpenter *The South African Constitutional Court: taking stock of the early decisions* (1996) *Human Rights and Constitutional Law Journal of South Africa* 24-29.

¹⁸⁷ Dugard *International law and the final constitution* 1995 (11) *SAJHR* par 242.

¹⁸⁸ OqShea (ed) *International law and the Bill of Rights* (2004) par 7A2.

¹⁸⁹ *Ibid.*

¹⁹⁰ Cockrell *The impact of the interim Bill of Rights in private law* (1994) unpublished paper 13.

¹⁹¹ *S v Makwanyane* par 35.

¹⁹² S 231(1) of the South African Constitution provides that the negotiating and signing of all international agreements is the responsibility of the national executive. According to s 231(2) an international agreement binds the Republic only after it has been approved by resolution in Parliament by both the National Assembly and the National Council of Provinces. S 231(4) of the South African Constitution provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation.

¹⁹³ *AZAPO v President of the RSA* 1996 (4) SA 672 (CC).

of the obligations of the State in terms of international law. Tuovinen¹⁹⁴ explains this assertion by stating that international law may therefore persuade courts to decide one way or the other. In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*,¹⁹⁵ Judge Ngcobo also described international law as a useful interpretative tool in the interpretation of the rights in the Bill of Rights, which provides a framework within which sections of the South African Constitution can be evaluated and understood. In *Grootboom*,¹⁹⁶ the Constitutional Court further reiterated that:

...relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.

Cognisance of international law is consequently significant as it can be seen as a constitutional prerequisite in the interpretation of the Bill of Rights.¹⁹⁷ The understanding that international law can provide a framework against which sections in the Bill of Rights can be measured and understood, provides a basis for the assessment of certain rights, especially where these rights have not been thoroughly tested in case law, or further protected in domestic legislation. For example, recognition of international conventions such as the UNCRC and UNCRPD can play a valuable role when interpreting the equality rights of CWD, as contained in the Bill of Rights.¹⁹⁸ These conventions may also provide a framework against which sections within the Bill of Rights can be evaluated, and provide guidance on how to give content to the rights of these children where domestic legislation has been lacking or unable to do so.¹⁹⁹

¹⁹⁴ Tuovinen %The role of international law in constitutional adjudication: Glenister v President of the Republic of South Africa+(2013) SALJ 664.

¹⁹⁵ *Director of Public Prosecutions, Transvaal v. Minister for Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC) par 75.

¹⁹⁶ *Government of the RSA v Grootboom* par 26.

¹⁹⁷ Bekink and Bekink %Children with disabilities and the right to education: a call for action+(2005) *Stell LR* 127.

¹⁹⁸ S 39(2) of the South African Constitution states that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. An interpretation considering international law may assist in expounding on the rights of CWD.

¹⁹⁹ *Ibid.*

Where section 39(1) provides for the application of international law, section 39(2) addresses the interpretation of legislation and the development of common and customary law.²⁰⁰ Section 39(2) states that the spirit, purport and objects of the Bill of Rights must be promoted when interpreting legislation, and developing common and customary law.²⁰¹ According to Botha,²⁰² this means that the interpretation of statutes commences with the South African Constitution and not by first assessing the legislative text. This section is further viewed as a section where no court has a discretion and as a section which must always be borne in mind by the courts.²⁰³ The Constitutional Court has found that in view of section 39(2), courts must prefer interpretations of legislation that fall within constitutional bounds over those that do not.²⁰⁴ In *Fraser v Absa Bank*,²⁰⁵ the Constitutional Court held that section 39(2) requires more from a court than to merely avoid an interpretation that clashes with the Bill of Rights. This section requires and demands the promotion of the spirit, purport and objects of the Bill of Rights. Roederer²⁰⁶ also supports this view and asserts that section 39(2), read with section 173 of the South African Constitution,²⁰⁷ requires that where the common law as it stands is deficient, courts are under a general obligation to develop it appropriately. A further obligation called for by

²⁰⁰ Currie and De Waal (2013) 161. Also note that s 39(2) must be read with s 8 of the South African Constitution, in order to establish if a legislative provision is in conformity with the Bill of Rights.

²⁰¹ S 39(b). S 39(3) states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill. See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at par 54; *S v Thebus and Another* 2003 (6) SA 505 (CC) par 28; *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

²⁰² Botha (ed) *Statutory interpretation: An introduction for students* (2005) 54.

²⁰³ *Phumelela Gaming and Leisure Limited v Grundlingh and Others* 2007 (6) SA 350 (CC) para 26-27.

²⁰⁴ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit N O* 2001 (1) SA 545 (CC) para 22-23.

²⁰⁵ *Fraser v Absa Bank Ltd (NDPP as Amicus Curiae)* 2007 (3) SA 484 (CC) par 47. See also *Laugh It Off Promotions CC v SAB International (Finance)* 2006 (1) SA 144 (CC) par 48.

²⁰⁶ Roederer *The transformation of South African private law after ten years of democracy: The role of torts (delict) in the consolidation of democracy* (2006) *Columbia Human Rights Law Review* 19.

²⁰⁷ S 173 of the South African Constitution determines that the Constitutional Court, Supreme Court of Appeal as well as high courts all have the inherent power to, amongst others, develop the common law, taking into account the interests of justice. Both s 173 and s 39(2) thus points to the responsibility of the judiciary to develop common law. In light of s 39(1) and s 233 (discussed hereunder), this can be achieved through taking cognisance of international law.

section 39(2) is found in *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another*,²⁰⁸ where the court held that an interpretation of legislation that results in the limitation of constitutional rights should be avoided, unless it is clear that this was the intended effect of the statute.

Whilst section 39(1)(b) determines that international law *must* be taken into account when interpreting the Bill of Rights, section 39(1)(c) provides that foreign law *may* be considered. Currie and De Waal²⁰⁹ points out that in respect to courts %there is an injunction to consider applicable international law, but not to consider foreign law.+in *Sanderson v Attorney-General, Eastern Cape*,²¹⁰ the court pointed out that comparative research is by and large of great value, especially where our courts have to deal with problems new to our jurisprudence.²¹¹ The court did however point out that such comparison must be carefully managed, in order to prevent a pure %transplant+ of a solution which may not be applicable to the South African legal system, or dispensation.²¹²

In addition, section 233 of the South African Constitution states that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. This section reinforces the standing of international law in the South African legal system in this regard, along with section 39.²¹³ A framework for using international law through interpretation is thus established within the South African Constitution. In *Glenister*²¹⁴ the court reiterated its duty to integrate international law obligations into legislation:

Section 233...demands any reasonable interpretation that is consistent with international law when legislation is interpreted. There is, thus, no escape

²⁰⁸ *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC) par 37.

²⁰⁹ S 39(1)(c); Currie and De Waal (2013) 147.

²¹⁰ *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC).

²¹¹ *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) par 26. See also *S v Makwanyane* par 37 where the court pointed out the value of comparative human rights jurisprudence, as well as *Fose v Minister of Safety and Security* 1997 (3) SA 789 (CC) for an example of the application of comparative research assisting the court in reaching its decision.

²¹² *Ibid.*

²¹³ S 39 of the South African Constitution.

²¹⁴ *Glenister v President of the Republic of South Africa* par 192.

from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law. We do so willingly and in compliance with our constitutional duty.

When examining South Africa's obligation in respect of access to justice for CWD, the Bill of Rights therefore allows us to seek guidance from international law, and possibly best practice from foreign law.²¹⁵ It also encourages courts to prefer an interpretation of legislation that is consistent with international law, thus promoting an awareness of the determinations of relevant international agreements.²¹⁶

2.8. Conclusion

This chapter illustrated that the South African Constitution is clear: CWD have specific and general rights under the Bill of Rights;²¹⁷ they may not be discriminated against on the basis of their disability;²¹⁸ they must be protected from maltreatment, abuse and neglect,²¹⁹ and they must have access to courts.²²⁰ Also ideally, they must be afforded legal assistance in all criminal and civil matters at the State's expense.²²¹

However, sections 9, 10, 28 as well as 34 and 35 of the South African Constitution do not explicitly define the right to have access to justice for CWD: it provides for indirect application by means of addressing the rights of CWD to equality, dignity, special protections, access to courts and fair criminal trials. To further clarify the understanding of what may constitute equal and fair access to justice for CWD, guidance may be sought from international sources.²²² According to the Constitutional Court,²²³ international law can provide a useful framework within which

²¹⁵ S 39(1)(a) of the South African Constitution.

²¹⁶ A court will not know whether its interpretation of legislation is in line with section 233, without having to fully engage with the relevant agreement.

²¹⁷ See par 2.5 *supra*. S 28 is specifically included in the Bill of Rights to afford children their own set of rights, applicable only to them.

²¹⁸ See par 2.3 *supra*.

²¹⁹ See par 2.5 *supra*.

²²⁰ See par 2.6 *supra*.

²²¹ *Ibid.*

²²² See par 2.7.

²²³ *S v Makwanyane* par 35.



the Bill of Rights can be evaluated and understood.²²⁴ Once this framework is established, it will allow for a proper determination of South Africa's duty in respect of access to justice for CWD.

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Ibid.

Chapter 3: International obligations

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3.4. Conclusion

3.1. Introduction

As discussed in the previous chapter, the South African Constitution establishes the foundation for access to justice for CWD: CWD may not be unfairly discriminated against on the basis of their vulnerability and they have equal protection and benefit of the law.¹ CWD also have an inherent right to dignity,² as well as the right not to be abused or maltreated.³ With specific reference to accessing justice, CWD have the right to legal representation⁴ and access to forums or courts which may resolve their matters in an equitable manner.⁵ Although these rights are very clear in that it applies to all people⁶ and in some cases particularly to children,⁷ the sections in the South

¹ S 9 of the South African Constitution. See also par 2.3 *supra*.

² S 10 of the South African Constitution. See also par 2.4 *supra*.

³ S 28 of the South African Constitution. See also par 2.5 *supra*.

⁴ S 28(1)(h) and s 35 of the South African Constitution. See also par 2.6 *supra*.

⁵ S 34 of the South African Constitution. See also par 2.6 *supra*.

⁶ For example, ss 9 and 10 of the South African Constitution refer to ~~everyone~~.

⁷ S 28 of the South African Constitution. See par 2.5 *supra*.

African Constitution have to be fleshed out in order to reach an understanding of how access to justice for CWD can be realised. In this regard, the rights of children, as well as the rights of people with disabilities must be further outlined and defined.

Against this background, the South African Constitution determines that international law must be consulted for purposes of interpreting rights contained in the South African Constitution.⁸ Section 233 of the South African Constitution further provides that when interpreting domestic legislation, which gives life to the principles contained in the South African Constitution, every court must prefer any reasonable interpretation which is consistent with international law over another interpretation that is inconsistent with international law. International law can therefore play an important role in providing content to the rights of CWD to access justice.⁹

For purposes of this chapter, two of the most significant international agreements relating to the rights of children and the rights of people with disabilities respectively, will be examined.¹⁰ South Africa has ratified both the UNCRC and UNCRPD, and has indicated that it will abide by the rules, standards and regulations of such. These obligations, although not domesticated in its totality, can be looked to in order to provide clarity on what access to justice for CWD may entail, and what obligations it may create for certain role-players. These agreements can therefore assist in interpreting sections 9, 10, 28, 34 and 35 of the South African Constitution, to ensure the provision of access to justice for CWD. The importance and relevance of international law *per se* have been illustrated under Chapter 2 above.¹¹ The highest court of the country has in particular singled out the UNCRC as having direct importance for South Africa in matters relating to children: in *M v S*¹² the Constitutional Court indicated that since its introduction, the UNCRC has become the international benchmark against which to evaluate relevant legislation in South Africa.¹³ The court also reiterated that certain principles included in the UNCRC have become %international currency+and by themselves guide all policy in South Africa in

⁸ S 39 of the South African Constitution.

⁹ See also par 2.7 *supra*.

¹⁰ The UNCRC and the UNCRPD.

¹¹ See par 2.7 *supra*.

¹² *M v S* par 16.

¹³ *Ibid.*

relation to children.¹⁴ In *DPP, Transvaal v Minister of Justice and Constitutional Development*,¹⁵ while underscoring the importance of the UNCRC, the court pointed out that South Africa, as a State Party to this instrument, is obliged to give effect to these instruments and to take all appropriate legislative and other measures to give effect to the articles contained in the UNCRC.¹⁶

This chapter will thus focus on providing the background and ambit of these international human rights agreements and how they specifically bind South Africa to adhere to certain obligations and standards. The purpose of this chapter is to clarify the understanding of what constitutes access to justice for CWD, and how South Africa's responses in respect of its obligations under these agreements, may be measured. Although there are other international and regional instruments also relevant to the discourse of children and disability rights, the UNCRC and UNCRPD offer a clear point of departure against which South Africa's international obligations will be tested.

As a point of departure, certain articles from each of these conventions will be highlighted and discussed. These articles provide for a framework within which access to justice for CWD within the South African context, may be measured. For example, Articles 2,¹⁷ 3,¹⁸ 6¹⁹ and 12²⁰ of the UNCRC are seen as the four pillars of

¹⁴ *M v S* par 17.

¹⁵ *DPP, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) 222 (CC) par 76.

¹⁶ In addition to these Constitutional Court matters, the UNCRC has also been cited in: *Kirsch v Kirsch* 1999 (4) SA 691 (C); *Bhe and others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 (CC); *Centre for Child Law and Others v Minister of Home Affairs* 2005 (6) SA 50 (T); *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C); *Jooste v Botha* 2000 (2) SA 199 (T); *Director of Public Prosecution, KwaZulu-Natal v P* 2006 (3) SA 515 (SCA).

¹⁷ Art 2 of the UNCRC states the following: 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

¹⁸ Art 3 of the UNCRC states that: 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or

the UNCRC, giving the UNCRC ~~6~~⁵oul. ~~21~~ With regard to the rights of CWD specifically, Article 23 may be seen as the ~~6~~⁵th pillar in respect of this chapter as this article describes the rights of CWD in particular.²² To provide for the further element of access to justice for these vulnerable children, Article 13 of the UNCRPD

legislative bodies, the best interests of the child shall be a primary consideration. 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall 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.

¹⁹ Art 6 of the UNCRC determines that: 1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

²⁰ Art 12 of the UNCRC states that : 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

²¹ Sloth-Nielsen ~~9~~ Ratification of the United Nations Convention on the Rights of the Child: some implications for South African law+(1995) *SAJHR* 401.

²² Art 23 determines the following: 1. States Parties recognize that a mentally or physically 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. 2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child. 3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development 4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

is added to this framework, as it describes what access to justice may constitute for people with disabilities.²³

By combining the five pillars of the rights of CWD with the elements of access to justice as contained in Article 13 of the UNCRPD, it is the aim of this chapter to establish a framework against which South Africa's responses in this regard can be measured.

3.1.1. Interpretation of the UNCRC and UNCRPD

Ten years after the UNCRC had entered into force, the understanding of the meaning and content of the UNCRC was still questioned by children's rights organisations.²⁴ More than 20 years on, governments and States Parties struggle with the implementation of the provisions provided for in the UNCRC.²⁵ As a starting point it may therefore be prudent to ascertain how the provisions of the UNCRC and the UNCRPD must be interpreted in order to ensure a fuller understanding.

The Vienna Convention on the Law of Treaties²⁶ provides for emphasis to be placed on the ordinary text of a convention. It states in Article 31 that a convention such as the UNCRC or UNCRPD shall be interpreted in good faith in accordance with the

²³ Art 13, which will also be more fully discussed below, states that: 1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

²⁴ Abramson Commentary on the United Nations on the Right of a Child: International Save the Children Alliance (ed) *Children's Rights: Reality or Rhetoric* (2000) 287-288.

²⁵ Lundy et al *The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries* (2012)⁴ available at http://www.unicef.org.uk/Documents/Publications/UNICEFUK_2012CRCImplementationreport.pdf (accessed on 19 Sept 2015). In this report, UNICEF looks at the implementation of the UNCRC in 12 countries, and find that Few of the countries analysed during this research have fully incorporated the CRC into domestic law.

²⁶ Vienna Convention on the Law of Treaties available at: <http://www.refworld.org/docid/3ae6b3a10.html> (accessed 16 Jun 2015). Hereafter referred to as the Vienna Convention.

ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.²⁷ For the purposes of this chapter, emphasis will accordingly be placed on the ordinary, commonsense meaning of the provisions of relevant international conventions. Secondly, Article 32²⁸ of the Vienna Convention provides that in the pursuit of interpreting the treaty, the preparatory work of the treaty may be considered in order to shed light on the approach contained in Article 31.²⁹

With regard to the UNCRC, in order to assist in determining what the aim of the negotiating states was during the drafting and adoption of the text of the UNCRC, and to amalgamate this aim with the textual interpretation of the convention in accordance with the approach set out in the Vienna Convention,³⁰ Article 43 of the UNCRC may be of assistance. Article 43 calls for a committee to be established for the purpose of examining the progress made by States Parties in achieving the realisation of the obligations undertaken in the UNCRC, and to provide clarity on the *intention* behind the provisions of the UNCRC. Here, the United Nations Committee on the Rights of the Child plays a key role.³¹ The CORC comprises ten independent human rights experts elected by the governments that have ratified the UNCRC.³² The CORC also issues General Comments on rights contained in the UNCRC. These comments are aimed at addressing broad themes emanating from the UNCRC and sheds light on the CORC's interpretation of the provisions contained in

²⁷ S 31(1) of the Vienna Convention states the following: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

²⁸ S 32 of the Vienna Convention reads as follows: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.

²⁹ This approach, also seen as the intentionalist approach, is nevertheless viewed as a secondary approach to the first part of Art 31, which clearly supports a textualist approach. See Boas *Public International Law: Contemporary Principles and Perspectives* (2012) 64.

³⁰ Vienna Convention s 3.

³¹ Hereafter referred to as the CORC. See also Rioux and Carbert *Human rights and disability: The international context* (2003) *Journal on Developmental Disabilities* 2.

³² Art 43(2) of the UNCRC. Although this Art refers to 10 experts, the Committee currently consists of 18 experts, as described on its website. See <http://www.ohchr.org/EN/HRBodies/UNCRC/Pages/UNCRCIndex.aspx> (accessed on 17 Jun 2015).

the UNCRC.³³ The CORC provides assistance in determining the actions required by States Parties to ensure the full implementation of the UNCRC.³⁴

Similarly, the Committee on the Rights of Persons with Disabilities³⁵ is established in terms of Article 34³⁶ of the UNCRPD. The CORPD also considers reports³⁷ and issues General Comments like the CORC. In interpreting access to justice for CWD it is thus useful to look to the CORC and CORPD's General Comments to guide the interpretation of this right *vis-à-vis* the implementation of these conventions. Relevant General Comments will therefore be included below where it can shed light on the interpretation of certain principles.

3.2. Convention on the Rights of the Child

3.2.1. Introduction

The UNCRC is a United Nations human rights treaty that contains the basic human rights of children. The UNCRC was adopted by the General Assembly in 1989 and has been ratified by 195 United Nations member countries.³⁸ All African countries have ratified the UNCRC.³⁹ Recognising the vulnerability of children and the previous

³³ The Office of the High Commissioner for Human Rights describes General Comments as the Committees' interpretation of the provisions of its respective human rights treaties.

³⁴ Art 45(d) of the UNCRC.

³⁵ Hereafter referred to as CORPD.

³⁶ Art 34(1) and (2) of the UNCRPD states the following: 1. There shall be established a Committee on the Rights of Persons with Disabilities (hereafter referred to as the Committee), which shall carry out the functions hereinafter provided. 2. The Committee shall consist, at the time of entry into force of the present Convention, of twelve experts. After an additional sixty ratifications or accessions to the Convention, the membership of the Committee shall increase by six members, attaining a maximum number of eighteen members.

³⁷ Art 36 of the UNCRPD.

³⁸ See the UN Treaty Collection: Status of Ratification at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-11&chapter=4&lang=en (accessed on 8 Oct 2012). As at 30 August 2015, USA is the only country yet to ratify the UNCRC.

³⁹ Somalia recently ratified the UNCRC. See <http://www.un.org/apps/news/story.asp?NewsID=49845#.VbxWzfmqqko> (accessed on 1 Aug 2015).

lack of provisions for and protection of children's rights in general,⁴⁰ the UNCRC emphasises that children are the subjects of rights, whose voices must be heard and given due weight. South Africa ratified the UNCRC on 16 June 1995.⁴¹

3.2.2. Children with disabilities under the UNCRC

The recognition of the vulnerability of children in general can be traced back through history. Kohm⁴² contends that even the earliest civilisations considered children to be special and deserving of protection.⁴³ In its preamble, the UNCRC states that childhood is entitled to special care and assistance. The child, by reason of his or her physical and mental immaturity, needs special safeguards and care.⁴⁴ Whilst proclaiming various rights relating to individualistic capacities and autonomy, the UNCRC emphasises the *vulnerability* of the child throughout.⁴⁵

In its endeavours to assist States Parties to fulfil their obligations under the UNCRC, the CORC issued its ninth General Comment in 2006, as comment on the rights of CWD specifically. In its description of the vulnerability of these children, the CORC reiterated that more is needed to generate genuine commitment from States Parties to respond to the needs of CWD.⁴⁶ The CORC also emphasized that CWD experience serious difficulties in order to fully enjoy their rights as enshrined in the UNCRC⁴⁷ and pointed out that these difficulties are not as a result of the disability

⁴⁰ Van der Walt *The United Nations Convention on the Rights of the Child . has the bridge been crossed between theory and practice: Mauritius and South Africa?* (2010) *Obiter* 715.

⁴¹ See the status of ratification of the UNCRC available at <http://indicators.ohchr.org/> (accessed on 17 Jun 2015).

⁴² Kohm *Tracing the foundations of the best interests of the child standard in American jurisprudence* (2008) *Journal of Law and Family Studies* 4.

⁴³ See also generally Eade *Legal incapacity, autonomy, and children's rights* (2005) *Newcastle L Rev* 157.

⁴⁴ The need for the provision of particular care to children was included in the 1924 Declaration of the Rights of the Child. The extension of care to children in general is therefore not an entirely novel concept and has been formalised in the international arena in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (in particular in arts 23 and 24), and the International Covenant on Economic, Social and Cultural Rights (in particular in Art 10).

⁴⁵ Rosa and Dutshcke *Child rights at the core: The use of international law in South African cases on children's socio-economic rights* (2006) *SAJHR* 230.

⁴⁶ UNCRC/C/GC/9 par 1.

⁴⁷ UNCRC/C/GC/9 par 5.

itself, but rather a combination of social, cultural, attitudinal and physical obstacles which CWD encounter in their daily lives.⁴⁸

The UNCRC was the first human rights treaty which contained a specific reference in Articles 2 and 23, to disability.⁴⁹ CWD are afforded rights under the UNCRC as children, as well as under the category CWD. The UNCRC addresses the rights of CWD directly and indirectly,⁵⁰ with Article 23 explaining the distinct rights CWD have under the UNCRC. Apart from Article 23, which will be more fully discussed below, the UNCRC contains what is deemed as the general principles for the implementation of the UNCRC,⁵¹ or otherwise known as the four pillars of the UNCRC. These pillars include Articles 3 (best interests of the child), 2 (non-discrimination), 6 (right to life) and 12 (right to be heard) of the UNCRC.⁵² The four pillars assist the delineation of the rights of CWD and will be discussed below in order to further provide content to their rights to access justice.

3.2.2.1. The best interests of the child principle

Article 3 of the UNCRC describes the best interests of the child principle.⁵³ The CORC has elaborated on the meaning behind the best interests of the child principle

⁴⁸ UNCRC/C/GC/9 par 5.

⁴⁹ See <http://www.ohchr.org/Documents/Publications/HRDisabilityen.pdf> (accessed on 18 Apr 2011).

⁵⁰ Children with disabilities are not only protected from discrimination under Art 2 of the UNCRC, but are also the recipients of positive measures or special measures of protection as included in Art 23, as further discussed below.

⁵¹ The CORC elaborated on the purported four pillars of the UNCRC in its fifth General Comment in 2003: UNCRC/GC/2003/5 General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child.

⁵² Mezmur *The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?* (2008) *SA Publiekreg/Public Law* 3; Sloth-Nielsen *Realising children's rights to legal representation and to be heard in judicial proceedings: An update* (2008) *SAJHR* 497.

⁵³ Art 3 of the UNCRC states the following: 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection

in its fifth General Comment, in 2003.⁵⁴ In its discussion of this principle, the CORC indicated that this principle binds both private and public institutions, and that every legislative, judicial and executive body must apply this principle by systemically considering how their decisions may affect the rights of children.⁵⁵ These decisions include decisions which are not directly applicable to children, but which may indirectly concern children.⁵⁶ The UNCRC therefore places a direct obligation on States Parties to implement this principle and follow an active approach in doing so.

Breen⁵⁷ asserts that the concept of the guiltless child whose best interests must be protected ascended from social and legal paradigms portraying children as inherently blameless and innocent. Article 3 obliges States Parties to take into account the child's best interests, as a *primary consideration* in all actions concerning the child, as children are characteristically vulnerable.⁵⁸

The best interests of the child principle also applies to all spheres of government and parliament, and specifically includes the judiciary.⁵⁹ Halloran⁶⁰ argues that the best interest standard strives to remind the court of the significance in considering the facts, conditions, and law of the case by looking at the subjective needs of the child affected by the outcome of the proceeding.

of children shall 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.

⁵⁴ UNCRC/GC/2003/5.

⁵⁵ UNCRC/GC/2003/5 par 12.

⁵⁶ *Ibid.*

⁵⁷ Breen (ed) *The standard of the best interest of the child: A Western tradition in international and comparative law* (2002) 3.

⁵⁸ Van Bueren *Multigenerational citizenship: The importance of recognizing children as national and international citizens* (2011) *The Annals of the American Academy* 35, where she states that the UNCRC's reworking of the best interests of the child principle to extend to the public as well as the private sphere implies that best interests are as equally applicable as a matter of international law to children's economic, social, and cultural rights as to their civil rights.

⁵⁹ See the CORC's General Comment No 5 (2003) on the General Measures of Implementation of the Convention on the Rights of the Child par 3; Arendse *The obligation to provide free basic education in South Africa: An international law perspective* (2011) *PELJ* 107.

⁶⁰ Halloran *Families first: Reframing parental rights as familial rights in termination of parental rights proceedings* (2014) *UC Davis Journal of Juvenile Law and Policy* 67.

In its eighth General Comment, the CORC highlighted the fact that not only does this principle bind the State, but in accordance with Article 18 of the UNCRC, the best interests of the child will be the parents' basic concern.⁶¹ This means that a child's caregivers must take into consideration how their decisions may affect their child. In this regard it is the subjective nature of this principle which may have caused its critique. What one parent may deem as in the interest of his child, another parent may frown upon. Also, a decision of a parent with regard to one of his children may not be in the best interests of his other child, taking into consideration households where a parent may have a child with a disability, with siblings who are not disabled. The parent will need to assess the situation of each child individually, as their best interests may differ. Mnookin⁶² suggests that determining what is best for a specific child poses a question akin to deciding on the purpose of life itself. In his later work, Mnookin also argues that the best interests of the child principle is flawed as what is best for children in general is frequently uncertain and speculative and necessitates a highly individualised choice between alternatives.⁶³ Skivenes⁶⁴ also joins in the critique of Article 3 and states that in its current state, the best interests of the child principle offers limited assistance to decision makers when taking into account matters affecting children. Skivenes also indicates that the ambiguity of what in fact constitutes the best interests of a child leads to legal uncertainty.⁶⁵

Although some deem this principle as uncertain, Freeman⁶⁶ indicates that this principle remains value-laden, although it is to some extent indeterminate. It remains

⁶¹ Art 18(1) states the following: 1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. *The best interests of the child will be their basic concern.*

⁶² Mnookin 'Child custody adjudication: Judicial functions in the face of indeterminacy' (1975) *Law and Contemporary Problems* 226-293.

⁶³ Mnookin 'The best interests syndrome and the allocation of power in child care' in Geach and Szwed (eds) *Providing civil justice for children* (1983) 7-20.

⁶⁴ Skivenes 'Judging the child's best interests: Rational reasoning or subjective presumptions' (2010) *Acta Sociologica* 339.

⁶⁵ *Ibid.*

⁶⁶ Freeman 'Upholding the dignity and best interests of children: International law and the corporal punishment of children' (2010) *Law and Contemporary Problems* 216. See also general Freeman (ed) *A commentary on the United Nations Convention on the Rights of the Child: Article 3 —the best interests of the child* (2007).

an individualistic approach which requires consideration on two levels. One level may be to identify what may be in the best interests of children in general. This may include general protection such as not to be subjected to violence, or not to be involved in harmful labour practices. Freeman argues that some determinations are given+ such as violence against children.⁶⁷ The second level of application then requires a more individualistic approach: what is in the best interest of the *specific* child.⁶⁸ The nature of this individualistic approach allows children who may not conform to the needs and requirements of the general population, to be approached differently, with the aim of obtaining an equal outcome.

Although this differential approach may cause for some uncertainty for role-players such as parents, or courts, Skivenes⁶⁹ points out that other elements and sources should be looked to in order to obtain information on what may constitute the best interests of a specific child. Decisions taken in respect of children must be directed at the enhancement of their growth and development.⁷⁰

3.2.2.2. Non-discrimination

Article 2 is viewed as one of the key provisions in respect of the rights of CWD.⁷¹

Article 2 of the UNCRC states the following:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

⁶⁷ Freeman (2010) 216.

⁶⁸ See UNCRC/C/GC/7/Rev.1 par 13. General Comment No 7 of the CORC refers to the best interests of children as a group, and the best interests of children individually.

⁶⁹ Skivenes Judging the child's best interests: Rational reasoning or subjective presumptions+ (2010) *Acta Sociologica* 339.

⁷⁰ These decisions inherently include the application of the best interest of the child to public policy and resource distribution in general. See Maurás Public policies and child rights: Entering the third decade of the Convention on the Rights of the Child+ (2011) *The Annals of the American Academy of Political and Social Science* 59; Kaime The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections+ (2005) *African Human Rights Law Journal* 232.

⁷¹ UNCRC/C/GC/9 par II.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Neither the UNCRC nor CORC has defined the word 'discrimination'.⁷² The UNCRC places a positive obligation on States Parties to 'ensure' that the rights of children not to be discriminated against on the basis of disability or age are respected, as well as protected.⁷³ Abramson⁷⁴ opines that Article 2 of the UNCRC, as with similar articles in other international instruments⁷⁵ is an 'umbrella' right and intrinsically interconnected to other rights, and that the psycho-social-political dynamics of discrimination put children at special risk as they are not in enough of a participatory position to fight for equal treatment.⁷⁶

As early as 1997, the CORC resolved under rule 75 of its provisional rules of procedures,⁷⁷ to devote a day of general discussion on the rights of CWD. Accordingly, during its sixteenth session at the United Nations Office in 1997, the CORC deliberated on the situation of CWD, which provided direction to States Parties on the fact that this particular group of children may be deemed as exceptionally vulnerable to discrimination.⁷⁸ During these deliberations, the CORC

⁷² Grahn-farley 'The U.N. Convention on the Rights of the Child and the forgotten history of the White House Children's Conferences' (2011) *Transnat'l L and Contemp Probs* 22.

⁷³ The CORC stated the following in its General Comment No 3 issued in 2003: 'Adolescents who are subject to discrimination are more vulnerable to abuse, other types of violence and exploitation, and their health and development are put at greater risk. They are therefore entitled to special attention and protection from all segments of society.' In addition, in par 6 of its General Comment No 10 issued in 2007, the CORC emphasised non-discrimination within the realms of child justice. The Committee cautioned states against the lack of a consistent policy which may result in discrimination against vulnerable groups of children, including children with disabilities.

⁷⁴ Abramson (ed) *A commentary on the United Nations Convention on the Rights of the Child: Article 2, the right of non-discrimination* (2008) 11.

⁷⁵ See Art 2 of the Universal Declaration of Human Rights, Art 2(1) of the International Covenant on Civil and Political Rights and Art 2(2) of the International Covenant on Economic, Social and Cultural Rights.

⁷⁶ Abramson (2008) 83.

⁷⁷ UNCRC/C/69,1997 (26 Nov 1997), available at http://www.bayefsky.com/general/UNCRC_c_69_16thsession_1997.pdf. par 310 (accessed on 31 Aug 2014).

⁷⁸ *Ibid.*

made recommendations to States Parties with regard to addressing the rights of CWD.

The recommendations included encouraging states to monitor the situation of CWD in their countries, including sourcing and collecting accurate statistics.⁷⁹ The CORC also recommended that CWD be consulted and involved in decision-making.⁸⁰ In this regard, the CORC encouraged best practices to be shared and training materials to be developed.⁸¹ Most importantly, the CORC recommended that states review and amend discriminatory laws affecting CWD, which are not compatible with the provisions of the UNCRC.⁸²

In its ninth General Comment, which was developed as a result of the recommendations made at its sixteenth session, the CORC stated that, in general, States Parties in their endeavours to prevent and eliminate all forms of discrimination against CWD must include disability explicitly as a ground for unfair discrimination.⁸³ They must also conduct awareness-raising campaigns to eliminate discrimination against CWD, and:

to provide for effective remedies in case of violations of the rights of children with disabilities, and ensure that those remedies are easily accessible to children with disabilities and their parents and/or others caring for the child.⁸⁴

This means that the States Parties must have accessible recourse and remedies available for CWD, not only in seeking redress for discrimination, but in a case of violations of the rights of CWD in general. The remedies must therefore be easily accessible and effective, and must be available when *any* of the rights of CWD are violated. This recommendation supports the assertion that CWD indeed have the right to have equal access to justice.

⁷⁹ *Ibid* par 338 (a).

⁸⁰ *Ibid*.

⁸¹ *Ibid* par 338 (l).

⁸² *Ibid* par 338 (d).

⁸³ UNCRC/C/GC/9 par 9(a).

⁸⁴ UNCRC/C/GC/9 par 9(b).

In order to address discrimination against CWD, resources are required to be channelled for the purpose of promoting equality for CWD. The UNCRC is not prescriptive in respect of guiding States on resource allocation. Article 4 states that parties shall undertake such measures to the *maximum extent of their available resources* for the implementation of the rights contained in the UNCRC. According to the General Comment No 9, the CORC views Article 4 as insisting that CWD be a priority in budget allocation, by stating the following:

However, it should not be forgotten that it is the State Party's *ultimate responsibility* to oversee that adequate funds are allocated to children with disabilities along with strict guidelines for service delivery.⁸⁵

Sufficient funds must therefore be earmarked for programmes promoting the equal rights of CWD and their inclusion in society. Proper resource allocation is the key in endeavouring to achieve equal access to justice for CWD and provide them with, as mentioned above, effective remedies should their rights have been violated.

As mainstream participatory mechanisms may not be designed to allow for full participation and equal treatment of a child with, for instance, a hearing impairment, some accommodation may have to be made to secure an equal outcome for the child in seeking to address a specific rights violation such as discrimination. More often than not, this will entail some level of financial and resource implication for the administering body, such as the Department of Justice and Correctional Services in South Africa.⁸⁶

Abramson⁸⁷ indicates that there are a number of manners in which States Parties may be erring with regard to Article 2. One, where States Parties have no anti-discrimination law, or, two, where such laws have gaps. States may also be in violation of Article 2 where national law allows discrimination, but the State has not enacted any corresponding reservation.⁸⁸ Hodgkin and Newell⁸⁹ assert that the

⁸⁵ UNCRC/C/GC/9 par 20 (own emphasis).

⁸⁶ This department was previously called the Department of Justice and Constitutional Development, but will be referred to by its current name throughout this research. Hereafter referred to as the DOJ&CS.

⁸⁷ Abramson (2008) 97-101.

⁸⁸ *Ibid.*

prevention element of Article 2 further cements the obligation of States Parties to actively engage in order to eliminate and attend to discrimination. This is also a way in which to control or respond to the discriminatory actions in the private sphere.

South Africa submitted its first country report within two years of ratification of the UNCRC. In February 2000 the CORC issued its concluding observations and comments on South Africa's first report.⁹⁰ The CORC observed that the principle of non-discrimination was strongly reflected in the South African Constitution and legislation.⁹¹ However, CORC expressed its concern that insufficient measures have been adopted to ensure that *all* children are guaranteed access to various social services. One of the categories of children that were of particular concern to the CORC was CWD. The CORC recommended that South Africa increased its efforts in this regard.⁹²

3.2.2.3. Survival and development of the child

The third pillar of the UNCRC is the survival and development of the child. Article 6 of the UNCRC obliges States Parties to recognize that each and every child has the inherent right to life.⁹³ It also places an obligation on States Parties to ensure the survival and development of the child to the maximum extent possible.⁹⁴

The obligation to recognise the child's inherent right to life includes the duty to address interrelated needs which safeguard the enjoyment of this right to life.⁹⁵ Article 6 thus embraces an all-encompassing right and includes the child's physical,

⁸⁹ Hodgkin and Newell (eds) *Implementation handbook for the Convention on the Rights of the Child* (2007) 21.

⁹⁰ Concluding Observations of the Committee on the Rights of the Child: South Africa. 23/02/2000. UNCRC/C/15/Add.122

⁹¹ UNCRC/C/15/Add.122 par 18.

⁹² *Ibid.*

⁹³ Art 6(1) of the UNCRC.

⁹⁴ Art 6(2) of the UNCRC.

⁹⁵ Bartholet 'Ratification by the United States of the Convention on the Rights of the Child: Pros and cons from a child's rights perspective' (2010) *The Annals of the American Academy of Political and Social Science* 91. See also Van Bueren (ed) *The international law on the rights of the child* (1995) 303.

mental, spiritual, moral, psychological and social development.⁹⁶ This concept must also be interpreted in the broadest sense of the word.⁹⁷ In its General Comment published in 2005, the CORC stated as follows:

Ensuring survival and physical health are priorities, but States Parties are reminded that Article 6 encompasses *all aspects of development, and that a young child's health and psychosocial well-being are in many respects interdependent*. Both may be put at risk by adverse living conditions, neglect, insensitive or abusive treatment and restricted opportunities for realizing human potential. Young children growing up in especially difficult circumstances require particular attention.⁹⁸

The CORC therefore equates adverse living conditions and the neglect of children's health and psychosocial well-being to an infringement of their right to life. The CORC also elevates the plight of children growing up in particularly difficult circumstances, as is the case of CWD, by confirming that States Parties need to give children in difficult circumstances special attention.⁹⁹ More specifically the CORC has acknowledged¹⁰⁰ that with reference to CWD, the inherent right to life, survival and development is a right that warrants particular attention. The CORC urges States Parties to punish all those who directly or indirectly violate the right to life, survival and development of CWD. From the CORC's comments, it is clear that the right to life and survival should be interpreted from a holistic point of view in order to allow for broad rights based interpretations.¹⁰¹ Applying this principle consequently requires States Parties to pay attention to their policies, programs, and services affecting children, so as to be inclusive of this right.¹⁰²

⁹⁶ UNCRC/GC/2003/5 par 12.

⁹⁷ UNCRC/GC/2003/5 par 12.

⁹⁸ UNCRC/C/GC/7/Rev.1 par 10 (own emphasis).

⁹⁹ *Ibid.*

¹⁰⁰ UNCRC/C/GC/9 par 31.

¹⁰¹ Britton and Ulkuer %Child development in developing countries: Child rights and policy implications+ (2012) *Child Development* 94. See also the CORC's General Comment No 13 (2011) par 62 where it includes protection from all forms of violence as part of the child's right to life and survival. The Committee also includes the protection from violence as contributing to the child's right to development.

¹⁰² Maurás (2011) 60.

3.2.2.4. The right to be heard

The child's right to express his or her views freely in all matters affecting the child is viewed as one of the cornerstones of the UNCRC, and included in Article 12 of the UNCRC. Shier¹⁰³ argues that although this right might be deemed the most radical and far reaching, it is also the most widely violated.

Article 12 is set out in two paragraphs. The first paragraph requires consideration of two distinctive elements: firstly, that any child, capable of forming a view has the right to express views freely in all matters affecting him or her. Secondly, that these views must be given due consideration in accordance with the age and maturity of the child.¹⁰⁴

The first part relates to the child's ability to form a view. Hodgkin and Newell¹⁰⁵ argue that Article 12 does not set any lower age limit on children's rights to express themselves. Any child, regardless of his or her age, but who is capable to hold a view, has the right to assert this right. It is also asserted that this right should be respected even where children are able to form views and yet be unable to communicate them, possibly due to impairment.¹⁰⁶ Accordingly Van Bueren¹⁰⁷ argues that Article 12 implies that States Parties have a legal duty to *create methods* that allow for child participation in all levels of decision-making. This means that States Parties may have to consider approaches such as Hart's¹⁰⁸ 'ladder of participation' in pursuit of fulfilling this obligation.¹⁰⁹ States Parties must thus actively create an

¹⁰³ Shier 'Pathways to participation: Openings, opportunities and obligations: a new model for enhancing children's participation in decision-making, in line with article 12.1 of the United Nations Convention on the Rights of the Child' (2001) *Children and Society* 108.

¹⁰⁴ Art 12(1) of the UNCRC.

¹⁰⁵ Hodgkin and Newell (ed) *Implementation handbook for the Convention on the Rights of the Child* (2007) 153.

¹⁰⁶ *Ibid.*

¹⁰⁷ Van Bueren (2011) 36.

¹⁰⁸ Hart 'Children's participation from tokenism to citizenship' (1992) available at http://www.unicef-irc.org/publications/pdf/childrens_participation.pdf (accessed on 13 Jul 2015) 9.

¹⁰⁹ *Ibid.* According to Hart there are 8 steps in order to engage with children and source their full participation. The initial steps, which include methods described as manipulation, decoration and tokenism, are engaged so as to create a basis from which to integrate the views of children more progressively. Thereafter stages such as allowing children to volunteer in organised events, providing them with feedback on their opinions,

environment to allow for participation in decision-making fora on an ongoing basis.¹¹⁰ Once the child has been provided with an opportunity to share his or her views, such views must be given due weight in accordance with the age and maturity of the child.¹¹¹

This second element of Article 12(1) indicates that there is no point in creating an environment for children to express themselves, if such views are not taken into consideration by a decision-making body or fora. The CORC has indicated that this section takes into consideration that children, even very young children, are acutely sensitive to their surroundings and that they are capable of making decisions and communicating their views and feelings in a variety of ways, which may not include spoken or written language.¹¹² Lansdown¹¹³ affirms that there is no required minimum age for children to be able to share their views. Young children or CWD may find it challenging to express their views through conventional methods, but can be encouraged to do so through art, play, poetry, writing, computers or signing. This does not mean that the wishes of the relevant child must be obeyed and followed without question. The view of the child is but one aspect which will make up an informed decision or outcome regarding such child. Hart¹¹⁴ contends that the UNCRC is clear in creating participatory rights for children, but it is lacking in emphasising the adjacent responsibilities which come with sharing ones views and opinions. Hart further argues that in order to teach children how to share their views in a meaningful manner, they must be provided with an opportunity to participate in community engagements first.¹¹⁵ He argues that community engagements such as collaborative activities with different persons, such as those with more experience and those who are older, may provide the child with an opportunity to learn from these

and allowing them to take charge of an occurrence or event initiated by an adult. All these steps lead to children implementing their own ideas, and ultimately sharing their views and ideas on an equal footing with adults.

¹¹⁰ See the CORC's General Comment No 5 (2003) par 12 where it states that listening to children should not be seen as an end in itself, but rather as a means by which states make their interactions with children and their actions on behalf of children ever more sensitive to the implementation of children's rights.

¹¹¹ Art 12(1) of the UNCRC.

¹¹² UNCRC/C/GC/7/Rev 1 par 14.

¹¹³ Lansdown 'Promoting children's participation in democratic decision-making' (2001) available at <http://www.unicef-irc.org/publications/pdf/insight6.pdf> (accessed on 13/7/15) 2.

¹¹⁴ Hart (1992) 7.

¹¹⁵ *Ibid.*

engagements, and that with the rights, come responsibilities.¹¹⁶ The CORC has also indicated that children should be provided with whatever method of communication they need to aid in expressing their views.¹¹⁷ Hodgkin and Newell¹¹⁸ indicate that in order to provide for the participation of CWD without discrimination, certain special measures may be required. This means that States Parties may have to make provision for the production of materials in special media and cater for special technology and interpreters for deaf and partially hearing children. Special training may also be required in order to provide CWD with equal and full participation. Article 12(2) places further emphasis on the views of the child in judicial proceedings in particular. The child must be provided with an opportunity to be heard in these proceedings either directly or through a representative.¹¹⁹ This right has also been described as including the right to representation, appropriate interpretation as well as the right of the child *not* to express his or her opinion.¹²⁰ Gal¹²¹ argues that direct participation is the most effective manner of participation as it allows the child to have a voice and to feel part of proceedings. This is because children must also be allowed to express themselves in a manner which is comfortable for them, and not necessarily in a *pro forma* prescribed manner which does not elicit free participation.¹²² Article 12(2) further states that a child may also be represented through an appropriate body in line with rules and procedures of national law.

It can therefore be supposed that the word participation is a term used for the expression of, listening to, and due consideration given for, the views of the child.¹²³ In its twelfth General Comment, the CORC elaborated on Article 12 of the UNCRC, and once again identified the right of the child to be heard as one of the UNCRC's

¹¹⁶ *Ibid.* See also in general, Hart (ed) *Children's Participation: The Theory and Practice of Involving Young Citizens in Community Development and Environmental Care* (2013).

¹¹⁷ UNCRC/C/GC/9 par 32.

¹¹⁸ Hodgkin and Newell (2007) 160.

¹¹⁹ Art 12(2) of the UNCRC.

¹²⁰ UNCRC/C/GC/11 par 38.

¹²¹ Gal *et al* (ed) *International perspectives and empirical findings on child participation: From social exclusion to child-inclusive policies* (2015) 43.

¹²² *Ibid* 44.

¹²³ Krappmann *et al* 'The weight of the child's view Article 12 of the Convention on the Rights of the Child' (2010) *International Journal of Children's Rights* 502.

cornerstones.¹²⁴ In its legal analysis, the CORC places a firm obligation on States Parties to recognize this right and ensure its implementation by listening to the views of the child and according them due weight.¹²⁵ The Committee also elaborates on this obligation by requiring that States Parties either directly or indirectly guarantee this right.¹²⁶

3.2.2.5. Disability

In elaborating on the responsiveness of the UNCRC to the rights of CWD, the CORC has underlined Article 23 of the UNCRC as speaking directly to CWD.¹²⁷ The CORC has indicated that the core message of Article 23 is that CWD should be included in the society.¹²⁸ Inclusion is therefore seen to be the key in the protection of the rights of CWD.¹²⁹

Article 23(1) of the UNCRC calls for States Parties to recognize the rights of CWD to enjoy a full and decent life.¹³⁰ This right is to be realised in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community. This subparagraph requires a three-step approach from States Parties as it necessitates States Parties to recognise the right of CWD to a full and decent life by enabling the creation of conditions which ensure the dignity of the child. It also requires States Parties to realise this right by creating environments for CWD that promote their self-reliance. Lastly, it advocates an approach to facilitate CWD's active participation in communities. Article 23(1) does not guarantee this right by means of placing direct obligations on States Parties.¹³¹ Article 23(2) recognises the

¹²⁴ UNCRC/C/GC/12 par 15.

¹²⁵ UNCRC/C/GC/12 para 17-18.

¹²⁶ UNCRC/C/GC/12 par 15.

¹²⁷ UNCRC/C/GC/9 par 6.

¹²⁸ UNCRC/C/GC/9 par 11.

¹²⁹ The CORC states that inclusion must be implemented to the "maximum", indicating that in all matters concerning children with disabilities, States Parties must employ all efforts to protect their rights.

¹³⁰ Art 23(1) of the UNCRC.

¹³¹ Quinn and Degener "The current use and future potential of United Nations human rights instruments in the context of disability" (2002) available at <http://www.ohchr.org/Documents/Publications/HRDisabilityen.pdf> (accessed on 18 Apr 2011) par 192. Arts 24 and 26 are examples of rights included in the UNCRC where States

rights of CWD to special care and appropriate assistance. It is important to note that the first part of Article 23(2) contains the qualification *subject to available resources*, which, as in the article's first paragraph, does not ensure this right without limiting its application.¹³² The limitation of the application is based on the need for resources, such as finance, to be available before this right can be fully addressed.

This Article therefore does not encapsulate how this right is to be secured, as it limits its application to the availability of resources. Accordingly, Quinn and Degener¹³³ contend that this right is awarded less protection than, for instance, the right contained in Article 19 of the UNCRC, which states that States Parties shall take *all* appropriate legislative, administrative, social and educational measures to protect the child from a variety of abuses. These measures contained in Article 19 must be put in place while the child is in the care of parent(s), legal guardian(s) or any other person. Article 19 thus obliges States Parties to *take all measures* to realise this right, which can be deemed as a strong requirement from States Parties. In stark contrast, Article 23(2) only *encourages* States Parties to realise this right, and subjects this expectation to a limitation clause which states that the rights contained in Article 23 must be ensured *subject to available resources*.¹³⁴

The second part of Article 23(2) provides even further qualifications by providing as follows:

States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, *to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child*.¹³⁵

Parties are obliged to pursue full implementation of this right. This obligation is not included in Art 23 (1) of the UNCRC.

¹³² Arts that also contain qualifications include Arts 6(2), 24(4), 27(3) and 28(1).

¹³³ Quinn and Degener (2002) par 192.

¹³⁴ Boezaart *The Children's Act: A valuable tool in realising the rights of children with disabilities* (2011) *THRHR* 266.

¹³⁵ Own emphasis.

Although this section refers to the recognition of the right of CWD to special care and assistance, Combrinck¹³⁶ asserts that this recognition comes with yet more conditions: children must be eligible for assistance, an application must be made for this assistance, the assistance must be appropriate for the child's condition and to the circumstances of the caregivers or parents. Section 23(2) therefore does not *guarantee* automatic special care and assistance to CWD and does not oblige States Parties to expressly put in place measures to that extent.¹³⁷

Article 23(3) further recognises the special needs of CWD and provides that assistance extended in accordance with Article 23(2) shall be provided *free of charge*, whenever possible. This article also states that the financial resources of the parents or others caring for the child must be taken into account when extending said assistance. The relevant assistance must also be designed to ensure that CWD have access to and receive education, training, health care services, rehabilitation services, preparation for employment and other opportunities. All these measures must be taken in a manner, which is conducive to the child's achieving the fullest possible social integration and individual development. It has also been proposed that by including the phrase *social integration* the UNCRC suggests that services made available must focus on inclusivity.¹³⁸ In respect of South Africa specifically, the CORC has explicitly expressed its apprehension regarding the inadequate services and programmes available to CWD in terms of Article 23 of the UNCRC.¹³⁹ The CORC further urged South Africa to work towards the inclusion of CWD in society.¹⁴⁰

¹³⁶ 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) 306. See also Le Blanc *The Convention on the Rights of the Child: United Nations lawmaking on human rights* (1995) 103.

¹³⁷ Quinn and Degener (2002) par 192.

¹³⁸ Akinbola *The right to inclusive education in Nigeria: Meeting the needs and challenges of children with disabilities* (2010) *African Human Rights Law Journal* 476.

¹³⁹ See Concluding Observations of the Committee on the Rights of the Child: South Africa. 23/02/200. UNCRC/C/15/Add.122 (Concluding Observations/Comments) par 32 where the Committee refers to legal protection, programmes, facilities and services for children with disabilities.

¹⁴⁰ *Ibid.*

3.2.2.6. The Optional Protocols under the UNCRC

Two Optional Protocols to the UNCRC were adopted on 25 May 2000 by the General Assembly. The first is the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography¹⁴¹ which requires States Parties to prohibit the sale of children, child prostitution and child pornography. It entered into force on 18 January 2002 and has been ratified by 161 States Parties.¹⁴² South Africa ratified this protocol on 24 September 2009. The second is the Optional Protocol on the Involvement of Children in Armed Conflict,¹⁴³ which obliges States Parties to ensure that children under the age of 18 are not recruited into armed forces, and where they are members of armed forces, that they are not involved in hostilities. This protocol entered into force on 12 July 2002 and has been ratified by 150 States Parties.¹⁴⁴ South Africa ratified this protocol on 30 June 2003.

On 28 February 2012 a third protocol to the UNCRC, the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure¹⁴⁵ was opened for signature. This Communications Protocol allows individuals, groups or their representatives to bring a communication before the relevant United Nations Committee when their rights have been violated by a State Party. Only 17 States

¹⁴¹ UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 25 May 2000, A/RES/54/263 available at: <http://www.unhcr.org/refworld/docid/3ae6b38bc.html> (accessed on 4 Nov 2012).

¹⁴² Status as at 23 Oct 2012. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-11-c&chapter=4&lang=en (accessed on 25 Oct 2012).

¹⁴³ UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2005, available at: <http://www.unhcr.org/refworld/docid/47fdfb180.html> (accessed on 4 Nov 2012).

¹⁴⁴ Status as at 23 Oct 2012. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-11-b&chapter=4&lang=en (accessed on 25 Oct 2012).

¹⁴⁵ UN Human Rights Council, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: resolution/adopted by the Human Rights Council, 14 Jul 2011, A/HRC/RES/17/18, available at: <http://www.unhcr.org/refworld/docid/4e72fbb12.html> (accessed on 4 Nov 2012). Hereinafter referred to as the Communications Protocol.

Parties have ratified this protocol and South Africa has yet to sign and ratify it.¹⁴⁶ Neither the Optional Protocol on the Involvement of Children in Armed Conflict nor the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography¹⁴⁷ addresses the rights of CWD directly.¹⁴⁸ Nevertheless, both protocols address the protection of children in general against exploitation. The Communications Protocol may, however, have direct relevance to CWD as an extremely vulnerable group as the Communications Protocol recognises in its preamble that CWD are to enjoy their rights equally, without discrimination.¹⁴⁹ Most importantly, this protocol serves as a mechanism for children and groups to submit complaints on alleged human rights violations directly to the CORC.¹⁵⁰ This may be done when domestic remedies have proved to be ineffective.¹⁵¹ Therefore, should CWD deem that their rights have been continuously violated in terms of Article 23 of the UNCRC, and that domestic remedies have been exhausted, they may make use of the complaints procedure catered for in the Communications Protocol.¹⁵² This is a valuable mechanism for CWD to access justice on an international platform, if same is denied to them domestically. This mechanism also promotes the participation of CWD as parties to a dispute, and thus encouraging their voices to be heard.

¹⁴⁶ The States Parties who at 21 Jun 2015 had ratified this protocol are the former Yugoslav Republic of Macedonia, Spain, Slovakia, Portugal, Montenegro, Germany, Gabon, Costa Rica, Bolivia, Belgium, Albania, Andorra, Argentina, El Salvador, Monaco, Thailand and Ireland.

¹⁴⁷ UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 25 May 2000, A/RES/54/263, available at: <http://www.unhcr.org/refworld/docid/3ae6b38bc.html> (accessed on 4 Nov 2012).

¹⁴⁸ The words %isable+, %isability+ and %disabilities+ are not mentioned % once in either of the above-mentioned protocols.

¹⁴⁹ The preamble of the Communications Protocol states that States Parties recognize the rights set forth in the UNCRC, to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

¹⁵⁰ Art 5(1) of the Communications Protocol determines that communications may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State Party, claiming to be victims of a violation by that State party of any of the rights set forth in any of the following instruments to which that State is a party: (a) The Convention; (b) The Optional Protocol to the Convention on the sale of children, child prostitution and child pornography; (c) The Optional Protocol to the Convention on the involvement of children in armed conflict.

¹⁵¹ Art 7 of the Communications Protocol determines that a submission of a communication will not be admissible if all available domestic remedies have not been exhausted.

¹⁵² Art 5 of the Communications Protocol.

Before the adoption of this Protocol, the UNCRC was the only international human rights treaty with a mandatory reporting procedure that *did not* include a communications procedure.¹⁵³

3.2.2.7. Conclusion

The UNCRC is the most comprehensive human rights treaty that addresses the rights of children. The four pillars of the UNCRC, which consists of the best interests of the child, the principle of non-discrimination, a child's right to survival and development as well as the child's right to participate, addresses the protection of CWD as part of the broader category of children. Article 23 of the UNCRC, further elevates the specific rights of CWD so as to form a baseline of obligations of States Parties against the rights of these specific children. The latter article forms a fifth pillar addressing CWD specifically.

These five pillars are closely related to the specific difficulties CWD are faced with on a daily basis, and form the basis for CWD's rights assertion in international law. For example, where the UNCRC states that the best interests of the child principle should be a primary consideration; this includes the best interests of CWD and the best interests of CWD must therefore be taken into account by all relevant stakeholders. Their interests must be addressed on an equal basis as the interests of their non-disabled counterparts.¹⁵⁴ The rights and interests of CWD should also be an automatic consideration in matters where the rights of children are addressed.

Furthermore, discrimination on the ground of disability is a reality in most societies across the world.¹⁵⁵ Where CWD are afforded a specific right, equal to any other child, this right might not be as easily accessible for the child with the disability.¹⁵⁶

¹⁵³ See <http://www.childrightsnet.org/NGOGroup/childrightsissues/ComplaintsMechanism/> (accessed on 25 Oct 2012).

¹⁵⁴ Art 3 of the UNCRC.

¹⁵⁵ Art 2 of the UNCRC.

¹⁵⁶ Bassler and Jones *Fostering inclusive societal values through law* (2002) *The International Journal of Children's Rights* 390, where it is stated that indirect discrimination occurs where

Due to the vulnerability of CWD their right to life and survival are easily compromised.¹⁵⁷ Article 6 includes the development of the child with a disability and asks of States Parties to ensure this right to the maximum extent possible. Additionally, the right to be heard is an essential right of CWD as they are often stigmatised and not allowed to participate in matters that affect them.¹⁵⁸ The right to be heard in judicial procedures and participate during decision-making on matters that affect their interests are therefore crucial to ensure CWD have proper access to justice.

The UNCRC's recognition of the right to be heard as one of its key principles highlights the importance of awarding all children voices, and allowing those voices to be heard and taken into consideration. The Optional Protocol on the Rights of the Child to a Communications Procedure further underlines the right of the child to be heard.¹⁵⁹ The inclusion of communications to be submitted by or on behalf of an individual or group of individuals caters to instances where CWD are not in a position to do so on their own behalf.¹⁶⁰ This provision is indicative of the rights of children to either directly, or through a representative or an appropriate body, participate in proceedings that affect them.

Lastly, by attending to the specific rights of CWD in Article 23 of the UNCRPD, the UNCRC brings an awareness of the vulnerability of this particular group of children to the attention of States Parties. The UNCRC also creates a platform where States Parties need to report on how they have responded to the rights of CWD. This is

a person is unfairly excluded from equal participation in society as a result of a requirement or condition with which certain categories of people will be unable to comply.

¹⁵⁷ See the CORC's General Comment No 9 (2006) par 31 where the Committee uses the example of children with disabilities being killed in certain societies as they are seen to bring bad omens to the family. This is a clear example of how children with disabilities are faced with threats to their right to survival, more so than their non-disabled counterparts.

¹⁵⁸ According to the Child Rights Information Network: "Children with disabilities face particular obstacles in getting their voices heard because of perceptions about their competence to participate in decisions, or as a result of indirect discrimination where participation spaces are not accessible." See <http://www.crin.org/Discrimination/UNCRC/index.asp> (accessed on 25 Oct 2012).

¹⁵⁹ Art 5 of the Communications Protocol.

¹⁶⁰ Art 5(2) of the Communications Protocol.

done by the submission of country reports to the CORC.¹⁶¹ The UNCRC can therefore ideally be seen as a responsive mechanism in addressing and monitoring the protection, promotion and fulfilment of the rights of CWD.

Nevertheless, as with various other human rights treaties, it is not the formal substance or political commitment of the obligations that is lacking, but the implementation thereof by States Parties.

3.3. The Convention on the Rights of Persons with Disabilities

3.3.1. Introduction

The UNCRPD is an international human rights treaty addressing the rights of people with disabilities, and serves as the second important international instrument promoting the rights of CWD.

The UNCRPD does not create new rights, but rather sets out measures to ensure that people with disabilities are afforded access to basic rights already entrenched in other international instruments, on an equal basis with others. As per Ngwena,¹⁶² the motivation behind the UNCRPD is inclusive equality. States Parties that sign and ratify the UNCRPD are obliged to implement these measures at national level and agree to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, including the promotion of their intrinsic dignity.¹⁶³

¹⁶¹ States Parties are obliged to submit Country Reports to the CORC on how children's rights under the UNCRC are being implemented. States Parties' initial reports are due within the first two years after acceding to the UNCRC. After that, States Parties must submit Country Reports every five years. The CORC scrutinizes reports and responds to its content by issuing Concluding Observations to guide States Parties towards further implementation. See <http://www.unhcr.org/refworld/publisher,UNCRC,COUNTRYREP,,,0.html> (accessed on 25 Oct 2012).

¹⁶² Ngwena %Western Cape forum for intellectual disability v Government of the Republic of South Africa: A case study of contradictions in inclusive education+(2013) *ADRY* 142.

¹⁶³ Par (a) of the preamble of the UNCRPD.

The UNCRPD was adopted by the United Nations on 13 December 2006 and opened for signature on 30 March 2007. The UNCRPD came into force on 3 May 2008 and was the outcome of three years' worth of dialogue involving various stakeholders.¹⁶⁴ The UNCRPD was ratified by South Africa on 30 November 2007.¹⁶⁵ South Africa was one of the first 20 countries to do so.¹⁶⁶

The UNCRPD consists of 50 articles addressing the rights and needs of persons with disabilities.

3.3.2. Children with disabilities and the UNCRPD

CWD are afforded rights under the UNCRPD in terms of the categorization of persons with disabilities, as well as rights under the specific classification of CWD.¹⁶⁷ In the chapters above, it has been argued that the category of CWD is unique, as it requires a consideration from a child rights, as well as disability-rights perspective. In discussing the UNCRC, specific emphasis was placed on the vulnerability of children as a result of their age. Under the UNCRPD the vulnerability of children as a result of their disability will be explored as well as whether this convention indeed recognises the specific needs of these children.

In its handbook for parliamentarians on the UNCRPD, the secretariat for the UNCRPD describes the UNCRPD as a reply to the international community's long history of discrimination, exclusion and dehumanization of persons with disabilities.¹⁶⁸ It is also significant and revolutionary in many ways, being the fastest

¹⁶⁴ See the United Nations' handbook for parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol+ (2007) available at <http://www.un.org/disabilities/documents/toolaction/ipuhb.pdf> (accessed on 13 Jul 2015) 17.

¹⁶⁵ See <http://www.un.org/disabilities/countries.asp?id=166> (accessed on 3 Nov 2012).

¹⁶⁶ Rule and Zuma 'Human rights forums and the Convention on the Rights of Persons with Disabilities in KwaZulu-Natal'+(2011) *ESR Review* 15.

¹⁶⁷ Art 1 of the UNCRPD refers to 'all persons with disabilities'+where Art 7 specifically refers to children with disabilities.

¹⁶⁸ See the United Nations' handbook for parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol+ (2007) available at <http://www.un.org/disabilities/documents/toolaction/ipuhb.pdf> (accessed on 13 Jul 2015) par III.

negotiated human rights treaty ever and the first of the twenty-first century.¹⁶⁹ The rights of people with disabilities to equal enjoyment of rights and dignity are pronounced in the first article of the UNCRPD. This article applies to all people, including children. What makes the UNCRPD even more significant for purposes of this chapter is that it specifically addresses the right of people with disabilities to have access to justice. Along with the abovementioned five pillars of the UNCRC, Article 13 of the UNCRPD stands to further provide elements outlining the right of CWD to access justice. Article 13 thus provides for a sixth pillar of the framework against which access to justice for CWD may be measured.

Before article 13 is however assessed, it is necessary to understand the context within which the rights of CWD are directly addressed in the UNCRPD. It is also necessary to identify areas where the five pillars as derived from the UNCRC, are reflected and supported by the UNCRPD.

3.3.3. Context and correlation

Article 1 of the UNCRPD states the following:

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.¹⁷⁰

The UNCRPD does not define disability, but rather, explains who a person with a disability is.¹⁷¹ This explanation of disability in the UNCRPD is deliberately broad so as to not exclude certain vulnerabilities. The UNCRPD also moves the cause for the disability away from the individual with a disability, and rather towards their interaction with various barriers which may hinder him or her.¹⁷² This supports the

¹⁶⁹ See <http://www.fimitic.org/content/historical-event-first-ever-un-convention-rights-persons-disabilities-signed> (accessed on the 2 Nov 2012).

¹⁷⁰ Art 1(2) of the UNCRPD.

¹⁷¹ Ofuani 'The right to economic empowerment of persons with disabilities in Nigeria: How enabled?' (2011) *African Human Rights Law Journal* 641.

¹⁷² Akinbola 'The right to inclusive education in Nigeria: Meeting the needs and challenges of children with disabilities' (2010) *African Human Rights Law Journal* 461.

social model of disability as it moves the barrier of having a disability as a limitation created by society and not the individual him or herself.¹⁷³

Article 3 of the UNCRPD outlines the general principles of the convention.¹⁷⁴ According to the Office of the High Commissioner of Human Rights guide on the monitoring of the UNCRPD,¹⁷⁵ these principles steer the interpretation of the whole of the UNCRPD. The general principles include respect for dignity and autonomy, with special emphasis on the freedom of persons with disabilities to make their own decisions. Further, non-discrimination and inclusivity are highlighted in Article 3 as forming part of the basis of the obligations under the UNCRPD.

Article 3(d) states that one of the key principles of the UNCRPD is to value and accept the differences of people with disabilities as part of humanity. Respect for the evolving capacities of CWD and respect for the rights of CWD to preserve their identities is also given specific recognition in Article 3(h). Once again, the UNCRPD does not purport to create new rights for people with disabilities, but rather, it elaborates on the already existing human rights obligations within the disability framework.

Although the UNCRPD refers to all persons, as opposed to exclusively to children as with the UNCRC, Article 7 of the UNCRPD refers expressly to the best interests of the child principle. Article 7(2) states that in all actions concerning CWD, the best interests of the child shall be a primary consideration. The text of this article is almost

¹⁷³ The preamble of the UNCRPD supports the social model of disability, by stating that disability is an evolving concept and that disability results from interaction between persons with impairments and attitudinal and environmental barriers that hinder[s] their full and effective participation in society on an equal basis with others.

¹⁷⁴ Art 3 states as follows: The principles of the present Convention shall be: (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; (b) Non-discrimination; (c) Full and effective participation and inclusion in society; (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; (e) Equality of opportunity; (f) Accessibility; (g) Equality between men and women; (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

¹⁷⁵ See the UNHRC's Monitoring the Convention on the Rights of Persons with Disabilities: guidance for human rights monitors+ (2010) available at http://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf (accessed on 13 Jul 2015) 17.

exactly the same as Article 3(1) of the UNCRC, with the UNCRC only elaborating on the role-players this section refers to:

In all actions concerning children, *whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies*, the best interests of the child shall be a primary consideration.¹⁷⁶

Article 23(2) of the UNCPRD also refers to the best interests of the child principle by stating that in matters such as guardianship or adoption, in all cases the best interests of the child shall be paramount. It is interesting to note that contrary to Article 7(2) of the UNCPRD which requires the best interests of the child to be a primary consideration,⁺ Article 23(2) requires that the best interests of the child shall be paramount. This determination therefore suggests that in matters where CWD are to be adopted, or placed in the care of a guardian or institution, that their best interests are not merely a consideration, but reign as the most important, overriding principle, and may offer more protection to CWD in similar situations, than the UNCRC would.

The recognition and prohibition of discrimination is repeated in the UNCPRD 27 times, demonstrating its importance in the context of people with disabilities.¹⁷⁷ The UNCPRD may offer more protection against discrimination for CWD than the UNCRC, as it specifically recognises discrimination as part of the difficult circumstances faced by people with disabilities in striving towards the full enjoyment of their human rights.¹⁷⁸ The UNCPRD also defines discrimination on the basis of disability¹⁷⁹ whereas the UNCRC does not provide a definition of discrimination on

¹⁷⁶ Own emphasis.

¹⁷⁷ Par (c), (d), (h), (p) of the preamble, as well as Arts 2, 3, 4, 5, 6, 23, 24, 25, 27, 28, 29 of the UNCPRD.

¹⁷⁸ Par (c), (h) and (p) of the preamble of the UNCPRD.

¹⁷⁹ Art 2 of the UNCPRD states the following: *Discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.*⁺

any of the prohibited grounds such as age or disability, and only refers to discrimination twice in the whole of the convention.¹⁸⁰

The third pillar, the rights of the child to survival and development is also reflected in the UNCRPD. Although the word *survival* is not repeated, Article 24(1)(a) states that States Parties, with the focus on education, shall ensure the full development of human potential and the development of the personalitiesq talents and creativity of people with disabilities to their fullest potential.¹⁸¹

The child's right to share their views, as the fourth pillar, is specifically catered for in the UNCRPD. Article 7(3) of the UNCRPD states that States Parties shall ensure that CWD have the right to express their views freely on all matters affecting them. As with Article 12(1) of the UNCRC the views of the child with a disability must be given due weight in accordance with the child's age and maturity and on an equal basis with other children. This section also obliges States Parties to provide CWD with disability and age-appropriate assistance to realize the right to express their views.

Article 12(1) of the UNCRC provides that a child *who is capable of forming his or her own views* must be assured the right to express those views.¹⁸² The UNCRPD does not include this qualification, and only states the following in Article 7(3):

States 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 realize that right.

This section calls on States Parties to ensure this right, without requiring that a child must be *capable* of forming his or her own views. In this regard, this provision guarantees this particular right to children, irrespective of a possible disability they may have which may have an impact on their capability. Article 12(1) thus indicates

¹⁸⁰ Art 2(1) and (2) of the UNCRC.

¹⁸¹ Art 24(1)(a) and (b) of the UNCRPD.

¹⁸² See par 3.2.2.4 *supra*.

that the interests of children facing substantial injustice must be protected and heard, regardless of whether they have the ability to express their own views. Weight may therefore be attached to the child's age and maturity, and not their inability, possibly as a result of a mental or cognitive disability, when their views are taken into consideration. This is an important protection for CWD in respect of being afforded the right to express themselves, as the presence of a disability may be considered irrelevant. Article 12 of the UNCRPD, read with Article 12 of the UNCRC thus determines that CWD, who are capable of forming their own views, must be provided with measures to allow for their participation. Their disability may not exclude them from partaking in the decision-making process.

Further to this, Article 12 of the UNCRPD addresses a very important concept with reference to the participation of CWD: assisted or supported decision-making. Article 12 determines that persons with disabilities have the right to be recognised as persons before the law,¹⁸³ and that they enjoy legal capacity on an equal basis with others in all aspects of life.¹⁸⁴ Additionally, Article 12(3) states that States Parties must take steps to provide people with disabilities with the necessary support they need in order to exercise their legal capacity,¹⁸⁵ and that these measures must be tailored to the person's preferences and circumstances.¹⁸⁶ Holness¹⁸⁷ argues that Article 12 signals a move towards supported decision-making laws and measures and away from substituted decision-making models where the decision-making role is given to a third party, such as a curator.

In 2014, the CRPD issued its first General Comment and focused it on persons with disabilities' right to equality before the law.¹⁸⁸ The Committee advised in this comment that the support referred to in Article 12(3) must respect the rights, will and preferences of persons with disabilities and should never amount to substituted decision-making. The Committee further indicated that the form the support should

¹⁸³ Art 12(1) of the UNCRPD.

¹⁸⁴ Art 12(2) of the UNCRPD.

¹⁸⁵ Art 12(3) of the UNCRPD.

¹⁸⁶ Art 12(4) of the UNCRPD.

¹⁸⁷ Holness 'Equal recognition and legal capacity for persons with disabilities: Incorporating the principle of proportionality' (2014) *SAJHR* 314.

¹⁸⁸ CRPD/C/GC/1.

take, is not specified or stipulated.¹⁸⁹ This means that support may take on the form of a legal representative, a family member or an interpreter. All these measures of support may encourage the person with a disability's right to participation, as highlighted in Article 3 of the UNCRPD.¹⁹⁰

Further to this, in respect of the fifth pillar, express provision for CWD, Articles 7, 8, 18, 23, 24, 25 and 30 of the UNCRPD all refer to CWD explicitly, therefore supporting Article 23 of the UNCRC.¹⁹¹ This may indicate that both these international instruments have recognised that the rights of CWD must be specifically addressed, as CWD not be covered by the general rights of children, and people with disabilities.

3.3.4. Access to justice under the UNCRPD: the sixth pillar

It was not until the UNCRPD that the phrase 'access to justice' was stipulated in an international treaty as a standalone, substantive right.¹⁹² In addressing the right of

¹⁸⁹ CRPD/C/GC/1 par 17.

¹⁹⁰ A further correlation between the UNCRPD and UNCRC is the The Optional Protocol to the UNCRPD which was adopted on 13 December 2006, and entered into force with the UNCRPD on 3 May 2008. More than 80 countries have ratified the Optional Protocol, including South Africa, who ratified it on 30 November 2007. As with the third Communications Protocol of the UNCRC, the Optional Protocol to the UNCRPD establishes a communications mechanism to receive communications from or on behalf of individuals or groups who claim that their rights under the UNCRPD have been violated by a State Party. Similar to the UNCRC, for a communication to be accepted by the Committee on the Rights of Persons with Disabilities, all domestic remedies must have been exhausted. The Optional Protocol to the UNCRPD can thus also be seen as a measure of supporting CWD to have their voices heard, should their rights under the UNCRPD be violated, and domestic remedies fail to address the violation.

¹⁹¹ A number of arts in the UNCRPD specifically address the situation and rights of children with disabilities. Art 3 addresses respect for the evolving capacities of children and their right to preserve their identities. Art 4(3) requires States Parties to consult with children with disabilities, or through their representative organisations, on matters pertaining to policy and legislation implementation. Art 17 in addition calls on States Parties to ensure the registration of children with disabilities immediately after birth. Children with disabilities are also afforded the right to retain their fertility according to Art 23. According to Art 23(3), where parents are unable to care for children, efforts must be made to provide alternative care within the wider family or within the community in a family setting. Lastly, the UNCRPD also expressly highlights rights of children regarding education and participation in cultural, recreation and sports endeavours.

¹⁹² Kanter *The development of disability rights under international law: From charity to human rights* (2015) 222.

people with disabilities to have access to justice, Article 13 explicitly explains how States Parties can ensure that people with disabilities have equal access to justice:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.¹⁹³

Kanter¹⁹⁴ describes Article 13 of the UNCRPD as affirming access to justice for people with disabilities. She also argues that Article 13 supports a substantive approach to equality, as it necessitates that people with disabilities be treated different from people without disabilities.¹⁹⁵ Read with Articles 2 and 5(3) of the UNCRPD,¹⁹⁶ Article 13 requires States Parties to provide such accommodation as the person with a disability may need so as to access justice in the same way as access would be provided to a person without a disability.¹⁹⁷

The UNCRPD thus provides three very useful elements against which equal access to justice can be measured: reasonable accommodation, participation and the training of relevant stakeholders. These three essential elements offer guidance in assessing a judicial system's responsiveness towards the needs of people with disabilities. Clark¹⁹⁸ asserts that Article 13 of the UNCRPD recognises that both the content of legislation and practice are necessary to attain the inclusion necessary for

¹⁹³ Art 13 of the UNCRPD.

¹⁹⁴ Kanter (2015) 221-222.

¹⁹⁵ *Ibid.*

¹⁹⁶ Art 2 of the UNCRPD defines reasonable accommodations as "necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to people with disabilities the enjoyment, or exercise on an equal basis with others of all fundamental human rights and fundamental freedoms". Art 5(3) of the UNCRPD requires that States Parties must take all appropriate steps to ensure that such reasonable accommodation is provided.

¹⁹⁷ Kanter (2015) 222.

¹⁹⁸ Clark "The human right of the disabled to access justice: An imperative for policing" (2012) *Pol J* 225.

victims of crime who may have some form of disability. He also argues that such an approach would include policies and procedures as well as sound training programmes to make sure that the purpose and outcome of the training were translated into practice.

When combining these three elements with the five pillars of the UNCRC (and supported by the UNCRPD), a proper framework is established in order to inform States Parties on how to respond to the rights of CWD to access justice.¹⁹⁹ Responses from States Parties, such as legislation and other measures, can be tested against this framework by establishing whether there is compliance with, for instance, the best interests of the child principle,²⁰⁰ whether CWD can freely express their views,²⁰¹ whether anti-discrimination laws are in place²⁰² or whether a particular justice system allows age-appropriate accommodations for CWD and training for court officials.²⁰³ In the chapters to follow, South Africa's response will be tested against this six pillar framework, to give an indication of the status quo of the the rights of CWD to access justice. Similarly, the test will also be applied to the comparative analysis undertaken in chapter six *infra*.

3.3.5. Conclusion

The UNCRPD does not create new rights. Instead, it emphasises the need for existing rights to be respected in relation to people with disabilities.²⁰⁴ It places obligations on States Parties to respect, promote and fulfil these rights so as to

¹⁹⁹ As with the UNCRC, the UNCRPD also establishes a committee of experts responsible for monitoring the implementation of the rights contained in the UNCRPD. Art 34 of the UNCRPD establishes the Committee on the Rights of Persons with Disabilities. States Parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially within two years of accepting the Convention and thereafter every four years. By Nov 2012, South Africa had failed to submit any report to the Committee on how it had progressed with the implementation of the UNCRPD. See <http://www.pmg.org.za/report/20110302-presentation-university-uwc-centre-disability-law-and-policy-complian> (accessed on 3 Nov 2012). In April 2013, South Africa submitted an unedited version of its initial country report to the CORPD.

²⁰⁰ Pillar one of the framework.

²⁰¹ Pillar four of the framework.

²⁰² Pillar two of the framework.

²⁰³ Art 13 of the UNCRPD.

²⁰⁴ See par 3.3.1 *supra*.

protect a type of person who has historically been disadvantaged.²⁰⁵ It also supports the social model of disability in promoting the view that the barriers created by society hamper the full participation of people with disabilities in society.²⁰⁶ By catering for a communications mechanism, the UNCRPD ensures that where States Parties are unresponsive to protect the rights contained in the UNCRPD, persons with disabilities might have recourse on an international platform, should they have exhausted all available domestic remedies.²⁰⁷

Equality in accessing services, enjoyment of rights and the fulfilment of full potential is stressed by the UNCRPD. The UNCRPD is without a doubt the most comprehensive human rights treaty addressing the rights of all persons with disabilities, including children. The principles of the UNCRC are further expressly supported by the UNCRPD, and correlates with the five pillars derived from the UNCRC. It also adds its own pillar, by expressly catering for access to justice for people with disabilities,²⁰⁸ further contributing to a useful framework against which States Parties such as South Africa's responsiveness can be tested.

3.4. Conclusion

South Africa is a State Party to the UNCRC and the UNCRPD, both addressing the rights of CWD. The UNCRC details the special protection measures children must be afforded. In ratifying the UNCRC and the UNCRPD, South Africa also expressly affirmed the best interests of the child principle, as well as the standard of equal enjoyment of all rights by CWD. Furthermore, the principle of non-discrimination is ever present in both international agreements. States Parties may not discriminate against a child on the basis of his or her disability or age. By ratifying the most prominent instruments on the protection of children's rights, as well as the most significant human rights treaty on the rights of persons with disability, South Africa is compelled to abide by the principles included therein.

²⁰⁵ Art 4 of the UNCRPD.

²⁰⁶ See par 3.3.3 *supra*.

²⁰⁷ See fn at par 3.3.3 *supra*.

²⁰⁸ See par 3.3.4 *supra*.

By combining the elements detailed in the ~~five~~ pillars of the UNCRC and the sixth pillar constituting of Article 13 of the UNCRPD, a framework can be established against which the realisation of the rights of CWD to have access to justice can be assessed. The ~~five~~ pillars of the UNCRC form a child-rights baseline, whereas Article 13 provides for the practical implementation of measures for ensuring access to justice for CWD. For example, CWD must be afforded an opportunity to participate in judicial proceedings (UNCRC) and age-appropriate accommodations must be made available to respond to this specific right (UNCRPD). Or, as CWD have the right not to be discriminated against (UNCRC), the training of relevant stakeholders is crucial throughout judicial interventions and proceedings to prevent unequal treatment (UNCRPD). In the following chapters, South Africa's response to these obligations as set out in the UNCRC and UNCRPD will be tested against the above-mentioned specific elements. Where there has been a lack of responsiveness to the specific needs of CWD, recommendations will be made in order to redress the deficiencies.

Chapter 4: Domestic Response

4.1. Introduction

4.2. Domestic legislation

4.2.1. Children's Act 38 of 2005

4.2.2. The Child Justice Act 75 of 2008

4.2.3. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

4.2.4. Mental Health Care Act 17 of 2002

4.2.5. Criminal Procedure Act 51 of 1977

4.2.6. Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000

4.3. Assessment of domestic legislation against the "six pillars"

4.3.1. Pillar one: The best interests of the child principle

4.3.2. Pillar two: The principle of non-discrimination

4.3.3. Pillar three: Survival and development

4.3.4. Pillar four: The child's right to be heard

4.3.5. Pillar five: The specific needs of children with disabilities

4.3.6. Pillar six: Article 13 of the UNCRC

4.3.6.1. Accessible court procedures

4.3.6.2. Physically accessible courts

4.3.6.3. Differential questioning techniques

4.3.6.4. Other participatory accommodations

4.3.6.5. Training in order to address stigmatisation

4.4. Conclusion

4.1. Introduction

As discussed in Chapter 2, the South African Constitution provides for the relevance and importance of international law when interpreting the Bill of Rights.¹ Chapter 3 further illustrated that South Africa has ratified key international instruments relating to access to justice for CWD. By combining the elements set out in the ~~five~~ ^{six} pillars of the UNCRC and Article 13 of the UNCRC, a framework has been established against which the realisation of the rights of CWD to have access to justice can be assessed.

¹ See par 2.7 *supra*.

Article 4 of the UNCRC compels States Parties to undertake all appropriate legislative, administrative and other measures for the implementation of the rights contained in the UNCRC. Similarly Article 4 of the UNCRPD states that States Parties are to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the UNCRPD. The UNCRPD goes further in requiring that States Parties take all measures to modify or abolish existing legislation or practices which may be discriminatory against persons with disabilities.² A positive obligation therefore rests on South Africa to comply with the duties as set out in both the UNCRC and UNCRPD: all appropriate measures must be taken to implement the rights recognised in both these treaties.

In addressing the right of CWD to access justice, South Africa's responsiveness towards its obligations in respect of the six pillars will be assessed in this chapter, in order to determine whether CWD have access to justice in South Africa. The legislative and other measures taken in order to respect and implement the right of CWD to have access to justice will be assessed against the framework set out in Chapter 3, and will include an evaluation of relevant domestic legislation. This chapter will also aim to illustrate that South Africa's ratification of these key international conventions, in so far as they relate to the fulfilment of the rights of CWD to have access to justice, may have remained unsupported by lack of implementation of the international instruments. South Africa's lack of administrative and budgetary commitments in order to address accommodation needed for CWD to be able to effectively approach the justice system will also be highlighted.

4.2. Domestic legislation

As discussed in Chapter 2,³ South Africa follows a dualistic approach in respect of the domestic effect of international treaties.⁴ This means that international agreements such as the UNCRC and UNCRPD only becomes law in South Africa when it is enacted into domestic national legislation and it means that international

² Art 4(1)(b) of the UNCRPD.

³ See par 2.7 *supra*.

⁴ *Ibid*.

treaties in South Africa are not self-executing.⁵ In order to assess the effectiveness of the UNCRC and UNCRPD, it is necessary to look at how South Africa has domesticated the obligations included in these agreements, in order to provide access to justice for children with disabilities. National legislation thus establishes a starting point to measure South Africa's responsiveness in respect of the six pillars, as this framework encapsulates the rights of CWD, as children, as well as people with disabilities pursuing justice. It also highlights the obligations of South Africa as a States Party to the UNCRC and UNCRPD, as according to Chapter two *supra*, international law plays a significant role in respect of the interpretation of the rights of CWD as contained in the Bill of Rights.⁶

In applying measuring South Africa's response against this framework, the main questions are whether South Africa has domesticated these principles through legislative and other means, and to what effect. Where domestic legislation indeed reflects the framework as set out in Chapter 3 it must be established how successful its implementation is. Has South Africa taken its obligation in respect of the UNCRC and UNCRPD seriously, and how has it responded to these obligations? A variety of domestic legislation may address South Africa's duties in respect of access to justice for CWD. As with deriving the framework set out in Chapter 3, a permutation approach must be applied when engaging domestic legislation relevant to the right of CWD to have access to justice. A brief general discussion of the background of relevant legislation follows as well as an assessment of these laws against the framework of the six pillars.

The following legislation will be outlined in this chapter:⁷ the Children's Act 38 of 2005, the Child Justice Act 75 of 2008, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, Mental Health Care Act 17 of 2002, the Criminal Procedure Act 51 of 1977 and the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000.

⁵ S 231 of the South African Constitution. See also *Glenister v President of the Republic of South Africa* par 96 on the important role of binding and even non-binding international law.

⁶ S 39 of the South African Constitution; Ch 2 in general.

⁷ These Acts do not constitute an exhaustive list, but are the most relevant in respect of their applicability, objectives and aims to support the rights of children with disabilities to have access to justice.

4.2.1. The Children's Act 38 of 2005⁸

In assessing South Africa's response to the right of CWD to have access to justice, the Children's Act serves as the principal point of departure. It encapsulates the rights contained in section 28 of the South African Constitution, and thus in turn reflects the five pillars of the UNCRC to a large extent.⁹

The Children's Act came into full operation on 1 April 2010¹⁰ and specifically includes the rights of CWD.¹¹ The Children's Act is also the product of an extensive review of its predecessor, the Child Care Act,¹² during which the South African Law Commission (SALC) endeavoured to address the needs of children in especially difficult circumstances, such as CWD.¹³ Generally, the objectives of the Children's Act are to give effect to children's specific constitutional rights.¹⁴ These include the best interests of the child principle,¹⁵ protection of children against discrimination,¹⁶ enabling the survival and development of the child,¹⁷ child participation¹⁸ and the

⁸ Hereafter referred to as the Children's Act.

⁹ S 2 of the Children's Act states specifically that one of the objectives of the Act is to give effect to the South Africa's obligations concerning the well-being of children in terms of international instruments binding on the Republic. Further details of the relevant ss will be discussed under par 4.3 *infra*.

¹⁰ The Children's Act was assented to on 6 Jun 2006. The first part of the Children's Act was passed by parliament in 2005. This part of the Act deals primarily with national government functions. The Children's Amendment Act 41 of 2007 was passed in 2007 and included additional provisions relating mostly to provincial government functions. On 1 Apr 2010 the full Act as well as the Amendment Act came into full operation.

¹¹ The specific rights of children with disabilities were included in the Children's Act after much lobbying by concerned stakeholders. See Bekink and Bekink (2005) 126. See also Jamieson and Proudlock (2009) 1.

¹² The Child Care Act 74 of 1983.

¹³ See the SALC issue paper 13 Project 110: Review of the Child Care Act (1998) 10, as well as Boezaart 'The Children's Act: A valuable tool in realising the rights of children with disabilities' (2011) *THRHR* 271.

¹⁴ S 28 of the South African Constitution, as well as Gray and Jack 'Health policy and legislation' (2011) *SAHR* 9.

¹⁵ S 28(2) of the South African Constitution, as well as s 2(b)(iv) and s 7, read with s 9 of the Children's Act.

¹⁶ S 9 of the South African Constitution, as well as ss 2(f), 6(2)(d), 32(b) of the Children's Act.

¹⁷ Ss 10 and 29 of the South African Constitution, as well as ss 2(d) and (i) and 6(2)(e) of the Children's Act.

¹⁸ Ss 28(1)(h), 34 and 35 of the South African Constitution, as well as s 10 of the Children's Act.

promotion of the rights of CWD specifically.¹⁹ As will be seen below, the five pillar+ framework established in Chapter 3 *supra*, is reflected in this newly enacted legislation.

4.2.2. The Child Justice Act 75 of 2008

The Child Justice Act²⁰ came into full operation on 1 April 2010. Following South Africa's ratification of the UNCRC in 1995, the SALC²¹ undertook an investigation into child justice, and how to apply the relevant principles of the UNCRC to children in conflict with the law.²² According to Gallinetti,²³ the CJA uses a rights-based approach in creating a procedural framework dealing with children in conflict with the law, whilst recognising their accountability. The CJA also contains provisions which encourage the avoidance of arrest, and where children are arrested, recommend their release as early as possible into the care of a suitable adult.²⁴

4.2.3. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

On 16 December 2007, certain sections of the Criminal Law (Sexual Offences and Related Matters) Amendment Act²⁵ came into effect.²⁶ Section 72 of the SOA provided for the implementation of Chapters 1 to 4 and 7, which mainly deal with the creation of statutory sexual offences, and special protection measures for children

¹⁹ S 9 of the South African Constitution, as well as s 11 of the Children's Act.

²⁰ Child Justice Act 75 of 2008. Hereafter referred to as the CJA.

²¹ The Committee was called the Project Committee of the SALC as opposed to its current name, the SALRC.

²² See in general the SALC Project 106 Juvenile justice report+ (2000) available at http://www.justice.gov.za/salrc/reports/r_prj106_juvjus_2000%20jul.pdf (accessed on 13 Jul 2015).

²³ Gallinetti Getting to know the Child Justice Act+(2009) *Child Justice Alliance* 8.

²⁴ S 21(3) of the CJA. These include the parents, guardian, or any other suitable adult.

²⁵ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Hereafter referred to as the SOA.

²⁶ With the exception of chs 5 and 6, the SOA came into operation on 16 Dec 2007.

and persons with mental disabilities.²⁷ It also revoked several common law crimes, including rape and indecent assault.²⁸

The SOA expressly addresses matters pertaining to children and persons with mental disabilities.²⁹ The SOA describes comprehensive provisions dealing with sexual offences against children and persons who are mentally disabled. These offences include sexual exploitation or grooming, exposure to or display of pornography and the creation of child pornography.³⁰ The identification of these offences aims to highlight the particular vulnerability of children and persons with mental disabilities in respect of matters relating to sexual exploitation and abuse.³¹ The SOA also expressly creates a duty to report sexual offences committed with or against children or persons who are mentally disabled.³²

Chapter 3 of the SOA specifically details sexual offences against children. These include committing an act of consensual sexual violation with a child,³³ sexual exploitation of a child,³⁴ sexual grooming of a child³⁵ and exposing child pornography or pornography to a child.³⁶

4.2.4. Mental Health Care Act 17 of 2002

Mental health legislation is essential for protecting the rights of people with mental disabilities, who are a vulnerable part of society. Persons with mental disorders,

²⁷ Certain transitional arrangements as well as evidence related matters are also dealt with in these chapters.

²⁸ The definition of rape was expanded to include all forms of non-consensual penetration. The common law offence of indecent assault was also repealed and replaced by the statutory offence of sexual assault in relation to all forms of sexual violation without consent.

²⁹ Chs 4 and 6 of the SOA.

³⁰ Part 3 of the SOA.

³¹ See the preamble of the SOA where the vulnerability of women and children to sexual abuse and exploitation is pointed out.

³² S 54 of the SOA.

³³ S 16 of the SOA.

³⁴ S 17 of the SOA.

³⁵ S 18 of the SOA.

³⁶ S 19 of the SOA. The SOA also includes the following offences pertaining to children: using a child for or benefiting from child pornography (s 20); compelling or causing a child to witness a sexual offence, a sexual act or self-masturbation (s 21); exposing or displaying or causing the exposure or display of genital organs, anus or female breasts to a child (s 22).

disabilities and illnesses face stigmatisation, prejudice and marginalisation in all societies and this amplifies the probability that their human rights will be violated.³⁷ The Mental Health Care Act³⁸ was assented to by the President on 28 October 2002 to provide for the care, treatment and rehabilitation of persons with mental disabilities. The preamble of the MHCA recognises that the South African Constitution prohibits discrimination against people with mental or other disabilities. The preamble also recognises that persons with mental disabilities and illnesses should be afforded special protection at all times. South Africa falls in the category of a small number of countries globally that has passed mental health legislation after the 1990s.³⁹ The MHCA addresses access to services for persons with mental health illnesses or intellectual disabilities,⁴⁰ and ensures that mental health care services become a part of the general health system.⁴¹ The MHCA in addition regulates access to services for patients,⁴² state patients and mentally ill prisoners.⁴³ The MHCA moreover explains how the property of mentally ill persons may be dealt with in a court of law.⁴⁴ The MHCA also creates mechanisms such as Mental Health Review Boards,⁴⁵ to protect and uphold the rights contained in the MHCA.⁴⁶

4.2.5. The Criminal Procedure Act 51 of 1977

The Criminal Procedure Act of 1977⁴⁷ governs criminal procedure in the South African legal system. It sets out the legal procedure in terms of matters related to the criminal justice system, including procedures of arrest, bail applications, witness

³⁷ See <http://www.mayoclinic.com/health/mental-health/MH00076> (accessed on 19 Jan 2013).

³⁸ Mental Health Care Act 17 of 2002. Hereafter referred to as the MHCA.

³⁹ World Health Organization %Mental health legislation and human rights+(2003) available at http://www.who.int/mental_health/resources/en/Legislation.pdf (accessed on 13 Jul 2015) 9. S 3 and 6 of the MHCA.

⁴⁰ S 3 and 6 of the MHCA.

⁴¹ See http://ossafrica.com/esst/index.php?title=Summary_of_the_Mental_Health_Act%2C_no._17_of_2002 (accessed on 18 Nov 2012).

⁴² These include voluntary, assisted and involuntary patients.

⁴³ Ch 7 of the MHCA refers to mentally ill prisoners.

⁴⁴ Ch 8 of the MCHA.

⁴⁵ See in general Mental Health Review Boards %Orientation guideline and training manual+(2007). These boards are mandated to uphold the human rights of persons with mental illness and intellectual disability.

⁴⁶ Lund *et al* %Mental health services in South Africa: Taking stock+(2012) *African Journal of Psychiatry* 402.

⁴⁷ Criminal Procedure Act 51 of 1977. Hereafter referred to as the CPA.

testimonies as well as sentencing after conviction. The CPA came into full operation on 22 July 1977 and has been amended 68 times by other legislation, as well as its own amendment acts.⁴⁸ Specific sections such as section 170A within the CPA address the rights of children to take part in evidentiary processes. This, as much as it allows the participation of children throughout the criminal justice system and therefore safeguards their rights to participate, also addresses the rights of the accused in criminal trials to be in the presence of their accuser.⁴⁹

4.2.6. The Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000

Section 9(4) of the South African Constitution states that national legislation must be enacted to prevent or prohibit unfair discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act⁵⁰ was drafted in fulfilment of this constitutional obligation, as well as to adhere to South Africa's international obligations in terms of the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination against Women.⁵¹ PEPUDA aims to fulfil the constitutional mandate to prevent and prohibit unfair discrimination.⁵² PEPUDA seeks to be a key legislative tool to translate the right to equality into rules that are practical and workable.⁵³ Prior to the enactment of PEPUDA, most people did not have any accessible legal remedies against discrimination, except for utilising civil litigation which may amount to a

⁴⁸ The coming into operation of legislation such as the CJA and the SOA amended certain sections of the CPA. The CPA also has 19 of its own amendment acts.

⁴⁹ See s 158 of the CPA where it provides that all criminal proceedings in any court must take place in the presence of the accused, except where a deviation is expressly provided for.

⁵⁰ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Hereafter referred to as PEPUDA.

⁵¹ International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature on 21 Dec 1965, 660 U.N.T.S. 195 (entered into force on 4 Jan 1969), International Convention on the Elimination of All Forms of Discrimination against Women 18 Dec 1979, 1249 U.N.T.S. 13 (entered into force on 3 Sep 1981) (CEDAW). The International Covenant on Civil and Political Rights, ICESCR and UNCRC also address matters relating to discrimination within their respective rights based focus areas.

⁵² The right not to be discriminated against is further given effect to by codes of good practice in both the Employment Equity Act 55 of 1998 and the Labour Relations Act 66 of 1995. A full discussion of this legislation, however, goes beyond the ambit of this contribution.

⁵³ Albertyn *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 2.

tedious and expensive endeavour. PEPUDA provides accessible remedies in terms of discrimination, and in essence puts certain elements in the search for justice within reach of more people.⁵⁴ This legislation therefore is of great relevance in respect of pillar two, the principle of non-discrimination, as well as the sixth pillar: access to justice in terms of Article 13 of the UNCRPD, more fully discussed below.

4.3. Assessment of domestic legislation against the “six pillars”

4.3.1. Pillar one: the best interests of the child principle

The best interests of the child principle is addressed and domesticated through local legislation mainly by way of the Children's Act. This Act makes 57 references to the best interests of the child. From the outset, respect for the best interests of the child is included in the main objectives of the Children's Act, and is detailed in Section 2(a)(iv). This section states that the best interests of a child are of paramount importance *in every matter concerning the child*.⁵⁵ The key principles of the Act further indicate that all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the best interests of the child standard as detailed in the Act.⁵⁶ The legislature's use of the words *in every matter* and *in all proceedings* requires an interests-consciousness with regard to children from all role-players, as there may be very few circumstances, decisions and actions which may not affect children in some way or the other.⁵⁷

The Children's Act also does not distinguish between the best interests of children without disabilities and those with some form of disability. The Children's Act does,

⁵⁴ Pityana *The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2002) available at http://uir.unisa.ac.za/bitstream/handle/10500/407/codi_v44_a1.pdf?sequence=1 (accessed on 13 Jul 2015) 6.

⁵⁵ S 2(a)(iv) of the Children's Act.

⁵⁶ S 6(2) of the Children's Act.

⁵⁷ Boezaart maintains that this section promotes a child-centred approach in respect of all legislation, proceedings and state actions regarding children, in Davel and Skelton (eds) *Commentary on the Children's Act* (2013) 1-3. See also Heaton *An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context* (2009) 34(2) *Journal for Juridical Science* 13.

however, provide a list of factors to be considered when determining the best interests of a child in a particular matter.⁵⁸ Section 7 of the Children's Act includes factors which must be taken into consideration in determining the best interests of the child. Where relevant, these may include the nature of the relationship between the child and, for example, a caregiver;⁵⁹ the child's needs,⁶⁰ age and maturity.⁶¹ The Children's Act also directly requires an engagement with the particular needs of CWD in terms of section 7(1)(ii), which states that any disability a child may have must be taken into account in determining the best interests of said child.⁶²

Although it appears to be a seemingly exhaustive list of factors to be considered, the Constitutional Court in *S v M*⁶³ held that the principle of the best interests of a child should not be applied to a predetermined formula.⁶⁴ This finding supports the above argument that a one-size-fits-all approach will unlikely serve the needs of CWD resolutely. It thus indirectly provides the motivation for a proper consideration of the best interests of CWD specifically.

Section 9 of the Children's Act further determines that in every matter concerning the care, protection and well-being of a child, the best interests of the child principle is of paramount importance.

The principle of the best interests of the child is also ingrained throughout the CJA.⁶⁵ The first and foremost objective of the CJA is the protection of children's rights as

⁵⁸ *S v M* par 24.

⁵⁹ S 7(1)(a) of the Children's Act.

⁶⁰ S 7(1)(f) of the Children's Act.

⁶¹ S 7(1)(g) of the Children's Act.

⁶² Prior to the coming into operation of the Children's Act, guidance on what constitutes as the best interests of the child was given by the court in *McCall v McCall* 1994 (3) SA 201 (C). The court in *McCall* listed 13 factors which may be taken into account in determining the best interest of the child. S 7 of the Children's Act provides a more comprehensive list. See also Boezaart in Davel and Skelton *Commentary on the Children's Act* (2013) 2-8.

⁶³ *S v M* par 24.

⁶⁴ As was pointed out in ch 2 under the discussion of s 28(2) of the South African Constitution, the courts have held that there is no exhaustive list of what may constitute as being in the best interests of the child. The concept therefore remains flexible and may result in different things to different children. See par 2.5 *supra*.

⁶⁵ See the preamble of CJA.

contained in the South African Constitution.⁶⁶ In addition to the concept of restorative justice, the CJA also aims to afford children special treatment once they are in conflict with the law.⁶⁷ Sections 9, 24, 30, 35, 38, 41, 44, 47, 63, 65 and 80 all expressly refer to the best interests of the child when applying the CJA.⁶⁸

As detailed in section 7(1)(ii) of the Children's Act, any disability a child may have must be taken into account in determining the best interests of said child. Therefore, once a decision is made in respect of the CJA, it must be guided by the best interests of the child, of which the child's disability is a definitive factor. The presence of a disability may very well determine the outcome of whether a child who committed a crime is released,⁶⁹ whether such child is further detained in a prison,⁷⁰ or in what manner a child is cross-examined.⁷¹

⁶⁶ S 28 of the South African Constitution, read with s 35.

⁶⁷ S 2(b)(ii) of the CJA.

⁶⁸ S 9(1) determines that where a child is suspected of having committed an offence and is under the age of 10 years, he or she may not be arrested, and must be handed over to an appropriate adult such as a parent, or a suitable child and youth care centre if it is not in the best interest of the child to be handed over to an adult; S 24 states that in considering whether or not it would be in the interests of justice to release a child, the presiding officer must have regard to the best interests of the child; s 30 states that Before a decision is made to detain or further detain a child in prison, the presiding officer must consider amongst others, the best interests of the child; s 35 determines that the purpose of an assessment into the CJA is, amongst others, to provide relevant information regarding the child which the probation officer may regard to be in the best interests of the child; s 38 states that certain persons may be excluded from an assessment of the child if it is in the best interests of the child or the administration of justice; s 41 states that If the child has not been assessed, the prosecutor may dispense with the assessment if it is in the best interests of the child to do so: provided that the reasons for dispensing with the assessment must be entered on the record; s 44 authorizes the presiding officer to exclude any person from attending the preliminary inquiry if that person's presence is not in the best interests of the child; s 47 determines that if a child is a co-accused with one or more other children, a joint preliminary inquiry may be held if the presiding officer is satisfied that it will be in the best interests of all the children concerned.; s 63 obliges a child justice court to, during the proceedings, ensure that the best interests of the child are upheld; s 65 states that if a parent, an appropriate adult or a guardian cannot be traced after reasonable efforts and any further delay would be prejudicial to the best interests of the child or to the administration of justice, the child justice court may dispense with the obligation that the child must be assisted by a parent, an appropriate adult or a guardian.; s 80 calls for the legal representative of the child to ensure that all proceedings are concluded without delay and deal with the matter in a manner to ensure that the best interests of the child are at all times of paramount importance.

⁶⁹ S 24 of the CJA.

⁷⁰ S 30 of the CJA.

⁷¹ S 63 of the CJA.

In addition to the Children's Act and CJA, the preamble of the SOA confirms the rights of children and other vulnerable groups to have their best interests considered of paramount importance.⁷² Further to this, the SOA only expressly refers to the best interests principle once more within the Act, when addressing the vulnerability of a victim in adducing evidence in court.⁷³ South Africa's response in respect of pillar one has therefore been to domesticate the best interests principle into key legislation such as the Children's Act, CJA and SOA. As this principle is rather vague as per the views of critics,⁷⁴ and subjective and subject to individual factors and case-by-case analysis,⁷⁵ proper implementation and compliance is difficult to monitor.⁷⁶

4.3.2. Pillar two: the principle of non-discrimination

One of the key objectives of the Children's Act is to protect all children from discrimination.⁷⁷ CWD may be exposed to discrimination based on their age and disability.⁷⁸ Albertyn⁷⁹ maintains that discrimination based on disability often stems from an omission or a failure to act, in principle based on the general exclusion of the needs of people with disabilities in legislation and policies.⁸⁰

As a result, it is imperative for the Children's Act to require positive obligations from role-players in order to address such potential oversight and omissions, and to

⁷² The preamble of the SOA states that the South African Constitution enshrines the rights of all people, including the rights of children and other vulnerable persons to have their best interests considered to be of paramount importance.

⁷³ S 31(2)(b) of the SOA.

⁷⁴ Moyo 'Reconceptualising the paramountcy principle: Beyond the individualistic construction of the best interests of the child' (2012) *African Human Rights Law Journal* 142-150.

⁷⁵ Heaton 'An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context' (2009) *Journal for Juridical Science* 3; Schafer *Child law in South Africa domestic and international perspectives* (2011) 67.

⁷⁶ See also par 2.5 *supra* for the discussion of the best interests of the child principle as set out in the South African Constitution.

⁷⁷ S 2(f) of the Children's Act.

⁷⁸ Although age is included as one of the prohibited grounds for discrimination, discrimination based on age has yet to be considered by the Constitutional Court.

⁷⁹ Albertyn (2003) par 4.8.

⁸⁰ See par 2.3 *supra* where the right to equality is discussed in i.t.o the South African Constitution.

prevent CWD from being seen as mere objects. Section 6(2)(d) of the Children's Act states that all decisions concerning a child must protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child.⁸¹ By making use of the word 'must' the legislature has left no discretion in relation to implementation, as the word 'must' is used to indicate a duty to act.⁸²

It should be noted that section 2 of the Children's Act refers to 'discrimination' in general, and does not qualify the protection that must be afforded to children and to the discrimination being 'unfair,' as reflected in section 6(2) of the Act. Section 2 is thus more reflective of Article 2 of the UNCRC which calls on States Parties to protect children against *all forms of discrimination* and discrimination of *any kind*.

Other key legislation addressing the general principle of non-discrimination expressly is the PEPUA, which is aimed at transforming South African society.⁸³ In contrast with the Children's Act, PEPUA does not address matters relating to children directly. It does however address unfair discrimination and equality in respect of *all persons*. The categorisation of *everyone* is broad enough to include the rights of children. The first Constitutional test of PEPUA in *MEC for Education KZN v Pillay* also related to unfair discrimination against a child.⁸⁴ The issue before the Equality Court *a quo* was whether a school's refusal to permit a learner to wear a nose stud for cultural and religious purposes at school, was an act of unfair discrimination. In this matter, the Constitutional Court held that the learner was indeed unfairly discriminated against on the basis of both religion and culture in terms of section 6 of the Equality Act.⁸⁵

⁸¹ S 6(2) of the Children's Act.

⁸² See <http://vspages.com/may-vs-must-5276/> (accessed on 9 Jan 2013).

⁸³ Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Court-driven or legislature-driven societal transformation?' 2008 *Stell LR* 124.

⁸⁴ *MEC for Education KZN v Pillay* where it was found that a school unfairly discriminated against a girl child on the basis of her religion.

⁸⁵ *MEC for Education KZN v Pillay* para 68 and 112.

Discrimination is defined by PEPUDA as any act or omission,⁸⁶ which directly or indirectly:

- (a) imposes burdens, obligations or disadvantage on; or
- (b) withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds.⁸⁷

The prohibited grounds referred to in this definition include discrimination on the basis of age, as well as disability. Other prohibited grounds also include any discrimination that undermines human dignity.⁸⁸ PEPUDA focuses on and prohibits *unfair* discrimination against any person, as opposed to section 2 of the Children's Act which merely refers to a prohibition of *discrimination* against a child.⁸⁹ To determine what constitutes unfair discrimination, the Constitutional Court has assisted in providing a three step approach to ascertain the status of a claim of unfair discrimination, which has been discussed more fully in Chapter 2 *supra*.⁹⁰ Firstly, a determination must be made whether there has been discrimination on a prohibited ground, such as age. Secondly, it needs to be proven that said discrimination was indeed unfair. Lastly, a determination must be made on whether the limitation, if emanating from a law of general application, is reasonable and justifiable.⁹¹

Section 9 of PEPUDA creates a very clear prohibition against discrimination on the ground of disability, and expressly states that failing to eradicate impediments that unfairly limit or restrict persons with disabilities from enjoying equal opportunities, amounts to discrimination. This also includes failing to take steps to reasonably accommodate the needs of such persons.⁹²

⁸⁶ These include policies, laws, rules, practices, conditions as well as situations.

⁸⁷ See the definitions under s 1 of PEPUDA.

⁸⁸ S 1(b)(ii) of PEPUDA.

⁸⁹ S 6 of PEPUDA states that neither the State nor any person may unfairly discriminate against any person, whereas s 2(f) of the Children's Act states that the objects of the Children's Act includes the protection of children from discrimination, exploitation and any other physical, emotional or moral harm or hazards.

⁹⁰ *Harksen v Lane* par 54. Also, *President of the RSA v Hugo* par 43.

⁹¹ It is suggested that the determination of unfairness in terms of PEPUDA cannot just be imported directly from Constitutional Court jurisprudence. See Albertyn (2003) 41.

⁹² S 28 of PEPUDA goes further by stating that if unfair discrimination on the grounds of disability is proven to have played a role in the commission of an offence, this proven fact must be taken into account and regarded as an aggravating circumstance for purposes of sentencing.

In addition to the Children's Act and PEPUDA, the MHCA addresses unfair discrimination specifically. Section 10 of the MHCA states that a mental health care user may not be unfairly discriminated against on the grounds of his or her mental health status. The MCHA includes in its definition of a mental health care user, a person below the age of 18, or a person unable to make his or her own decisions, who is receiving care or treatment aimed at enhancing his or her mental health status. Specific reference is thus made here to children, as well as persons suffering from severe or profound mental and intellectual disabilities.

Although the CJA does not explicitly refer to the principle of non-discrimination, it does vaguely touch on the standard that a child involved in a crime must not be treated more severely than an adult in similar circumstances.⁹³

In respect of the second pillar, domestic legislation thus addresses the principle of non-discrimination in respect of children and people with disabilities explicitly in the Children's Act,⁹⁴ PEPUDA,⁹⁵ the MHCA,⁹⁶ as well as at some level in the CJA.⁹⁷

4.3.3. Pillar three: survival and development

The UNCRC obliges States Parties to recognize that each and every child has an inherent right to survival and development.⁹⁸ Neither the South African Constitution nor the Children's Act, however, makes express reference to the right to survival. Dutschke and Abrahams⁹⁹ nevertheless argue that the right to survival is reflected under South African law as the right to life and a variety of socio-economic rights.¹⁰⁰

⁹³ S 3(b) of the CJA.

⁹⁴ S 2 of the Children's Act.

⁹⁵ S 1 and 9 of PEPUDA.

⁹⁶ S10 of the MHCA.

⁹⁷ S 3(b) of the CJA.

⁹⁸ Art 6 and 23 of the UNCRC.

⁹⁹ Dutschke and Abrahams 'Children's right to maximum survival and development' (2006), available at

http://www.ci.org.za/depts/ci/pubs/pdf/health/resource/Rights_in_brief_survival.pdf

(accessed on 13 Jul 2015) 5; Hodgkin and Newell (1998) 85-95, 94.

¹⁰⁰ See ss 11, 26, 27, 28 and 29 of the South African Constitution.

Development is enshrined throughout the Children's Act and has particular reference to CWD. At the outset of the Children's Act, the preamble states that children should be provided with the necessary protection and assistance for the full and harmonious development of his or her personality.¹⁰¹ Section 6(2) of the Children's Act further refers to the 'win principles relating to development', which relates to encouraging autonomy and the potential of children, whilst recognising their vulnerability and need for protection.¹⁰² Development in this regard is addressed by the Children's Act from two perspectives: the process of progression from one form or stage of the child, as well as the specific stage of development the child is currently at.¹⁰³ For example, the Children's Act promotes the development of a child from one phase to another, but it also expressly requires respect, protection and appropriate responses for the child, whichever stage of development the child is at.¹⁰⁴ This is important when addressing the rights of CWD as a child with a disability may be the same age as his or her non-disabled peer, however, their level and pace of development may differ. In many cases, the development of a child with a disability may also become stagnant much sooner than his or her peer, as his or her functional capabilities and participation will be limited by a range of factors. Once this recognition is accomplished the needs analysis of the child will ideally inform a response to the rights of such child.

In respect of whether or not the third pillar is reflected in the CJA, a consideration of diversion programmes is required. As pointed out above, the CJA aims to divert children away from the harsh criminal justice system, towards programmes with restorative and rehabilitative value.¹⁰⁵ The objectives of these diversion programmes

¹⁰¹ Caring for a child inherently requires that the child be provided with living conditions conducive to his or her development, guiding, directing and securing the child's education and upbringing, in a manner appropriate for the child's development, and assisting the child in decisions to be taken by the child in a manner appropriate to the child's level of development.

¹⁰² Boezaart in Davel and Skelton (eds) *Commentary on the Children's Act* (2013) 2-4. See also Davel and De Kock 'In kind se beste belang' (2001) *De Jure* 272-291.

¹⁰³ Ss 6(2)(e), 7(1)(g) and 10 of the Children's Act.

¹⁰⁴ *Ibid.*

¹⁰⁵ Badenhorst 'Launch and implementation of the Child Justice Act' (2010) *Art 40* 3. See also Sloth-Nielsen and Galinetti 'Must say sorry?' *Ubuntu*, Africanisation and the child justice system in the Child Justice Act 75 of 2008 (2011) *PELJ* 64.

include the promotion of the child's well-being and dignity, as well as the development of his or her sense of self-worth and ability to contribute to society.¹⁰⁶ The type of diversion programme a child is diverted to, will also be determined in respect of the child's developmental needs.¹⁰⁷ The CJA also refers to the child's cognitive ability in this regard,¹⁰⁸ determining an understanding that children may differ in their development stages and intellectual ability. This must be taken into account when an appropriate diversion programme is determined, as different abilities will necessitate possible different approaches.

4.3.4. Pillar four: the child's right to be heard

As pointed out above,¹⁰⁹ the UNCRC determines that a child must be provided with:

...the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the rules of national law.¹¹⁰

This is supported by Article 12 of the UNCRPD which addresses the right of people with disabilities to be provided with the support they may require to exercise their legal capacity.¹¹¹

The right of CWD to be heard may thus be realised through direct participation, indirectly through a representative or other measures of support.¹¹² One of these indirect measures includes the appointment of a curator *ad litem*, who is appointed to assist children in litigation.¹¹³ In terms of South African common law and current

¹⁰⁶ S 51 of the CJA.

¹⁰⁷ S 54(e) of the CJA.

¹⁰⁸ S 54(c) of the CJA.

¹⁰⁹ Par 3.2.2.4 *supra*.

¹¹⁰ Art 12(2) of the UNCRC.

¹¹¹ Art 12(3) of the UNCRPD states that States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

¹¹² Art 12 of the UNCRC read with Art 12(3) of the UNCRPD.

¹¹³ Boezaart 'The role of a curator *ad litem* and children's access to the courts' (2013) *De Jure* 707. See also Boezaart 'Child law, the child and South African private law' in *Child law in South Africa* (2009) in Boezaart (ed) *Child Law In South Africa* 22-23; Du Toit 'Legal

practice, a curator *ad litem* may be appointed in circumstances where the child is without a parent or legal guardian, or such parent or guardian is unavailable or unreasonably refusing to assist the child to pursue legal proceedings. As Letzer and Vergano¹¹⁴ state, the appointment of such curators is a daily occurrence in courts and may thus be seen as affording a child an opportunity to be heard and represented in litigious matters affecting him or her. With regard to Article 12 of the UNCRPD, however, this curator may not be appointed solely on the assumption that the child's specific disability makes him or her unable to make decisions or participate in proceedings. Each case will be different and the representation or support required by each child in order to participate must be assessed based on his or her own circumstances. According to Boezaart,¹¹⁵ the role of the curator *ad litem* has been defined by the courts and it has been differentiated from the roles of a legal representative.¹¹⁶

In respect of the rights of the child to be heard in the Children's Act, Sloth-Nielsen¹¹⁷ states the following:

The solicitation of children's views runs like a golden thread through the Children's Act, thereby rendering the Act a thoroughly modern text.

There are thus a number of sections providing children with an opportunity to participate in matters affecting them, and for their voices to be heard.

In respect of legal representatives for children, apart from the key legislation mentioned in paragraph 4.2.1 above, the Divorce Act,¹¹⁸ Domestic Violence Act¹¹⁹

representation of children in *Child law in South Africa* (2009) Boezaart (ed) 106 as well as Heaton *Law of persons* (2008) 92.

¹¹⁴ Letzer and Vergano 'Appointing a curator *ad litem* . are we applying the law correctly?' (2014) *De Rebus* 30.

¹¹⁵ Boezaart (2013) *De Jure* 725.

¹¹⁶ Examples of case law where the court decided to appoint a curator *ad litem* include the following: *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC); *S v M*.

¹¹⁷ Sloth-Nielsen 'Seen and Heard? New Frontiers in Child Participation in Family Law Proceedings in South Africa' (2009) *Speculum Juris* 5.

¹¹⁸ S 6(4) of the Divorce Act 70 of 1979.

¹¹⁹ S 4 Domestic Violence Act 116 of 1998.

and the Refugees Act¹²⁰ all refer to the provision of legal representation to minors, in sum, if substantial injustice will result otherwise. The Children's Act,¹²¹ however, elaborates on the role of a legal representative in civil matters such as Children's Court matters and states in section 55¹²² that should a child be involved in a matter at the Children's Court, without legal representation, the court must ascertain whether it would be in the best interest of the child to be represented by a legal representative.¹²³ Therefore, the discretionary power is given to the presiding officer in the Children's Court to decide whether the child, in this case CWD, must be referred to Legal Aid South Africa.¹²⁴ The latter must then address the matter in terms of section 3B of the Legal Aid Act 22 of 1969. LASA is guided by the Legal Aid Guide in making a determination in this regard.¹²⁵

¹²⁰ S 32 of the Refugees Act 130 of 1998.

¹²¹ S 10 of the Children's Act states that children who are able to participate in matters concerning them, have the right to participate and share their views on such matters. The Act also states that the views expressed by the child must be given due consideration. S 31 echoes this principle by stating that persons holding parental responsibilities and rights in respect of a child must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development. This must be done before making any major decisions about the child. S 61 of the Children's Act further deals directly with the participation of children in court proceedings and thus their right to be heard. This section determines that a presiding officer in a matter before a Children's Court must allow a child to express a view and preference in the matter if the court finds that the child is able to participate in the proceedings. This must be done with due cognisance given to the child's age, maturity and stage of development and any special needs that the child may have.

¹²² In the event the court finds that a legal representative will serve to the best interest of the child, the court must refer the matter to Legal Aid South Africa. S 55, read with s 10 of the Children's Act provides that in all civil matters a child has the right to participate in an appropriate way in matters concerning said child. Legal representation therefore serves as a manner in which the child's views can be heard, and gives effect to s 28(1)(h) of the South African Constitution which provides that every child has the right to have a practitioner assigned to that child by the state, at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.

¹²³ Boezaart %General principles+in Davel and Skelton (eds) *Commentary on the Children's Act* (2013) 2-12; Du Toit %Legal representation of children+in Boezaart (ed) *Child law in South Africa* (2009) 93-11; Bekink and Brand in Davel *Introduction to child law* (2000) 193.

¹²⁴ Hereafter referred to as LASA.

¹²⁵ S 3B states that before a court in criminal proceedings direct that a person be provided with legal representation at state expense, the court must take into account certain factors. As this section deals specifically with criminal matters, the Children's Act requires that it be read with the changes required by the context. The court therefore refers the matter to LASA to evaluate the need for representation at state expense, and report back to the court. The report will then include a recommendation whether the person concerned qualifies for legal

In this regard, section 3A of the Legal Aid Act requires that LASA states the details of policies and procedures for providing and administering legal aid.¹²⁶ The most recent such guide is the Legal Aid Guide 2014.¹²⁷ The LASA Guide indicates that LASA grants legal aid in civil matters to all children resident in South Africa. The South African Constitution provides that legal representation must be granted at State expense in civil proceedings affecting a child if substantial injustice would otherwise result.¹²⁸ The LASA Guide, however, sets criteria that will decide if a child has a right to legal aid in civil cases at State expense. The list, which appears to be an exhaustive list, contains the following criteria:

The seriousness of the issue for the child, for example, if the child's constitutional rights or personal rights are at risk; the complexity of the relevant law and procedure; the ability of the child to represent himself or herself effectively without a lawyer; the financial situation of the child or the child's parents or guardians; the child's chances of success in the case; and, whether the child has a substantial disadvantage compared with the other party in the case.¹²⁹

There is no special mention of the child's special needs or disability. On the contrary, the LASA Guide as a whole does not identify disability as a factor that requires express consideration. It is also not clear from the LASA Guide whether all of the above criteria need to be met before legal aid can be provided to a child. Furthermore, paragraph 4.18 of the LASA Guide states that where these criteria are met, the child should get legal aid *as long as LASA has the necessary resources* and the other requirements of the LASA Guide are met. Legal aid in civil matters for children is therefore subject to not only criteria as set out by the LASA Guide, but also to the availability of resources. Accordingly Stewart¹³⁰ asserts that the duty of providing children with legal representation is not an immediate or mandatory duty,

representation, as well as certain particulars, and any other factor which in the opinion of the board should be taken into account.

¹²⁶ S 3A of the Legal Aid Act 22 of 1969.

¹²⁷ Hereafter referred to as the LASA Guide.

¹²⁸ S 28(1)(h) of the South African Constitution.

¹²⁹ Par 4.18.1 of the Guide.

¹³⁰ Stewart 'Resource constraints and a child's right to legal representation in civil matters at state expense in South Africa' (2011) *International Journal of Children's Rights* 297.

but rather a duty which must be progressively realised, subject to the available resources of the State.

On application for legal aid, the child's means are considered if the child is not assisted by his or her parents or guardians.¹³¹ Where the child is assisted by his or her parents or guardians, then their means will be considered.¹³² As noted in the preamble to the UNCRPD the majority of persons with disabilities live in conditions of extreme poverty.¹³³ In its 2012 concept note on the Day of the African Child, the African Committee of Experts on the Rights and Welfare of the Child expressed their concern regarding the linkage between poverty and disability.¹³⁴ The Committee indicated that disability and poverty are intricately linked with each other and that CWD are more likely to be poor than their non-disabled counterparts. Moreover, they indicated that people living in poverty are more likely to become disabled than those who are not living in poverty.¹³⁵

Emmet and Alant¹³⁶ have pointed out that disability may be both the cause and consequence of poverty.¹³⁷ This is argued against the premise that disability

¹³¹ In the matter of *Manana and Others v Presiding Officer of the Children's Court, District of Krugersdorp and Others* 2013 (4) SA 379 (GSJ) the court considered what would constitute the child's visible means of support. The court pointed out that they may have received an inheritance or an insurance policy, which would constitute them having the appropriate means to support themselves. In relation to the means test applied to the financial position of children, it is argued that these will also be the circumstances where a child will be able to pay for his/her legal representation.

¹³² Free legal aid is only awarded to households that earn less than R6,000.00 per month, after tax has been deducted. The assets of a household are also taken into account. Should a person own a house, then the total value of the house with all its belongings must not be worth more than R500,000.00. Should the person not own the house, then the total value of all of his or her belongings must not be worth more than R100 000.00. See <http://www.legal-aid.co.za/?p=956> (accessed on 23 Jun 2015).

¹³³ Par (t) of the preamble of the UNCRPD states the following: Highlighting the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognizing the critical need to address the negative impact of poverty on persons with disabilities.

¹³⁴ African Committee of Experts on the Rights and Welfare of the Child concept note on the commemoration of the Day of the African Child on 16 Jun 2012 under the theme: The rights of children with disabilities: The duty to protect, respect, promote and fulfill+par 13.

¹³⁵ *Ibid* par 21.

¹³⁶ Emmett and Alant, *Women and disability: Exploring the interface of multiple disadvantage+* (2006) *Development Southern Africa* 445-460.

escalates the risk of poverty whereas poverty creates the circumstances for an increased risk of disability.¹³⁸ Against this background, it is sensible for LASA to in the very least note that a means test in relation to CWD must be understood against a capability as well as livelihood approach. CWD may not have the inherent potential to meet their needs.¹³⁹ In addition, they cannot contribute to a household to ensure the survival of the household. Thus, a means test in relation to a child with a disability will always have to take into account the fact that such child is unable to care for him or herself, even with an inheritance or grant. The mere nature of the vulnerability of CWD seeking legal representation should warrant a negation of the current applicable means test.

In relation to the means test of the parents of the child with a disability seeking legal representation, it must be borne in mind that against a contextual background, CWD are not viewed as being able to care for themselves in the future.¹⁴⁰ In households that are already living in chronic poverty, but still presenting enough means for LASA to hold them accountable for legal representation fees, CWD may be excluded and

¹³⁷ The idea that poverty is both cause and consequence of disability has been argued by numerous authors. The World Health Organization made public that 575 million people with disabilities live below the poverty line. See <http://www.guardian.co.uk/global-development-professionals-network/2013/mar/26/poverty-and-disability-too-close-for-comfort> (accessed on 22 Jun 2013). See also Elwan *Poverty and disability: A survey of the literature* (1999) available at <http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/Background/elwan.pdf> (accessed on 13 Jul 2015) 15; Zimmer *Poverty, wealth inequality and health among older adults in rural Cambodia* (2008) *SocSci* 57-71; Braithwaite *Disability and poverty: A survey of World Bank poverty assessments and implications* (2009) *European Journal of Disability Research* 219-232; Filmer *Disability, poverty, and schooling in developing countries: Results from 14 household surveys World Bank Economic Review* (2008) available at http://siteresources.worldbank.org/DISABILITY/Resources/280658-1239044853210/5995073-1246917324202/Disability_Poverty_and_Schooling_in_Developing_Countries.pdf (accessed on 13 Jul 2015) 141-163; Hoogeveen *Measuring welfare for small but vulnerable groups: Poverty and disability in Uganda* (2005) *J Afr Econ* 603-631.

¹³⁸ Emmett and Alant (2006) 445-460.

¹³⁹ Graham *et al* *Understanding poverty and disability in Johannesburg* (2010) available at <http://www.uj.ac.za/EN/Faculties/humanities/Research-Centres/csda/research/Documents/Poverty%20Disability%20Content%202010%20A5.pdf> (accessed on 13 Jul 2015) 23.

¹⁴⁰ Yeo *Chronic poverty and disability* (2001) *Chronic Poverty Research Centre* 9. See also Ashton *Promoting the rights of disabled children globally . disabled children become adults: Some implications* (1999) *Action on Disability and Development* 13.

ostracised even further. Where there are limited resources it may be seen as economically careless to give resources for legal representation purposes to a child which may already be viewed as financially burdensome to a family. These costs to the household may not only result from the disability in itself; rather, they are the result of barriers that exclude persons with disabilities from being independent. Laudan and Loprest¹⁴¹ assert that while low income may be viewed as a good measure for those in need, actual expenditures on CWD in comparison with their counterparts without disabilities, vary greatly. Parents may thus fall outside the means-test threshold, but their expenditure on their child leaves them worse off than a similar family who does not need to take care of CWD. The recommendation is further made by Laudan and Loprest that income, less direct out-of-pocket disability-related expenditures may be a more appropriate measure to determine need, than a means test.¹⁴² It is therefore important for LASA to note that poverty often causes disability and disability in itself increases poverty.

According to LASA's 2013/2014 annual report, 5169 children were assisted with free legal representation in civil matters, 2531 which related to estates. It can therefore be calculated that during the 2012/2013 financial year, a maximum of 2638 children would have been assisted in matters relating to civil issues other than estates, which may have included cases dealt with by the Children's Court and Equality Court.¹⁴³

In respect of supported decision-making as referred to in the UNCRPD,¹⁴⁴ and the provision of measures to allow a child with a disability to be able to make decisions and participate in decision-making, the South African Law Reform Commission (SALRC) embarked on integrating this principle into domestic legislation through the proposal of the Assisted Decision-making Bill.¹⁴⁵ The ambit of project paper 122, which pre-empted the proposed Bill, was exclusively aimed at adults. The project paper even indicated that when it came to children, the then-pending Children's Act

¹⁴¹ Laudan and Loprest *Meeting the needs of children with disabilities* (2007) 67.

¹⁴² *Ibid.*

¹⁴³ See LASA 2013/14 annual report par (A) available at <http://www.legal-aid.co.za/wp-content/uploads/2012/12/2014-Legal-Aid-REPORT.pdf> (accessed 22 Sep 2015).

¹⁴⁴ Art 12 of the UNCRPD.

¹⁴⁵ SALC Discussion Paper 105: Assisted decision-making of adults with impaired decision-making capacity (Mar 2004).

would address issues relating to children.¹⁴⁶ The Children's Act did not necessarily do that. It did include the principle of non-discrimination,¹⁴⁷ guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development, as part of the definition of 'care'.¹⁴⁸ It also included section 11 which states that the child with a disability must be provided with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community.¹⁴⁹ The full intended effect of project paper 122 is not translated into the Children's Act. Holness¹⁵⁰ argues that should the Bill be accepted in its current form, its conception of supported decision-making is used as a rhetorical change from substituted decision-making because the decision-maker role is still given to a person other than the person with the disability.

Save for the appointment of an administrator for a person who has a severe or profound intellectual disability in terms of the MHCA,¹⁵¹ the concept of proper and non-discriminatory substituted decision-making as opposed to the much more preferred supported decision-making has yet to be fully addressed within domestic legislation, specifically as it relates to children.

In respect of criminal matters, the CJA further determines that every child should, as far as possible, be given an opportunity to participate in proceedings where he or she may be affected by decisions being taken.¹⁵² This level of participation is extended to all children, regardless of whether they have a disability or not.¹⁵³ The CJA also encourages the child's participation during the assessment and preliminary enquiry proceedings and therefore supports the right of the child to share his or her views.¹⁵⁴ Section 82 of the CJA states that where a child is not represented by a

¹⁴⁶ SALC Issue Paper 18: Incapable adults+ http://www.justice.gov.za/salrc/ipapers/ip18_prj122_2002_quest.pdf (accessed on 13 Jul 2015) 5.

¹⁴⁷ S 10 of the Children's Act.

¹⁴⁸ S 1 of the Children's Act.

¹⁴⁹ S 11 of the Children's Act.

¹⁵⁰ Holness 'Equal recognition and legal capacity for persons with disabilities: Incorporating the principle of proportionality' (2014) *SAJHR* 324.

¹⁵¹ Ss 59-60 of the MHCA.

¹⁵² S 3(c) of the CJA.

¹⁵³ S 3 of the CJA.

¹⁵⁴ Ss 39 and 43(2)(g) of the CJA.

legal representative in the Child Justice Court, the presiding officer must refer the child to the Legal Aid Board for the matter to be evaluated by the Board as provided for in section 3B(1)(b) of the Legal Aid Act.¹⁵⁵ This provision is similar to section 55 of the Children's Act and in essence refers the determination of free legal representation to LASA.¹⁵⁶ In contrast with the qualifications set out in the LASA Guide in respect of children involved in civil matters, the LASA Guide very clearly indicates that no child may be refused legal aid in a Child Justice Court. The CJA further obliges legal representatives to uphold the highest ethical standards when dealing with the matter of a child and to allow the child, as far as is reasonably possible, to give instruction on his or her case.¹⁵⁷

According to LASA's 2013/2014 annual report, it was able to assist 16 858 children in conflict with the law through legal representation.¹⁵⁸ There is no indication in the LASA annual report whether any of these children had a disability. The report only refers to disabilities in an employment equity context.¹⁵⁹ By omitting to take into account whether any of the more than 20 000 children represented had a disability or not, LASA is unable to plan or budget for any specific training for legal representatives to undergo in relation to representing the rights of CWD.

It may therefore be assumed that training of legal representatives on how to manage and represent a client who is a child with a disability, is either only addressed as part of general training,¹⁶⁰ or not addressed at all. Participation of CWD as called for by Article 13 of the UNCRPD is therefore neglected as the accommodation and training required are not addressed.

¹⁵⁵ Act 22 of 1969.

¹⁵⁶ See also ss 73, 309, 309B, 309C, 309D and 316 of the CPA, read with ss 82 and 83(1) of the CJA.

¹⁵⁷ S 80 of the CJA.

¹⁵⁸ See LASA 2013/14 annual report par (A) available at <http://www.legal-aid.co.za/wp-content/uploads/2012/12/2014-Legal-Aid-REPORT.pdf> (accessed 22 Sep 2015).

¹⁵⁹ See LASA 2013/14 annual report table 22 available at <http://www.legal-aid.co.za/wp-content/uploads/2012/12/2014-Legal-Aid-REPORT.pdf> (accessed 22 Sep 2015).

¹⁶⁰ For instance, LASA 2012/2013 Annual Report 32. This report only refers to training endeavours undertaken in general.

4.3.5. Pillar five: the rights of CWD specifically

The importance of addressing the rights of CWD specifically in legislation and other measures is grounded in the two tier vulnerability of the CWD. This means that legislation addressing children in general may not understand that these children may possibly need separate measures to be undertaken so as to accommodate their inclusion. Thus where legislation specifically address their rights and needs, it elevates them as a designated, vulnerable group, who can not just be bundled into a categorisation of ~~child or~~ ~~person with disability~~.

In this regard, it is important to note that section 11 of the Children's Act explicitly addresses the rights of CWD and states that their needs must be taken into account ~~in~~ ~~any matter concerning~~ that child. This section elaborates on section 6(1) of the Children's Act where it is specified that the general principles of the Children's Act must guide the implementation of all legislation relevant to children, as well as all proceedings, actions and decisions made by organs of State in any matter concerning children in general. Therefore, when reading section 7¹⁶¹ with section 11, it not only states that the child's disability must be taken into account by organs of State, but the child's disability must be recognised in *any* matter relating to that child.

Due consideration of the child's disability must be given to provide said child with parental care, family care or special care in relevant circumstances.¹⁶² Section 11(1) also calls for the participation of CWD in social, cultural, religious and educational activities whilst recognising the specific needs that such a child may have. The same section also calls for circumstances to be created which provide the child with conditions that guarantee ~~the~~ dignity, promote self-reliance and facilitate active participation in the community.¹⁶³

Simultaneously, section 11(1)(d) addresses the need for the care-givers of CWD to be provided with the necessary support services. In this regard, it is important to

¹⁶¹ This section, as discussed above expressly addresses the best interests of the child principle.

¹⁶² S 11(1)(a) of the Children's Act.

¹⁶³ S 11(1)(c) of the Children's Act.

refer to section 4(2) of the Children's Act which states that all organs of State must, in the application of the Children's Act, take reasonable measures to the maximum extent of their available resources to achieve the realisation of the Children's Act's objectives and aims. The provision of support services to the caregivers of CWD inherently has a socio-economic impact on the budgetary resources of the State. The weak wording of this particular section in only stating that "due consideration must be given to" + providing these services to caregivers also diminishes the importance of recognising the need for these services to be available to caregivers in order to prevent CWD from being confronted with unfair discrimination. For example, in matters where a care-giver needs to accompany a child with a disability to court, and where said child's disability results in, amongst others, incontinence, services to allow the care-giver to attend to the prevalent incontinence must be provided to the care-giver, and not giving consideration to such need will be to negate the child's right to human dignity.¹⁶⁴ Nevertheless, the Children's Act is very clear in stating that the State must attempt to fulfil the provisions of the Children's Act to the *maximum extent* of their available resources.¹⁶⁵ In this regard, it is to be noted that socio-economic rights such as housing, health care, food, water and social security are all subject to internal limitation clauses in the sections in the South African Constitution that confers them.¹⁶⁶ Incidentally, the State is required to take "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights".¹⁶⁷ The limitation clause included in section 4(2) of

¹⁶⁴ Incontinence is the involuntary leakage of urine or faeces. Persons who have a disability or has a chronic health problem are at increased risk. Certain disabilities like conditions affecting the brain or spinal cord (such as multiple sclerosis or dementia) may also increase the risk of urinary incontinence. See <http://www.nhs.uk/Conditions/Incontinence-urinary/Pages/Causes.aspx> and http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Incontinence_tips_for_carers (accessed on 9 Jan 2013).

¹⁶⁵ Ss 26(2) and 27(2) of the South African Constitution.

¹⁶⁶ Stewart "interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socio-economic rights of others" (2008) *SAJHR* 472-494 in this regard. Stewart also discusses the fact that the rights relating to children as contained in s 28 of the South African Constitution do not contain an internal limitation clause. This presents the question of whether these rights are subject to progressive realisation, as opposed to immediate realisation.

¹⁶⁷ In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC), the court held that positive duties such as realising certain socio-economic rights, as are seen from ss 26 and 27 of the Bill of Rights, which impose on the state the obligation to "take reasonable measures within

the Children's Act is akin to these clauses which innately mean that where the fulfilment of the rights of CWD relate to socio-economic measures, such rights will be addressed progressively.¹⁶⁸ Support services to the caregivers of CWD will therefore be attended to, if and when the resources for them become available. This may mean that these services will not be available until the funds to allow for proper implementation are made available and prioritised. Nevertheless, in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa & Another*¹⁶⁹ the court found that the State infringed on the rights of children with intellectual disabilities as there was no rational basis for imposing a shortage in funds and budget cuts on these vulnerable children only, and not on their non-disabled peers. The court also held that as a result, the State had marginalised these children and contributed to the stigmatisation of CWD.¹⁷⁰ In this regard the court held that their right to dignity had been violated. This decision may be important where shortages of funds are argued in respect of other service delivery to CWD.

In comparison to the Children's Act, the CJA does not address or mention CWD specifically. The CJA only refers to the special needs of children in vulnerable groups when describing the minimum standards applicable to diversion programmes.¹⁷¹ This may be problematic, as *Weissbrodt et al*¹⁷² describes:

In the case of children with disabilities, even restraint that does not use excessive force may violate their basic human rights if restraint is used in response to behaviors that directly result from the child's mental health disorder and that the State has failed to identify and reasonably accommodate.

its available resources to achieve progressive realisation, are not subject to immediate enforceability.

¹⁶⁸ In *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) the court however held that "the state's obligation in respect of these rights goes no further than to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the rights."

¹⁶⁹ *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another* 2011 (5) SA 87 (WC).

¹⁷⁰ *Ibid* at par 46. See also Ngwena %*Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A case study of contradictions in inclusive education*+(2013) *ADRY* 146-163 for a full discussion on this matter.

¹⁷¹ The preamble of the CJA.

¹⁷² *Weissbrodt et al %Applying International Human Rights Standards to the Restraint and Seclusion of Students with Disabilities*-(2012) *Law and Inequality* 290.

This means that where CWD may be in conflict with the law, not catering for an early detection of their status or needs may result in CWD being processed through the criminal justice system as a result of an action which is directly linked to his or her disability. This may emanate in further trauma to the child, and calls for the Act to more clearly recognise the need for disabilities to be detected amongst possible child offenders at a very early stage.

In respect of the MHCA, this Act does not expressly mention mental illnesses or intellectual disabilities of children. According to Moosa,¹⁷³ many South African psychiatric hospitals also do not separate the patients by age groups. The different needs of a child with a mental disability may therefore not be taken into account in order to address said child's specific requirements for treatment. Burns¹⁷⁴ also contends that personnel are not properly trained in the needs of patients, or the impact of the MHCA.

One of the main characteristics of the SOA is that sexual offences specifically relating to persons with mental disabilities are identified and addressed. The SOA also addresses and repeals the derogatory terminology used in the previous section 15 of the Sexual Offences Act of 1957, where persons with mental disabilities were described as "idiots" and "imbeciles".¹⁷⁵ The SOA defines a person with a mental disability as a person who is affected by any mental disability, including any disorder or disability of the mind. This disability or disorder also does not allow such person to understand the nature and consequence of a sexual act. The definition similarly includes a person who is capable of understanding the nature and consequence of such an act, but unable to take action in accordance with this appreciation. Persons who are unable to resist or communicate their unwillingness to participate in a sexual act are also included in this definition.¹⁷⁶ Chapter 4 further elaborates on sexual

¹⁷³ Moosa and Jeenah "Involuntary treatment of psychiatric patients in South Africa" (2008) *Afr Journal of Psychiatry* 109-110.

¹⁷⁴ Burns "Implementation of the Mental Health Care Act (2002) at district hospitals in South Africa: Translating principles into practice" (2008) *SAfr Med J* 46-49.

¹⁷⁵ S 15 of the SOA 23 of 1957.

¹⁷⁶ S 1 of the SOA.

offences committed against persons with mental disabilities. Sections 23,¹⁷⁷ 24,¹⁷⁸ 25¹⁷⁹ and 26¹⁸⁰ are similar to the sexual offences committed against children in this

¹⁷⁷

S 23 of the SOA states as follows: (1) A person ('A') who unlawfully and intentionally engages the services of a complainant who is mentally disabled ('B'), for financial or other reward, favour or compensation to B or to a third person ('C')- (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or (b) by committing a sexual act with B, is, in addition to any other offence which he or she may be convicted of, guilty of the sexual exploitation of a person who is mentally disabled. (2) A person ('A') who unlawfully and intentionally offers the services of a person who is mentally disabled ('B') to a third person ('C'), for financial or other reward, favour or compensation to A, B or to another person ('D')- (a) for purposes of the commission of a sexual act with B by C; (b) by inviting, persuading or inducing B to allow C to commit a sexual act with B; (c) by participating in, being involved in, promoting, encouraging or facilitating the commission of a sexual act with B by C; (d) by making available, offering or engaging B for purposes of the commission of a sexual act with B by C; or (e) by detaining B, whether under threat, force, coercion, deception, abuse of power or authority, for purposes of the commission of a sexual act with B by C, is guilty of an offence of being involved in the sexual exploitation of a person who is mentally disabled. (3) A person ('A') who- (a) intentionally allows or knowingly permits the commission of a sexual act by a third person ('C') with a person who is mentally disabled ('B') while being a care-giver, parent, guardian, curator or teacher of B; or (b) owns, leases, rents, manages, occupies or has control of any movable or immovable property and intentionally allows or knowingly permits such movable or immovable property to be used for purposes of the commission of a sexual act with B by C, is guilty of the offence of furthering the sexual exploitation of a person who is mentally disabled. (4) A person ('A') who intentionally receives financial or other reward, favour or compensation from the commission of a sexual act with a person who is mentally disabled ('B') by a third person ('C'), is guilty of an offence of benefiting from the sexual exploitation of a person who is mentally disabled. (5) A person ('A') who intentionally lives wholly or in part on rewards, favours or compensation for the commission of a sexual act with a person who is mentally disabled ('B') by a third person ('C'), is guilty of an offence of living from the earnings of the sexual exploitation of a person who is mentally disabled. (6) A person ('A'), including a juristic person, who- (a) makes or organises any travel arrangements for or on behalf of a third person ('C'), whether that other person is resident within or outside the borders of the Republic, with the intention of facilitating the commission of any sexual act with a person who is mentally disabled ('B'), irrespective of whether that act is committed or not; or (b) prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual act with B, is guilty of an offence of promoting sex tours with persons who are mentally disabled.

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S 24 of the SOA states as follows: (1) A person ('A') who- (a) supplies, exposes or displays to a third person ('C')- (i) an article which is intended to be used in the performance of a sexual act; (ii) child pornography or pornography; or (iii) a publication or film, with the intention to encourage, enable, instruct or persuade C to perform a sexual act with a person who is mentally disabled ('B'); or (b) arranges or facilitates a meeting or communication between C and B by any means from, to or in any part of the world, with the intention that C will perform a sexual act with B, is guilty of the offence of promoting the sexual grooming of a person who is mentally disabled. (2) A person ('A') who- (a) supplies, exposes or displays to a person who is mentally disabled ('B')- (i) an article which is intended to be used in the performance of a sexual act; (ii) child pornography or pornography; or (iii) a publication or film, with the intention to encourage, enable, instruct or persuade B to perform such sexual act; (b) commits any act with or in the presence of B or who describes the commission of

regard.¹⁸¹ The sections on children and the mentally disabled have been described as sound and comprehensive, in order to protect the most vulnerable members of our society.¹⁸²

any act to or in the presence of B with the intention to encourage or persuade B or to reduce or diminish any resistance or unwillingness on the part of B to- (i) perform a sexual act with A or a third person ('C'); (ii) perform an act of self-masturbation in the presence of A or C or while A or C is watching; (iii) be in the presence of or watch A or C while A or C performs a sexual act or an act of self-masturbation; (iv) be exposed to child pornography or pornography; (v) be used for pornographic purposes as contemplated in section 26 (1); or (vi) expose his or her body, or parts of his or her body to A or C in a manner or in circumstances which violate or offend the sexual integrity or dignity of B; (c) arranges or facilitates a meeting or communication with B by any means from, to or in any part of the world, with the intention that A will commit a sexual act with B; (d) having met or communicated with B by any means from, to or in any part of the world, invites, persuades, seduces, induces, entices or coerces B- (i) to travel to any part of the world in order to meet A with the intention to commit a sexual act with B; or (ii) during such meeting or communication or any subsequent meeting or communication to- (aa) commit a sexual act with A; (bb) discuss, explain or describe the commission of a sexual act; or (cc) provide A, by means of any form of communication including electronic communication, with any image, publication, depiction, description or sequence of pornography of B himself or herself or any other person; or (e) having met or communicated with B by any means from, to or in any part of the world, intentionally travels to meet or meets B with the intention of committing a sexual act with B, is guilty of the offence of sexual grooming of a person who is mentally disabled.

179 S 25 of the SOA states the following: A person ('A') who unlawfully and intentionally exposes or displays or causes the exposure or display of any image, publication, depiction, description or sequence of child pornography or pornography to a complainant who is mentally disabled ('B'), is guilty of the offence of exposing or displaying or causing the exposure or display of child pornography or pornography to a person who is mentally disabled.

180 S 26 of the SOA states as follows: (1) A person ('A') who unlawfully and intentionally uses a complainant who is mentally disabled ('B'), whether for financial or other reward, favour or compensation to B or to a third person ('C') or not- (a) for the purpose of creating, making or producing; (b) by creating, making or producing; or (c) in any manner assisting to create, make or produce, any image, publication, depiction, description or sequence in any manner whatsoever, of pornography or child pornography, is guilty of the offence of using a person who is mentally disabled for pornographic purposes. (2) Any person who knowingly and intentionally in any manner whatsoever gains financially from, or receives any favour, benefit, reward, compensation or any other advantage, as the result of the commission of any act contemplated in subsection (1), is guilty of the offence of benefiting from using a person who is mentally disabled for pornographic purposes.

181 See ss 17, 18, 19 and 20 of the SOA which specifically refer to sexual exploitation, grooming, as well as child pornography.

182 Fuller *Bureaucracy versus democratisation: The promulgation of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill+ (2007) available at <http://www.csvr.org.za/docs/gender/amendment.pdf> (accessed on 14 Jul 2015) 13.*

It is clear that the SOA only specifically refers to sexual offences committed against persons with *mental* disabilities. This is as a result of the principle of consent relating to sexual conduct. A person with a physical disability is still capable of giving consent and understanding the consequences of such consent. CWD are therefore safeguarded in the SOA under their status of ~~children~~, as well as ~~person with disability~~. This will however be dependent on whether the child has a mental disability as defined in the SOA. For purposes hereof, it is important to note that the definition of a ~~child~~ in the SOA is the following:

- (a) a person under the age of 18 years; or
- (b) with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years.¹⁸³

Other measures which specifically address the rights and needs of children with disabilities are the Social Assistance Act,¹⁸⁴ as well as the Income Tax Act,¹⁸⁵ which will be discussed in paragraph 5.3.5. *infra*.

4.3.6. Pillar six: Article 13 of the UNCRPD

Article 13 of the UNCRPD obliges States Parties to address three elements in respect of access to justice for people with disabilities: reasonable accommodation, participation and the training of relevant stakeholders. In order for legislation to adhere to this framework, certain facilities must be adapted to accommodate CWD throughout the justice system. Although the ~~child's~~ right to participation has been addressed under paragraph 4.3.4, a variety of other safeguards must be catered for to facilitate access to justice for CWD.

4.3.6.1. Accessible court procedures

The ~~Children's~~ Court, as determined by the ~~Children's~~ Act may be seen as an accommodative mechanism to facilitate access to justice for CWD, as the Act

¹⁸³ S 1 of the SOA.

¹⁸⁴ 13 of 2004.

¹⁸⁵ 58 of 1962.

determines that a child him or herself, may bring a matter to court.¹⁸⁶ This is as a result of the processes applied in the Children's Court deviating from the formalistic approach used by, for instance, a criminal or civil court. Section 52 of the Children's Act further determines that any rule made with specific reference to the Children's Court, must be made to avoid adversarial procedures.¹⁸⁷

The Children's Act supports informal court proceedings and requires such proceedings to be conducted in a relaxed and non-adversarial atmosphere, as far as possible.¹⁸⁸ The general environment of the Children's Court is thus to encourage the involvement and participation of the concerned child who forms part of these processes. The Children's Act further determines that every child has the right to bring,¹⁸⁹ and to be assisted in bringing, a matter to court, provided that matter falls within the jurisdiction of that court.¹⁹⁰ This section therefore supports the right of access to court to everyone, as set out in section 34 of the South African Constitution and does not limit this form of access only to the Children's Court.¹⁹¹ Boezaart and De Bruin¹⁹² point out that the fact that a child more often than not has limited capacity to litigate on his or her own, does not dispossess that child of the right of access to a court in terms of section 14 of the Children's Act. Although this assertion was made in respect of the limited capacity of the *infans* to litigate, it can very well be applied in respect of CWD as well. The only qualification to section 14 is that the matter must fall within the jurisdiction of the specific court. No other

¹⁸⁶ S 53(2)(a) of the Children's Act.

¹⁸⁷ S 52(2) of the Children's Act and s 6(4)(a). The adversarial process has been proven to be to the detriment of children and may also constitute secondary victimisation. Case law has indicated that children are %by their very nature ill-equipped to deal with a confrontational and adversarial setting+.The *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and others* 2009 (4) SA 222 (CC) par 12. Hereafter referred to as *Phaswane*.

¹⁸⁸ S 60(3) in this regard. S 6(4)(a) further determines that an approach which is %conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided+. The non-adversarial approach is thus supported throughout the Children's Act. S 14 of the Children's Act.

¹⁸⁹ A child who is affected by or involved in the matter to be adjudicated may also bring a matter which falls within the jurisdiction of a Children's Court, to a clerk of the Children's Court for referral to a Children's Court.

¹⁹¹ Boezaart and De Bruin %Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate+(2011) *De Jure* 419. Heaton in Visser and Pretorius (eds) *The law of persons and family law* (2008) 888.

¹⁹² Boezaart and De Bruin (2011) *De Jure* 420.

qualification is expressly determined by section 14, such as only children who are able to participate may bring a matter to a court, or, only children who have reached a specific level of development may bring a matter to court. The general application of section 14 refers to every child, and therefore mechanisms must be in place in order to support children with different types of special needs. Training must also be provided to clerks such as the Children's Court clerk who is designated to receive matters directly from children, on how to assist and address CWD.

Similar to the Children's Act, in order to further assist accessibility, Chapter 4 of PEPUDA creates the Equality Courts. Section 16(1)(a) states that every high court is an Equality Court for the area of its jurisdiction. Equality Courts are created as specialised courts, operating within the structure of high courts and magistrates' courts. Each high court in South Africa is automatically an Equality Court, whereas magistrates' courts may be designated as Equality Courts.¹⁹³

As children, and especially CWD, have difficulty in accessing services directly, an attempt to simplify participation in matters relating to discrimination assists in addressing the rights of CWD to have access to justice. Section 20 of PEPUDA states that any person acting in their own interest, may institute proceedings under PEPUDA. Section 20(1)(b) goes further and states that a person acting on behalf of another person, who cannot act in his or her own name, may also institute proceedings. It is therefore possible for a child with a disability to be assisted by a range of representatives in instituting proceedings at the Equality Court. As certain disabilities bring forth communication difficulties, a child may therefore be duly represented by a trusted caregiver or relative, who will be able to understand and assist the child to share his or her views during proceedings. Accessibility of the Equality Court is further enhanced by being inexpensive for complainants to use, as well as the fact that legal representatives are not needed in said courts. Also, no fees

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Both the high court and magistrates' court have jurisdiction to hear equality matters. The size of the claim determines which court will hear the matter. Where an order exceeds the monetary jurisdiction of a magistrates' court, such an order must be referred to the high court (*Government Gazette* No 25065 reg 9(1)).

are required to place a case before an Equality Court.¹⁹⁴ Nevertheless, Hollness and Rule¹⁹⁵ argue that although bringing a discrimination matter to the Equality Court in itself is free, this does not take into account other expenses potential victims of discrimination may have to incur to have such a matter heard, such as transportation costs and the costs of assistants that may accompany persons with disabilities.

The biggest issue regarding the effectiveness of the Equality Courts is that they are being underutilised. In 2013, the DOJ&CS reported that for the 2012/13 financial year, 619 matters were enrolled at Equality Courts nationwide.¹⁹⁶ No indication was given whether these matters indeed proceeded to formal inquiries, whether they in fact fell within the jurisdiction of these courts, and how many of these were finalised. Reference is only made here to matters having been enrolled. In 2012, the South African Human Rights Commission¹⁹⁷ undertook a monitoring project into the functioning of Equality Courts around the country. This project sampled five courts per province and illustrated a number of challenges in the implementation of these Equality Courts. In its report, the SAHRC indicates that the courts monitored had handled cases ranging from none to below ten.¹⁹⁸ This clearly illustrates that these courts were being grossly underutilised, and as a result, Equality Court clerks and

¹⁹⁴ In order to institute proceedings in the Equality Court, the complainant approaches the court and informs the clerk that he or she wishes to institute proceedings. It is incumbent upon the clerk to assist the complainant to fill in the prescribed form. As indicated, no court or stamp fees are payable. The clerk consequently opens a file and allocates a case number to the matter. The support given to a complainant by the clerk of the court is crucial in rendering the Equality Court accessible to the public.

¹⁹⁵ Hollness and Rule (2014) *PELJ* 1935. A recommendation is however made that Equality Courts, and therefore the DOJ&CS, should have a discretionary fund to pay for costs such as transportation for indigent complainants.

¹⁹⁶ See the Deputy Minister of Justice and Constitutional Development's budget vote speech in parliament on 29 May 2013 at <http://www.pmg.org.za/briefing/20130529-minister-justice-and-constitutional-development-2013-budget-speech-responses-anc-and-da> (accessed on 25 Oct 2014).

¹⁹⁷ The South African Human Rights Commission (SAHRC) is a state institution established by ch 9 of the South African Constitution to support constitutional democracy. The SAHRC is mandated in terms of s 184 of the South African Constitution to promote the protection, development and attainment of human rights, and to monitor and assess the observance of such rights within the Republic of South Africa.

¹⁹⁸ SAHRC Equality Report Commentaries on equality: Race, gender, disability and LGBTI Issues+ (2012) available at <http://www.sahrc.org.za/home/21/files/Equality%20Report%2020%20Oct%202012%20Final.pdf> (accessed on 7 Nov 2013).

presiding officers were not provided with an opportunity to develop jurisprudence relating to matters of equality. As per Holness and Rule,¹⁹⁹ despite the designation of all magistrates' courts in South Africa as Equality Courts, there is limited research available on the effect of litigation in the Equality Courts. Thus, although these courts are designed to be accessible to the public, the public is simply not making use of them, and information pertaining to these courts are lacking. In 2015, the SAHRC released its report on a 2014 Equality Roundtable Discussion Report aimed at identifying and paving a way forward on advancing the realisation of the right to equality.²⁰⁰ In this report, the SAHRC indicated that between 2012 and 2013, only 310 matters were brought to Equality Courts throughout the country. Out of these, 57 matters were dismissed, and judgements were handed down in only six cases. Further to this, 66 of these matters were referred to other courts and alternative dispute resolution forums and 6 were settled out of court.²⁰¹ The report also expressed dismay at the fact that in terms of section 32 of PEPUDA,²⁰² an Equality Review Committee has to be established to advise the Minister responsible for the administration of justice about matters relating to PEPUDA and other laws that impact on equality and the prevention of discrimination, but that this committee has not been provided with adequate resources to function properly.²⁰³ This, in turn, reflects on the lack of commitment from the State to invest in the proper functioning of the Equality Courts, as a mechanism to protect and provide recourse to vulnerable members of society such as CWD. In criminal matters, the CPA plays a crucial role in the process of allowing children, including CWD, to access justice ascertain procedural accommodations are made where the witness or victim is a child.

¹⁹⁹ Holness and Rule (2014) *PELJ* 1912.

²⁰⁰ SAHRC %Equality Roundtable Discussion Report+ (2015) available at <http://www.sahrc.org.za/home/21/files/Equality%20Roundtable%20Dialogue%20Report.pdf> (accessed on 22 Sep 2015).

²⁰¹ SAHRC %Equality Roundtable Discussion Report+ (2015) 15 available at <http://www.sahrc.org.za/home/21/files/Equality%20Roundtable%20Dialogue%20Report.pdf> (accessed on 22 Sep 2015).

²⁰² S 32 of PEPUDA establishes this Committee, and s 33 of PEPUDA sets out the duties of the Committee, which includes advising the Minister about the operation of PEPUDA; advising the Minister about laws that impact on equality; and, submitting regular reports to the Minister on the operation of the Act, addressing whether the objectives of the Act and the Constitution have been achieved.

²⁰³ SAHRC %Equality Roundtable Discussion Report+ (2015) 15 available at <http://www.sahrc.org.za/home/21/files/Equality%20Roundtable%20Dialogue%20Report.pdf> (accessed on 22 Sep 2015).

Measures are also taken to accommodate persons with disabilities. The key provisions which will be discussed hereunder include sections 153, 154, 158, and 161 of the CPA.

Section 153 of the CPA provides for a child to be able to testify *in camera*. This section allows a child, who has fallen victim to a sexual crime, to give evidence and testify in a private room, behind closed doors. The child's privacy is protected in terms of section 153 of the CPA. This is an exception to criminal proceedings which usually take place publicly.²⁰⁴ Proceedings *in camera*, however, do not protect witnesses from testifying in the presence of the accused.²⁰⁵ In terms of section 154 of the CPA, the court may further direct that no information relating to the proceedings held in terms of section 153 behind closed doors shall be published in any manner. This safeguards the vulnerability of child victims and witnesses as section 154(3) states that no person shall publish any information which discloses the identity of a witness who is under the age of 18 years at criminal proceedings. Section 154 does however indicate that the court may direct that the accused's details may be made public if it does not prejudice the non-publication of the *in camera* proceedings.²⁰⁶

Section 158 of the CPA determines that evidence can also be given via closed-circuit television (CCTV) or similar equipment. This may be utilised should it be in the interest of justice, as well as readily available.²⁰⁷ It is also used to prevent harm to the person testifying. The CPA provides that this equipment may be used if it appears to the court that to do so would prevent unreasonable delay, as well as contribute to convenience. It is submitted that convenience must not be a factor for consideration should the usage of such facilities cause undue trauma to a child witness. The prospect that a court might disallow the utilisation of facilities or equipment that prevent a child witness from being subjected to secondary victimisation, due to

²⁰⁴ Van der Merwe %Children as victims and witnesses+ in Boezaart (ed) *Child law in South Africa* (2009) 568.

²⁰⁵ Wolhuter and Hamman %A comparative analysis of protective measures for vulnerable and intimidated victim-witnesses in South African and English law+(2009) *Acta Criminologica* 48.

²⁰⁶ S 154(1) of the CPA.

²⁰⁷ S 158(2)-(4) of the CPA.

convenience, is respectfully rejected.²⁰⁸ Schwikkard²⁰⁹ also argues that the discretionary nature of this section creates a challenge as it deems those children who testify via CCTV as being the exception rather than the rule.

Section 161 of the CPA allows further participation by children, as well as persons with hearing impairments, in criminal proceedings:

- (1) A witness at criminal proceedings shall, except where this Act or any other law expressly provides otherwise, give his evidence *viva voce*.
- (2) In this section the expression *viva voce* shall, in the case of a deaf and dumb witness, be deemed to include gesture-language and, in the case of a witness under the age of eighteen years, be deemed to include demonstrations, gestures or any other form of non-verbal expression.

This exception to the *viva voce* requirement allows children to give evidence in a manner fitting to their understanding of events. The CPA allows persons with limited communication abilities to be able to give evidence, without disregarding his or her testimony at the outset.

4.3.6.2. Physically accessible courts

Article 13 of the UNCRPD does not specifically refer to physical access to a courtroom. It only refers to procedural and age-appropriate accommodations being made, which one may argue can be achieved without a matter having to be heard in a formal court setting. This inference correlates with the general understanding that

²⁰⁸ S 5 of the SOA which amended s 158 of the CPA provides that a court is obliged to provide reasons for any refusal of an application to allow a child complainant below the age of 14 years to testify by means of electronic media or CCTV. See also Iyer and Ndlovu *Protecting the child victim in sexual offences: Is there a need for separate legal representation?* (2012) *Obiter* 81, where the following is argued: *From this section, it appears that the legislature has decided to discriminate between a child complainant below the age of 14 years and those above that age. A child is a person under the age of 18 years, and it would be illogical for any court to distinguish between children below and above 14 years as the levels of pain, trauma and mental anguish that they experience cannot be said to vary or diminish with age. It is submitted that all children irrespective of their age must be given the opportunity to testify by means of electronic media or closed-circuit television. S 158(5) of the CPA, therefore fails to provide protection to all vulnerable minor complainants, and appears to be in direct conflict with s 28 of the Constitution.*

²⁰⁹ Schwikkard *The abused child: A few rules of evidence considered* (1996) *Acta Juridica* 148.

courtrooms intimidate people and children in particular. Muller²¹⁰ argues that traditional courtroom procedures act against eliciting complete and reliable evidence from children. In 1987 Hill and Hill²¹¹ published a study on the effect of a formal courtroom environment on the ability of children to recall certain facts and occurrences. Half of the children interviewed were interviewed in a private room, whereas the other half of the children was interviewed at court. The study found that the children interviewed in the private room recalled facts more accurately and did not experience the questioning as being as traumatic as the children who were interviewed in the courtroom.²¹² A similar finding was also made by Saywitz and Nathanson²¹³ who found that the mere character of the courtroom may interfere with the capacity of a child to give proper evidence and places great stress on children.²¹⁴ This begs the question whether a formal court environment should at all be considered in matters where children are parties, or witnesses, or whether matters involving children who seek access to justice should not automatically be diverted away from a courtroom, to a more relaxed and conducive environment.²¹⁵ As mentioned above, this may have to include children giving testimony through other means, such as CCTV cameras, as the default position, as this will remove them from the intimidating nature of the courtroom, and serve the best interests of the child principle, which remains a paramount consideration in all matters affecting a child.²¹⁶

As is the case in South Africa, however, the judicial authority is vested in the courts,²¹⁷ and the *status quo* is that matters referred for judicial adjudication, such as a matter relating to a child in need of care and protection²¹⁸ must be adjudicated by,

²¹⁰ Muller *An inquisitorial approach to the evidence of children* (2001) available at <http://www.crisa.org.za/downloads/ia.pdf> (accessed on 14 Jul 2015) 1.

²¹¹ Hill and Hill *Videotaping children's testimony: An empirical view* (1987) *Michigan Law Review* 809-833.

²¹² Hill and Hill (1987) 815.

²¹³ Saywitz and Nathanson *Children's testimony and their perceptions of stress in and out of the courtroom* (1993) *Child Abuse and Neglect* 613.

²¹⁴ Saywitz and Nathanson (1993) 615.

²¹⁵ Ch 6 *infra* explores the best practices from other countries and will include an exploration of practices which allow hearings involving children to not be held at court.

²¹⁶ S 9 of the Children's Act.

²¹⁷ S 165 of the South African Constitution states that the judicial authority of South Africa vests in the courts.

²¹⁸ S 150 of the Children's Act.

and heard in a court. This may mean that the relevant courtroom in itself must be as suitable as possible for a child having no option other than to be heard in this setting. The physical accessibility of the Children's Court is addressed under section 42(8) of the Children's Act where it states that the Children's Court hearings must, as far as is achievable, be held in a room which is conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings whilst respecting the prestige of the court, and, be accessible to persons with disabilities and special needs. Reference is also made to the specific room in which proceedings are held and indicates that this room should be accessible to persons with various types of disabilities and special needs and not just focus on certain disabilities such as disabilities where people make use of wheelchairs.

Sections 14, 42 and 52 of the Children's Act all support Article 13 of the UNCRPD in requiring some sort of age-appropriate and procedural accommodation when it comes to CWD approaching the courts. Although this may be deemed as domesticating this very important pillar into local legislation, these sections may only be successful if properly committed to and implemented. As these accommodations may also have a budgetary impact on relevant role-players and departments, an assessment must be made in terms of the expenditure and roll-out of relevant programmes in order to ascertain whether pillar six is fully recognised and respected. In this regard, it is important to refer to the *Esthé Muller v DoJCD and Department of Public Works, 2003*²¹⁹ matter. Ms Muller, a legal practitioner in South Africa and a wheelchair user, took the respondents to the Equality Court under PEPUDA. Ms Muller, who was supported by the SAHRC alleged that courthouses were inaccessible to people with disabilities, with specific reference to those who were wheelchair bound. In 2004, a final settlement was reached in this matter and the respondents committed themselves to a plan to ensure that court buildings throughout the country will be made accessible within three years. In this regard, the settlement determined that at least one courtroom and one toilet in each building would be made accessible to people with disabilities. As the agreement required resource intensive responses, it was settled that inaccessible courthouses, in the

²¹⁹ *Esthé Muller v DoJCD and Department of Public Works (Equality Court, Germiston Magistrates' Court 01/03)* unreported case (2003).

interim, would need to find alternative avenues of ensuring that persons with disabilities have access to the court facilities.²²⁰

Consequently, according to the DOJ&CS²²¹ all new courts built as from the 2009/10 financial year, are equipped with one courtroom which is fully accessible to people with disabilities.²²²

The Children's Act, however, calls for proceedings to be held in a room not ordinarily used for the adjudication of criminal trials. Thus, should there only be one room equipped in a court that suits the needs of persons with disabilities, it will most likely host criminal, civil as well as Children's Court matters as the need arises. Criminal matters will therefore be heard in the same room, contrary to the requirements stressed in section 42(8)(c).²²³

In courts which were built before 2009/10, wheelchair ramps are being added to make courts wheelchair accessible. This addition is referred to as the first phase of making courts accessible. The second phase is stipulated as the provision of lifts to courts that were built prior to 2009/10. According to the Department's submission to Parliament, these were the only measures in place, or planned in terms of the

²²⁰ Equality court victory for people with disabilities. 24 Feb 2004. SAHRC available at http://www.sahrc.org.za/sahrc cms/publish/article_150.shtml; and <http://www.inclusiondaily.com/archives/04/09/15/091504sacourtaccess.htm> (accessed on 25 Jun 2015).

²²¹ See the DOJ&CS Presentation to Parliament: Presentation to the Portfolio and Select Committees on Women, Children and People with Disabilities: Implementation of the United Nations Convention on the Rights of Persons with Disabilities Aug 2012 available at <http://www.pmg.org.za/report/20120821-responses-issues-raised-submissions-public-hearings-implementation-un> (accessed on 14 Jul 2015).

²²² *Ibid.*

²²³ It is contended that the introduction to s 48(2) creates some latitude here. It states that Children's Court hearings must, as far as is practicable, be held in a room is not ordinarily used for criminal proceedings. Should this section be met with strict adherence, the DOJ&CS must provide two rooms that are fully accessible to persons with disabilities: one for Children's Court and civil matters, another for criminal matters. However, a room that is only used for criminal proceedings when access needs to be provided for a person with a disability, would not ordinarily be used for criminal proceedings. Should this room indeed mainly be used for criminal proceedings, this may create a challenge in terms of s 48(2)(c) *vis-à-vis* s 48(2)(d).

infrastructure relating to access to courts for people with disabilities.²²⁴ Therefore in phase one of enabling access to courts for people with disabilities, only the needs of people with movement impairments are reported to be addressed through the upgrading and amendment of infrastructure.²²⁵

Available data in relation to the needs and prevalence of certain disabilities should have been highlighted in order to determine what type of infrastructure should be prioritised. In terms of Census 2001 and 2011, the most prevalent disability amongst South Africans is visual impairment.²²⁶ In respect of the current implementation of physical accessibility for children and people with disabilities, only some disabilities are catered for.

In 2011 the National Building Regulations and Buildings Standards Act was further amended in order to, amongst others, comply with the constitutional principle of non-discrimination.²²⁷ One of the outcomes of the amended legislation was to ensure that public buildings were constructed in order to become %disabled friendly+.²²⁸ According to the South African Standard Code of Practice for the Application of the National Building Regulations,²²⁹ the application of the National Building Regulations establishes requirements for ramps, stairways, handrails, lifts, toilet facilities, auditoriums and halls, obstructions in the path of travel, parking and indication of facilities, in relation to accessibility to public buildings for people with disabilities.

²²⁴ It is argued that emphasis is placed on wheelchair accessibility against the backdrop of the Esthé Muller out-of-court settlement of 2004 which created a precedent by directing that all courtbuildings be made accessible, and the Willem Hendrik Bosch Court Judgement in 2005 which determined that all police stations be made accessible. See South African Government Information, %equality court victory for people with disabilities,+ <http://www.info.gov.za/speeches/2004/04022415461001.htm> (accessed 22 Jan 2013).

²²⁵ Both wheelchair ramps and lifts are specifically aimed at creating ease of access to people who have difficulty in moving unaided.

²²⁶ See par 5.3 *infra*. Access to courts for persons who are wheelchair bound may have been seen as taking precedence in relation to other disabilities. Should a person not be able to access a court, his right is not only limited, but denied as he or she will have no means to approach services that should be available to them. A person with a visual impairment may physically access the court, however, his or her access will be limited as services will not be fully enjoyed as it needs to be specifically accommodated.

²²⁷ The National Building Regulations and Buildings Standards Act 103 of 1977.

²²⁸ Part S to the National Building Regulations and Buildings Standards Act deals specifically with facilities for persons with disabilities.

²²⁹ *Ibid.*

Although the Department only referred to the building of ramps, it is maintained that all of the latter elements are required in order to address accessibility to courts for people with disabilities. Holness and Rule²³⁰ indicate that the promises of increased budgetary allocation to courts and materials have dealt with the challenges that face persons with physical and sensory disabilities only.

In its 2011/2012 annual report, the Department indicated that an amount of R85 million was allocated to the Rehabilitation and Maintenance Programme which was aimed at the upgrading and maintenance of buildings.²³¹ However, the Rehabilitation and Maintenance Project budget for 2011/12 was diverted to capital projects where funds were urgently needed, and therefore cut. One of the key deliverables of the Department in this regard was to improve four priority courts through the Rehabilitation and Maintenance Programme in 2011/12.

This target was not achieved due to financial constraints and all of the later programmes were put on hold.²³² This indicates that upgrading courts in order to become disabled friendly is not a priority performance indicator, and although the Department indicated to Parliament that measures were in place to address accessibility to courts for people with disabilities, the implementation thereof is once again challenging.²³³

²³⁰ Holness and Rule (2014) *PELJ* 1927.

²³¹ The DOJ&CD Annual Report 2011/2012 25.

²³² The DOJ&CD Annual Report 2011/2012 52.

²³³ In its 2013 Budget Vote Speech, the Deputy Minister of Justice and Constitutional Development indicated that over the next 3 years, the department will spend R3,2 billion on the construction of courts and other infrastructure projects to enhance access to justice. A further R92 million will be spent on day-to-day maintenance and R279 million on rehabilitation of court facilities over the next 3 years. See <http://www.pmg.org.za/briefing/20130529-minister-justice-and-constitutional-development-2013-budget-speech-responses-anc-and-da> (accessed on 12 Oct 2014) The department, however, had a budget cut of more than R600 million and it is argued that, should a shortfall arise in one or the other areas of service delivery, that funds will be cut in the budget for infrastructure, and therefore, inherently, in the budget for making courts more accessible to people with disabilities.

4.3.6.3. Differential questioning techniques

Fouche and Joubert²³⁴ assert that children can be trustworthy witnesses and that they can make meaningful comments about their experiences when questioned correctly. Songca²³⁵ argues that even though children may communicate in a different way from adults, this does not prevent them from providing information accurately in a manner that can be understood. Generally, children should be questioned in a specific manner as they simply do not have the same abilities as adults to retain memories and information.²³⁶ This impacts dramatically on their reliability as information bearers and witnesses unless specific techniques are utilised in order to source the required information. Dunn²³⁷ illustrates that young children by the mere nature of their age need to still learn to retain information. She also indicates that this may result in the child not having any memory of a particular event, or conversely, only recalling fragments of the event.²³⁸ By questioning the child on issues where he or she has no or very little recollection of the event, the child attempts to fill in the gaps of the story.²³⁹ Should the child be coerced into a direction by means of an incorrect questioning technique, the child may attempt to fill in the gaps of his memory with incorrect or suggested information.²⁴⁰ She also states that children are much less likely to be able to filter out actual retained memory from modifications in the original memory that resulted from post-event occurrences and input. Walker²⁴¹ further illustrates that linguistic complexities may further contribute

²³⁴ Fouche and Joubert %Facilitating disclosure of child sexual abuse victims in the middle childhood: A seven-phase forensic interview protocol+(2009) *Acta Criminologica* 43.

²³⁵ Songca %The evidence of young children: Establishing the truth in South African criminal courts+(2004) *South African Journal of Criminal Justice* 313.

²³⁶ Dunn %Questioning the reliability of children's testimony: An examination of problematic elements+(1995) *Law and Psychology Review* 1.

²³⁷ *Ibid.* See also Dale %Ensuring reliable testimony from child witnesses in sexual abuse cases: Applying social science evidence to a new fact-finding method+(1993) *Aib L Rev* 187; Lyon %Child witnesses and the oath: Empirical evidence+(2000) *Southern California Law Review* 1021-1027; Cunningham %Helping a child be a witness in court: 101 things to know, say and do+(2011) available at http://www.lfcc.on.ca/Helping_a_Child_Witness.pdf (accessed on 14 Jul 2015) 1-55.

²³⁸ Dunn %Questioning the reliability of children's testimony: An examination of problematic elements+(1995) *Law and Psychology Review* 1.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ Walker %Children in the courts: When language gets in the way+(1999) *Association of Trial Lawyers of America* 2. Walker is a forensic linguist and consultant.

to the testimonies of children being brought into question. Vocabulary, word order, syntactic methods and ambiguity in language may be difficult for children to grasp, and much more so for children with learning and speech impairments. The mere use of prepositions may also have an effect of a dire outcome in a matter should they be incorrectly used by a child.²⁴² Walker provides the example of the use of the prepositions *in* and *on*. A child gave testimony that her father put his hand *in* her bottom. The father was charged with sexually abusing the child. Upon re-interviewing the child, a child-psychologist, who noted inconsistency in her use of prepositions, ascertained that the child meant to say that her father put his hand *on* her bottom. Although he was guilty of physically assaulting his child, the father was not guilty of sexual abuse. It is therefore important for any person questioning a child to be alert to the importance of language command. In the light of the status of sign language, the nuances of prepositions, synonyms and ambiguity require alertness from the person questioning the child. As much as it may be challenging to determine the true meaning behind the testimony provided by a child as a result of linguistic intricacies, it becomes ever more complex if the language used by the child can only be understood by a limited number of role-players.²⁴³

Appropriate questioning techniques are therefore even more important in matters where the child with a disability is asked to testify or relay an experience. Should the wrong questioning technique be used, the credibility of the child may be brought into question. For example, a child with Down's syndrome may be particularly sensitive to negative emotion and would respond to what he or she perceives as aggression by trying to appease the questioner.²⁴⁴ Consequently the reliability of the information he or she provides may be undermined, unless questioning is kept non-threatening, non-adversarial and simple.²⁴⁵ The questioning of CWD becomes more highlighted in matters where children are in conflict with the law. Studies have shown that individuals with mild learning disabilities present an increased rate of offending when

²⁴² *Ibid.*

²⁴³ For example a trained sign-language interpreter, as well as the child's immediate family who are able to understand him. Other judicial role-players will be unable to determine whether a child who uses sign language used prepositions incorrectly, etc.

²⁴⁴ McEwan (ed) *The verdict of the court: Passing judgment in law and psychology* (2003) 98.

²⁴⁵ Sanders *et al* *Witnesses with learning disabilities* (1996) *Office of Research and Statistics* 2.

compared to their peers without a learning disability.²⁴⁶ In a 1992 study into the offending probability of persons with mental disabilities, it was found that intellectually handicapped men were up to three times more likely to commit an offence than their non-disabled peers, and five times more inclined to commit an offence of a violent nature.²⁴⁷ Another study indicated that several specific mental disabilities are associated with an elevated risk for criminal and violent behaviour.²⁴⁸ For professionals who question these children in conflict with the law, education and training is therefore a must. Additional caution is required when questioning a child with a mental disorder or intellectual disability. In *S v Mahlangu*²⁴⁹ the court ruled that admissions made by a child offender were inadmissible as the child was not properly informed of his constitutional rights not to incriminate himself. The court also indicated that:

An uninformed accused, particularly a minor, could be seriously prejudiced should he incriminate himself without appreciating the gravity thereof.²⁵⁰

Should a child in conflict with the law present some sort of intellectual disability to the extent that he or she cannot grasp the gravity of his admissions, this must be recognised by the questioning police official at the outset. As the first point of contact, police officials should be circumspect regarding the mental capacities of child offenders. Without requiring the police to pronounce on the intellectual abilities of the alleged child offender, a measure of cautiousness must be adhered to in order to prevent, in the first instance, the infringement of the child's constitutional rights, and secondly, a possibility of rendering a potential criminal case void due to procedural inaccuracies.

Against this background section 52 of the Children's Act calls for rules to be made on the appropriate questioning techniques for children with intellectual or psychiatric difficulties or with hearing or other physical disabilities which cause difficulties in

²⁴⁶ Hall & Young offenders with a learning disability+ (2000) *Advances in Psychiatric Treatment* 279.

²⁴⁷ Hodgins & Mental disorder, intellectual deficiency and crime: Evidence from a birth cohort+ (1992) *Arch Gen Psychiatry* 476-483.

²⁴⁸ Tiihonen *et al* & Specific major mental disorders and criminality: A 26-year prospective study of the 1966 Northern Finland birth cohort+(1997) *Am J for Psych* 843.

²⁴⁹ *S v Mahlangu and Another* (CC70/2010) [2012] ZAGPJHC 114 (22 May 2012).

²⁵⁰ *S v Mahlangu* par 21.

communication.²⁵¹ Gallinetti²⁵² asserts that this provision is innovative as it provides for the legal framework for the *obligatory* drafting of rules to protect vulnerable children from certain procedures at court. The Children's Act therefore obliges relevant role-players²⁵³ to make rules designed to address these various types of questioning techniques. No such rules have however been made in terms of the Children's Act. The Rules Board for Courts of Law Act²⁵⁴ determines that the Board may, with a view to the efficient, expeditious and uniform administration of justice in courts, subject to the approval of the Minister, make rules for the lower courts, which would include the Children's Court.²⁵⁵ The Rules Board Act also states that the Rules Board may generally make any rule which may be useful to be prescribed for.²⁵⁶ Although both the Children's Act and the Rules Board Act determines and mandates the Rules Board to make rules for procedures such as questioning techniques, the Rules Board has failed to do so. Although crucial in terms of the rights of CWD to have access to justice and participate during court proceedings, there is no prescribed manner in which presiding officers and other judicial stakeholders should undertake the questioning of children with communication difficulties.

Lastly, section 170(A)(1) of the CPA states the following:

Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

²⁵¹ S 52(2)(a)(ii) of the Children's Act.

²⁵² Gallinetti in Davel and Skelton (eds) 22.

²⁵³ In this regard, the DOJ&CD and Department of Social Development.

²⁵⁴ The Rules Board for Courts of Law Act 107 of 1985. Hereafter referred to as the Rules Board Act.

²⁵⁵ S 6 of the Rules Board Act.

²⁵⁶ S 6(1)(t) of the Rules Board Act.

Initially, the SALC's Report on the protection of the child witness introduced the concept of the intermediary.²⁵⁷ In 1991, the Criminal Law Amendment Act 135 of 1991 amended the CPA by introducing section 170A which allows persons under the age of 18 to testify through intermediaries.²⁵⁸ Section 170A came into full operation on 30 July 1993. The SOA, which came into effect in 2007 further amended section 170A by adding sections addressing the use of intermediaries by persons with mental disabilities.²⁵⁹

Section 170A allows a victim and/or witness under the biological or mental age of 18 to give evidence through a trained person and therefore to not be subjected to an accusatorial²⁶⁰ direct line of questioning and cross examination.²⁶¹ As intermediaries have been used in the South African justice system for over two decades,²⁶² it can therefore be suggested that a system that has found its relevance within local jurisprudence for this period of time, must by now be well adjusted and responsive towards the needs presented by the South African justice system. This is not the case. The list of people who may act as intermediaries were published in the *Government Gazette* in 1993²⁶³ and includes registered paediatricians; registered

²⁵⁷ See the SALC Issue Paper 10 Project 108: Sexual Offences Against Children+ (1997) available at http://www.justice.gov.za/salrc/ipapers/ip10_prj108_1997.pdf (accessed on 14 Jul 2015) 74.

²⁵⁸ In terms of s 186 of the CPA, the court may at any stage of criminal proceedings subpoena any person as a witness at such proceedings if the evidence of such witness appears to the court important to the outcome of the case.

²⁵⁹ Previously only a child under the age of 18 could give evidence through an intermediary. The SOA was amended in 2007 to allow for a person over 18 years, but with a mental age that is under 18, to also testify through an intermediary.

²⁶⁰ The accusatorial system takes the form of an open and public confrontation between the accuser and the accused. Legal systems usually adopt either the accusatorial or inquisitorial type of criminal procedure. In the case of the accusatorial procedure, the presiding officer's role is limited to the role of an umpire. The presiding officer's main role is to maintain the rules of procedure throughout the proceedings, as well as to pronounce a verdict subjected to the evidence that is presented. See the SALC Issue Paper 10 Project 108: Sexual offences against children+ (1997) available at http://www.justice.gov.za/salrc/ipapers/ip10_prj108_1997.pdf (accessed on 14 Jul 2015) 68.

²⁶¹ This amendment also recognised the vulnerability of children below the age of 14.

²⁶² See par 4.3.7.

²⁶³ The *Government Gazette* in 1993, 15024 of 30 Jul 1993, as amended by *Government Gazette* 17822 of 28 Feb 1997, and amended by *Government Gazette* no 22435 of 2 Jul 2001.

psychiatrists; certain family councillors,²⁶⁴ qualified childcare workers, registered social workers with the prerequisite experience, psychologists and certain educators. Apart from providing guidance on what the types of vocational background an intermediary must have, there is no specification given regarding any additional training or skills development that these categories of persons must undergo before being appointed as an intermediary.²⁶⁵

In April 2012, in responding to a parliamentary question regarding the availability of intermediaries, the DOJ&CS indicated that at that stage, there was an established capacity of only 131 intermediaries available at courts throughout South Africa. The DOJ&CS also indicated that it was planning to progressively appoint another 30 intermediaries for the 2012/13 financial year. Currently, the DOJ&CS lists 698 lower courts, including magistrate's courts, branch courts and periodical courts on its website.²⁶⁶ From the information provided to Parliament, it can therefore be inferred that at the most, there would be 161 intermediaries serving a number of 698 lower courts and approximately 16 higher courts, including the Constitutional Court and Supreme Court of Appeal. In 2008, in the matter of *Phaswane*, it was concluded by the Constitutional Court that at that stage, there were not enough intermediaries who could carry out intermediary duties in an effective manner.²⁶⁷

This would appear to still be the case. In 2014, the South African Parliament issued a report on the cost of justice and tracking expenditure on gender-based violence in the DOJ&CS.²⁶⁸ The report reflects that at that stage, 164 full-time intermediaries were employed by the DOJ&CS. The report also states the following:

²⁶⁴ Family councillors may act as intermediaries should they be appointed in terms of s 3 of the Mediation in terms of Certain Divorce Matters Act 24 of 1987 and who are or were registered as social workers, or who have four years experience as educators, or who are or were registered as clinical, educational, or counselling psychologists.

²⁶⁵ Schoeman % training Programme for Intermediaries for the Child Witness in South African Courts+(Doctoral Research 2006 UP) 225.

²⁶⁶ See http://www.justice.gov.za/contact/lowercourts_full.html (accessed 29 Jun 2013).

²⁶⁷ *Phaswane* par 195.

²⁶⁸ See in general Watson % Report on the cost of justice and tracking expenditure on gender-based violence in the Department of Justice and Constitutional Development+ (2014) available at <http://www.ghjru.uct.ac.za/pdf/the-cost-of-justice-in-south-africa.pdf> (accessed on 9 Nov 2014).

There is no indication of whether the intermediary services provided are adequate or not.²⁶⁹

From Parliament's own report, there is uncertainty that this number is responsive to the needs of vulnerable children or not. The non-availability of intermediaries to assist children, and more specifically CWD, may thus severely affect the efficiency with which a matter involving such child is dealt with.²⁷⁰ It is important to note that intermediaries may be appointed not only for children, but more specifically for any witness under *the biological or mental age* of 18 years whenever criminal proceedings are pending before any court.²⁷¹ An intermediary may be appointed for such person where it appears to the court that proceedings would expose such person or child to undue mental stress or suffering.²⁷²

It would therefore appear that the current situation means that each appointed intermediary in South Africa may have to serve up to five courts in order to make intermediary services universally available.²⁷³ The proximity of courts, caseloads as well as financial resources may impact on whether these intermediaries will indeed be able to do so, or whether courts may decide to proceed without the presence of an intermediary, to the possible detriment of the child.²⁷⁴

²⁶⁹ *Ibid* 8.

²⁷⁰ *Phaswane* par 191. In an example listed by the court, a matter was postponed for the appointment of an intermediary. One year later, an intermediary had not yet been appointed and the case had to be postponed further.

²⁷¹ S 170A of the CPA.

²⁷² S 170A(1) of the CPA.

²⁷³ In this regard, see <https://www.govpage.co.za/justice--constitutional-development-vacancies-01062015.html> (accessed on 25 Jun 2015) where the advertisements for intermediary positions indicate that in some areas, such as the Northern Cape, intermediaries must serve up to seven (7) different magistrates courts.

²⁷⁴ In this regard, it is important to note that by 2012, intermediaries were appointed on a contract basis by the DOJ&CS. Recent vacancy advertisements within the DOJ&CS indicate that these positions may still not form part of the permanent human resources structure of the DOJ&CS. Positions are advertised on a year by year basis. In the light of the lack of job security and continuity, the quality of applicants and their training may be questioned. See <http://www.justice.gov.za/vacancies/posts/KZN-13-023.pdf> as well as <http://www.justice.gov.za/vacancies/posts/LMP-13-082.pdf> for examples of vacancy advertisements for court intermediaries (accessed on 12 Nov 2014).

4.3.6.4. Other participatory accommodations

Sign language is the natural language used by Deaf²⁷⁵ people. Sign language includes visual-gestural languages, capable of expressing human experience by using the hands and the face to communicate without sound.²⁷⁶ The South African Constitution recognises the importance and relevance of the South African Sign Language²⁷⁷ for persons who are unable to hear, and uses this method of communication as their primary language and mother tongue. Section 6 of the South African Constitution states that a Pan South African Language Board recognised by national legislation must promote and create conditions for the development and use of, amongst others, sign language.²⁷⁸ Further to this, sections 29, 30 and 31 of the South African Constitution states that everyone has the right to receive education in the language of their choice, to use the language of their choice and to participate in the cultural life of their choice. Sign language, although not constitutionally recognised as one of South Africa's official languages, is recognised as an official language for educational purposes.²⁷⁹ Conversely, the South African School Act of 1996 states that the South African Sign Language is to be the medium of instruction in schools for the deaf.²⁸⁰ Lotriet²⁸¹ argues that due to the history of apartheid in South Africa, the majority of Deaf people in the South Africa were marginalised and

²⁷⁵ In keeping with international convention, Deaf (upper case D) is used to refer to people who identify themselves with the Deaf community, and deaf (lower case d) to refer to people who have been diagnosed as audiotologically deaf. It is similar to the use of an upper case % used when referring to a Jewish person.

²⁷⁶ Aarons %Signed language and professional responsibility+ (1996) *Stellenbosch Papers in Linguistics* 285.

²⁷⁷ South African Sign Language is used as a first language.

²⁷⁸ S 6(5)(a)(iii) of the South African Constitution.

²⁷⁹ S 6(4) of the South African Schools 84 of 1996 states that Sign Language has the status of an official language for purposes of learning at a public school.

²⁸⁰ Thus, although South African Sign Language is *not* an official language of the country, it does have the status of a medium of instruction in schools that are *set* up specifically to accommodate the needs of Deaf pupils. A variety of African countries such as Uganda (in its 1995 Constitution) as well as Zimbabwe (in its 2013 Constitution) recognise sign language as one of the country's official languages. Also in 1988, the European Union approved a resolution requesting all member countries for recognition of their national sign languages as official languages of the Deaf.

²⁸¹ Lotriet %Sign language interpreting in South Africa: Meeting the challenges+ (2001) *Critical Link* 1.

sign language interpreting was never promoted or properly developed.²⁸² She also argues that due to this marginalisation, the majority of Deaf people have had inadequate access to services, including legal services.²⁸³

In August 2012, the DOJ&CS indicated to Parliament that the availability of relevant sign-language interpreters has been identified as a challenge.²⁸⁴ In 2002, the SALRC recommended that sign language should be recognised as deaf children's first and natural language and as the primary medium of their communication.²⁸⁵ It was also recommended and pointed out that sign-language interpreters used must be able to understand the dialect of the deaf child as well.²⁸⁶

In respect of the CJA, it is important to note that the UNCRC calls for the child in conflict with the law to have the free assistance of an interpreter if the child cannot understand or speak the language used.²⁸⁷ This safeguard is crucial to allow children with hearing or speaking impairments to participate in the CJA proceedings. This matter was deliberated during the negotiations of the CJA by the then SALC.²⁸⁸ At that stage, the Legal Aid Board of South Africa²⁸⁹ questioned the availability of funds to provide children with the assistance of free interpreters. This led to the recommendation made by the SALRC to only reflect the child's right to speak in a

282 *Ibid.*

283 *Ibid.*

284 See the DOJ&CS's responses in respect of sign-language interpreters at <https://pmg.org.za/committee-meeting/14715/> (accessed on 16 Jul 2015).

285 See SALRC Discussion Paper 103 Project 110: Review of the Child Care Act+ (2002) available at http://www.justice.gov.za/salrc/reports/r_pr110_01_2002dec.pdf (accessed on 16 Jul 2015) 575.

286 Differentiation must also be made between sign language for children, as opposed to sign language for adults. According to Akach and Naude, prior to 1997 there had been no formal training of sign-language interpreters in South Africa. Most of the available sign-language interpreters were children of Deaf adults, who were untrained and not skilled to do interpreting from spoken language into sign language: Akach and Naude Empowering marginalised culture: The institution of South African Sign Language at the University of the Free State+ (2008) *Journal for New Generation Sciences* 13.

287 Art 40(2)(vi) of the UNCRC states that every child accused of having infringed the penal law has at least the guarantee to have the free assistance of an interpreter if the child cannot understand or speak the language used.

288 See the SALC Project 106: Juvenile Justice Report+(2000) available at http://www.justice.gov.za/salrc/reports/r_prj106_juvjus_2000%20jul.pdf (accessed on 13 Jul 2015) par 11.20.

289 Now referred to as Legal Aid South Africa (LASA).

language of his or her own choice with the assistance of an interpreter, where necessary.²⁹⁰ There is therefore currently not any mention made of this assistance free of charge in the CJA.

The availability of sign-language interpreters to deaf children was identified as a key issue in assisting children with hearing disabilities to participate in court proceedings.²⁹¹ However, more than a decade after the SALRC's recommendations were made, courts are still struggling to provide proper and skilled sign-language interpreters to deaf children and adults during court proceedings, as per their own admittance.²⁹² In addition, sign-language interpreters made available to children during court proceedings must not only be trained in legal interpretation, but also in special skills to interpret for children. Much as the intermediary, the sign-language interpreter may serve as a platform for effective participation, as well as a safeguard between adversarial formal court proceedings and the vulnerable deaf child. It is therefore important that the sign-language interpreter for children in court proceedings understand the dialect used by the child, as signs used by deaf children may originate from a different reference framework than the one used by deaf adults.²⁹³

During its submission to Parliament, the DOJ&CS stated the following:

The Department is working on a partnership with DeafSA, to develop relevant partnerships in this regard. This project is at a documenting stage. This project is proposed to start within the next financial year, 2013/14.²⁹⁴

In the DOJ&CS's 2013/2014 Performance Plan, however, no specific mention was made of any matter related to sign-language interpreting save for a reference to the

²⁹⁰ This section now reads as follows: 'Every child should be addressed in a manner appropriate to his or her age and intellectual development and should be spoken to and be allowed to speak in his or her language of choice, through an interpreter, if necessary.'

²⁹¹ See the SALC's Project 106: Juvenile Justice Report (2000) available at http://www.justice.gov.za/salrc/reports/r_prj106_juvjus_2000%20jul.pdf (accessed on 13 Jul 2015) par 11.20.

²⁹² See the DOJ&CS's responses in respect of sign-language interpreters at <https://pmg.org.za/committee-meeting/14715/> (accessed on 16 Jul 2015).

²⁹³ This is in accordance with the submissions to the Law Commission made by DeafSA on 12 Aug 1998.

²⁹⁴ See the DOJ&CS's responses in respect of sign-language interpreters at <https://pmg.org.za/committee-meeting/14715/> (accessed on 16 Jul 2015).

training of interpreters, and no mention was made of any steps to be taken in this regard in its 2013/2014 annual report.²⁹⁵ It can therefore be inferred that no ring-fenced budget was made available for this specific purpose either. The lack of available trained sign-language interpreters will therefore inadvertently impede on service delivery to persons who are deaf. Access to justice for children with specific disabilities such as deafness would remain a pipedream should the barriers and systemic issues not be recognised and addressed. Dialects of certain areas, dialects of children, training on interpretation, training on interpretation for children, as well as special skills in legal interpretation are all required to be recognised and addressed before the sixth pillar will be successfully abided by.

4.3.6.5. Training in order to address stigmatisation

Article 13 of the UNCRPD expressly addresses the training of relevant stakeholders. Against the framework discussed above, stakeholders must be appropriately trained to assist and address CWD in accessing justice. In order for South Africa to meet its obligations with respect to the six pillars, persons at present attending to the rights of CWD to access justice must receive some form of specific training. A one-size-fits-all approach cannot suffice, as once again reference must be made to the permutation approach: CWD are vulnerable and unique as a result of their age and disability.

It is crucial for presiding officers to be trained to assist CWD in their pursuit to access justice. With the initial implementation of the Children's Act, the DOJ&CS's training body; the Justice College provided training to presiding officers on the implementation of the Children's Act.²⁹⁶ However, no reference was made to CWD in the 2009 edition of the *Guide for Presiding Officers in the Children's Court on the New Children's Act*, as developed by Justice College.²⁹⁷ Reference was only made

²⁹⁵ See the DOJ&CS's 2013/14 Annual Report (2014) available at <http://www.justice.gov.za/reportfiles/anr2013-14.pdf> (accessed on 16 Jul 2015).

²⁹⁶ Justice College no longer trains presiding officers, as this duty is currently the responsibility of the Office of the Chief Justice and the Judiciary in general.

²⁹⁷ Justice College was the DOJ&CS's official training body.

to the accessibility of a courtroom to persons who are disabled.²⁹⁸ This is an oversight as it is pointed out above that a differential approach in procedure, accommodation as well as questioning techniques must be embarked on to provide CWD with equal access to justice. For instance, should the court find that the child is in need of care and protection, for example, there are few children's homes or places of safety with physical environments that are accessible or with staff who are properly trained to accommodate the needs of a child with disabilities.²⁹⁹ A presiding officer must thus be knowledgeable on the needs of such child, so as to ensure the appropriate response in such a matter. By merely addressing all children as the same, CWD will be subjected to further victimisation.

Training becomes even more pressing in respect of presiding officers of the Equality Court. Firstly, only a judge, magistrate or additional magistrate who has completed a training course as a presiding officer of an Equality Court may be designated as such.³⁰⁰ Specific Equality Court training is therefore a prerequisite for presiding officers to hear matters which may fall within the ambit of Equality Court legislation. In 2006, the court in the matter of *George v The Minister of Environmental Affairs and Tourism*³⁰¹ indicated that Equality Courts were to be staffed by presiding officers who have been specifically equipped to address the adjudication of equality matters. In 2009, all magisterial district courts were designated as Equality Courts.³⁰² However, such designation is provisional pending the availability of a trained Equality Court presiding officer. In 2013, in a response to the National Assembly, the then DOJ&CS indicated that as a result of little interest being shown by presiding officers to engage in Equality Court matters, the Department was in the process of recommending that Equality Court training becomes compulsory for all presiding officers.³⁰³ The training up to then seemed lacking and ill-conceived, as the training

²⁹⁸ See Justice College (ed) *Guide for presiding officers in the Children's Court on the new Children's Act* (2009) 3.

²⁹⁹ Jamieson and Proudlock (2009) 8.

³⁰⁰ S 16(2) of PEPUDA.

³⁰¹ *George and Others v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC) par 7.

³⁰² Government Notice R859 in *Government Gazette* 32516 of 28 Aug 2009.

³⁰³ National Assembly: Question for Written Reply Parliamentary Question No: 669, available at <https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&cad=rja&uact=8&ved=0CDkQFjAH&url=http%3A%2F%2Fwww.parliament.gov.za%2Flive%2Fcommonreposito>

material developed in 2000 for this purpose was left unchanged despite numerous developments within the field.³⁰⁴

Secondly, in determining the nuanced approach to disability discrimination, presiding officers must not only be trained in the relevant legislation so as to be able to hear such matters, but they must also be trained and sensitised with reference to the social context of disability discrimination. Without such awareness, proper systemic transformation will not be possible, as a lack of understanding the plight of for instance CWD will prevent case law from being substantially developed. As with the Children's Court, the Equality Court must be able to provide the necessary redress in respect of the specific needs of CWD.³⁰⁵

Proper training also becomes imperative in relation to role-players who provide for procedural accommodation in respect of access to justice for CWD. For instance, it is crucial that intermediaries are continuously trained on how to assist not only children in general, but also CWD. Without specific guidance, intermediaries will generally not be able to address and understand the needs of, for instance, a child with a mental disability. There are also general concerns about the expertise of intermediaries as no government training or oversight is officially required. Jonker and Swanzen³⁰⁶ maintain that intermediary work is *ad hoc* in its nature, and therefore

[ry%2FProcessed%2F20130507%2F335960_1.doc&ei=WUZoVKKAHMTbarOhgLAL&usg=A FQjCNEETq4fJprudFZPEU730tu1RtHwpw&sig2=1tIWCMWNjeg0p5nPhoMM2Q&bvm=bv.79142246.d.d2s](#) (accessed on 16 Nov 2014).

304 Kruger explains that the training of presiding officers at the inception of the PEPUDA legislation took the form of the Benchbook for Equality Courts. For a full discussion of the Benchbook and its apparent limitations, see Kruger *Racism and law: Implementing the right to equality in selected South African Equality Courts* (2008) (Doctoral Research 2008) Rhodes) 212.

305 In terms of both the Children's Act and PEPUDA, presiding officers may determine where proceedings are held, should it not serve the interest of justice to hold same in an open, regular, courtroom. In this respect, and with reference to this very important discretion, presiding officers must therefore be trained to identify whether the specific hearing or inquiry must be held in areas which may be more conducive towards the participation of children with disabilities.

306 Jonker and Swanzen *Intermediary services for child witnesses testifying in South African criminal courts* (2007) *International Journal on Human Rights* 110. See also Goodman-Brown *et al* *Why children tell: A model of children's disclosure of sexual abuse* (2003) *Journal of Child Abuse and Neglect* 525-540. On the need for training to understand the

there exists very little room for accountability and support in specific pursuits for expertise.

The training of intermediaries was also highlighted in the *Phaswane* matter where the court pointed out that language barriers, as well as an intermediary's unfamiliarity with court procedures, contribute to the inefficiency of the intermediary service.³⁰⁷ In these instances, intermediaries may simply serve as interpreters as they will be unsuccessful in performing their appointed function of ensuring that the child is made comfortable by specific use of language and tone of questioning.³⁰⁸

Apart from equipping relevant stakeholders to adequately respond to the needs of CWD, training is also imperative in order to prevent stigmatisation and continued unequal treatment.

Basic elements such as how to refer to the child's disability or how to address a child with a specific disability can assist in providing the child with equal access to justice, in a dignified manner. Although not a prescribed science or enshrined in any international agreement, disability etiquette is key in the promotion and protection of the rights of CWD to access justice. According to the United Nations Office of the High Commissioner for Human Rights,³⁰⁹ it is imperative when engaging with a person with a disability, to focus on the person and not his or her disability.³¹⁰ Accepted terminology according to the Convention is ~~persons with disabilities~~, not

child witness see *S v S* 1995 (1) SACR 50 (ZS); *S v Ontong A* 719/01, 2002 (CPD) (unreported).

³⁰⁷ *Phaswane* par 196.

³⁰⁸ This situation is not unique to South Africa. In Mar 2012 a case was heard at the Court of Appeal in the United Kingdom relating to a man who had been accused of a sexual offence. The accused presented a clear learning disability as well as speech impairment. The judge presiding over the matter directed that the accused was to be provided with an intermediary under his common law powers to ensure a fair trial. However, no appropriate intermediary was available. In fact, three different intermediaries were approached but each felt unable to provide the necessary assistance. The matter continued at the discretion of the presiding judge, and the accused was convicted. The accused later argued that the trial had been unfair. This matter is another illustration of firstly, the issues relating to the availability of intermediaries in court proceedings and secondly, the suitability, skill and training of intermediaries to assist persons with special needs. See *Regina v Anthony Russell Cox* No. 2011/04593/C1.

³⁰⁹ OHCHR (2010) 1-68.

³¹⁰ OHCHR (2010) 48.

disabled person; rights of persons with disabilities; not disability rights. The Convention also uses the terms mental disability and intellectual disability although some prefer the term psychosocial disability. If a person with disabilities prefers the use of certain terminology, respect for that person's wishes is pivotal, unless it can be considered derogatory or undermining dignity. Relevant stakeholders such as legal representatives and court personnel must be conscious of the language used to address and communicate with CWD, as well as referring to them. This may be attained through very basic training in respect of disability etiquette, which in turn may serve to promote the obligations under pillar six of the above-mentioned framework.

4.4. Conclusion

In respect of the six pillars, for South Africa to observe and respect the rights of CWD to access justice, certain basic principles must be observed and adhered to: non-discrimination,³¹¹ the best interests of the child,³¹² the child's right to survival³¹³ and to be heard,³¹⁴ basic recognition of the disability of the child,³¹⁵ as well as specific access to justice in terms of the UNCRPD.³¹⁶ This may be done by the enactment of specific legislation and also other executive and administrative measures.

In respect of the six pillars, a list of domestic statutes addresses these principles in some form or the other.³¹⁷ Nevertheless, most domestic legislation does not expressly refer to CWD. The protection of the rights of CWD is mostly implied.

The Children's Act recognises the rights of CWD and attempts to respond to their special needs.³¹⁸ The Children's Act is progressive in its nature and is a valuable

³¹¹ See par 3.2.2.2 as well as par 4.3.2 *supra*.

³¹² See par 3.2.2.1 as well as par 4.3.1 *supra*.

³¹³ See par 3.2.2.3 as well as par 4.3.3 *supra*.

³¹⁴ See par 3.2.2.4 as well as par 4.3.4 *supra*.

³¹⁵ See par 3.2.2.5 as well as par 4.3.5 *supra*.

³¹⁶ See par 3.3.4 as well as par 4.3.6 *supra*.

³¹⁷ See para 4.2 and 4.3 *supra*.

³¹⁸ See par 4.2.1 as well as par 4.3.1 *supra*.

mechanism in answering to the needs CWD may present. The Children's Act also addresses elements pertaining to the right of CWD to access justice. These include the right to legal representation, the right to have their disability taken into consideration in any and all actions taken in regard to their well-being, as well as their right to participate in proceedings affecting them.³¹⁹ The Children's Act pronounces on the principle of non-discrimination,³²⁰ the best interests of the child,³²¹ the child's right to survival³²² as well as to be heard,³²³ and most significant of all, it addresses the rights of CWD specifically.³²⁴ In respect of specific accommodations as determined by Article 13 of the UNCRPD, the Children's Act refers to certain physical and age-appropriate accommodations which must be made in order to facilitate access to justice for CWD: the room in which the inquiry is held must be accessible for people with disabilities, questioning techniques must be developed in order to interact with CWD.³²⁵ Section 11 requires that in all matters concerning CWD, due consideration must be given to provide them with support services. In the light of section 10 confirming the CWD's right to participate and share their views in an appropriate manner, the call for support services becomes a necessity. In respect of access to justice for CWD, the Children's Act is the most encompassing legislation addressing the rights of CWD to access justice. The implementation of this legislation is unfortunately flawed and fragmented.

The CJA also plays an integral role in matters where a child with a disability may be in conflict with the law.³²⁶ Although not addressing CWD explicitly, this Act creates a platform for said child not to be subjected to the formal criminal justice system, thus creating age-appropriate accommodations as called for in Article 13 of the UNCRPD.³²⁷ In creating diversion programmes, the CJA requires that the special needs of vulnerable groups must be taken into consideration. Therefore, in order for CWD to fully benefit from the diversion system, their needs must be taken into

³¹⁹ See par 4.3.4 *supra*.

³²⁰ See par 4.3.2 *supra*.

³²¹ See par 4.3.1 *supra*.

³²² See par 4.3.3 *supra*.

³²³ See par 4.3.4 *supra*.

³²⁴ See par 4.3.5 *supra*.

³²⁵ See par 4.3.6 *supra*.

³²⁶ See par 4.2.2 *supra*.

³²⁷ See par 4.3.6 *supra*.

account. This has been proven specifically in the case of children with debilitating conduct disorders.

The SOA, in identifying specific sexual crimes against children and persons with mental disabilities, recognises the vulnerability of both these groups.³²⁸ In addressing the vulnerability of both children and persons with mental disabilities, the SOA recognises the particular needs of these two groups of society. CWD and children with mental disabilities are also expressly protected under their status as children, as well as under their status as persons with mental disabilities. It has also been seen that children with mental disabilities are easy targets for sexual predators and the SOA is responsive in addressing this scourge.

According to the World Health Organisation (WHO), the MHCA is consistent with international human rights standards and must be seen as an important milestone in the advancement of managing the mental health system in South Africa.³²⁹ Just as with most legislation,³³⁰ the substance of the laws exists, although the implementation is lacking. As illustrated, the MHCA does not mention mental illnesses or intellectual disabilities of children expressly and relevant stakeholders are not trained in the needs of children with these specific mental disabilities. The MHCA, however, addresses the rights of persons with mental disabilities from a care and institutionalisation perspective. In order for children with mental disabilities to participate in matters affecting them, they need to be nurtured in an environment suited to facilitate said participation and in essence integration. The MHCA aims to promote the mental health care of children through its regulations. The Act also attempts to mainstream mental health services into everyday health care services. This is crucial in order for children with mental disabilities not to be ostracised and side-lined by their non-disabled peers. This is also important in confirming their credibility whilst participating in proceedings affecting them.

³²⁸ See par 4.2.3 *supra*.

³²⁹ Lund *Mental health policy development and implementation in South Africa: A situation analysis+* (2008) available at http://www.who.int/mental_health/policy/development/SA%20Country%20Report%20-%20Final%20Draft%20Jan%202008.pdf (accessed on 16 Jul 2015) 10.

³³⁰ Children's Act, MHCA, CJA etc.

In respect of the ~~six~~ pillars, the CPA plays an integral role in allowing the participation of children in the criminal justice system.³³¹ The safeguards put in place by this legislation aims to prevent secondary traumatisation in matters where children are required to participate, thus facilitating their age-appropriate and procedural accommodation as called for by the UNCRPD.³³² The measures adopted by the CPA aims to ease the burden of testifying and participating on the child victim and/or witness. The regulations also call for services to be available to witnesses who testify at court, including various support mechanisms. Due to the high number of sexual violations occurring against CWD, in order for them to be able to give testimony, special services and assistance are needed. Trained intermediaries are crucial to assist the CWD.³³³ The CPA also goes as far as to include testimony by means of gestures and other non-verbal communicative signals. This strives to accommodate the best interests of CWD, who have a right to participate in any and all matters affecting them on an equal basis with others.³³⁴

Lastly, PEPUDA has created an accessible and affordable manner to approach the court in matters relating to unfair discrimination.³³⁵ PEPUDA offers complainants simple procedures for redress. This is crucial in order to ensure that the most vulnerable members of society also have access to justice. Furthermore, non-discrimination is at the centre of this Act and addresses matters relating to the rights of persons with disabilities directly.³³⁶ Should the rights of a child with a disability to access justice be infringed on due to unfair discrimination on the basis of his or her disability, the Equality Courts are the ideal courts to remedy the situation.

It is therefore clear that various pieces of legislation address matters relating to CWD directly and indirectly. Nevertheless, all commitments called for by the ~~six~~ pillars are not fully addressed by the implementation of these domestic laws. The South African Constitution calls for international agreements to be domesticated through the enactment of national legislation. The status and effect of international

³³¹ See par 4.2.5 *supra*.

³³² See par 4.3.6 *supra*.

³³³ *Ibid.*

³³⁴ *Ibid.*

³³⁵ See par 4.2.6 *supra*.

³³⁶ See par 4.3.2 *supra*.

agreements in South Africa and as pointed out above, are governed by section 231 of the South African Constitution. Section 231 affirms that South Africa follows a dualist approach with regard to the acceptance of international treaties. Therefore, any international agreement becomes law in the Republic when it is enacted into law by national legislation.³³⁷ International law can therefore only be applied, for instance, by the courts and other fora when it has been converted into municipal law, such as its enactment through legislation.³³⁸ For the UNCRPD to take specific effect and have teeth, South Africa may have to translate it into domestic legislation. Existing legislation as referred to earlier is fragmented, outdated and needs to be strengthened by a specific political move towards the introduction of dedicated legislation on the rights of people with disabilities in South Africa.

In 2012, the SAHRC recommended to Parliament that South Africa needs to review its current legislation and determine whether there is a need to amend legislation or draft new legislation in order to ensure the domestication of the UNCRPD. The Commission indicated that there are two options available after conducting the review process: the drafting of *ad hoc* legislation, or the drafting of a comprehensive and overarching piece of legislation to specifically address the implementation of the UNCRPD.³³⁹ These recommendations have to date not been brought to fruition.

The UNCRPD has yet to be fully domesticated, which may contribute to the lack of commitment from relevant role-players to specifically address matters such as contained in Article 13.³⁴⁰ South Africa does not have an appropriate number of available and trained intermediaries and sign-language interpreters to address the needs of CWD in accessing the justice system. Court buildings do not respond to the

³³⁷ S 231 of the South African Constitution.

³³⁸ Brownlie (ed) *Principles of public international law* 7 (2008) 31; Dugard (ed) *International law: A South African perspective* (2005) 47.

³³⁹ See the SAHRC's submission to Parliament's Submission to the Portfolio Committee and Select Committee on Women, Children and People with Disabilities Implementation of the Convention on the Rights of Persons with Disabilities (UNCRPD) Jul 2012, available at <http://www.sahrc.org.za/home/21/files/Disability%20submissionFINAL%20for%20Parliament%2025%207%2012.pdf> (accessed on 23 Jul 2015).

³⁴⁰ On the 9th of December 2015, the South African government did however approve the White Paper on the Rights of Persons with Disabilities, from which legislation reflecting the principles contained in the UNCRPD may follow in the future. A copy of the White Paper was accessed through the offices of the Department of Social Development.



most prevalent forms of disability and budgets are not used preferentially in order to allow for children with all types of disabilities to be able to approach the court. Free legal representation is only provided to CWD in civil matters once certain criteria have been met, and the training of these legal representatives to represent CWD specifically is also either non-specific or non-existent. The preparation and training of individuals working within the judicial system to appropriately address the needs of CWD is the key in order to adhere to South Africa's responsibilities both under the UNCRC and UNCRPD. Skills regarding appropriate questioning techniques and other appropriate accommodation measures are crucial in order to safeguard CWD against discrimination. In order to impose these obligations onto the relevant judicial authorities, it is necessary to review the recommendations of the SAHRC and move towards possible specific legislation domesticating the obligations ratified under the UNCRPD.

Chapter 5: Childhood disability and the abuse and neglect profile

5.1. Introduction

5.2. Defining childhood disability

5.3. South African data and statistics

5.3.1. The South African Census

5.3.2. The Census 2011 and disability

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5.4. The abuse and neglect profile

5.4.1. The victim profile

5.4.2. The abuser profile

5.4.3. The abuse statistics

5.4.4. The effect of an increased abuse probability

5.5. Conclusion

5.1. Introduction

Previous chapters have indicated that CWD have the right to access to justice in terms of the South African Constitution,¹ as well as international law.² It is, however, important to determine who we speak of when we refer to CWD and why they are in specific need of the realisation of this particular right.

In order to establish answers to these questions, it is necessary to consult available data on CWD. Unfortunately, reliable data on CWD, local or international, are not readily available. This is due to a number of reasons, which will be explored throughout this chapter. In its 2013 publication on the State of the World's Children, the United Nations International Children's Emergency Fund (UNICEF) pointed out that global estimates of children living with disabilities are largely speculative, as the method of measurement varies so greatly between countries, that a true reflection of

¹ Ch 2 *supra*.

² Ch 3 *supra*.

the number of CWD in the world may only be an estimate.³ Research also proposes that CWD are often overlooked in surveys which do not ask explicitly about them.⁴ Feldman *et al*⁵ maintain that disability research is largely adult-centric and that limited studies have been undertaken into childhood disability. Where general surveys or censuses do contain questions relating to both adults and CWD, it has been found to inadequately identify CWD.⁶

In this regard, the South African 2011 census as well as data gathered under the Social Assistance Act⁷ will be discussed in so far it may shed light on the prevalence of CWD in South Africa. Once it has been established that CWD are indeed widely found in South Africa, an analysis will follow on why there is an increased likelihood that these children will require the need for judicial intervention more frequently than their non-disabled peers. Statistics from social agencies as well as the South African Police Service (SAPS) will be used to illustrate the incidence of abuse against children in general, as there is no specific data available illustrating the abuse and neglect exclusively against CWD. It will, however, be argued that due to their vulnerability, CWD are at an increased risk of being subjected to these abusive practices.

The profile of CWD more prone to abuse will also be explored, as well as the profile of the potential abuser, to illustrate the vulnerability of these children and why abusers may target them specifically.

³ UNICEF %State of the worlds children+ 2013 available at http://www.UNICEF.org/sowc2013/perspective_garces.html (accessed on 15 Jan 2014) 3.

⁴ Durkin %Population-based studies of childhood disability in developing countries: Rationale and study design+(1991) *International Journal of Mental Health* 47-60.

⁵ Feldman *et al* %Inclusion of children with disabilities in mainstream child development research+(2013) *Disability & Society* 998.

⁶ See http://www.unicef.org/southafrica/SAF_resources_sitandisabilityes.pdf for this survey which was commissioned by the Department of Social Development in 2012 regarding a situational analysis of children with disabilities in South Africa. In this survey UNICEF reiterates that surveys in general are not designed to identify children with disabilities. Moreover, while the census and other national household surveys do include general questions about people with disabilities, these questions were not specifically designed to identify children with disabilities. The analysis also points out that it is much more difficult to measure disability in children as a result of their innate developing state.

⁷ Act 13 of 2004.

In relation to existing legislation and the analysis made in Chapter 4 of this research, it is the aim of this chapter to illustrate that specific courts and fora can anticipate being approached by CWD seeking recourse. This would be as a result of the prevalence of CWD in South Africa, the likelihood that these children will be abused or neglected more frequently than their non-disabled counterparts, as well as their need for redress as a result of the violation of their rights.

This chapter will aim to provide answers to three questions in this regard namely: Who is a child with a disability? How prevalent are CWD in South Africa in respect of data and statistics, and, are CWD at an increased risk of being abused and neglected? The further aim of this chapter is to illustrate that, owing to the abuse and neglect profile of CWD, judicial mechanisms must be ready and able to receive CWD, as even without exact guidance from statistical resources, their attendance at these courts may be anticipated due to their increased risk of being abused and neglected.

5.2 Defining childhood disability

It is complicated to provide an exact all-encompassing definition of disability as disability is multidimensional and heterogeneous, and presents itself in various unique forms.⁸

Domestically, no definition of disability is included in the South African Constitution, the Children's Act,⁹ the MHCA¹⁰ or PEPUDA.¹¹ In respect of employment, the Employment Equity Act¹² defines disability as a long-term or recurring physical or mental impairment which limits people's chances of being employed and retaining that employment.¹³ In terms of section 9 of the Social Assistance Act,¹⁴ and without

⁸ Altman %Disability definitions, models, classification schemes, and applications+ (2001) in Albrecht *et al* (eds) 101.

⁹ 38 of 2005.

¹⁰ 17 of 2002.

¹¹ 4 of 2000.

¹² 55 of 1998.

¹³ S 1 of the Employment Equity act 55 of 1998.

¹⁴ 13 of 2004.

expressly defining **disability**, a person is eligible to receive a disability grant if due to a physical or mental disability, he or she is unfit to obtain employment and therefore is unable to maintain him or herself.¹⁵ The Income Tax Act¹⁶ provides the following definition of disability in section 18(3):

disability means a moderate to severe limitation of a person's ability to function or perform daily activities as a result of a physical, sensory, communication, intellectual or mental impairment, if the limitation-

- (a) has lasted or has a prognosis of lasting more than a year; and
- (b) is diagnosed by a duly registered medical practitioner in accordance with criteria prescribed by the Commissioner.

Nevertheless, no single definition of disability is used in the South African domestic context. This means that by merely consulting domestic legislation, it may be difficult to ascertain who a person with a disability in the South African context may be and how to gather standardised data on disability prevalence in South Africa. As a result of the uncertain and ill-defined nature of the definition of disability, international law may have to be consulted in order to provide some clarity on the extent of this definition.

The WHO's International Classification of Functioning, Disability, and Health (ICF) measures disability by describing disability as an interaction between health conditions and contextual factors.¹⁷ Three elements are used by the ICF to determine disability in this regard. It includes the impairment itself, the relevant activity limitation, as well as the resultant restriction in participation.¹⁸ These elements are reflected in the description of people with disabilities in the UNCRPD which states as follows:

¹⁵ S 9(b) of the Social Assistance Act 13 of 2004.

¹⁶ 58 of 1962.

¹⁷ The health conditions include body functions and structures, as well as activities and participation, whereas the second part, the contextual factors include environmental factors and personal factors. See the World Health Organization **International Classification of Functioning, Disability and Health** (2001) available at http://psychiatr.ru/download/1313?view=1&name=ICF_18.pdf (accessed on 27 Jun 2015) 10.

¹⁸ *Ibid* at 8.

ō long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder [a person's] full and effective participation in society on an equal basis with others.¹⁹

According to Bick,²⁰ this definition is preferred by the disability sector for use within the South African context. Measuring and defining disability in children is however innately more challenging than evaluating disability amongst adults. This is as a result of their developing and evolving characteristics which inherently complicate distinguishing the characteristics of the normal development process²¹ (or small deviations and variations thereof), from limitations present during the child's development, which may ultimately result in some form of impairment and limitation in participation.²² The challenge of defining childhood disability may thus contribute to a general lack of available and reliable data as it is difficult to determine in respect of young children, who to include in this definition or who to exclude.

Nonetheless, as per Simeonsson *et al*²³ a more efficient approach for defining childhood disability may be to focus on the child's needs for services and support. The impairment need therefore not be categorised as, for instance, a specific physical or mental disability. If the child is hindered from fully participating, for example, in the judicial system and requires services and support in order to realise

¹⁹ S 1 UNCRPD.

²⁰ Bick 'Definitions of disability and the 2011 census: Constitutional law' (2011) *Without Prejudice* 49.

²¹ Even recognised models of assessment of the development of children such as the Wechsler Intelligence Scale for Children and Griffith's Mental Development Scale can only be relevant to the country or community for which it was developed, as research has shown that children from different countries develop at different rates. This does not mean that the children who develop slower should be classified as living with a disability. See in general Adolph *et al* 'Moving between cultures: Cross-cultural research on motor development' (2009) in Bornstein (ed) *Handbook of cross-cultural developmental science*; Grantham-Mcgregor *et al* 'Developmental potential in the first 5 years for children in developing countries' (2007) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2270351/> (accessed on 7 Feb 2015) and Fernald *et al* *Examining early child development in low-income countries: A toolkit for the assessment of children in the first five years of life* (2009) 2.

²² UNICEF 'Children with disabilities in South Africa: A situation analysis 2001. 2011' (2012) available at http://www.unicef.org/southafrica/resources_14394.html (accessed on 31 Jan 2015) 6.

²³ Simeonsson *et al* 'Applying the International Classification of Functioning, Disability and Health (ICF) to measure childhood disability' (2003) *Journal for Disability and Rehabilitation* 604.

his or her rights, the child may present a disability. The specific type of disability may only inform the level and nature of the responsiveness and support to be provided to the child by relevant duty bearers.

Apart from challenges in defining childhood disability, a variety of other reasons may also contribute to why data on CWD are so unattainable and unreliable. This includes the possible social stigma of admitting to a child's disability by the family or parents.²⁴ Parents may simply refuse to acknowledge that their child has a disability out of fear of how the community may perceive the relevant child or family. Furthermore, in countries where the infant mortality rate is higher, the child's disability may have gone unnoticed or unreported, as the child may have passed on before the disability was reported.²⁵ CWD who live and work on the street may also be left uncounted, which contributes to the unreliability of existing global data on CWD.²⁶

It therefore appears that in gathering data on CWD, the South African context must be explored in order to determine the prevalence of CWD and consequently the resources which must be made available to serve to their needs.

5.3 South African data and statistics

In its ninth General Comment, the CORC indicated that States Parties must gather data and statistics on CWD in order to fulfil their obligation under the CRC.²⁷ The CORC also indicated that the importance of gathering data on CWD is regularly overlooked and not viewed as a key concern, notwithstanding the fact that it has an impact on resource distribution and preventative programmes.²⁸ The CORC further stated that States Parties must employ additional efforts to gather data on CWD, as they are often hidden by their parents or caregivers.²⁹

²⁴ UNICEF *State of the world's children+ 2013* available at http://www.unicef.org/sowc2013/perspective_garces.html (accessed on 15 Jan 2014) 64.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ CRC/C/GC/9 par 19.

²⁸ *Ibid.*

²⁹ *Ibid.*

Against this background, data accumulation on CWD is crucial to inform programmes to respond to the needs of CWD. South African data on CWD must thus be readily available and guide the responses of, for instance, the courts and judicial service providers such as LASA or the SAHRC.

5.3.1 The South African Census

Since South Africa's first democratic elections, three national censuses have been conducted: in 1996, 2001 and 2011. During the censuses of 1996 and 2001 Statistics South Africa (StatsSA) collected data on the disability status in the population based on the definition of the 1980 WHO International Classification of Impairments, Disabilities and Handicaps.³⁰ The South African census of 2011, however, adopted a different set of disability questions, developed by the Washington Group.³¹ The Washington Group approach measured disability, based on activity limitations and restrictions in social participation, with the aim of generating prevalence measures that are globally comparable.³² As indicated by Swartz,³³ questions developed in relation to the Washington Group approach, enquire about functional or activity limitations as opposed to enquiring about disability or being disabled. Where individuals had difficulty in performing some tasks, or were unable to perform them, they were categorised as disabled. The set of

³⁰ Stats SA Library Cataloguing-in-Publication (CIP) Data Census 2011: Profile of persons with disabilities in South Africa/Statistics South Africa. Pretoria: Statistics South Africa, 2014 Report 03-01-59 available at <http://beta2.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf> (accessed on 28 Jun 2015) 14. This definition included a physical or mental handicap which lasted for six months or more, or was expected to last at least six months, which prevented the person from carrying out daily activities independently, or from participating fully in educational, economic or social activities.

³¹ Hereafter referred to as Census 2011. The questions relate to difficulties people have in executing a series of activities: seeing, hearing, walking, communicating, self-care, remembering and concentrating.

³² Stats SA Library Cataloguing-in-Publication (CIP) Data Census 2011: Profile of persons with disabilities in South Africa/Statistics South Africa. Pretoria: Statistics South Africa, 2014 Report 03-01-59 available at <http://beta2.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf> (accessed on 28 Jun 2015) 13.

³³ Swartz %Five challenges for disability-related research in sub-Saharan Africa+(2014) *African Journal of Disability* 4.

questions used for the 2011 census therefore differed a great deal from questions asked to populate censuses 1996 and 2001 and are therefore not comparable.³⁴

5.3.2 The Census 2011 and disability

The population estimate of Census 2011 was found to be around 51 770 560.³⁵ Census 2011 revealed that 11% of the population had some sort of visual limitation, or difficulty in seeing.³⁶ Of this, 1.7% of the population had severe difficulty in seeing.³⁷ In the region of 1.4% of people indicated that they had severe difficulty in taking care of themselves, which may indicate that these respondents are reliant upon others for their care.³⁸ Overall, 3.5% of the population indicated that they had mild to severe difficulty walking or climbing stairs.³⁹ Furthermore, persons who indicated that they had mild to severe difficulty in communicating were assessed to be around 1.5% of the population.⁴⁰

³⁴ Questions asked during the 1996 and 2001 censuses were, for example, 'Are you disabled or is your child disabled'. The questions would then ask what type of disability the person had. It was found that the Washington Group questions were easier to respond to especially in cases where only moderate difficulty was experienced in participating in societal activities. The Washington Group questions also catered to the instances where parents would not admit to their children being disabled, but who will admit to their difficulty in managing certain tasks.

³⁵ Census 2011 Census in brief/Statistics South Africa. Pretoria: Statistics South Africa, 2012 available at http://www.statssa.gov.za/census/census_2011/census_products/Census_2011_Census_in_brief.pdf (accessed on 29 Jun 2015) table 2.1.

³⁶ Census 2011: Profile of persons with disabilities in South Africa/Statistics South Africa. Pretoria: Statistics South Africa, 2014 available at <http://beta2.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf> (accessed on 29 Jun 2015) par 5.2.1.

³⁷ Census 2011: Profile of persons with disabilities in South Africa/Statistics South Africa. Pretoria: Statistics South Africa, 2014 available at <http://beta2.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf> (accessed on 29 Jun 2015) fig 5.1.

³⁸ Census 2011: Profile of persons with disabilities in South Africa/Statistics South Africa. Pretoria: Statistics South Africa, 2014 available at <http://beta2.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf> (accessed on 29 Jun 2015) fig 5.6.

³⁹ Census 2011: Profile of persons with disabilities in South Africa/Statistics South Africa. Pretoria: Statistics South Africa, 2014 available at <http://beta2.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf> (accessed on 29 Jun 2015) fig 5.4.

⁴⁰ Census 2011: Profile of persons with disabilities in South Africa/Statistics South Africa. Pretoria: Statistics South Africa, 2014 available at

The data received from the census also revealed that approximately 0.7% of the people in South Africa experienced severe difficulty with their hearing to the extent that they were unable to hear at all.⁴¹ This amounts to more than 300 000 in South Africa, experiencing severe difficulty with their hearing ability.

The Census 2011 in addition gathered information on the population's usage of assistive devices, especially devices used by those with disabilities to perform certain tasks. Data indicated that 2.3% of the population made use of wheelchairs, which amounted to approximately more than one million people in South Africa.⁴²

5.3.3 Census 2011 and age

Population estimates were further grouped into five year estimates. Accordingly, data were gathered on people between age categories of 0-4 years old, 5-9 years old, 10-14 years old, 15-19 years old and so forth. More than five and a half million children were estimated to be below the age of 5, with 29.6% of the population of South Africa being estimated as being below the age of 15 years.⁴³ This amounts to more than fifteen million children below the age of 15 years.

However, in terms of the South African Constitution, a child is defined as any person below the age of 18 years.⁴⁴ As data were collected in five year estimates, the

<http://beta2.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf>
(accessed on 29 Jun 2015) fig 5.3.

⁴¹ Census 2011: Profile of persons with disabilities in South Africa/Statistics South Africa. Pretoria: Statistics South Africa, 2014 available at <http://beta2.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf> (accessed on 29 Jun 2015) fig 8.1.

⁴² Furthermore it was found that 14% of the population made use of eye glasses, 3.2% made use of walking sticks or frames and 2.8% made use of hearing aids. These do not however infer that the respondents were classified as being disabled, as can be clearly seen from the disjuncture between people with extreme visual impairments and the number of people using glasses.

⁴³ Census 2011 Census in brief/Statistics South Africa. Pretoria: Statistics South Africa, 2012 available at http://www.statssa.gov.za/census/census_2011/census_products/Census_2011_Census_in_brief.pdf (accessed on 29 Jun 2015) table 2.9.

⁴⁴ S 28(3) of the South African Constitution.

reports compiled by Census 2011 only provide the population statistics of children up to the age of 15, and then again below the age of 20. In this regard, it is difficult to get an estimate of the total number of children in South Africa. Nevertheless, as Census 2011 estimated that approximately five million respondents were between the ages of 15 and 19 years, this puts the total number of respondents 19 years and younger at just over 20 million.⁴⁵ It is thus projected that the number of children as defined in the South African Constitution, will be slightly lower and can be roughly estimated to be around 18 million in total.

It is important to identify the number of children living in South Africa, as these numbers form the basis of resource allocation and planning for the services these children may inevitably require. More significantly, it is imperative to know the number of CWD as these children may need specific reactions in order to access a range of services, including services to attain access to justice.

According to Census 2011, approximately 5.8% of people between the ages of five and 19 presented some form of disability.⁴⁶ Although indicating that an approximate number of just over 700 000 people between the ages of five to 19 present some form of disability, this number needs to be interpreted with caution due to two key reasons.

Firstly, a child's developing and evolving character will make it innately more difficult to determine what constitutes a possible slower level of development, and what constitutes a disability. In this regard, StatsSA noted that parents misreported on children by placing them in a category of either being %unable to do+ something, and/or %having a lot of difficulty to perform certain functions+when in actual fact the

⁴⁵ Census 2011 Census in brief/Statistics South Africa. Pretoria: Statistics South Africa, 2012 available at http://www.statssa.gov.za/census/census_2011/census_products/Census_2011_Census_in_brief.pdf (accessed on 29 Jun 2015) table 2.9.

⁴⁶ Census 2011: Profile of persons with disabilities in South Africa/Statistics South Africa. Pretoria: Statistics South Africa, 2014 available at <http://beta2.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf> (accessed on 29 Jun 2015) vii.

inability could be attributed to the child's level of development rather than a disability or impairment.⁴⁷

Secondly, the data in Census 2011 do not include any information on CWD below the age of five years.⁴⁸ It is therefore unknown whether the more than five and a half million children in South Africa under the age of five have any sort of impairment or disability and what support or resources they may require. The prevalence of the disability will also in some instances never be reported on, as some of these children will not reach the age of five years.

For example, in 1985 Kudrajavcev⁴⁹ contended that 10% of children diagnosed with cerebral palsy died within the first ten years of their lives, while 32% of these children died before reaching the age of five.⁵⁰ Other disabilities such as Down's syndrome may present a higher life expectancy rate, however, only if risks innately known to the disability itself, such as congenital heart defects, are diagnosed and treated as soon as possible.⁵¹ In developing countries such specialised medical interventions

⁴⁷ *Ibid.*

⁴⁸ Census 2011: Profile of persons with disabilities in South Africa/Statistics South Africa. Pretoria: Statistics South Africa, 2014 available at <http://beta2.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf> (accessed on 29 Jun 2015) v.

⁴⁹ Kudrajavcev *et al* 'Cerebral palsy: Survival rates, associated handicaps and distribution by clinical subtype' (1985) *Neurology* 900-903. See also Crichton *et al* 'The life-expectancy of persons with cerebral palsy' (1995) *Developmental Medicine and Child Neurology* 567-576.

⁵⁰ More recently, however, Strauss indicated that the life expectancy of these children may have risen to 20 years, in certain circumstances. The likelihood of children with severe forms of cerebral palsy dying before the age of 5 years is however very prevalent, and if not specifically recorded for children below the age of 5 years, a correct account of disability prevalence in South Africa can not be derived: Strauss *et al* 'Survival in cerebral palsy in the last 20 years: Signs of improvement?' (2007) *Developmental Medicine and Child Neurology* 86-92. Furthermore, children with severe mental disabilities are generally at a higher risk of mortality, see Durkin *et al* 'Prevalence and correlates of mental retardation among children in Karachi, Pakistan' (1998) *American Journal for Epidemiology* 286. See also Eyman *et al* 'The life expectancy of profoundly handicapped people with mental retardation' (1990) *N Engl J Med* 584-9.

⁵¹ According to Bittles *et al*, 50 years ago only 45% of infants with Down's syndrome lived past their first year of life. However, these days, in developed countries a child with Down's syndrome has a 96% chance of surviving to 1 year of age. When the child has a congenital heart defect, this reduces to 80%. In respect of life expectancy of children in developing, poorer nations, less progress has been made. In a study conducted in South America, only 66% of children with Down's syndrome with a congenital heart defect, survived infancy;

may not be available or accessible, thus elevating the risk of children with Down syndrome presenting a low life expectancy rate.⁵² A child with a spinal cord deficiency in more developed countries, may have a long life expectancy, however, in some poorer African countries the life expectancy of such children has been estimated to be only between four months and two years.⁵³ In 2008, the UNICEF found that a moderate association between higher under five mortality and a higher percentage of children screening positive for disability, exists.⁵⁴ Higher mortality rates of CWD may consequently result in reduced disability rates in the population overall,⁵⁵ as disability will go undetected if not explored and reported on expressly. As Census 2011 did not provide reliable data on the prevalence of disabilities amongst children, other sources may need to be consulted.

5.3.4 Data from the care dependency grant

As data on CWD are unclear in respect of Census 2011 other sources of information need to be consulted to determine the prevalence of CWD. One of these is data gathered by the National Department of Social Development in terms of the care dependency grant.

According to the Social Assistance Act,⁵⁶ a care dependency grant is paid to primary caregivers who provide care to children under the age of 18 who require and receive

Bittles *et al* Clinical, social, and ethical implications of changing life expectancy in Down syndrome (2007) *Developmental Medicine and Child Neurology* 283.

⁵² *Ibid.*

⁵³ Kamga *et al* call for a Protocol to the African Charter on Human and Peoples' Rights on the rights of persons with disabilities in Africa (2013) *African Journal of International and Comparative Law* 2. See also Chalklen *et al* Establishing the secretariat for the African decade of persons with disabilities (2006) in Watermeyer *et al* (ed) *Disability and social change: a South African agenda* 96.

⁵⁴ UNICEF Monitoring child disability in developing countries: Results from the multiple indicator cluster surveys (2008) available at <http://www.crin.org/resources/infodetail.asp?id=19377> (accessed on 29 Mar 2013).

⁵⁵ Mete Economic implications of chronic illness and disability in Eastern Europe and the former Soviet Union (2008) *The World Bank* 14. Mete illustrates that in 2004 Romania the mortality rate of children with disabilities was 28%, as opposed to 1.6% of their non-disabled peers.

⁵⁶ Social Assistance Act 13 of 2004.

permanent care or support services due to their physical or mental disability.⁵⁷ A caregiver is eligible for a care dependency grant if an assessment confirms that the child, due to his or her disability, necessitates and receives permanent care or support services and that said caregiver meets certain financial criteria.⁵⁸ The number of people receiving this specific grant may provide an indication as to the number of children who present a disability which requires permanent care. According to the South African Social Security Agency,⁵⁹ by March 2015, 126 777 beneficiaries in South Africa received the care dependency grant.⁶⁰ This means that in 2014, more than 120 000 children in South Africa presented a severe disability. Although this number may serve as a guideline as to how many children in South Africa may live with severe disabilities, this number may only be a fraction of the actual number of children who fall within this category as it excludes children whose caregivers do not meet the financial criteria to qualify.⁶¹

It also excludes children from undocumented⁶² and asylum seeking caregivers.⁶³

⁵⁷ S 7 of the Social Assistance Act 13 of 2004.

⁵⁸ Reg 8 of the Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance. The caregiver must be a South African citizen, a permanent resident or a refugee. This is a monthly non-contributory cash transfer of R1,410.00 (as of May 2015) to caregivers of children over the age of 1 year with severe disabilities or disabling chronic illnesses who require permanent home care.

⁵⁹ The South African Social Security Agency (SASSA) was created by the South African Social Security Agency Act 9 of 2004 and is an agency of the National Department of Social Development.

⁶⁰ SASSA Fact sheet: Issue no 3 of 2015. 31 March 2015+ (2015) 1 available at [file:///C:/Users/ECarter.SAHRC/Downloads/march%202015%20\(1\).pdf](file:///C:/Users/ECarter.SAHRC/Downloads/march%202015%20(1).pdf) (accessed on 30 Jun 2015). See also Mathews *et al* The South African child gauge 2014+ (2014) available at <http://www.ci.org.za/depts/ci/pubs/pdf/general/gauge2014/ChildGauge2014.pdf> (accessed on 16 Jul 2015) 98.

⁶¹ In this regard, parents or caregivers who do not qualify for the care dependency grant, may be able to claim certain tax deductions in respect of the expenses incurred in caring for the child. S 18(2)(b) of the Income Tax Act 58 of 1962 provides the deduction of expenses if the taxpayer or his child is a person with a disability.

⁶² In its 2009/2010 Annual Report, the SAPS estimated that the number of undocumented foreigners in South Africa was between 3-6 million. This estimation was also referred to in its 2010/2011 report, however, no mention of undocumented foreigners were made in its 2011/2012 and 2012/2013 reports.

⁶³ According to the Department of Home Affairs 2014 Budget Vote speech, in 2013 a total of 68 241 registered asylum claims were adjudicated and finalised. Of these claims, a total of 10,6% were approved and 30% were rejected as unfounded. Altogether, 52% were rejected as manifestly unfounded, fraudulent and abusive. See <http://www.gov.za/deputy-minister->

5.3.5 Other sources of data

In 2015 the National Department of Social Development in conjunction with UNICEF released a report on a study commissioned into CWD from birth to four years of age.⁶⁴ The study utilised qualitative data collection methods, but came no closer to determining a trend in their analysis of three different South African research sites: one site in a deep rural area, one in a town and one in a township.⁶⁵ The report pointed out its own limitations in this regard:⁶⁶

One of the objectives of this study was to investigate the types of disabilities that exist amongst children between birth and the age of four in South Africa. *Despite undertaking a comprehensive literature search, there was very limited or outdated information available.* It is acknowledged that the various types of disabilities revealed in the study are not an exhaustive list of all the disabilities that exist in children in this age cohort in South Africa. The information presented in the study is that which could be obtained in the desktop review.⁶⁷

This report did provide helpful anecdotal information in respect of the prevalence of certain disabilities amongst children in the three sites sourced,⁶⁸ as well as valuable first hand experiences from caregivers and educators in respect of caring for and teaching CWD. The report reinforced the understanding that data and research on CWD are lacking, which inhibits proper service delivery to these children in South

[home-affairs-fatima-chohans-speech-2014-budget-vote-debate-parliament-today](#) (accessed on 13 Feb 2015). See also Olivier who contends that nationality exclusions call for grants such as the care dependency and disability grants to be subject to review, in order to ensure effective and comprehensive coverage to all people: *Revisiting the social security policy framework in South Africa* (2000) *Law Democracy and Development* 106. See also Olivier *Understanding social security law* (2009) 61 for a discussion on social assistance in general in South Africa.

⁶⁴ UNICEF *Study on children with disabilities from birth to four years+ (2015)* Unedited final version obtained from UNICEF South Africa 1-84.

⁶⁵ UNICEF *Study on children with disabilities from birth to four years+ (2015)* Unedited final version obtained from UNICEF South Africa par 2.1. The sites were located in the Eastern Cape, Gauteng and the Free State.

⁶⁶ UNICEF *Study on children with disabilities from birth to four years+ (2015)* Unedited final version obtained from UNICEF South Africa par 2.8.

⁶⁷ Own emphasis.

⁶⁸ UNICEF *Study on children with disabilities from birth to four years+ (2015)* Unedited final version obtained from UNICEF South Africa 81.

Africa. It was found that an urgent need exists for better data for CWD, as uncounted children are not benefitting from national-level planning to address their needs.⁶⁹

5.4 The abuse and neglect profile

In the previous paragraph it was shown that although data on CWD were inadequate, Census 2011 illustrates two important aspects: people between the ages of five and 19 make up approximately 20 million of the total population and that approximately 5.8% of the people between the ages of five and 19 presented some form of disability. This number amounts to almost 1.4% of the overall population. This, however, still excludes information of children below the age of five years old, making it difficult to reliably determine the number of children who have disabilities in addition to the approximately 5.8% children above the age of five and below the age of 19.⁷⁰ Statistics from the care dependency grants indicated that 126 777 beneficiaries qualified for this grant.⁷¹ As a result of certain exclusions and no disaggregation of the data in terms of age, this information does not shed more light on the number of CWD in South Africa. Nevertheless, the figures are indicative of the fact that there is a high number of CWD in South Africa and cannot be ignored when it comes to the allocation of resources and provision of services. In the following paragraphs, it will be argued that these children are more at risk of abuse and neglect. The reasons behind this increased risk will also be explored.

5.4.1 The victim profile

⁶⁹ As pointed out above, Census 2011 made use of the Washington Group on Disability Statistics disability-related questions. These questions are not appropriate for children under the age of 5, and excluded the gathering of information on children with disabilities below the age of 5. Thus, adequate prevalence data on children with disabilities do not exist for children below the age of 5 years old.

⁷⁰ See par 5.3 *supra*.

⁷¹ See par 5.3.4 *supra*.

CWD are easy victims for abuse.⁷² Local media houses frequently report on the abuse and neglect of CWD.⁷³ Therefore CWD require an increased level of protection due to their vulnerability. Data available on the prevalence of abuse and neglect amongst CWD vary, although most data reflect a common trend where CWD are more likely to be abused and neglected, than their non-disabled counterparts.⁷⁴

According to leading epidemiological data from the USA by Sullivan and Knutson on the prevalence and characteristics of abuse and neglect of children with

⁷² Kamga (2013) 3; Murphy (2011) 3; Maltreatment of children with disabilities: The breaking point+ (2011) *Journal of Child Neurology* 1054. This is not a novel understanding and stems from ample research already conducted 30 years ago. For a discussion on studies undertaken in the 60s, see Westcott and Jones (1999) *J Child Psychol Psychiat* 497. For a discussion on the results of studies undertaken in the 80s, see Kirkham *et al* (1986) *Journal of Family Violence* 235-245; Schinke *et al* (1981) *Education and training of the mentally retarded* 299-303; Schilling *et al* (1986) *Education and Training of the Mentally Retarded* 20-26.

⁷³ Child with a disability locked up in a shack without ventilation: see Unknown (2014) *The New Age* 5; Adolescents with a mental disability starved as a child: see Malan (2013) *Mail and Guardian* 18; 68% of girls with disabilities will be abused before their 18th birthday: see Unknown (2013) *Mail and Guardian* 28; Children with disabilities are the forgotten victims of crime: see Geldenhuys (2013) *Servamus* 10; According to Arnold Christianson from the National Health Laboratory Service 65% of Down syndrome children in black rural communities in South Africa die before their second birthday: see Unknown (2013) *Mail and Guardian* 39; Children with mental disabilities are more likely to be sexually abused than other children: see Van Schalkwyk (2008) *Mail and Guardian* 32; Relative rapes child who is wheelchair bound and cannot speak: see Verwey (2006) *The Star* 2; 4 year old child with cerebral palsy abused by busdriver: see Green (2005) *The Star* 1; Foster mom locks two children with disabilities up for a week, without food, they resort to eating their own excrement: see Khumalo (2004) *The Sowetan* 9; Children with mental disabilities freed from three years of neglect in a tent: see Malefane (2004) *The Star* 3, and Nomdo and Kgampe (2004) *The Cape Times* 11; Criminal justice system does little to help children with disabilities who have been abused: see Russel (2001) *The Citizen* 4; Deaf-mute child kept tied up in a care centre: see Mbanda and Mbara (2000) *The Star* 6.

⁷⁴ Elphick *et al* (2014) *SAJHR* 222. See also Smit *et al* (2006) *Public Health* 534, 542.

developmental disabilities,⁷⁵ CWD are 3.4 times more likely to be maltreated than those without.⁷⁶ This estimate from the study conducted by Sullivan and Knutson indicates that one in three children with an identified disability may be a victim of some type of ill-treatment, while one in ten non-disabled children experience abuse.⁷⁷ Furthermore, when CWD are maltreated, they are also more likely to be more seriously injured or harmed than children without disabilities.⁷⁸ In its own study, the United Nations found that violence against CWD occurs at annual rates *at least* 1.7 times greater than for their non-disabled peers.⁷⁹ Research conducted by Stalker *et al* further indicates that children with communication impairments, behavioural disorders, learning disabilities and sensory impairments are predominantly susceptible to abuse.⁸⁰ Marge⁸¹ contends that certain disabilities increase the

⁷⁵ Sullivan and Knutson %Maltreatment and disabilities: A population-based epidemiological study+(2000) *Child Abuse and Neglect* 1257.

⁷⁶ Although this study was published in the USA in 2000, it is still seen as one of the most authoritative studies done on the abuse, maltreatment and neglect of children with disabilities. Sullivan and Knutson surveyed 50 278 children aged 0-21 enrolled for education programmes. Among non-disabled children in this study, they found a 9% prevalence rate of abuse, whereas the comparable rate for disabled children was 31%. See also their earlier 1998 article: Sullivan and Knutson %The association between child maltreatment and disabilities in a hospital-based epidemiological study+(1998) *Child Abuse and Neglect* 271-288. Earlier studies in America and Canada found that children with disabilities are almost seven times more likely to be sexually abused than their non-disabled peers. Kennedy %The abuse of deaf children+(1989) *Child Abuse Review* 3-6; Sullivan *et al* %Sexual abuse of deaf youth+(1987) *American Annals of the Deaf*, 256-262.

⁷⁷ Davis %Abuse of children with intellectual disabilities+ (2011) available at https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.thearc.org%2Fdocument.doc%3Fid%3D3666&ei=EmfoVLugJovmUsmgPgH&usq=AFQjCNFCPkLrVQ3CgY9dLIXPxCUnATAjg&sig2=NzFBQzcz_if_Y4aNfqJQLw&bvm=bv.86475890,d.d24 (accessed on 21 Feb 2015) 1.

⁷⁸ Murphy (2011) 1054. See also Sedlak *et al* %Fourth national incidence study of child abuse and neglect (NIS. 4): Report to Congress.+ (2010) available at <http://www.law.harvard.edu/programs/about/cap/cap-conferences/rd-conference/rd-conference-papers/sedlaknis.pdf> (accessed on 23 Feb 2015) 12.

⁷⁹ See <http://www.un.org/disabilities/convention/facts.shtml> (accessed on 26 Mar 2011). Parents and caregivers often do not know how to address their children's special needs which may result in neglecting these children. See Jamieson and Proudlock (2009) 7.

⁸⁰ Stalker *et al* %Child protection and the needs and rights of disabled children and young people: A scoping study+(2010) *University of Strathclyde Institutional Repository* 4. The Children's Bureau Washington in the USA indicates in an article published in Mar 2012 that children with disabilities often experience multiple types of maltreatment, with neglect being the most common. See <http://www.childwelfare.gov/pubs/prevenres/focus> (accessed on 25 Jun 2012).

vulnerability of children as they are deemed more accessible to abusers, with abusers facing a reduced risk of being held accountable for the abuse. Marge explains that children with severe disorders of speech, language and cognition are most at risk of maltreatment.⁸² This is as a result of the child having diminished ability to comprehend, reason, or communicate the abuse.⁸³ This argument is supported by Pickar and Kaufman⁸⁴ who assert that higher rates of child abuse have been found in the special needs population of children with learning disabilities, hearing impairments and autism. Morin⁸⁵ also indicates that CWD, especially those who have difficulty to communicate or have been diagnosed with autism, are less able to prevent abuse and are incapable to report the abuse once it has occurred.⁸⁶

Children with physical disabilities, although sometimes presenting the ability to communicate, may be unable to escape imminent danger and abuse as a result of the limited use of their bodies. For example, a child with multiple sclerosis may be able to communicate, but he or she may be incapable to defend him or herself against abuse as a result of loss of strength in the large muscle groups in his or her body.⁸⁷

⁸¹ Marge, *A call to action: Ending crimes of violence against children and adults with disabilities: A report to the nation* (2003) available at http://www.aucd.org/docs/annual_mtg_2006/symp_marge2003.pdf (accessed on 23 July 2015) 11.

⁸² *Ibid.* These may include children with traumatic brain injuries, intellectual deficits, cerebral vascular accidents (aphasias) dementia or autism.

⁸³ *Ibid.* Marge further contends that this increases the risk for victimisation because many perpetrators seek individuals who are unable to understand and communicate criminal actions and whose credibility will be questioned because of the disability.

⁸⁴ Pickar and Kaufman, *Parenting plans for special needs children: Applying a risk-assessment model* (2015) *Family Court Review* 3.

⁸⁵ Morin, *Protecting our students: The need for audiovisual monitoring in special needs classrooms* (2014) *Wayne Law Review* 1.

⁸⁶ See also Murphey, *Traumatized children who participate in legal proceedings are entitled to testimonial and participatory accommodations under the Americans with Disabilities Act* (2014) *Roger Williams University Law Review* 4, where she states that children who have been severely traumatised by abuse often have disabilities that interfere with their capacity to convey information effectively.

⁸⁷ *Ibid.* Marge also argues that children with sensory disabilities will have a reduced sense of danger and hence may be unable to escape from a dangerous encounter. She indicates that those who are deaf will not necessarily be able to sense danger, but are usually physically capable of defending themselves against physical assault or escaping a dangerous situation. Other research has found different outcomes in respect of children who are deaf: Brown contends that deaf children in particular experience a high level of sexual abuse. See Brown, *Protecting children from sexual violence* (2010) available at

Briggs⁸⁸ on the other hand states that one of the reasons for the higher prevalence of abuse amongst CWD may be that they are ill-informed about their rights as well as their sexuality. This also includes their understanding of what constitutes acceptable social behaviour.⁸⁹ She similarly indicates that these children are not sufficiently protected by judicial stakeholders and overall lacked confidence and self-esteem to complain about what they were experiencing.⁹⁰ Additionally, in a study surveying 302 adults with hearing impairments, it was found that 134 of these adults had been subjected to unwelcome sexual experiences during their childhood.⁹¹ Children with hearing impairments were therefore at greater risk of sexual abuse than hearing children.⁹²

Although a lack of consistent national and international data concerning the incidence of abuse amongst CWD creates barriers to adequately respond to this observance, the data in general provide an understanding that CWD require an increased level of protection due to their vulnerability.⁹³ The predominant trend appears to be that the less a child with a disability is able to communicate, the higher the risk is of abuse.⁹⁴ It is consequently evident that a strong causal link exists

http://www.coe.int/t/dg3/children/1in5/WhatWeKnow/Publication_en.asp (accessed on 23 Feb 2015) 108.

⁸⁸ Briggs %Safety issues in the lives of children with learning disabilities+ (2006) *Social Policy Journal of New Zealand* 43. Briggs also looked at 116 students between the ages of 11-17, with learning disabilities and whether they were subjected to sexual abuse. She found that 32% of girls in the sample group reported sexual abuse.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ Kvam %Sexual abuse of deaf children: A retrospective analysis of the prevalence and characteristics of childhood sexual abuse among deaf+ (2004) *Child Abuse and Neglect* 250.

⁹² In 2005, Kvam *infra* also conducted a study regarding sexual abuse amongst visually impaired children. It was found that visually impaired women and men aged 18. 65 who lost their sight as children, experienced sexual abuse before reaching the age of 18. This happened more often and with greater severity than with their non-disabled counterparts. See Kvam %Experiences of childhood sexual abuse among visually impaired adults in Norway: Prevalence and characteristics+ (2005) *Journal for Visual Impairment and Blindness* 1.

⁹³ Horner-Johnson and Drum %Prevalence of maltreatment of people with intellectual disabilities: A review of the recently published research+ (2006) *Mental Retardation and Developmental Disabilities Research Reviews* 57-69.

⁹⁴ Humphries *et al* also found that deaf children and adults who are unable to communicate with those around them are more often abused than their peers who do not have hearing

between an increased occurrence of abuse amongst CWD and their disability status.⁹⁵

5.4.2 The abuser profile

CWD are also more at risk of abuse and neglect as a result of the effect the disability may have on, for example, their parent or caretaker. Maltreatment may thus occur not only as a result of the child having a disability, but also as a result of the parent or caretaker not knowing how to address or deal with the disability of the child. As a result, maltreatment, neglect, abuse or degradation of CWD may occur in the family, as well as in the broader community.⁹⁶ The vulnerability of the caretaker in this regard, or the lack of support received to care for a child, may thus put CWD further at risk of abuse and neglect.

A number of factors contribute to the increased risk of CWD being abused or neglected by their parents or caregiver. Hibbard and Desch⁹⁷ explore a range of

impairments. They also contend that victims of maltreatment, especially during childhood, have a higher incidence of mental disturbance and risky behaviours. See Humphries *et al* %language acquisition for deaf children: Reducing the harms of zero tolerance to the use of alternative approaches+ (2012) *Harm Reduction Journal* 3. Sullivan and Knutson also found in their study that children with communication challenges and behavioural disorders had a much heightened risk of maltreatment, between 5 and 7 times that of non-disabled children. See also Braeken %sexual abuse of children with disabilities: Overview and analysis of international research+ (2003) available at <http://childcenter.info/research/abusedchil/norway/dbaFile11017.doc> (accessed on 1 Apr 2013) 2-20. Braeken indicates that another reason for the increase of abuse may be that children with disabilities may have several carers, which increases their exposure and therefore their vulnerability. They also may have difficulties in communicating that maltreatment has taken place. What is interesting to note is that the author links behaviour changes caused by the abuse to the notion that caregivers may have assumed that these were related to the disability, as opposed the result of a separate trigger.

⁹⁵ Were *et al* %hidden shame: Sexual abuse against children with physical disabilities in rural Kenya+ (2014) *International Journal of Applied Sociology* 83. Were indicates that the perpetrators of sexual abuse against children with physical disabilities are generally known to the victim. See also Glaser *et al* %Child abuse and neglect and the brain: A review+(2000) *Journal of Child Psychology and Psychiatry* 97-116 which in general indicates that children with disabilities are more susceptible to sexual abuse than others.

⁹⁶ UNICEF %Report on violence against children: Findings and recommendations+ (2005) available at [http://www.unicef.org/violencestudy/pdf/Study%20on%20Violence Child-friendly.pdf](http://www.unicef.org/violencestudy/pdf/Study%20on%20Violence%20Child-friendly.pdf) (accessed on 16 Jul 2015) 38. Hereafter referred to as the Violence Report.

⁹⁷ Hibbard & Desch %Maltreatment of children with disabilities+(2007) *Pediatrics* 1020.

triggers which may move a parent or caregiver to ill-treat the child, such as parents being overwhelmed or receiving limited support to take care of the child. Other parental risk factors have been identified as parents lacking the skill and resources to take care of the child, or where the cost of taking care of the child with disability puts a financial burden on the family as a whole.⁹⁸

Some caregivers will respond with violence to their child with a disability as they feel ashamed of the child.⁹⁹ Families may also see the child as having brought embarrassment to the larger extended family.¹⁰⁰ Lansdowne¹⁰¹ illustrates various examples of how parental shame led to the abuse and neglect of a child with a disability. These range from a child in Zambia never being given a bath in his life to a Palestinian girl being kept in a cage by her caregivers. As a result of this indignity, families may be slow to make use of services and interventions required for the well-being of the child.¹⁰² This in turn may lead to the child's further neglect.

Neglect may sequentially manifest itself due to pure ignorance on the part of the caregiver. The caregiver may not know that the child in question requires specific

⁹⁸ In this regard, see the Child Welfare Information Gateway's *The risk and prevention of maltreatment of children with disabilities+* (2012) available at <http://www.childwelfare.gov/pubPDFs/focus.pdf> (accessed on 23 Feb 2015) 6 for a discussion on how to identify and prevent the risk of abuse of children with disabilities. See also *Violence Report* (2005) 6. The report elaborates on the types of violence that may emanate when a disabled child is born into a family. These include infanticide and mercy killings where the parent is convinced that in the former instance, the child is a curse, and in the latter instance, that the child is suffering and needs to be relieved by way of death.

⁹⁹ Elphick (2014) 249.

¹⁰⁰ Lansdowne *See me, hear me: A guide to the UN Convention on the Rights of People with Disabilities to promote the rights of children+* (2009) available at <http://www.savethechildren.org.uk/resources/online-library/see-me-hear-me-guide-using-un-convention-rights-person-disabilities-promote> (accessed on 27 Feb 2015) 60; Malik *Beliefs and attitudes towards intellectual disability within the UK Pakistani community as perceived by key community members+* (2011) available at <http://discovery.ucl.ac.uk/1332788/1/Amna%20Malik%20Volume%201%20171111%20-%20final%20version.doc.pdf> (accessed on 27 Feb 2015) 4. See also Kuyini and Mahama *Implementing child rights and protection law in Ghana: Case study+* (2009) available at <http://challengingheights.org/wpcontent/uploads/2014/11/ImplementingChildRightsProtectionLawinGhana.26070718.pdf> (accessed on 29 July 2015) 3; Nwoke *The incidence of child abuse in the contemporary society: A fact or farce?+* (2010) *Ife Psychol A* 87.

¹⁰¹ Lansdowne (2009) 93.

¹⁰² Bywaters *et al* *Attitudes towards learning disability amongst Pakistani and Bangladeshi parents of disabled children in the UK: Considerations for service providers and the disability movement+* (2003) *Health Soc Care Community* 502-509; Lansdowne (2009) 99.

medical intervention or even specific nutrition. For example, it has been reported that in some instances in Nepal, CWD were starved to death or were not given sufficient food and water in order to control their bowel movements whilst their caregivers were not at home.¹⁰³

All of these factors may lead to the neglect of the child.¹⁰⁴ The child's disability may be viewed as an extreme burden on the family's time and resources.¹⁰⁵ This additional economic stressor may further impact on how the parent or caretaker views and treats the child.¹⁰⁶

CWD may also be victims of abuse and maltreatment within the broader society, such as in educational facilities by means of violence and victimisation. Abuse may also include bullying of a child by a caretaker or another child.¹⁰⁷ According to Dagget¹⁰⁸ when a child presents a disability, the likelihood of him or her being bullied may be reasonably foreseeable.¹⁰⁹ There are numerous definitions ascribed to the term bullying. It can be characterized as being one or more individuals aggressing on a vulnerable peer, primarily to assert control or power.¹¹⁰ The Oxford English

¹⁰³ Human Rights Watch "Futures stolen: Barriers to education for children with disabilities in Nepal" (2011) available at <http://www.hrw.org/sites/default/files/reports/nepal0811ForWebUpload.pdf> (accessed on 16 Jul 2015) 62.

¹⁰⁴ Violence Report (2005) 7.

¹⁰⁵ Anderson *et al* "The personal costs of caring for a child with a disability: A review of the literature" (2007) *Public Health Reports* 3.

¹⁰⁶ UNICEF (2007) 6, 67.

¹⁰⁷ Secunda and Paul "Overcoming deliberate indifference: Reconsidering effective legal protections for bullied special education students" (2015) *Illinois Law Review* 177. According to Secunda, a series of studies have shown that children with disabilities were two to three times more likely to be bullied than their non-disabled peers. Also see in general the Pacer Centres' information on bullying at "Bullying and harassment of students with disabilities: Top 10 facts parents, educators, and students need to know" (2012), available at <http://www.pacer.org/publications/Bullypdf/BP-18.pdf> (accessed on 4 Mar 2015).

¹⁰⁸ Dagget "Reasonable supervision of special students: The impact of disability on school liability for student injury" (2014) *Journal of Law and Education* 13.

¹⁰⁹ Laas and Boezaart "The legislative framework regarding bullying in South African schools" (2014) *PELJ* 2675. The authors maintain that equality plays a key role in why some children are bullied. Hence, the mere fact that a child with a disability may be perceived as being weaker than other children, may contribute to the likelihood of him/her being bullied.

¹¹⁰ Kehinde *et al* "Psychopathology of bullying and emotional abuse among school children" (2011) *Ife Psychologia* 128. O'Neal on the other hand provides examples of where students with disabilities were bullied by not only their peers, but also their teachers. O'Neal

Dictionary also defines a bully as a person who deliberately intimidates or persecutes those who are weaker.¹¹¹ According to Naser¹¹² bullying includes physical, verbal, emotional as well as relational bullying.¹¹³ Emotional bullying includes terrorising, extorting, defaming, humiliating, blackmailing and ranking of personal characteristics such as disability.¹¹⁴ Consistent with reports, CWD are bullied more frequently and severely than their non-disabled peers.¹¹⁵

As bullying of CWD may manifest itself as name-calling and mocking, these may amount to discriminatory actions and attitudes in terms of PEPUDA. Hurtful and harmful name-calling may even result in hate speech, as section 10 of PEPUDA determines that no person may communicate words based on the prohibited ground of disability against any person that could reasonably be construed to demonstrate a clear intention to be hurtful.¹¹⁶

5.4.3 The abuse statistics

According to statistics from the SAPS, more than 45 000 crimes were committed against children between April 2013 and March 2014.¹¹⁷ These crimes include all

¹¹¹ Students with disabilities bullied by their teachers: Current laws, barriers and proposed solutions+(2014) *Whittier Journal of Child and Family Advocacy* 2.

¹¹² Stevenson and Waite *Concise Oxford English Dictionary* (2011) 184.

¹¹³ Naser *et al* The victims of bullying at schools+(2004) *Acta Criminologica* 28.

¹¹⁴ Relational bullying occurs when a child is deliberately excluded from activities, for example, during playtime or break.

¹¹⁵ Twyman *et al* assert that children with autism spectrum disorder are at increased risk of being bullied and left out by peers: Twyman *et al* Bullying and ostracism experiences in children with special health care needs+(2010) *Journal of Developmental Behavioral Pediatrics* 1-8; Hamiwka *et al* indicate that children with epilepsy are more likely to be bullied by their peers: Hamiwka *et al* Are children with epilepsy at greater risk for bullying than their peers?+(2009) *Epilepsy and Behavior* 500-505.

¹¹⁶ Campbell and Missiuna Bullying risk in children with disabilities: A review of the literature+(2011) *Child Centre for Childhood Disability Research* 2.

¹¹⁷ S 10 of PEPUDA.

¹¹⁷ See the South African Police Service's media statement at <http://www.saps.gov.za/newsroom/msspeechdetail.php?nid=4936> issued in Jun 2015 (accessed on 1 Jul 2015).

sexual offences, assault, as well as murder. The statistics moreover indicated that more than half of these crimes were purportedly sexual offences against children.¹¹⁸ Crimes against children are unacceptably underreported and the actual figure is understood to be abundantly higher. According to a 2010 report supported by UNICEF, children with a disability are most vulnerable due to physical barriers created by their disability, which may prevent them from reporting and protecting themselves from sexual assaults.¹¹⁹ Although SAPS is the key source for all information regarding crimes against CWD, its data is not disaggregated, which means that a determination can not be made in respect of how many different crimes are committed against children, more specifically CWD. Data from the National Prosecuting Authority also does not assist, as its annual reports only provide for a single figure for conviction rates regarding 59 sexual offences contained in the SOA.¹²⁰

It was also found that CWD as well as their caregivers were hindered from reporting abuse as a result of the stigma attached to the child's disability and condition. It is therefore difficult to ascertain an exact picture of the prevalence of sexual and other forms of abuse amongst these vulnerable children as it mostly goes unreported, even more so than with children without disabilities. For example, it may be impossible for a child with extreme communication and cognitive difficulties to report abuse as, first of all, the child will have a limited grasp of what was happening to him or her, and secondly, the child will be unable to communicate these actions to anyone else. Sadly, there would be a third barrier: even if the child was able to communicate the abuse, the stigma surrounding the credibility of CWD, especially those with cognitive restraints, will sometimes prevent caregivers from believing them.

5.4.4 The effect of an increased abuse probability

¹¹⁸ During this period, a total of 64 514 sexual offence cases were reported to the SAPS countrywide. As far as sexual offences are concerned, an appalling 40,1% of all cases involved children as victims.

¹¹⁹ Antonowicz *Too often in silence: A report on school-based violence in West and Central Africa* (2010) available from <https://plan-international.org/about-plan/resources/publications/campaigns/too-often-in-silence-a-report-on-school-based-violence-in-west-and-central-africa> (accessed on 16 Jul 2015) 26.

¹²⁰ Townsend *et al* *Court support workers speak out* (2014) *SA Crime Quarterly* 76.

As research has shown that CWD have an increased risk of being abused and neglected, they will inherently present an increased need for response mechanisms to address and prevent the abuse and neglect. For example, section 150(1) of the Children's Act defines a child in need of care and protection as a child who:

- (a) has been abandoned or orphaned and is without any visible means of support;
- (c) lives or works on the streets or begs for a living;
- (e) has been exploited or lives in circumstances that expose the child to exploitation;
- (f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
- (h) is in a state of physical or mental neglect; or
- (i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.

In view of the above and the prevalence of abuse and neglect, CWD may therefore more frequently be in need of care and protection. In terms of the Children's Act, a Children's Court must decide whether a child is in need of care and protection.¹²¹ Preceding this decision by the court, a social worker conducts an investigation into the circumstances of the child and a report is drafted to inform the decision of the presiding officer.¹²² Whilst the social worker conducts the investigation, the child may be placed in temporary safe care if it would be in his or her best interest.¹²³ If the social worker is of the opinion that the child is indeed in need of care and protection, that child must be brought to the Children's Court.¹²⁴

As CWD are more likely than their non-disabled peers to be abused and neglected, they will therefore also be more likely to require a visit to the Children's Court. Their need to access the judicial processes by means of the Children's Court must

¹²¹ S 45 of the Children's Act. See also Matthias and Zaal in Davel and Skelton (eds) *Commentary on the Children's Act* (2013) 6-16.

¹²² S 155 of the Children's Act.

¹²³ S 155(6)(b) as well as ss 151 and 152 of the Children's Act. The latter sections describe the processes of removing a child who is deemed to be in need of care and protection.

¹²⁴ S 155 of the Children's Act.

therefore be addressed differently from their non-disabled peers. Should the need arise to remove the child from the threatening environment, facilities or alternative care placement options also need to be specifically available to address the needs of the child and his or her specific disability.¹²⁵

Once the presiding officer of the Children's Court is of the view that the child is in need of care and protection, various orders may be made in order to safeguard the rights of the child. The court may make an order that a child with a disability be placed in a facility designated by the court which is managed by an organ of State or registered, recognised or monitored in terms of any law.¹²⁶ These facilities must specifically be aimed at caring for CWD or chronic illnesses and the placement must be in the best interests of the child. Matthias and Zaal¹²⁷ argue that this section prevents the child from being placed in just any facility. The facility must have appropriate programmes available to address the specific needs of the child's disability.

It has also been illustrated that more than half of sexual crimes reported in South Africa are committed against children.¹²⁸ In terms of criminal procedure these children will approach the criminal court, albeit magistrates, regional or high court, as witnesses to share their account of the crime committed against them. These courts must therefore be fully equipped to receive these children. As CWD have a higher likelihood of being sexually abused, it is clear that courts dealing with sexual crimes must be fully responsive to the needs of CWD, as they will inevitably be subjected to the judicial system should these crimes be reported. Although the numbers of these children are smaller than their able bodied peers, they will frequent the court more often.

Furthermore, and depending on the definition and assessment used, it has been suggested that children with learning disabilities are more prone to become child

¹²⁵ S 152 of the Children's Act.

¹²⁶ S 156(1)(g) of the Children's Act.

¹²⁷ Matthias and Zaal (2012) 158. See also Boezaart *The Children's Act: A valuable tool in realising the rights of children with disabilities* (2011) *THRHR* 276.

¹²⁸ See par 5.4 *supra*.

offenders, than their non-disabled peers.¹²⁹ Individuals with a mild learning disability show a higher rate of offending compared with peers without a learning disability.¹³⁰ In the USA a study found a prevalence of learning disabilities among child offenders of 12.6%.¹³¹ In terms of the CJA,¹³² a child in conflict with the law may be diverted from the criminal justice system.¹³³ With an increased prevalence of child offenders with learning disabilities, services for these children need to be in place from the inception of the preliminary inquiry to the diversion processes, as well as at child and youth care centres.¹³⁴

As the probability of discrimination occurring against a person with a disability is higher *vis-à-vis* his or her non-disabled counterpart, the Equality Court should play an active role in safeguarding the rights of these people.¹³⁵ This court must therefore cater to support the specific needs of people and specifically CWD, as they must be encouraged to approach these courts for recourse. A court which stands for the treatment of all persons equally, must ensure that even CWD receive the services they require when obliged to seek justice from this court.

5.5 Conclusion

The worldwide prevalence of disability is difficult to determine as the definition of what constitutes disability may vary.¹³⁶ The number of children worldwide who live with disabilities is even more difficult to determine as the prevalence of disabilities is not necessarily included in data collection initiatives.¹³⁷

¹²⁹ Mishna and Muskat %Social group work for young offenders with learning disabilities+(2001) *Social Work with Groups* 12. The suggestion is made that between 30-50% of young offenders have learning disabilities.

¹³⁰ Hall %Young offenders with a learning disability+(2000) *Advances in Psychiatric Treatment* 279.

¹³¹ See <http://www.thelearningdisabilitieself.net/2013/03/13/comparison-of-juvenile-offenders-with-and-without-learning-disabilities-shows-differences-in-offence-type/> (accessed on 20 Apr 2013).

¹³² For a full discussion of this Act see ch 4.

¹³³ S 41-62 of the CJA.

¹³⁴ See par 4.2.2 for a discussion on the CJA.

¹³⁵ See para 4.2.6 and 4.3.2 *supra*.

¹³⁶ See par 5.1 *supra*.

¹³⁷ *Ibid*.

In its latest census, South Africa has followed the Washington Group model of disability questioning.¹³⁸ This method of questioning allowed a broader interpretation, which resulted in data incomparable with previous censuses. The census did, however, reveal that South Africa is a relatively young country, with children under the age of 14 totalling one third of the population.¹³⁹ As the accepted international definition of a child was not used, the number of children under the age of 18 in South Africa may be much higher. The census also gave a snapshot view of the types of disabilities people in South Africa suffer from, the most prevalent disability being visual impairment.¹⁴⁰

One of the biggest challenges emanating from the results of the most recent census is that it is still unknown how many children in South Africa live with disabilities, and what type of disabilities they suffer from. This is due to the fact that questions were not asked about the possible disabilities of children below the age of five years. Although the reasoning behind this omission is supportably valid,¹⁴¹ it sheds no light on the specific services required by these children to enable the necessary planning and budgetary allocations to be made. A projection from the prevalence of adult disability may be made, for example, that the disability most prevalent amongst children is also visual impairment. This may be far from the truth, as adult disability may have been the result of the ageing process, which will not be relevant in assessing the status of children. Furthermore, with a child mortality rate of 55 474 children below the age of four per annum in South Africa, many of these children may have had a disability, which would have gone undetected by data collection initiatives.¹⁴² The number of CWD in South Africa, as well as their types of disabilities, therefore remains unknown.

¹³⁸ See par 5.3 *supra*.

¹³⁹ See par 5.3.3 *supra*.

¹⁴⁰ See par 5.3.2 *supra*.

¹⁴¹ See par 5.3 *supra*.

¹⁴² *Ibid.*

It has also been illustrated that CWD have an increased risk of being abused in various ways.¹⁴³ This is ascribed mainly to the fact that they do not understand that the related conduct is abuse, that they are unable to report the abuse,¹⁴⁴ and also, that their credibility is questioned due to their disability. This consequence indicates that these children should be protected aggressively as the chance that they will be subjected to abuse, can be anticipated.

Neglect of CWD is also deemed to be directly linked to their disability.¹⁴⁵ They will therefore be more recurrently neglected by their caretakers due to ignorance, financial constraints or shame.

The available data regarding the sexual abuse of children indicate that more than half of the sexual crimes committed in South Africa are committed against children.¹⁴⁶ It is accepted that sexual crimes are grossly underreported and even more so with CWD. Nevertheless, the prevalence of the abuse, especially sexual abuse, and neglect, determine that these children should, if these crimes are reported, approach the Children's Court as well as criminal courts in terms of legislation.¹⁴⁷ These courts must be able to receive these vulnerable children and cater to their specific needs. There is therefore no excuse for these specific courts not to be equipped with mechanisms to respond to the needs of these children as research supports the suggestion that there *will* be CWD approaching them for recourse, at a much higher rate than children without disabilities. This may be the case with the Equality Court as well as Child Justice Courts.

It is therefore argued that as a result of the abuse and neglect profile of CWD, the judicial system must be ready, trained and equipped to receive them throughout its processes, as sadly, and especially in poorer communities, these children will need to approach the courts for intervention and assistance.

¹⁴³ See par 5.4 *supra*.

¹⁴⁴ *Ibid*.

¹⁴⁵ See par 5.4 *supra*.

¹⁴⁶ See par 5.4.3 *supra*.

¹⁴⁷ See par 5.4.4 *supra*.



Chapter 6: International trends and comparative analysis

6.1 Introduction

6.2 Ghana

6.2.1 Introduction

6.2.2 Pillar one: the best interests of the child principle

6.2.3 Pillar two: the principle of non-discrimination

6.2.4 Pillar three: survival and development

6.2.5 Pillar four: the child's right to be heard

6.2.6 Pillar five: the rights of CWD specifically

6.2.7 Pillar Six: Article 13 of the UNCRC

6.3 Canada

6.3.1 Introduction

6.3.2 National

6.3.2.1 Pillar one: the best interests of the child principle

6.3.2.2 Pillar two: the principle of non-discrimination

6.3.2.3 Pillar three: survival and development

6.3.2.4 Pillar four: the child's right to be heard

6.3.2.5 Pillar five: the rights of CWD specifically

6.3.2.6 Pillar six: Article 13 of the UNCRC

6.3.3 Provincial

6.3.3.1 Ontario

6.3.3.1.1 Pillar one: the best interests of the child principle

6.3.3.1.2 Pillar two: the principle of non-discrimination

6.3.3.1.3 Pillar three: survival and development

6.3.3.1.4 Pillar four: the child's right to be heard

6.3.3.1.5 Pillar five: the rights of CWD specifically

6.3.3.1.6 Pillar six: Article 13 of the UNCRC

6.3.3.2 British Columbia

6.3.3.2.1 Pillar one: the best interests of the child principle

6.3.3.2.2 Pillar two: the principle of non-discrimination

6.3.3.2.3 Pillar three: survival and development

6.3.3.2.4 Pillar four: the child's right to be heard

6.3.3.2.5 Pillar five: the rights of CWD specifically

6.3.3.2.6 Pillar six: Article 13 of the UNCRC

6.4 The USA

6.4.1 Introduction

6.4.2 Measures undertaken by States to address pillar six

6.4.2.1 The Guide

6.4.2.2 The Handbook

6.4.2.3 The Rules

6.5 Conclusion

6.1. Introduction

The six pillars have established a framework against which South Africa's efforts to realise the rights of CWD to access justice, can be measured. As can be seen from Chapter 4, South Africa does not comprehensively and responsively cater to the needs of CWD in their attempts to access justice, despite having ratified the key international treaties calling for such actions. As was argued in Chapter 5, these responsive mechanisms are a foreseeable necessity as CWD, as a result of their abuse and neglect profile, may require the assistance of a responsive justice system more often than their non-disabled counterparts.

Various countries have implemented measures to address the rights of children and people with disabilities by ensuring their access to justice. The present chapter will analyse possible best practices using the framework which was established in Chapter 4 hereof: the six pillars. Even where South Africa has legislated on issues, for example the best interests of the child, or non-discrimination, the implementation of these determinations may still be lacking. It is thus prudent to determine, by way of a comparative analysis, what other countries have done to address similar issues. The use of comparative law will be restricted to the extent that measures taken by certain jurisdictions may add value to the possible reform required in the South African context. These comparative examples will inform the discourse where legal precedent in South Africa is either absent, non-responsive, or underdeveloped in law. The relevant comparative jurisdictions were limited to two examples: Ghana and Canada. These countries were selected on the basis that they have both ratified the most significant international law instruments addressing access to justice for CWD, akin to South Africa.¹ The countries also share South Africa's dualistic approach.²

¹ This will be further discussed in para 6.2 and 6.3.

² In respect of Canada, in 1937 the Supreme Court of Canada held in *Attorney-General for Canada v. Attorney-General for Ontario and Others* (1937) A.C 326 that international agreements signed and ratified by the state do not automatically become law in Canada: the legislature must first domesticate international agreements into domestic law. See also Brunnee and Toope, *Hesitant Embrace: The Application of International Law by Canadian Courts* (2002) *Canadian Yearbook of International Law* 5; In respect of Ghana, s 75 of the Constitution of the Republic of Ghana, 7 Jan 1993, available at: <http://www.refworld.org/docid/3ae6b5850.html> (accessed on 23 May 2015) determines that that international agreements or conventions executed by or under the authority of the

An exception was made in the case of the USA.³ The USA has yet to ratify the UNCRC⁴ and UNCRPD.⁵ However, in respect of disability rights in this country, the Americans with Disabilities Act⁶ has inspired the international disability discourse since its inception in 1990.⁷ According to Stein and Stein,⁸ the ADA played a significant role in the development of anti-discrimination and disability law in more than 40 countries. Although the USA has not yet ratified the UNCRPD, it has served as a benchmark for disability reform, and may provide guidance on specific issues such as access to justice and access to courts. It is against this premise that the USA will be briefly examined the sixth pillar of the discussion: Article 13 of the UNCRPD. The USA is included in this category to provide examples of how to practically respond to the rights of CWD, albeit indirectly in most cases. The aim of this specific comparative analysis is therefore to inform what the possible best practice to be adopted within the South African response is, which is to be discussed in the next chapter.

Below follows an analysis of Ghana and Canada as the countries chosen for this comparative analysis, as well as the USA. The analysis will be made on how both Ghana and Canada measure up against the six pillars, and where they can possibly serve as best practice models for access to justice for CWD. In responding to the obligations under the framework, the UNCRC and UNCRPD determine that enacting domestic legislation may be but one measure for States Parties to address their obligations in respect of international agreements. Therefore, legislation from

President must be ratified by an Act of Parliament, or by a resolution of Parliament supported by the votes of more than one-half of the members of Parliament after the requisite Cabinet approval. See also Quansah 'An Examination of the use of international law as an interpretive tool in human rights litigation in Ghana and Botswana' in Killander (ed) *International law and Human Rights litigation in Africa* (2010) 40.

³ Hereafter referred to as the USA.

⁴ The USA signed this agreement in 1995. The USA has yet to ratify same.

⁵ The USA signed this agreement in 2009. The USA has yet to ratify same.

⁶ The Americans with Disabilities Act of 1990, 42 US Code ch 126. Hereafter referred to as the ADA.

⁷ The ADA was first introduced in its original form in 1988, and adopted by the USA senate in 1990. See Weicker 'Historical background of the Americans with Disabilities Act' (1991) 64 *Temple Law Review* 387.

⁸ Stein and Stein 'Beyond disability civil rights' (2007) *Hastings Law Journal* 1204-1208. See also Stein and Janet 'Disability human rights' (2007) *California Law Review* 90.

these countries will be assessed mainly as they respond to the six pillars. However, should they have undertaken other measures to support their obligations, these will be highlighted accordingly.

Under the discussion of Article 13 of the UNCRC, three federal States of the USA will be discussed in so far they can contribute to examples of best practice in this particular category.

6.2 Ghana

6.2.1 Introduction

Ghana, a West African country, bordering on the Gulf of Guinea, between Cote d'Ivoire and Togo, is one quarter the size of South Africa.⁹ Ghana shares a colonial past with South Africa and in 1957 became the first sub-Saharan country in colonial Africa to gain its independence. Also similar to South Africa, Ghana became a constitutional democracy in the early nineties with its 1992 Constitution¹⁰ serving as the supreme law of the country. In 1990, Ghana ratified the UNCRC becoming the first country to do so.¹¹ According to the Ghanaian Constitution, a child is any person below the age of 18 years.¹² Ghana also became the 119th state to ratify the UNCRC and the Optional Protocol on 31 July 2012.¹³ In order for these international agreements to take effect,¹⁴ they have to be domesticated into

⁹ Ghana is 238 533 km², where South Africa comprises approximately 1 219 090 km².

¹⁰ Constitution of the Republic of Ghana, 7 Jan 1993, available at <http://www.refworld.org/docid/3ae6b5850.html> (accessed on 23 May 2015). Hereafter referred to as the Ghanaian Constitution.

¹¹ See Ghana's status of ratifications at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=67&Lang=EN (accessed on 30 Sep 2015); Agbeyiga in Kwame *et al* (ed) *Children's rights in Ghana: Reality or rhetoric?* (2011) 15.

¹² S 28(5) of the Ghanaian Constitution 1992.

¹³ See the status of the ratification of the UNCRC and its Optional Protocol at <http://www.un.org/disabilities/countries.asp?id=166> (accessed on 22 Aug 2015).

¹⁴ The UNCRC and UNCRC as referred to in par 6.1.

Ghanaian legislation.¹⁵ This is consistent with the dualistic approach, which is also followed by South Africa.

In respect of measuring Ghana's efforts against the above-mentioned established framework, the Ghanaian Constitution, Disability Act,¹⁶ Children's Act¹⁷ as well as Commission of Human Rights and Administrative Justice Act,¹⁸ will be examined amongst other efforts.

6.2.2 Pillar one: best interests of the child principle

The Ghanaian Constitution is the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.¹⁹ The Ghanaian Constitution guarantees equality before the law for all citizens, as well as fundamental civil and political rights. Section 28 of the Ghanaian Constitution is titled 'Children's Rights', and guarantees a full range of rights for persons below the age of 18,²⁰ by providing as follows:

- 28 (1) Parliament shall enact such laws as are necessary to ensure that-
- (a) every child has the right to the same measure of special care, assistance and maintenance as is necessary for its development from its natural parents, except where those parents have effectively surrendered their rights and responsibilities in respect of the child in accordance with law;
 - (b) every child, whether or not born in wedlock, shall be entitled to reasonable provision out of the estate of its parents;
 - (c) parents undertake their natural right and obligation of care, maintenance and upbringing of their children in co-operation with such institution as Parliament may, by law, prescribe in such manner that in all cases the interest of the children are paramount;

¹⁵ S 75(2) of the Ghanaian Constitution, 1992 states that 'A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by (a) Act of Parliament; or (b) A resolution of Parliament supported by the votes of not more than one-half of the all the members of Parliament.'

¹⁶ Persons with Disability Act 715 of 2006. Hereafter referred to as the Ghanaian Disability Act.

¹⁷ Children's Act 560 of 1998. Hereafter referred to as the Ghanaian Children's Act.

¹⁸ Commission of Human Rights and Administrative Justice Act 456 of 1993.

¹⁹ S 1(2) of the Ghanaian Constitution.

²⁰ S 28(5) of the Ghanaian Constitution.

- (d) children and young persons receive special protection against exposure to physical and moral hazards; and
 - (e) the protection and advancement of the family as the unit of society are safeguarded in promotion of the interest of children.
- (2) Every child has the right to be protected from engaging in work that constitutes a threat to his health, education or development.
- (3) A child shall not be subjected to torture or other cruel, inhuman or degrading treatment or punishment.
- (4) No child shall be deprived by any other person of medical treatment, education or any other social or economic benefit by reason only of religious or other beliefs.
- (5) For the purposes of this article, %child+means a person below the age of eighteen years.

Section 28(1)(c) of the Ghanaian Constitution states that the best interests of children are paramount, and parents as well as relevant institutions must act and care for children within the confines of this determination. Section 28 also explicitly mandates Parliament to enact such laws as are essential to guarantee the realisation of the rights of children.

Although section 28 was deemed as reflecting the core values of the UNCRC, it was nevertheless considered inadequate by the Ghanaian government to fully meet the requirements of the UNCRC.²¹ Accordingly, in 1995 the then Ghana National Commission on Children created the Child Law Reform Advisory Committee to review and update the laws on children's rights, justice and the welfare of children in accordance with international standards.

One of the laws adopted in this regard, was the Ghanaian Children's Act. The Ghanaian Children's Act was passed in December 1998 in order to domesticate the UNCRC into national law.²² Kludze²³ is of the view that the Ghanaian Constitution

²¹ Manful and McCrystal %Ghana's Children's Act 560: A Rethink of its Implementation?+(2011) *International Journal of Children's Rights* 153.

²² The first part of the Ghanaian Children's Act outlines the basic rights of the child, which reflect the Constitution as well as the principles contained in the UNCRC. The second part addresses the concept of the child in need of care and protection, as well as Child Panels and Family Tribunals. The third part of the Ghanaian Children's Act addresses issues relating to parental rights and responsibilities, and the fourth part covers alternative care such as foster care and adoption. The fifth part of this Act addresses child labour issues.

²³ Kludze %Constitutional Rights and their Relationship with International Human Rights in Ghana+ (2008) *Isr L Rev* 697. Kludze does not elaborate on where the Ghanaian

and the Ghanaian Children's Act now enact all the provisions of the UNCRC, and more. Woodman²⁴ states that other than the enactment of the Ghanaian Children's Act, the provisions of the Constitution which relate to family law have not produced any significant visible effect. Section 2 of the Ghanaian Children's Act echoes the best interests of the child principle as set out in the UNCRC, as well as the country's constitution,²⁵ and calls for this principle to be the primary consideration by any court, person, institution or other body in any matter concerned with a child.²⁶ The Ghanaian Children's Act is similar to the South African position as both the South African Constitution and the South African Children's Act reflect this principle in its text.²⁷

The Juvenile Justice Act of 2003,²⁸ akin to its South African counterpart the CJA,²⁹ also addresses the best interests of children in conflict with the law. Section 2 of the Juvenile Justice Act states that the best interests of a child shall be paramount in any matter concerning such child, and that it must remain a primary consideration when courts address a matter concerning the child. Police officers must also consider the possibility of only giving a child an informal caution, instead of arresting the child, should it be in the child's best interests to do so.³⁰ The Juvenile Justice Bench Book³¹ guiding courts on the implementation of the Juvenile Justice Act also

Constitution and Children's Act provide more protection than the UNCRC, however, he points out that children born out of wedlock are not discriminated against, and that western countries are learning from Africa through legislation such as these. See 698.

²⁴ Woodman %family Law in Ghana under the Constitution 1992-(2003) *International Survey of Family Law* 199.

²⁵ S 28(1)(c) of the Ghanaian Constitution states that parents undertake their natural right and obligation of care, maintenance and upbringing of their children in co-operation with such institution as Parliament may, by law, prescribe in such manner that in all cases the interest of the children are paramount.

²⁶ S 2(1) of the Ghanaian Children's Act states that the best interest of the child shall be paramount in any matter concerning a child. S 2(2) determines that the best interest of the child shall be the primary consideration by any court, person, institution or other body in any matter concerned with a child.

²⁷ S 28(2) of the South African Constitution as well as s 7 of the South African Children's Act. Juvenile Justice Act 653 of 2003.

²⁹ See par 4.2.2 and 4.3 *supra*.

³⁰ S 12 of the Juvenile Justice Act 653 of 2003.

³¹ Judicial Training Institute of Ghana %Juvenile Justice Bench Book+ (2011) available at <http://www.jtighana.org/new/links/publications/JuvenileHandbook.pdf> (accessed on 4 Aug 2015).

indicates to presiding officers that the court must consider the juvenile's best interest as an essential element in its decision making.³²

Generally, children in Ghana are also protected by the Criminal Offences Act of 1960³³ against all forms of abuse and neglect. Section 60,³⁴ 71,³⁵ 91³⁶ and 92 of this Act criminalised exposing a child to harm or danger, abandonment of a child, abduction of a child as well as a range of sexual offences that could harm a child. Section 111 also refers directly to the best interests of the child by giving powers to a judge to order a search for a child suspected of being used for immoral purposes.³⁷ The judge in this case may act on information of any other person acting in the best interest of the child.

What exactly constitutes the best interests of the child, however, is also not particularly clear. Dowuona-Hammond³⁸ asserts that the test of what may constitute the best interests of the child is inherently subjective, imposing an onerous obligation on the judge to predict, based on any number of factors, what is "best" for

³² Judicial Training Institute of Ghana Juvenile Justice Bench Book+ (2011) available at <http://www.jtighana.org/new/links/publications/JuvenileHandbook.pdf> (accessed on 4 Aug 2015) 10.

³³ The Criminal Offences Act 28 of 1960.

³⁴ S 60 of the Criminal Offences Act 28 of 1960 states as follows: "Whoever intentionally and unlawfully causes harm to a living child during the time of its birth shall be guilty of second degree felony."

³⁵ S 71 of the Criminal Offences Act 28 of 1960 determines that "(1) Whoever unlawfully (a) exposes a child to danger or abandons a child under twelve years; or (b) exposes any physically or mentally handicapped child to danger or abandons a physically or mentally handicapped child in such a manner as to cause any harm to the child shall be guilty of a misdemeanour. (2) Except as otherwise provided, for purposes of this Chapter, a child is a person under the age of eighteen years."

³⁶ S 91 and 92 addresses the definition of, and the abduction of the child by stating: "Whoever is guilty of an abduction of any child under eighteen years of age shall be guilty of misdemeanour".

³⁷ S 111(1) of the Criminal Offences Act 28 of 1960 states that: "(1) If it appears to a Chairman of a Tribunal or a Judge that there is reasonable cause to suspect that a child is detained for immoral purposes by any person in a place within his jurisdiction he may issue a warrant in accordance with subsection (3) of this section." S 111(3) states that "(3) The warrant shall authorise the person named in it to search for and when found to take and detain the child detained for immoral purposes in a place of safety until he can be brought before the Chairman of the Tribunal or the Judge or some other Tribunal or a Judge. The Chairman of the Tribunal or the Judge before whom the child is brought may order that the child be taken to his parents or guardian or be otherwise dealt with as circumstances permit or require."

³⁸ Dowuona-Hammond Upholding the "best interests" of the Ghanaian child in custody cases: the customary law and the courts+(2014) *U Ghana LJ* 129.

the child.³⁹ Even the Family Tribunal Bench Book, which was issued by the Judiciary of Ghana in 2011 to provide guidance on issues relating to children's rights, states that no guidance is to be found in the law as to how to determine the best interest of the child.⁴⁰ Reference is nevertheless made to case law, albeit decisions which were made more than 50 years ago.⁴¹ One such matter is *Asem v Asem*,⁴² where the Court of Appeal illustrated the clear duty of a court to protect the best interests of the child, regardless of any alternative wishes of his or her parents. The court further noted that it is obliged by statute in deciding a matter, to consider the welfare of the child as its paramount consideration. In another matter, *Nyarkoa v Mansu*⁴³ the court was prepared to subject Ghanaian customary Law rules to the paramount principle of the "best interests of the child". Further, in *Ibrahim v. Amalibini*,⁴⁴ the court indicated that the best interests of the child principle must be the paramount consideration in deciding cases of custody. The court however asserted that in applying this principle, courts should not be unrealistic, and that the welfare and interests of the child, although paramount, must not be applied to the exclusion of all other considerations.

Although the Ghanaian courts may refer to outdated case law, it appears that the application of the best interests of the child principle is still applied to reflect the current and existing legislation and standards.

In terms of reflecting pillar one of the framework, it appears that Ghana has taken a similar approach to South Africa in incorporating this principle into its legislation.

6.2.3 Pillar two: the principle of non-discrimination

Section 17 of the 1992 Ghanaian Constitution, is referred to as the equality clause and states the following:

³⁹ *Ibid.*

⁴⁰ Judicial Training Institute of Ghana Family Tribunal Bench Book (2011) available at <http://www.jtighana.org/links/publications/TheFamilyTribunal.pdf> (accessed on 4 Aug 2015).

⁴¹ Judiciary of Ghana Family Tribunal Bench Book (2011) 7. Reference is made to *Antwi v Antwi* [1962] 1 GLR 321, *Re Dankwa* [1961] GLR 352 and *Ansah v Ansah* [1982-83] GLR 1127.

⁴² *Asem v Asem* [1968] GLR 1146.

⁴³ *Nyarkoa v Mansu* [1967] GLR 523.

⁴⁴ *Ibrahim v. Amalibini* [1978] GLR 368.

17 (1) All persons shall be equal before the law

(2) A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.

(3) For the purposes of this article, ~~%discriminate+~~ means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description which are not granted of persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description.

Section 17(4) goes further and provides that the Ghanaian Parliament may enact any law which may be necessary to provide, amongst others, for the implementation of policies and programmes aimed at redressing social, economic or educational imbalance in the Ghanaian society.⁴⁵ Coupled with section 17, section 37(1) of the mandates the State to pursue a social objective of directing ~~%ts~~ policy towards ensuring that every citizen has equality of rights, obligation and opportunities before the law.⁴⁶ Section 35(3) further provides that ~~%be~~ the State shall promote just and reasonable access by all citizens to public facilities and services in accordance with law.⁴⁷ Atuguba *et al*⁴⁸ argue that this section includes public facilities for accessing justice and that by virtue of this inclusion, the State as the key duty-bearer in the provision of public facilities incurs an immediate responsibility to provide same. In *Nartey v Attorney-General & Justice Adade*,⁴⁹ the Supreme Court states the following:

The 1992 Constitution envisages that the implementation of its provisions as a living, vibrant and humane document would lead to harmonious, beneficent, healthy, just and fair results. These qualities are aimed at achieving justice. The Constitution abhors discrimination in any form, disparity and any inequitable results arising out of its implementation. It

⁴⁵ S 17(4)(a) of the Ghanaian Constitution.

⁴⁶ S 37(1) of the Ghanaian Constitution.

⁴⁷ S 35(3) of the Ghanaian Constitution.

⁴⁸ Atuguba *et al* ~~%Access to justice in Ghana: The real issues+~~ (2006) available at <http://www.ladagroupgh.com/docs/5854320d48f0ed75317469e0d04679eeAccess%20to%20Justice%20In%20Ghana%20-%20The%20Real%20Issues.pdf> (accessed on 5 Jun 2015) 8.

⁴⁹ *Nartey v Attorney-General and Justice Adade* [1996-97] SCGLR 63 par 79.

provides equality before the law and ensures that there is uniformity, discouraging all forms of arbitrariness.

The Supreme Court thus cemented the Ghanaian Constitution as a pillar in promoting equality. Notably, however, the Ghanaian Constitution does not expressly include age or disability as a category which needs to be protected from discrimination. In its consideration of Ghana's initial report on the implementation of the UNCRC, the CORC noted that the omission of age as a category to benefit from non-discrimination may result in a social implication that %o.the younger you are the fewer privileges you get+.⁵⁰ Although age may not be included as a ground for discrimination in Ghana's Constitution, the Ghanaian Children's Act specifically prohibits discrimination against any child on the basis of his or her age or disability.⁵¹ Parents are also obliged under this Act to protect their children against any form of discrimination, as part of their parental duties.⁵² Similarly, the Juvenile Justice Act⁵³ cautions against discrimination against a child when in conflict with the law. Section 26 determines that a child may not be discriminated against in the selection of a diversion programme, and children should be provided with equal access to diversion options.⁵⁴

The rights of people with disabilities, whilst excluded from section 17, are addressed comprehensively elsewhere in the Ghanaian Constitution. The Ghanaian Constitution provides guarantees for the full range of civil and political rights as well as substantial specific protections for people with disabilities,⁵⁵ as opposed to the South African Constitution where disability is only included in the context of non-discrimination.⁵⁶ Section 29 of the Ghanaian Constitution expressly states that the rights of persons with disabilities must be protected and includes in section 29(4) that people with disabilities must be protected from all treatment of a discriminatory,

⁵⁰ CORC %initial Report of Ghana+CRC/C/3/Add.39 par 40.

⁵¹ S 3 and 124 of the Ghanaian Children's Act.

⁵² S 6 of the Ghanaian Children's Act.

⁵³ Juvenile Justice Act 2003 (653).

⁵⁴ S 26(2) of the Juvenile Justice Act 2003 (653).

⁵⁵ Open Society Initiative for West Africa %Ghana justice sector and the rule of law+ (2007) Discussion Paper available at http://www.afrimap.org/english/images/report/AfriMAP_Ghana%20JusticeDD.pdf (accessed on 14 Aug 2013) 4.

⁵⁶ S 9 of the South African Constitution.

abusive or degrading nature. Section 29(5) also addresses the rights of people with disabilities involved in judicial proceedings and determines that in any judicial proceedings where persons with disabilities may be a party to the proceedings, their physical and mental condition must be taken into account.⁵⁷ The rights of people with disabilities to access justice are therefore enshrined in the supreme law of the country and provide much needed emphasis to the needs of this vulnerable group of society.

In 2006, Ghana passed the Ghanaian Disability Act⁵⁸ in realisation of its constitutional duty to adopt legislation providing protection for the rights of persons with disabilities.⁵⁹ This Act seeks to further address unequal treatment between persons living with disabilities and their non-disabled counterparts.⁶⁰ Section 4(1) of the Ghanaian Disability Act states that a person shall not discriminate against, exploit or subject a person with a disability to abusive or degrading treatment.⁶¹

This clear non-discrimination clause supports section 29 of the Ghanaian Constitution and also addresses the omission of disability in section 17 of said Constitution. However, Gyamfi⁶² asserts that the Ghanaian Disability Act does not address equality of people with disabilities before and under the law as adequately and detailed as the UNCRPD. Gyamfi⁶³ argues that section 4 of this Act fails to address the need for prohibiting all kinds of discrimination on the basis of equality as is prohibited by the UNCRPD.

⁵⁷ S 29(5) of the Ghanaian Constitution.

⁵⁸ Persons with Disability Act 715 of 2006.

⁵⁹ S 37 of the Ghanaian Constitution; Commonwealth Human Rights Initiative 'Denying Ghana's disabled their rights: The Disability Act, 5 years on+ (2011) available at <http://chriafrika.blogspot.com/2011/06/denying-ghanas-disabled-their-rights.html> (accessed on 6 Apr 2015) 1.

⁶⁰ See in general Gyamfi 'Ghana+ (2013) *ADRY* 221-243 for a discussion on the status of the Persons with Disability Act 2006. Specifically par 4.

⁶¹ S 4(1) of the Persons with Disability Act 2006 (715).

⁶² Gyamfi 'Ghana+ (2013) *ADRY* 226.

⁶³ *Ibid.*

In addition to the Ghanaian Constitution, the Ghanaian Children's Act, as well as the Ghanaian Disability Act, the Ghanaian Constitution also creates a commission mandated to promote and protect human rights, such as the right to equality.⁶⁴

In 1993, the Commission of Human Rights and Administrative Justice Act⁶⁵ established the Commission of Human Rights and Administrative Justice in order to protect and promote fundamental rights and freedoms, as well as administrative justice in Ghana. In accordance with section 18 of the Commission of Human Rights and Administrative Justice Act, the Commission can make a decision whether certain acts of conduct complained about amounts to discrimination and recommend remedial action to address such findings.⁶⁶ According to historical data available from the Commission on Human Rights and Administrative Justice, the greater part of human rights complaints received by its offices relates to child matters.⁶⁷ The Commission on Human Rights and Administrative Justice's 2010 annual report states that approximately 12 900 complaints were received by this Commission of which 11 884 related to human rights. According to the Commission's 2010 annual report more than 40% of these complaints received related to the rights of children.⁶⁸ Also during this period, 26 of those complaints related to the denial of access to justice.

In respect of Ghana's high prevalence of complaints relating to children, a difference in mandate may attribute to the visibly higher number of complaints relating to such, than which is received by the SAHRC.⁶⁹ Nevertheless, South Africa's population is twice as large as that of Ghana. Although the general mandates of these commissions differ to some extent, the fact remains that children do not approach the SAHRC as they would the equivalent Ghanaian authority. The accessibility of the

⁶⁴ S 70 of the Ghanaian Constitution.

⁶⁵ Commission of Human Rights and Administrative Justice Act 456 of 1993.

⁶⁶ S 18 of the Commission of Human Rights and Administrative Justice Act 456 of 1993.

⁶⁷ Current figures were not available at the time of completion of this research. The annual reports available on the Commission's website are outdated and only goes up to 2010. See http://www.chrajghana.com/?page_id=53 (accessed on 3 Mar 2015).

⁶⁸ *Ibid.*

⁶⁹ For instance, the complaints most received in Ghana on children's rights, relate to the maintenance of children. South Africa has a dedicated maintenance court which addresses these issues, and thus the SAHRC would automatically not deal with such matters.

SAHRC as a body protecting and promoting equality for children and people with disabilities is therefore brought into question.⁷⁰

The Commission on Human Rights and Administrative Justice thus plays an active role in promoting the principle of non-discrimination through its investigations, especially into the rights of people with disabilities and children. In 2006, the CORC criticized the functioning of this Commission, and recommended that a department within the Ghanaian Commission of Human Rights and Administrative Justice be established to address and deal specifically with child rights.⁷¹ The CORC also recommended that adequate financial and human resources be allocated to allow for the proper functioning of this department.

6.2.4 Pillar three: survival and development

The Ghanaian Constitution determines that every child must be ensured of the same measure of special care, assistance and maintenance as is necessary for his or her development.⁷² This must be achieved through the enactment of enabling legislation.⁷³ Section 6 of the Ghanaian Children's Act further obliges parents, as part of their parental duties, to assure the child's survival and development. Section 8 of the Ghanaian Children's Act determines that no person shall deprive a child access to any... thing required for his development. This is a broader determination than what is encapsulated within the South African Children's Act.⁷⁴

With respect to whether the third pillar is reflected in the country's Juvenile Justice Act, consideration must be given to the diversion programmes, catered for in this Act. Section 28 states that amongst others, diversion programmes should promote

⁷⁰ See also Couzens 'An analysis of the contribution of the South African Human Rights Commission to protecting and promoting the rights of children' (2012) *SAJHR* 570, where she criticises the SAHRC in its inconsistent approach to the protection of children's rights in South Africa. She also indicates that the enthusiasm for children's rights and matters have diminished in the SAHRC.

⁷¹ CORC Concluding Observations Ghana CRC/C/GHA/CO/2 par 16.

⁷² S 21(1) of the Ghanaian Constitution.

⁷³ *Ibid.*

⁷⁴ S 25(1)(b) of the Ghanaian Constitution also determines that the child has a right to proper development and that basic education shall be free, compulsory and available to all.

the dignity and well-being of the child, as well as his or her development.⁷⁵ Such programmes must thus be tailored to serve the different needs presented by a child with a disability as their developmental stages may differ.

6.2.5 Pillar four: the child's right to be heard

Section 11 of the Ghanaian Children's Act states that children who are able to form their own views, must have the right to express their opinions. This section also calls for children to be afforded the opportunity to be listened to and to participate in decisions, which may affect their well-being and lives. Said views and opinions must be given due weight in accordance with the child's maturity and age.

A child's right to legal representation is only mentioned once in the Ghanaian Children's Act, in reference to the Family Tribunal. Section 38 states that the child has the right to legal representation at the Family Tribunal. These tribunals have jurisdiction in matters concerning parentage, custody, access and maintenance of children.⁷⁶ The Family Tribunal also provides for the inclusion of a social worker as member of the tribunal.⁷⁷ The Family Tribunal, much like proceedings held in the Children's Court in South Africa, has to be held in a different room or building from that in which sittings of other courts are held, or on different days from those on which sittings of other courts are held.⁷⁸

There is therefore a prohibition of convening the tribunal in any other court, as opposed to the Children's Act in South Africa which only calls for proceedings not to be in the same room where criminal matters are ordinarily dealt with.⁷⁹ According to

⁷⁵ Ss 25 to 28 of the Juvenile Justice Act all address the circumstances under which a child in conflict with the law in Ghana, may be diverted away from the criminal justice system. As with the CJA, the aim of these diversion programmes includes the encouragement of the child to be accountable for harm caused; promote an individual response to the harm caused which is appropriate and proportionate to the circumstances of harm caused; as well as to prevent stigmatisation of the child which may occur through contact with the criminal justice system. See s 26(1) of the Juvenile Justice Act.

⁷⁶ S 35 of the Ghanaian Children's Act.

⁷⁷ S 34 of the Ghanaian Children's Act.

⁷⁸ S 36 of the Ghanaian Children's Act.

⁷⁹ S 42 of the Children's Act 38 of 2005.

the Ghanaian Children's Act, should a sitting be held in a court, for instance, where matters of domestic violence are ordinarily heard, no such matters may be heard on the day the court will be used for a Family Tribunal sitting.⁸⁰ The Ghanaian Children's Act also permits the Family Tribunal sitting to be held in a different building from where other court matters are heard.⁸¹ This is a valuable measure in pursuing the rights of CWD to obtain access to justice by creating an opportunity for sittings to be held in a building which is accessible to people with disabilities. To facilitate access to the Family Tribunal, the Act allows for application fees to be waived.⁸²

Britwum⁸³ however criticizes the functioning of these tribunals. During Britwum's research, there was only one functioning Family Tribunal in the whole of the Northern Region of Ghana, which is the largest region in Ghana. Britwum however ascribes these challenges and lack of functionality to a lack of resources, especially human resources such as judges and lawyers.⁸⁴ It therefore appears that the Family Tribunal may be a useful and novel measure in order to address matters relating to children, and promoting their participation. However, the proper execution of this measure is hindering the possible benefit it can provide in terms of children's rights and child participation. According to UNICEF,⁸⁵ and in line with Britwum's criticism, the design of some justice structures such as the abovementioned panel system required for the Family Tribunal is arguably overly ambitious given existing resources.

Another measure through which child participation is facilitated can be found in section 27 of the Ghanaian Children's Act. This section calls for the establishment of

⁸⁰ S 36 Ghanaian Children's Act.

⁸¹ *Ibid.*

⁸² S 61 of the Ghanaian Children's Act.

⁸³ Britwum *et al* 'Child maintenance and plural legal systems in Ghana' (2004) available at [http://www.Ircghana.org/assets/Child_Maintenance_Report\(1\).pdf](http://www.Ircghana.org/assets/Child_Maintenance_Report(1).pdf) (accessed on 3 August 2013) 55.

⁸⁴ Britwum *et al* 'Child maintenance and plural legal systems in Ghana' (2004) available at [http://www.Ircghana.org/assets/Child_Maintenance_Report\(1\).pdf](http://www.Ircghana.org/assets/Child_Maintenance_Report(1).pdf) (accessed on 3 August 2013) 81.

⁸⁵ UNICEF 'Report of the mapping and analysis of Ghana's child protection system' (2011) available at http://www.unicef.org/wcaro/english/Ghana_Mapping_Analysis_Child_Protection.pdf (accessed on 17 Jul 2015) 8.

Child Panels with non-judicial functions to mediate in civil as well as criminal matters which concern the child. These panels consist of persons from various disciplines and include the following:

- (a) the Chairman of the Social Services Sub-Committee of a District Assembly who shall be the chairman of the panel;
- (b) a member of a women's organisation;
- (c) a representative of the Traditional Council;
- (d) the district social worker, who shall be the secretary;
- (e) a member of the Justice and Security Sub-Committee of the District Assembly; and
- (f) two other citizens from the community of high moral character and proven integrity one of whom shall be an educationalist.⁸⁶

Any person with a significant interest in a matter before a Child Panel may also be invited to attend and participate in its deliberations.⁸⁷ The Child Panels may therefore allow for a multi-disciplinary approach to address matters that involve children through consultation and mediation. Children are also encouraged to participate in any decisions which affect their wellbeing. This measure is made commensurate to the level of understanding that the child presents.⁸⁸

Instituting an informal forum such as the Child Panel promotes access to justice for children due to its relative flexibility, accessibility and cost effectiveness.⁸⁹ The Child Panels address various matters relating to children and have a specific mandate to assist in criminal matters.⁹⁰ The composition of the Child Panel may also be deemed a more appropriate model to allow for CWD to have access to justice and to participate in proceedings concerning them.⁹¹ Social workers and educational experts may be better equipped to accommodate the needs of CWD against the background of their qualifications, as opposed to judicial officers who may not have

⁸⁶ S 29 of The Ghanaian Children's Act.

⁸⁷ S 30(4) of The Ghanaian Children's Act.

⁸⁸ S 30(5) of The Ghanaian Children's Act.

⁸⁹ Britwum *et al* 'Child maintenance and plural legal systems in Ghana' (2004) available at [http://www.Ircghana.org/assets/Child_Maintenance_Report\(1\).pdf](http://www.Ircghana.org/assets/Child_Maintenance_Report(1).pdf) (accessed on 3 Aug 2013) 40.

⁹⁰ Hoffman and Baerg 'Juvenile justice in Ghana: A study to assess the status of juvenile justice in Ghana' (2011) *Commonwealth Human Rights Initiative, Africa Office Research Paper 12*.

⁹¹ S 29 of the Ghanaian Children's Act.

been specifically trained on how to assist and address children in general, as well as CWD specifically.⁹² Furthermore, the panel must have representatives from the community, which will allow for the appointment of a member of the community who may have insight in the disability presented by the child.⁹³

However, according to a 2011 UNICEF report on the analysis of Ghana's child protection system, 70 district Child Panels had been officially established, but very few were functioning at full capacity.⁹⁴ According to a 2014 scoping study undertaken by Women in Law and Development in Africa (WILDAF),⁹⁵ at the time of the research there were only 46 Child Panels out of 170 Districts in existence. WILDAF was also of the view that the absence of Child Panels in 124 Districts in Ghana impeded on the effect the Panels may have. Manful and McCrystal⁹⁶ argue that although the Child Panels enable communities and families to resolve problems regarding children and affecting children without having to resort to the main judicial system, it also appears that funding and administrative structures are inadequate in order to fully implement these Panels.

The rights of the child in conflict with the law are contained in section 3 of the Juvenile Justice Act. Unlike the South African CJA,⁹⁷ the Juvenile Justice Act does not enshrine the right of the child to participate in proceedings affecting him or her, nor does it provide for the child's right to be heard. The rights of the child are provided for in section 3, and include the right to privacy, and not to have his or her identification published or unnecessarily released. It is only in section 22 where the Juvenile Justice Act provides for the right of the child to legal representation and

⁹² *Ibid.*

⁹³ S 29(f) of the Ghanaian Children's Act.

⁹⁴ UNICEF 'Report of the mapping and analysis of Ghana's child protection system' (2011) available at http://www.unicef.org/wcaro/english/Ghana_Mapping_Analysis_Child_Protection.pdf (accessed on 17 Jul 2015) 47.

⁹⁵ WILDAF 'Scoping study for Parliamentary Advocacy Programme on Combating Early and Forced Marriage in Ghana' (2014) available at <http://www.pgaction.org/pdf/2014-03-05-Final-Report-Scoping-study-on-Early-and-Forced-Marriage-in-Ghana.pdf> (accessed on 06 Jul 2015) 12.

⁹⁶ Manful and McCrystal 'Ghana's Children's Act 560: A Rethink of its Implementation?' (2011) *International Journal of Children's Rights* 154, 165.

⁹⁷ See para 4.2.2 and 4.3 *supra*.

legal aid.⁹⁸ In this regard the Ghanaian Constitution requires its parliament to regulate the provision of legal aid to those in need by enacting legislation.⁹⁹ In 1997 the Legal Aid Scheme Act¹⁰⁰ was passed and regulates the provision of legal aid within the country. Section 2 of the Legal Aid Scheme Act determines that a person is entitled to legal aid if such person has reasonable grounds for taking, defending, prosecuting or being a party to the proceedings.¹⁰¹ It further calls for such person to earn less than the government minimum wage or be considered by the Legal Aid Board as a person requiring legal aid.¹⁰²

The 2014 operational manual for the Legal Aid Scheme of Ghana expressly addresses instances where children are applicants for legal aid.¹⁰³ The manual also determines that where the prospective applicant for legal assistance is a child or a person with a disability, the age or disability must be taken into account in any action undertaken with regard to the prospective applicant.¹⁰⁴ In general, section 59 of Ghana's Evidence Act of 1975¹⁰⁵ provides that a child is capable of being a witness, except if the child is incapable of expressing himself so as to be understood, either directly or through interpretation by one who can understand him or incapable of understanding the duty of a witness to tell the truth.

6.2.6 Pillar five: the rights of CWD specifically

The key intention of this pillar is to determine whether a country addresses the rights of CWD specifically, and not just under the broader protections awarded to children and people with disabilities respectively.

⁹⁸ S 22 of the Juvenile Justice Act states the following: "The juvenile court shall, at the commencement of proceedings in court, inform the juvenile in a language that the juvenile understands of the following: the right to remain silent; the right to have a parent, guardian, close relative or probation officer present at the proceedings; the right to legal representation; and the right to Legal aid.

⁹⁹ S 294 of the Ghanaian Constitution.

¹⁰⁰ Legal Aid Scheme Act 542 of 1997.

¹⁰¹ S 2(1) of the Legal Aid Scheme Act 542 of 1997.

¹⁰² S 2(1)(a) and (b) of the Legal Aid Scheme Act 542 of 1997.

¹⁰³ Legal Aid Scheme, Ghana "Operational manual for the Legal Aid Scheme" (2014) available at <http://www.legalaidghana.org/web/images/Downloads/LAS-Ghana%20Operational%20Manual,%202014-1.pdf> (accessed on 11 Jul 2015) 77.

¹⁰⁴ *Ibid* at 75.

¹⁰⁵ Evidence Act 323 of 1975.

One of the few legislations in Ghana specifically referring to the rights of CWD, is the Ghanaian Children's Act. Section 10 of this Act determines that no person shall treat a child with a disability in an undignified manner, and that the child with a disability has a right to special care, education and training in order to develop to his or her full potential. Specific focus is therefore placed on the rights of CWD, in view of their two-tier vulnerability. No mention is made of CWD in the Juvenile Justice Act.

CWD are also specifically mentioned in the Ghanaian Disability Act in respect of their rights to education and development.¹⁰⁶ The first mention of CWD within the Act is in section 34, which calls for the government to screen children in order to detect, prevent and manage disability. Ghana views the identification of CWD as an important avenue in order to assist these children, as they are often hidden from society by their caregivers.¹⁰⁷ As Simeonsson *et al* state,¹⁰⁸ screening for the purpose of identifying CWD is crucial, as it serves as an early intervention method and may reduce the risk of secondary conditions linked to the disability and even further disablement. It may also promote the child's development at a key stage.¹⁰⁹

In this regard the Ghanaian Disability Act also establishes a National Council on Persons with Disability to keep records of people with disabilities, including children, to provide appropriate services to them.¹¹⁰ The objectives of the Council include recommending and evolving policies and strategies to enable persons with disabilities to participate in mainstream activities and be included in the national

¹⁰⁶ Ss 20 and 34 of the Ghanaian Disability Act.

¹⁰⁷ UNESCO Global Report: Opening new avenues for empowerment: ICTs to access information and knowledge for persons with disabilities Global Summary Report+ (2013) available at <http://unesdoc.unesco.org/images/0021/002197/219767e.pdf> (accessed on 12 Aug 2013) 67.

¹⁰⁸ Simeonsson *et al* Applying the International Classification of Functioning, Disability and Health (ICF) to measure childhood disability+(2003) *Journal for Disability and Rehabilitation* 605.

¹⁰⁹ Muga indicates that several studies have proven that early intervention programs do have a positive effect on young CWD's development. Muga Screening for disability in a community: the Ken questions screen for children, in Bondo, Kenya+(2003) *African Health Sciences* 34. See also Bornstein and Hendricks Screening for Developmental Disabilities in Developing Countries+(2012) *Social Sciences and Medicine Journal* 9.

¹¹⁰ S 41 of the Ghanaian Disability Act. Hereafter referred to as the Council.

development process.¹¹¹ The Council is also required to keep and maintain a register of people with disabilities and the institutions and organizations who provide services to people with disabilities.¹¹²

6.2.7 Pillar six: Article 13 of the UNCRPD

In respect of the right to have access to justice, the Ghanaian Disability Act states that law enforcement agencies shall take into consideration the disability of a person on arrest, detention, trial or confinement.¹¹³ It is also stated that during these processes, the person with a disability must be provided for accordingly.¹¹⁴ No further description is given in relation to how this provision should occur, as the caveats of *as far as practicable* and *reasonability* are omitted in this regard. On the face of it, the needs of persons with disabilities in the justice system are catered for broadly in this section.

The Act also states that institutions for the training of law enforcement personnel must have, as part of their curricula, the study of disability and disability related issues.¹¹⁵ In 2007, after the enactment of the Ghanaian Disability Act, the Open Society Initiative for West Africa indicated the following:

Human rights law should become a compulsory course in the various faculties of law where Ghanaian lawyers receive their education. The JTI (Judicial Training Institute) curriculum should also include training in human rights law, including the application of international precedents in Ghanaian courts. Social context training would also enable the justice community to better understand and deal with gender-, child- and disability-sensitive issues, including domestic violence.

As referred to under paragraph 6.2.2, the Family Tribunal Bench Book as well as Juvenile Justice Bench Book guide presiding officers on how to address matters involving children. In referring to addressing matters involving CWD, the Family

¹¹¹ S 41(1) of the Ghanaian Disability Act.

¹¹² S 42(2) of the Ghanaian Disability Act.

¹¹³ S 40 of the Ghanaian Disability Act.

¹¹⁴ S 40(1) of the Ghanaian Disability Act.

¹¹⁵ S 40(2) of the Ghanaian Disability Act.

Tribunal Bench Book indicates that a court should be made aware of the exact nature and extent of the disability of the child. This will enable the court to apply itself and make suitable directions and arrangements to minimise distress or embarrassment for the child.¹¹⁶ No mention of CWD is made in the Juvenile Justice Bench Book. A handbook which was developed for interpreters by the Judicial Training Institute of Ghana does however make reference to people with disabilities and obliges interpreters who work in courts to ensure that everyone is treated equally regardless of their disability.¹¹⁷ It would appear that the Judicial Training Institute of Ghana has started to include training on disability sensitivity and social context within their training material. The reference however which is made throughout the examples of these bench books and guide, shows that limited attention is being given to this very important matter and that at current, the provision in section 40(2) of the Ghanaian Disability Act is not being adhered to in full.

Accessibility to buildings and other facilities are crucial to allow persons with disabilities to obtain access to justice. The Ghanaian Disability Act notably provides for a 10-year transition period within which the owner or occupier of an existing building to which the public has access must make that building accessible to and available for use by a person with disability.¹¹⁸ Through this section the Ghanaian Legislature has determined that by 12 August 2016 all publicly accessible buildings will be accessible to persons with disabilities.¹¹⁹ The implementation of this provision has however been criticised. According to Danso *et al*¹²⁰ by 2012, no progress had been made since the passing of the Ghanaian Disability Act to revise the relevant building code and building regulations, which regulate the construction of buildings in Ghana. The regulations which guided the design of buildings for people with disabilities had been left unchanged since the inception of the Ghanaian Disability

¹¹⁶ Judicial Training Institute of Ghana Family Tribunal Bench Book (2011) available at <http://www.jtighana.org/links/publications/TheFamilyTribunal.pdf> (accessed on 4 Aug 2015) 13.

¹¹⁷ Judicial Training Institute of Ghana Interpreters Handbook (2011) available at <http://www.jtighana.org/new/links/publications/Interpretershandbook.pdf> (accessed on 4 Aug 2015) 12, 25.

¹¹⁸ S 60 of the Ghanaian Disability Act.

¹¹⁹ *Ibid.*

¹²⁰ Danso *et al* Designed to deter: Barriers to facilities at secondary schools in Ghana (2012) *African Journal of Disability* 3.

Act, and had thus left Ghana without a policy framework that regulates and obliges the stakeholders in the building industry to design and build structures that are disability-friendly.¹²¹ Later in 2012, Ghana did however issue the Draft Ghana Building Code, in an attempt to address the requirements of the existing building regulations and Draft Building Code.¹²² This late response to facilitate the obligations under section 60 of the Ghanaian Disability Act may indicate that very few public buildings will be accessible to people with disabilities come 2016, as only four years were left after the drafting of the guidelines.

Some of the miscellaneous provisions encompassed in the Ghanaian Disability Act include the express prohibition of calling persons with disabilities derogatory names as a result of their disability.¹²³ This action is deemed a criminal offence and punishable with imprisonment.¹²⁴ Furthermore, manufacturers of technical aids or appliances in Ghana for the use of persons with disabilities are given tax exemptions.¹²⁵ The Ghanaian Disability Act therefore promotes the protection of people with disabilities and encourages business enterprises to cater to their needs.

6.3 Canada

6.3.1 Introduction

Canada, a federal parliamentary democracy with constitutional supremacy, is a country located in the northern part of the continent of North America, and consists of ten provinces. Canada is approximately eight times larger than South Africa,¹²⁶ but

¹²¹ *Ibid.* See also Adjei (2013) *Putting decision into action: The Disability Act of Ghana, six years down the line* Unpublished thesis in Public Administration, University of Bergen 69, 76.

¹²² See the Draft Ghana Building Code (2012). See also the Code's preface for an explanation regarding the updating of the 1988 Draft Ghana Building Code, as well as the National Building Regulations of 1996.

¹²³ S 37 of the Ghanaian Disability Act.

¹²⁴ A person who is found guilty of this offence is liable on summary conviction to a fine not exceeding fifty penalty units or to a term of imprisonment not exceeding three months or to both.

¹²⁵ S 36 of the Ghanaian Disability Act.

¹²⁶ Canada is 9,984,670 km² and the second largest country in the world, after Russia.

has a population only slightly more than half the size of South Africa.¹²⁷ The Canadian federal government, with the support of its provinces, ratified the UNCRC in 1991.¹²⁸ Canada further ratified the UNCRPD on 11 March 2010. Canada has neither signed nor ratified the Optional Protocol to the UNCRPD, which creates an individual complaints process concerning violations of the UNCRPD.¹²⁹

As is the case in South Africa and Ghana, international treaties and conventions only form part of Canadian law when it has been implemented through domestic legislation.¹³⁰ This means that similar to the two former countries, Canada follows a dualist approach.

Sections 91 and 92 of the Canadian Constitution Act of 1867¹³¹ details the subject matter upon which either the federal or provincial level of government may legislate. The subject matter of children and disabilities, though, are not specifically assigned to either level of government and therefore both provinces as well as Parliament may enact legislation addressing matters relating to children and disability.¹³² Child and disability legislation and services may consequently go beyond federal, provincial and territorial jurisdictions as well as various departments within provinces.¹³³ In order to assess best practices relating to access to justice for CWD in Canada, a

¹²⁷ According to 2014 midyear statistics, South Africa's population has reached more than 54 million people, whereas Canada is estimated to have a population of just over 30 million. See <http://www.statssa.gov.za/publications/P0302/P03022014.pdf> (accessed on 30 Sep 2015).

¹²⁸ Martinson %Hear the child . the legal framework: Why children in Canada have the legal right to be heard+(2009) *Continuing Legal Education Society of British Columbia* 213.

¹²⁹ See the status of the ratification of this Optional Protocol at <http://www.un.org/disabilities/countries.asp?id=166> (accessed on 22 Aug 2015).

¹³⁰ See par 6.3 *supra* with specific reference to Canada, as well as *Baker v Canada (Minister of Citizenship and Immigration)* (1999) 2 SCR 817 par 69.

¹³¹ S 91 of the Canadian Constitution gives the Canadian Parliament the power %to make laws for the peace, order and good government of Canada.+ It defines the exclusive responsibilities and duties of the federal government. S 92 outlines the specific powers given to the provincial governments in which the federal government may not interfere.

¹³² Torjman in Cameron and Valentine (eds) *Disability and federalism: Comparing different approaches to full participation* (2001) 151-153.

¹³³ See the Canadian Coalition for the Rights of Children %Right in principle, right in practice: Implementation of the convention on the rights of the child in Canada+(2011) available at <http://rightsofchildren.ca/wp-content/uploads/CCRC-Report-to-UN-on-CRC.pdf> (accessed on 15 May 2015).

brief comparative analysis must be undertaken between Canada and South Africa nationally, as well as provincially.

At the national level, legislation from Canada in the form of the Canadian Charter of Rights and Freedoms,¹³⁴ and the Canadian Human Rights Act,¹³⁵ will be assessed against the framework established. Provincially, legislation from the provinces of Ontario and British Columbia will be included. In this regard, the Ontario province in Canada was chosen for the main comparison as it is the most populous province in Canada. British Columbia will be assessed as a province with similar legislation to Ontario, although it does not provide for disability legislation as expressly as Ontario does.

6.3.2 National

6.3.2.1 Pillar one: the best interests of the child principle

In 2003, Canada was requested by the CORC to integrate the best interests of the child+ principle into *all* its laws, administrative processes, and programs for children.¹³⁶ According to the Canadian Coalition for the Rights of Children however, little action has been taken.¹³⁷

¹³⁴ Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK) 1982 c 11 available at <http://canlii.ca/t/ldsx> (accessed on 23 May 2015).

¹³⁵ Canadian Human Rights Act, RSC 1985, c H-6, available at <http://canlii.ca/t/52c3f> (accessed on 23 May 2015).

¹³⁶ See the CORC's Consideration of Reports Submitted by States Parties Concluding Observations of the Committee on the Rights of the Child: Canada CRC/C/15/Add 215+ Office of the United Nations High Commissioner for Human Rights, Geneva para 24-25 available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsgnXZ0ChBsrwmcy8%2F%2BFNoDHXw8azmg1tCr8tbeV2%2FwwwzAOpqSI19npSubu9UQILF9l%2FSaMOKUhWjCPDYKhkwWJzAUslUiicLR00PbKF35XAe> (accessed on 27 Sep 2015).

¹³⁷ See the Canadian Coalition for the Rights of Children Best interests of the child: Meaning and application in Canada+ (2009) available at <http://rightsofchildren.ca/wp-content/uploads/bic-report-eng-web.pdf> (accessed on 2 May 2015) 5-65.

The Canadian Charter of Rights and Freedoms was enacted in 1984 and forms part of the Constitution of Canada.¹³⁸ It replaced the 1960 Canadian Bill of Rights,¹³⁹ and enhanced the protections provided to Canadians in respect of a range of rights and freedoms. The Canadian Charter of Rights and Freedoms consists of seven categories,¹⁴⁰ including fundamental freedoms,¹⁴¹ legal rights,¹⁴² and equality rights.¹⁴³ There is no specific mention of the rights of children, or the best interests of the child in Canada's Charter of Rights and Freedoms, as is reflected in the Constitutions of South Africa and Ghana.¹⁴⁴

In 1999, Canada's Supreme Court addressed the issue of the best interests of the child principle in *Baker v Canada*.¹⁴⁵ In this case, Ms. Baker, a Jamaican citizen faced an order of deportation in 1992, after entering only as a visitor in 1981. Whilst in Canada, she gave birth to four children, and argued that she should not be deported, based on humanitarian and compassionate considerations. Her deportation was nevertheless ordered. When the matter reached the Supreme Court, one of the issues the court had to decide was whether discretion was improperly exercised when considering the interests of Ms. Baker's children. The majority of the court held that compassionate and humanitarian considerations require particular consideration of the interests and needs of children. The court held that:

Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the Convention on the Rights of the Child, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada...The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. The principles of the Convention and other international instruments place special importance on protections

¹³⁸ Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK) 1982 c 11 available at <http://canlii.ca/t/lidsx> (accessed on 23 May 2015).

¹³⁹ Canadian Bill of Rights SC 1960.

¹⁴⁰ These include fundamental freedoms, democratic rights, language rights, mobility rights, minority language educational rights, legal rights, and equality rights.

¹⁴¹ S 2 of the Canadian Charter of Rights and Freedoms.

¹⁴² S 7-14 of the Canadian Charter of Rights and Freedoms.

¹⁴³ S 15 of the Canadian Charter of Rights and Freedoms.

¹⁴⁴ S 28 of the South African Constitution and Art 28 of the Ghanaian Constitution.

¹⁴⁵ [1999] 2 SCR 817.

for children and childhood, and on particular consideration of their interests, needs, and rights.¹⁴⁶

The court further held that even though, at that stage, the UNCRC had not been implemented by statute, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation. In this context, the Baker decision allows for an interpretation of Canada's Charter of Rights and Freedoms in a similar fashion section 39(1)(b) of the South African Constitution binds courts to consider international law: against a backdrop of principles such as the best interests of the child.

In *Winnipeg Child and Family Services v KLU*¹⁴⁷ however, the Canadian Supreme Court was asked to decide on the constitutionality of federal legislation in the province of Manitoba. This legislation, the Child and Family Services Act,¹⁴⁸ gave powers to child protection authorities to apprehend a child in need of protection, without prior judicial authorization. The court was left to decide whether the apprehension of the child took place in compliance with the values of fundamental justice. The court held that the best interests of the child is not *the* paramount consideration, but merely one of the primary considerations within the context of protection proceedings, and that the Act respected this principle.¹⁴⁹ Malhotra and Hansen¹⁵⁰ assert that the Supreme Court has approached the relationship between the Canada's Charter of rights and freedoms and the States' international commitments in several dissimilar ways. In 2007 the Supreme Court in *Health Services and Support v British Columbia*¹⁵¹ the court characterized Canada's international human rights obligations in terms of international human rights treaties as providing a minimum standard for the Charter's human rights protection. This decision attaches considerable weight to international obligations, and shows

¹⁴⁶ *Baker v Canada* [1999] 2 SCR 817 para 69-71.

¹⁴⁷ [2000] 2 SCR 519.

¹⁴⁸ Child and Family Services Act CCSM 1985.

¹⁴⁹ *Winnipeg Child and Family Services v KLU* [2000] 2 SCR 519 par 80.

¹⁵⁰ Malhotra and Hansen %The United Nations Convention on the Rights of Persons with Disabilities and Its Implications for the Equality Rights of Canadians with Disabilities: The Case of Education+(2011) *Windsor Yearbook of Access to Justice* 9.

¹⁵¹ *Health Services and Support--Facilities Subsector Bargaining Assn. v British Columbia* [2007] 2 SCR 391 par 70.

international human rights obligations as providing a minimum standard for Canada's Charter of Rights and Freedoms in the protection of human rights.

Despite the absence of the rights of children in the Canadian Charter of Rights and Freedoms, rights groups have used other sections of the Charter to fight for the rights of children. In *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*¹⁵² the Canadian Foundation for Children, Youth and the Law sought a declaration that section 43 of the Canadian Criminal Code.¹⁵³ Section 43 serves as a defense to assault that justifies corporal punishment of children by parents and teachers in the name of correction. It was argued that section 43 was in contravention of section 7 of the Canadian Charter of Rights and Freedoms because it failed to give procedural protections to children and did not promote the best interests of the child. It was also argued that section 43 violated section 12 of the Canadian Charter of Rights and Freedoms as it constituted cruel and unusual punishment or treatment for children. It further violated section 15 of the Canadian Charter of Rights and Freedoms as it denied children the legal protection against assaults that is accorded to adults. The Supreme Court however held that the best interests of the child principle was in fact not a principle of Canadian fundamental justice.¹⁵⁴ The court held that the best interests of the child principle was merely viewed as a legal principle, and did not comply with the second criterion for a principle of fundamental justice: consensus that the principle is vital or fundamental to our societal notion of justice.¹⁵⁵ The court refused to declare section 43 unconstitutional, but rather limited its scope.¹⁵⁶

¹⁵² *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] 1 SCR 76.

¹⁵³ Criminal Code RSC 1985 c C46

¹⁵⁴ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] 1 SCR 76.

¹⁵⁵ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] 1 SCR 76 par 10.

¹⁵⁶ The Court limited the legal approval of hitting children by restricting hitting to certain ages, degrees of force, and parts of the body. In *R v Marmo-Levine* [2003] 3 SCR 571 the Supreme Court established a template for determining a principle of fundamental justice: For a rule or principle to constitute a principle of fundamental justice for the purposes of s 7 of the Canadian Charter of Rights and Freedoms it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a

As criminal matters are dealt with through national legislation, the Youth Criminal Justice Act¹⁵⁷ refers to the best interests of the child at a national level in the context of children in conflict with the law.¹⁵⁸ Tanny¹⁵⁹ argues that this Act, a response and improvement on the repealed Young Offenders Act of 1985,¹⁶⁰ toughens the Canadian youth justice system, by providing for extended sentences for violent and repeat offenders.¹⁶¹ The Youth Criminal Justice Act also caters for diversion for first-time and minor offenders, to deflect them from the formal criminal justice system.¹⁶² Tanny though criticises the Youth Criminal Justice Act, and states that from a rights-based perspective, this Act is a problematic document.¹⁶³

The Youth Criminal Justice Act determines that a child found guilty of violent offences including murder and sexual assault, may be sentenced as an adult, if the youth is over the age of 14.¹⁶⁴ A youth court judge must impose an adult sentence on the youth in the case of these presumptive offences unless the young person can demonstrate that a youth sentence has sufficient length to hold him or her accountable. The Youth Criminal Justice Act thus puts the onus on the child to justify why an adult sentence must not be imposed, rather than on the State to demonstrate why the child has lost his or her claim to a youth sentence. In the 2008 decision of *R v DB*¹⁶⁵ the Supreme Court had to determine whether this reversed onus on the child to prove why he should *not* be sentenced as an adult violated section 7 of the Canadian Charter of Rights and Freedoms, and, in particular, the child's right not to

manageable standard against which to measure deprivations of life, liberty or security of the person.

¹⁵⁷ Youth Criminal Justice Act SC 2002 c 1.

¹⁵⁸ Ss 25, 27, 30, 42, 76, 89, 92, 93, 110 and 111 of the Youth Criminal Justice Act SC 2002 c 1.

¹⁵⁹ Tanny *What have we done to Gault? Youth Criminal Justice and the Charter Of Rights and Freedoms: A Canadian Perspective* (2007) *Barry Law Review* 144.

¹⁶⁰ Young Offenders Act RSC 1985.

¹⁶¹ S 38 of the Youth Criminal Justice Act SC 2002 c 1.

¹⁶² Tanny *What have we done to Gault? Youth Criminal Justice and the Charter Of Rights and Freedoms: A Canadian Perspective* (2007) *Barry Law Review* 144.

¹⁶³ Tanny *What have we done to Gault? Youth Criminal Justice and the Charter Of Rights and Freedoms: A Canadian Perspective* (2007) *Barry Law Review* 143. In 2012, ss 2, 3, 29, 38, 39, 64, 72, 75, 76 and 115 of this Act was amended by Parliament to address issues relating to amongst others, amended custody placement provisions, a new definition of violent offence and clarified pre-trial provisions.

¹⁶⁴ Part 4 of the Youth Criminal Justice Act SC 2002 c 1.

¹⁶⁵ *R v DB* 2008 SCC 25.

be deprived of liberty except in accordance with principles of fundamental justice. The Supreme Court highlighted the interests of the child, and found that it was a principle of fundamental justice that children should be entitled to a presumption of diminished moral culpability.

The national Criminal Code¹⁶⁶ is also silent on the best interests of the child, and only refers to the best interests of the administration of justice, in a range of articles.¹⁶⁷ Even the Canadian Human Rights Act¹⁶⁸ does not refer to the best interests of the child, or the rights of children in general. The Canadian Human Rights Act does, however, create the Canadian Human Rights Commission.¹⁶⁹ Nevertheless, it is mainly mandated to address complaints relating to discrimination.¹⁷⁰

The principle of the best interests of the child is thus not embedded as a general fundamental principle of national law in Canada.¹⁷¹ Where South Africa caters for Pillar one in its Constitution¹⁷² as well as domestic legislation, it appears that the principle of the best interests of the child is not as guaranteed in national Canadian law. This is evident from the recommendations made by the CORC, emphasising that more prominence must be given to this principle within all actions and laws of the country.¹⁷³

¹⁶⁶ Criminal Code RSC 1985 c C46.

¹⁶⁷ For example, s 186, 487 and 530 of the Canadian Criminal Code, RSC 1985, c C46, which refers to certain actions which may be taken if it is determined to be in the best interests of justice.

¹⁶⁸ Canadian Human Rights Act RSC 1985 c H-6.

¹⁶⁹ S 11 of the Canadian Human Rights Act 1985.

¹⁷⁰ See also the mandate of the Canadian Human Rights Commission at <http://www.chrc-ccdp.ca/eng/content/our-work> (accessed on 3 Jun 2015).

¹⁷¹ See the Canadian Coalition for the Rights of Children %Best interests of the child: Meaning and application in Canada+ (2009) available at <http://rightsofchildren.ca/wp-content/uploads/bic-report-eng-web.pdf> (accessed on 2 May 2015) 79.

¹⁷² See par 2.5 *supra* for a discussion on s 28(2) of the South African Constitution. See also par 4.3.1 where Pillar one is discussed in respect of South African legislation.

¹⁷³ See the CORC's %Consideration of Reports Submitted by States Parties Concluding Observations of the Committee on the Rights of the Child: Canada CRC/C/15/Add 215+ Office of the United Nations High Commissioner for Human Rights, Geneva para 24-25 available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsgnXZ0ChBsrwmcy8%2F%2BFNoDXw8azmg1tCr8tbeV2%2FwwwzAOpqSl19npSubu9UQILF9l%2FSaMOKUhWjCPDYKhwkWJzAUslUicIR00PbKF35XAe> (accessed on 27 Sep 2015).

6.3.2.2 Pillar two: the principle of non-discrimination

Nationally, the Canadian Constitution was specifically amended to introduce basic human rights such as equality. As referred to above, the Canadian Charter of Rights and Freedoms¹⁷⁴ was included in the Canadian Constitution in 1982, which details the equality clause that promotes non-discrimination. Section 15 of the Charter determines that everyone is equal before and under the law. Section 15 also prohibits discrimination on the basis of age or disability:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In essence, this section reflects the values encompassed in section 9 of the South African Constitution. The interpretation and application of the test for discrimination, however, differs. In the first Supreme Court of Canada decision to address section 15 of the Canadian Charter of Rights and Freedoms, the court developed a two-step approach to alleged discrimination in *Andrews v Law Society of British Columbia*.¹⁷⁵ Firstly, does the law create a distinction based on an enumerated or analogous ground; and secondly, does the distinction create a disadvantage by perpetuating prejudice or stereotyping? However, in 2013 the same court found that perpetuating prejudice or stereotyping did not form an additional requirement in the second part of the test. The majority of the court however differed on the correct way to interpret and apply the second part of the test, resulting in a current uncertainty in respect of the application of section 15 of the Canadian Charter of Rights and Freedoms.¹⁷⁶

¹⁷⁴ Constitution Act 1982 Schedule B to the Canada Act 1982 (UK) 1982 c 11.

¹⁷⁵ [1989] 1 SCR 143. %enumerated or analogous grounds+in this matter referred to personal characteristics that, when being the basis of discrimination, show the discrimination is unconstitutional under section 15 of the Canadian Charter on Rights and Freedoms.

¹⁷⁶ *Québec (Attorney General) v A* [2013] SCC 5.

Sealy-Harrington¹⁷⁷ has argued that Canadian case law in respect of the interpretation of section 15 has suffered from a shortage of conceptual clarity because of the Canadian Supreme Court's inconsistency when it comes to legal test it describes and applies. Biddulph and Newman¹⁷⁸ refers to the Supreme Court's 2013 decision as its latest take on equality rights, and that this decision now complicates what rule needs to be extracted from equality cases.

The Canadian Human Rights Act of 1985¹⁷⁹ is further akin to the South African Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, and lists age and disability as part of the prohibited grounds for discrimination. The Canadian Human Rights Act also created the Canadian Human Rights Commission¹⁸⁰ that investigates claims of discrimination, as well as the Canadian Human Rights Tribunal¹⁸¹ to judge such cases which may have been unresolved by the Canadian Human Rights Commission.

According to the Canadian Human Rights Commission, in 2014 it received 1 364 discrimination complaints of which more than half related to disability.¹⁸² The Canadian Human Rights Tribunal in addition for the same year received a total of 47 complaints relating to discrimination based on disability, which was addressed through mediation, rulings or decisions.¹⁸³ In respect of the SAHRC, only 11% of the 9 217 complaints received related to equality, which amounts to less than those received by the Canadian Human Rights Commission.¹⁸⁴

¹⁷⁷ Sealy-Harrington 'Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach' (2013) *Journal of Law and Equality* 37.

¹⁷⁸ Biddulph and Newman 'Equality Rights, Ratio Identification, and the Un/Predictable Judicial Path not Taken: Quebec (Attorney General) v A, and R Vibanescu' (2015) *University of British Columbia Law Review* 1-2.

¹⁷⁹ Canadian Human Rights Act RSC 1985 c H-6.

¹⁸⁰ S 26 of the Canadian Human Rights Act.

¹⁸¹ S 48 of the Canadian Human Rights Act.

¹⁸² Canadian Human Rights Commission 2014 Annual report available at <http://www.chrc-ccdp.gc.ca/eng/report/2014/outcomes/statistics> (accessed on 25 Apr 2015) 1.

¹⁸³ Canadian Human Rights Tribunal 2014 Annual Report available at http://chrt-tcdp.gc.ca/NS/pdf/CHRT_AR14_EN_WEB.pdf (accessed on 25 Apr 2015) 9.

¹⁸⁴ See the SAHRC's 2013/14 Annual Report available at http://www.sahrc.org.za/home/21/files/2013_14%20SAHRC%20ANNUAL%20REPORT%20AS%20AT%2031%20MARCH%202014.pdf (accessed on 20 Aug 2015).

Pillar two and the principle of non-discrimination is therefore embedded in the highest laws of Canada, although the application of section 15 in respect of equality matters appears to currently pose a challenge. The Canadian Human Rights Commission however also actively engages in matters relating to equality, more so than the SAHRC.

6.3.2.3 Pillar three: survival and development

As with the South African Constitution,¹⁸⁵ the Canadian Charter of Rights and Freedoms does not refer to the word ~~“survival”~~. Section 7 does however protect the right to life:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In terms of national legislation, the Canadian Youth Criminal Justice Act aims to address children in conflict with the law by focusing on the development of the child, and the prevention of underlying causes for the youth crime.¹⁸⁶ Section 3 of this Act determines that any measures taken against a child who has committed a crime, must be meaningful for the child in respect of his or her needs and level of development.¹⁸⁷ This determination allows subjective responses, as CWD will be assessed on their individual needs and level of development.

6.3.2.4 Pillar four: the child’s right to be heard

Nationally, section 11(e) of the Canadian Charter of Rights and Freedoms guarantees every person charged with an offence the right to a fair and public hearing. Children over the age of 12 years in many provincial and territorial jurisdictions in Canada have the right to participate in matters affecting them. The Declaration of Principle in section 3(e) of the Young Offenders Act¹⁸⁸ determines that young persons have the right to be heard in decisions and processes affecting them.

¹⁸⁵ See par 4.3.3 *supra*.

¹⁸⁶ See the preamble of the Youth Criminal Justice Act.

¹⁸⁷ S 3(c)(iii) of the Youth Criminal Justice Act.

¹⁸⁸ Youth Criminal Justice Act SC 2002 c 1.

Under this Act, children have an automatic right to be a party to proceedings, as well as be represented by a legal representative. Covell and Howe¹⁸⁹ argue that despite efforts, in main, reflected in the Youth Offenders Act, children in Canada are denied their right to be heard in legal proceedings affecting them.¹⁹⁰ In *Young v Young*¹⁹¹ and *Gordon v Goertz*¹⁹² the Canadian Supreme Court showed that it favoured a broad approach to the best interests principle, which focuses on the *child's* perspective. In *AC Manitoba (Director of Child Services)*,¹⁹³ the Canadian Supreme Court of Canada also noted that the importance of the UNCRC, and that it sets out a framework under which the child's own input will inform the content of the best interests standard. This was interpreted in the Yukon Supreme Court matter of *BJG v DLG*¹⁹⁴ as follows:

Taking a broad and flexible child centred approach, the best interests provisions should be interpreted to reflect the fact that, by virtue of international law, the rights to participate in the decision making process are an integral part of the determination of a child's best interests.¹⁹⁵

In December 2012 the CORC hailed this decision as a move in the right direction for Canada in providing children with the right to be heard.¹⁹⁶ Nevertheless, the CORC raised concerns that Canada does not have adequate mechanisms to facilitate proper child participation in matters that impact children, such as legal, policy and administrative issues.¹⁹⁷

As is the case with South Africa, free legal representation plays a key role in providing an avenue for children to have their views heard. According to the Canadian Department of Justice, the federal government provides contribution funding to

¹⁸⁹ Cowell and Howe *The Challenge of Children's Rights for Canada* (2006)118.

¹⁹⁰ *Ibid.*

¹⁹¹ *Young v Young* [1993] 4 SCR 3.

¹⁹² *Gordon v Goertz* [1996] 2 SCR 27.

¹⁹³ *AC Manitoba (Director of Child Services)* [2009] SCC 30 par 43.

¹⁹⁴ *BJG v DLG* [2010] YKSC 44.

¹⁹⁵ *BJG v DLG* [2010] YKSC 44 par 43.

¹⁹⁶ CRC/C/PRT/CO/3-4.

¹⁹⁷ CRC/C/PRT/CO/3-4 par 36. The CORC also urged Canada to ensure that children have the possibility to voice their complaints if their right to be heard is violated with regard to judicial and administrative proceedings, and that children have access to an appeals procedure. See par 37.

provinces for the delivery of legal aid services for persons who qualify for same.¹⁹⁸ The provision of this funding is based on the constitutional responsibility for matters relating to criminal justice by the federal government, and the constitutional responsibility of provinces to administer justice, including legal aid.

According to the Canadian Bar association, the amount of funding provided by the Canadian federal government to provinces in order for them to provide legal aid services has not changed in 10 years.¹⁹⁹ Buckley²⁰⁰ describes the shrinking government support for legal aid as a 'silent crisis'. Criticisms of the Canadian legal aid system relate both to the amount of legal aid allowed and the kinds of cases for which legal aid will be granted,²⁰¹ the former of which falls squarely within the ambit of the national government's responsibility. The fact that legal aid is available, but only with limited resources may be contributing to the CORC's concerns in respect of whether Canada is able to provide for the child's views to be heard in view of its limited resources.

6.3.2.5 Pillar five: the rights of CWD specifically

The specific rights of CWD are addressed nationally in section 34 of the Youth Criminal Justice Act, where a court is obliged to send a child for assessment should the court have reasonable grounds to believe that the child suffers from a mental disability. No further mention is made of CWD in this Act.

As with the CPA²⁰² and the Criminal Law (Sexual Offences and Related Matters) Amendment Act²⁰³ of South Africa, Canada's Criminal Code²⁰⁴ deals with the rights

¹⁹⁸ See the Canadian Department of Justice's website explaining Canada's legal aid program, available at <http://www.justice.gc.ca/eng/fund-fina/gov-gouv/aid-aide.html> (accessed on 20 Aug 2015).

¹⁹⁹ See the Canadian Bar Association's website explaining its critique against the status quo of legal aid in Canada, at <http://www.cba.org/CBA/Advocacy/legalAid/> (accessed on 23 Aug 2015).

²⁰⁰ Buckley 'Moving Forward on Legal Aid' (2010) available at <http://www.cba.org/CBA/Advocacy/PDF/CBA%20Legal%20Aid%20Renewal%20Paper.pdf> (accessed on 23 Aug 2015) 1.

²⁰¹ Hughes and Mossman 'Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs and Responses' (2002) *Windsor Review of Legal and Social Issues* 89. 51 of 1977.

²⁰² 51 of 1977.

²⁰³ 32 of 2007.

²⁰⁴ Criminal Code RSC 1985 c C 46.

and needs of CWD in the context of providing evidence and criminalising certain acts. The sexual exploitation of any person with a physical or mental disability is criminalised,²⁰⁵ and evidence that the offence was motivated by bias, prejudice or hate based on mental or physical disability shall be deemed to be aggravating circumstances during sentencing procedures.²⁰⁶

In respect of allowing for better participation and acknowledging the vulnerability of a witness with a disability, section 486 of the Criminal Code determines that the court may order that a support person of the vulnerable witnesses choice be permitted to be close to the witness and be present while the witness testifies. This measure is not included in the Criminal Code's South African counterpart. The only remotely relevant determination is the appointment of an intermediary in terms of section 170A of the CPA. The difference between the intermediary and the person of support is that the intermediary is appointed to enable the witness to give evidence, where the person of support is merely there to support and comfort the witness. The intermediary is also only appointed for a witness under the biological or mental age of 18 years to prevent undue mental stress or suffering if he or she testifies at such proceedings.²⁰⁷ The person of support may be requested to assist a witness who is under the age of 18, or, has a mental or physical disability and therefore permits for broader application. Potential undue stress towards the witness does not have to be shown or proven.²⁰⁸

The CPA does, however, determine that the Minister has the power to establish services to be provided to a witness who is required to give evidence in any court of law, and with specific reference to the assistance of, and support to, witnesses at courts.²⁰⁹ No such regulations have to date been made by the DOJ&CS.

The Criminal Code further provides for witnesses with disabilities to testify outside of the court, if the witness is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability.²¹⁰ The court may then order

²⁰⁵ Ss 153 & 159 of the Criminal Code 1985.

²⁰⁶ S 718(2) of the Criminal Code 1985.

²⁰⁷ 170A of the CPA.

²⁰⁸ *Ibid.*

²⁰⁹ S 191A of the CPA 51 of 1977.

²¹⁰ S 486 of the Criminal Code 1985.

that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused.²¹¹ This measure is catered for in South African legislation, although only when an intermediary has been appointed.²¹² Section 170A(3) of the CPA states that the court may direct that the relevant witness shall give evidence at any place which is informally arranged to set that witness at ease.²¹³

The Criminal Code also allows video recordings of persons with disabilities testimony to be admissible as evidence, where such a recording was made within a reasonable time after the alleged offence, in which the victim or witness describes the acts complained of.²¹⁴ This video recording may be used where a witness is able to communicate evidence but may have difficulty doing so by reason of age, or mental or physical disability.²¹⁵ The CPA allows testimony to be given via CCTV or similar electronic media.²¹⁶ However, this is underscored by the right of the accused to question the witness and to observe the reaction of that witness whilst the testimony takes place.²¹⁷ This would inevitably entail that a pre-recorded video, as is the case in Canada, will not be allowed as evidence in this regard.

Canada also provides support to families of children with disabilities through various other measures. The Child Disability Benefit is a tax-free benefit of up to \$2 695 per annum for families who care for a child under the age 18 with a severe and prolonged impairment in physical or mental functions.²¹⁸ As with the care dependency grant in South Africa, a means test is required before the Child Disability Benefit may be claimed.²¹⁹ Further to this, the Disability Tax Credit is a non-refundable tax credit for individuals who have a severe and prolonged

211

Ibid.

212

S 170A of the CPA.

213

See par 4.3.6 *supra*.

214

S 715 of the Criminal Code 1985.

215

Ibid.

216

S 158 of the CPA.

217

Ibid.

218

See information available on the child disability benefit on the Canada Revenue Agency's website at <http://www.cra-arc.gc.ca/bnfts/dsblty-eng.html> (accessed on 22 Aug 2015).

219

See par 5.3.5 *supra*.

impairment in physical or mental function, and is required in order to qualify for the Child Disability Benefit.²²⁰

There have been a few decisions by the Supreme Court of Canada regarding the rights of CWD specifically. Although not relating to access to justice per se, these decisions showed a clear interaction between the rights of CWD to be included and accommodated in society. In *Eaton v Brant County Board of Education*²²¹ the court held that it was in the best interests of a CWD to be included and accommodated in a mainstream school, and that:

...inclusion is so obviously an important factor in the acquisition of skills necessary for each of us to operate effectively as members of the group that we treat it as a given.²²²

The court also highlighted that inevitably, reasonable accommodation may be required for some individuals, such as CWD, to participate fully in society.²²³ In *Auton (Guardian ad litem of) v British Columbia*²²⁴ the court however indicated that reasonable accommodation may not be stretched as far as including specialised therapy for children with autism, when the parents of such children are unable to pay for same. The court unanimously held that the refusal from the British Columbia government to fund the treatment did not violate the child's equality rights.

Further in respect of catering specifically to the needs of CWD, in 2012, the Supreme Court of Canada found that a public school in British Columbia's failure to provide adequate and meaningful access to education to a student with a severe learning disability was discriminatory.²²⁵ It was ruled that the District's conduct was not justified, as disproportionate budgetary cuts were made to special needs programs.²²⁶ The significance of this decision rests in the suggestion that any

²²⁰ See information available on the disability tax credit on the Canada Revenue Agency's website at <http://www.cra-arc.gc.ca/tx/ndvdl/sgmnts/dsblts/dtc/menu-eng.html> (accessed on 22 Aug 2015). The Canadian government has also introduced the Registered Disability Savings Plan to support families caring for children with disabilities in order to assist in ensuing longer term economic stability.

²²¹ *Eaton v Brant County Board of Education* [1997] 1 SCR 241.

²²² *Eaton v Brant County Board of Education* [1997] 1 SCR 241 par 20.

²²³ *Eaton v Brant County Board of Education* [1997] 1 SCR 241 par 67.

²²⁴ *Auton (Guardian ad litem of) v British Columbia* (AG) [2004] 3 SCR 657.

²²⁵ *Moore v British Columbia (Education)* 2012 SCC 61.

²²⁶ *Ibid* at par 65.

responsible administrator, such as a department or institution, should carefully evaluate how budgetary cuts or limitations to programmes that serve the needs of CWD are made and what effect this may have on these children, and people with disabilities.

6.3.2.6 Pillar six: Article 13 of the UNCRPD

In 2012, a study found that disability and age was the most considerable demographic predictor of civil justice problems in Canada, the United Kingdom and New South Wales.²²⁷

Section 14 of the Canadian Charter of Rights and Freedoms stipulates that an accused person who does not understand the language in which his or her trial is carried out, or is deaf, is entitled to an interpreter. According to Bakken-Jepson *et al*²²⁸ the estimated number of sign language users in Canada is variable. In 2006 the Canadian Census estimated that there were an approximate number of 35 370 users of ~~the~~ gestural language+ in Canada.²²⁹ The Canadian Official Languages Act²³⁰ however only recognizes English and French as the official languages of Canada. This Act is also very specific in recognizing only these two languages in its federal court system, under section 14 thereof.

In *Eldridge v British Columbia (Attorney General)*, 1997²³¹ the Supreme Court of Canada held that discrimination can ensue from a mere failure to take positive steps to ensure that disadvantaged groups, such as people with disabilities, benefit equally from services offered to the general public.²³² This finding points out that the Supreme Court views the mere neglect of catering to the needs of people with disabilities, as constituting discrimination. This is in line with Article 13 of the UNCRPD calling for accommodations to be made for people with disabilities. Similarly, in *Granovsky v Canada (Minister of Employment and Immigration)*, 2000²³³ the Canadian Supreme Court indicated that the main focus in analyzing disability

²²⁷ Trebilcock *et al Middle Income Access to Justice* (2012) 67.

²²⁸ Bakken-Jepson *et al Sign Languages of the World: A Comparative Handbook* (2015) 702.

²²⁹ *Ibid.*

²³⁰ Official Languages Act RSC 1985 c. 31.

²³¹ *Eldridge v British Columbia (Attorney General)* 1997 3 SCR 624.

²³² *Ibid* at par 78.

²³³ In *Granovsky v Canada (Minister of Employment and Immigration)* 2000 SCC 28.

should be on whether or not legislative or administrative responses are appropriate or not.²³⁴ The court indicated that the state may not further stigmatize a person with a disability by failing to provide for appropriate accommodation for that person's needs.²³⁵

Apart from the Canadian Charter of Rights and Freedoms, and the Canadian Human Rights Act, the legislation implementing Article 13 of the UNCRPD can mainly be found in provincial territories.

6.3.3 Provincial

From the above, it would appear that very few national laws address the rights of children, and the rights of people with disabilities respectively. As per the constitutional determination of jurisdiction regarding child or family law, such laws may well be found in provincial or territorial legislation.²³⁶ Provinces such as Ontario and British Columbia have specifically put in place legislation and measures addressing the rights of children and people with disabilities. In Ontario, these include enacting the Child and Family Services Act,²³⁷ the Children's Law Reform Act,²³⁸ as well as the Family Law Act.²³⁹ In respect of British Columbia, the Child, Family and Community Service Act,²⁴⁰ which primarily addresses the framework for services to be provided to children and families in need of care and assistance, addresses the principle of the best interests of the child in full.

6.3.3.1 Ontario

6.3.3.1.1 Pillar one: the best interests of the child principle

²³⁴ *Ibid* at par 39.

²³⁵ *Ibid* at par 33.

²³⁶ See S 92 of the the Canadian Constitution which outlines the specific powers given to the provincial governments. Family law, for instance, is an area of shared constitutional jurisdiction due to the provinces' responsibility for property as well as civil rights, and the national, federal responsibility for marriage and divorce.

²³⁷ Child and Family Services Act RSO 1990 c C 11.

²³⁸ Children's Law Reform Act RSO 1990 c C 12.

²³⁹ Family Law Act, RSO 1990 c F 3.

²⁴⁰ Child, Family and Community Service Act RSBC 1996 c 46.

The Child and Family Services Act of Ontario was specifically created to promote the best interests, protection and wellbeing of children.²⁴¹ The Child and Family Services Act supports the needs of children and parents and aims to provide services to parents requiring assistance in taking care of their children.²⁴² The Act also governs the agencies mandated to provide these services. The best interests of the child are mentioned throughout this legislation and form the guiding principle for all services to adhere to. Although it is determined that the paramount purpose of this Act is to promote the best interests, protection and well being of children, it also provides for other purposes:

(2) The additional purposes of this Act, so long as they are consistent with the best interests, protection and well being of children, are:

1. To recognize that while parents may need help in caring for their children, that help should give support to the autonomy and integrity of the family unit and, wherever possible, be provided on the basis of mutual consent.
2. To recognize that the least disruptive course of action that is available and is appropriate in a particular case to help a child should be considered.²⁴³

Kierstead²⁴⁴ argues that these mixed objectives of most child welfare statutes, such as the Child and Family Services Act of Ontario, may cause challenges for stakeholders involved in child protection work, such as legislators, lawyers and judges. The Act in essence requires that the promotion of the best interests, wellbeing and protection of the child is the paramount purpose of this Act. However, it reminds stakeholders such as judges that the autonomy and integrity of the family unit must be respected. Although not necessarily competing interests, it provides for a contextual interpretation of the best interests of the child principle in the Child and Family Services Act, as opposed to the stand-alone application of this standard. In 2015, the Child and Family Services Act underwent a review process in order to explore potential changes. The review process was focussed on improving outcomes

²⁴¹ S 1 of the Child and Family Services Act 1990.

²⁴² S 2 Child and Family Services Act RSO 1990.

²⁴³ S 2 Child and Family Services Act RSO 1990.

²⁴⁴ Kierstead %therapeutic jurisprudence and child protection+(2012) *Barry Law Review* 34.

for children, and modernizing as well as clarifying the language of the Act.²⁴⁵ During this review, the Ontario Human Rights Commission, as established by the Ontario Human Rights Code,²⁴⁶ made certain submissions so as to strengthen the principle of the best interests of the child, as reflected in the Child and Family Services Act. In doing so, the Ontario Human Rights Commission recommended that section 1 of the Act be amended to recognize the best interests of the child to include respect for the child's, ethnic and linguistic identities, whenever possible. The Commission also recommended that the best interests of the child provision under section 1 of the Child and Family Services Act should be interpreted in a way that allows for growing regard for a child's religious wishes as the child matures.²⁴⁷

The Children's Reform Act mainly addresses parental rights and responsibilities, and binds all processes to the principle of the best interests of the child.²⁴⁸ Section 24 of this Act specifically lists factors to be taken into account by a court when determining what the best interests of the child are in custody disputes. This section is similar to section 7 of the South African Children's Act, albeit only in reference to custody or access to the child.²⁴⁹ Section 7 of the South African Children's Act has a seemingly broader application as it applies not only to parental rights and responsibility disputes, but to any situation where a provision of this specific Act requires the best interests of the child standard to be applied.²⁵⁰

The Family Law Act determines matters relating to property of the family, wills and child support issues. Section 24(4) specifically prescribes that in order to determine

²⁴⁵ See <http://www.children.gov.on.ca/htdocs/English/about/CFSA2014/index.aspx> (accessed on 13 Aug 2015).

²⁴⁶ S 27 of the Ontario Human Rights Code RSO 1990.

²⁴⁷ The Ontario Human Rights Commission's submission to the Ministry of Children and Youth Services Review of the *Child and Family Services Act* December 2014+ (2014) available at http://www.ohrc.on.ca/en/ohrc-submission-ministry-children-and-youth-services-review-child-and-family-services-act#_ednref17 (accessed on 13 Jul 2015).

²⁴⁸ Ss 6, 19, 20, 21, 22, 24, 29, 40, 41, 42, 62 and 67 of the Children's Law Reform Act 1990.

²⁴⁹ Both sections include similar factors which have to be considered, in most likely, care and contact matters.

²⁵⁰ S 7 of the Children's Act lists fourteen factors that must be taken into consideration whenever the best interests of the child are determined.

what the best interests of the child are in respect of a determination of the matrimonial home, the child's views must be taken into account.²⁵¹

6.3.3.1.2 Pillar two: the principle of non-discrimination

Provincially, Ontario also has its own human rights legislation. Ontario's Human Rights Code²⁵² explicitly prohibits discrimination on the basis of age and disability. Section 1 of this Act states the following:

Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

In *Board of Governors of Seneca College of Applied Arts and Technology v Bhaduria*,²⁵³ the Supreme Court of Canada described the Ontario Human Rights Code as an exclusive method for adjudicating issues of discrimination.

The Ontario's Human Rights Code also created the Ontario Human Rights Commission under section 27 thereof. The Ontario Human Rights Commission's mandate includes the promotion of the elimination of discriminatory practices, and the development of policy which recognizes the equal rights of all, without discrimination.²⁵⁴ In addition to the Commission, the Human Rights Tribunal of Ontario is established under section 32 of the Ontario's Human Rights Code, in order to adjudicate human rights complaints. Between 2013 and 2014, the Human Rights Tribunal of Ontario received 3 242 applications for adjudication of which 54% of the cases dealt with allegations of discrimination based on the grounds of disability, whereas 13% related to discrimination based on age.²⁵⁵

²⁵¹ S 24(4) of the Family Law Act R.S.O. 1990, c. F.3 states that in determining the best interests of a child, the court shall consider the possible disruptive effects on the child of a move to other accommodation as well as the child's views and preferences, if they can reasonably be ascertained.

²⁵² Ontario Human Rights Code RSO 1990 ch H 19.

²⁵³ *Board of Governors of Seneca College of Applied Arts and Technology v Bhaduria* (1981) 2 SCR 181.

²⁵⁴ S 29 of the Ontario Human Rights Code RSO 1990.

²⁵⁵ See the 2013/14 annual report of the Human Rights Tribunal of Ontario at <http://www.sjto.gov.on.ca/documents/sjto/2013-14%20Annual%20Report.pdf> (accessed on 4 Jun 2015) 28.

The Human Rights Code also establishes a Human Rights Legal Support Centre.²⁵⁶ The Human Rights Legal Support Centre provides legal services to victims of discrimination in Ontario. Its services include providing legal assistance in filing applications at the Human Rights Tribunal of Ontario, and legal representation at mediations and hearings.²⁵⁷ Between 2013 and 2014, the Human Rights Legal Support Centre was able to provide in-depth legal services to almost 3000 people in Ontario, who allege that they had fallen victim to discrimination.²⁵⁸

Against the background of the above, Ontario's human rights system thus comprises of three separate agencies to exclusively address the second pillar of the framework: the Human Rights Tribunal where human rights applications are adjudicated and decided; the Human Rights Legal Support Centre which provides legal services to people who have been victim to discrimination; and, the Ontario Human Rights Commission who is mandated to works to advance human rights through research, education and policy development. Further legislation explicitly addressing Pillar two is the Ontarians with Disabilities Act²⁵⁹ which promotes equal treatment for persons with disabilities without discrimination, as in accordance with the Ontario Human Rights Code.²⁶⁰ This Act, along with the Accessibility for Ontarians with Disabilities Act²⁶¹ which will be more fully discussed below, provides for a set of laws which addresses, in main, equal accessibility to people with disabilities in Ontario.

6.3.3.1.3 Pillar three: survival and development

Provincially, the purpose of the Child and Family Services Act²⁶² includes the recognition of the fact that children's services should be provided in a manner that takes into account physical, mental and developmental needs and differences among children.²⁶³ Through recognising these individual differences, the unique needs of CWD can be taken into account when services are provided, rather than applying a one-size-fits-all approach. This legislation is on par with the Children's Act

²⁵⁶ S 45(11) of the Ontario Human Rights Code RSO 1990.

²⁵⁷ See <http://www.hrlsc.on.ca/en/home> (accessed on 15 Aug 2015).

²⁵⁸ See <http://www.hrlsc.on.ca/en/reports-and-statistics/statistics> (accessed on 15 Aug 2015).

²⁵⁹ Ontarians with Disabilities Act, 2001, S.O. 2001, c. 32.

²⁶⁰ See the preamble of the Ontarians with Disabilities Act, 2001, S.O. 2001, c. 32.

²⁶¹ Accessibility for Ontarians with Disabilities Act 2005 SO 2005 c 11.

²⁶² Child and Family Services Act RSO 1990 c C 11.

²⁶³ S 3(ii) of the Child and Family Services Act.

of South Africa, in referring to the need to promote the developmental needs of children.

6.3.3.1.4 Pillar four: the child's right to be heard

Section 39 of the Child and Family Services Act of Ontario²⁶⁴ determines that where a child is party to proceedings, that child has the right to participate on his or her own or through a legal representative. Section 107 of the Child and Family Services Act of Ontario also provides for the following:

A child in care has a right to be consulted and to express his or her views, to the extent that is practical given the child's level of understanding, whenever significant decisions concerning the child are made, including decisions with respect to medical treatment, education or training or work programs and religion and decisions with respect to the child's discharge from the placement or transfer to another residential placement.²⁶⁵

In respect of participation through legal representation, the Ministry of the Attorney General in Ontario has established the dedicated Office of the Children's Lawyer,²⁶⁶ who is mandated to represent children under the age of 18 in court cases involving a range of issues, including civil matters and child protection. Pursuant to the Courts of Justice Act of 1990²⁶⁷ the court can request that the OCL Children's Lawyer represent the interests of a child access and custody matters. Section 112(1) of the Courts of Justice Act states as follows:

In a proceeding under the Divorce Act or the Children's Law Reform Act in which a question concerning custody of or access to a child is before the court, the Children's Lawyer may cause an investigation to be made and may report and make recommendations to the court on all matters concerning custody of or access to the child and the child's support and education.

The OCL does not provide children with representation in criminal matters, and refers such matters to the Legal Aid Ontario,²⁶⁸ for relevant representation.

²⁶⁴ Child and Family Services Act RSO 1990 c C 11.

²⁶⁵ S 107 of the Child and Family Services Act 1990.

²⁶⁶ This office was established by the Ministry of the Attorney General of Ontario and not by legislation. Hereafter referred to as the OCL.

²⁶⁷ RSO 1990, c.C. 43.

²⁶⁸ Legal Aid Services Act 1998 SO 1998 c 26.

According to Bessner,²⁶⁹ a child in divorce, custody and access proceedings does not have an automatic right to independent counsel, as in criminal matters. The court has discretion whether or not a child may be provided with legal representation in such matters.

The OCL presents itself as a mixture between the Office of the Family Advocate and Legal Aid in South Africa.²⁷⁰ The OCL only becomes involved in children's cases when authorized to do so by the court.²⁷¹ Involvement in child protection cases is mandatory for the OCL when ordered by the court, whereas involvement in custody, access and other civil cases is discretionary.²⁷² According to the Ontario Ministry of the Attorney General's 2012/13 annual report, the OCL assists over 20,000 children at any given time through approximately 80 staff and 750 fee-for-service legal and clinical agents across the province of Ontario.²⁷³ The Canadian Foundation for Children, Youth & the Law, has indicated that although the OCL is well-established and provides for well-trained lawyers to represent children, court proceedings in itself do not cater to the needs of children themselves. In this respect, the criticism was that the child is the subject of the court proceedings but is not a party to them.²⁷⁴

²⁶⁹ Bressner *The Voice of the Child in Divorce, Custody and Access Proceedings* (2002) available at http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2002_1/pdf/2002_1.pdf (accessed on 13 Jun 2015).

²⁷⁰ The Office of the Family Advocate assists the parties to reach an agreement on disputed issues, namely care and contact, access and guardianship. If the parties are unable to reach an agreement, the Family Advocate evaluates the parties' circumstances in light of the best interests of the child and makes a recommendation to the Court with regard to care and contact, access or guardianship. See ss 1,2,4,5 and 8 of the Mediation in Certain Divorce Matters Act 24 of 1987. See also De Jong *Child-Focused Mediation* in Boezaart (ed) *Child law in South Africa* (2009) 118; Glasser *Can the Family Advocate adequately safeguard our children's best interest?* (2002) *THRHR* 77. LASA on the other hand may act on behalf of the child in civil matters, once it has been determined that the child will experience substantial injustice should he or she not be represented.

²⁷¹ See the functions of the OCL at <http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.asp> (accessed on 29 Jul 2015).

²⁷² *Ibid.*

²⁷³ The Ministry of the Attorney General 2012/13 annual report available at http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/mag_annual/annual-rpt_2012_13.asp (accessed on 26 Apr 2015). The *fee-for-service* is a payment model where certain services may be paid for separately.

²⁷⁴ The Canadian Foundation for Children, Youth and the Law *Children's Right to be Heard in Canadian Judicial and Administrative Proceedings* (2013) available at <http://jfcy.org/wp-content/uploads/2013/10/UNDiscussionPaper.pdf> (accessed on 20 Sep 2015).

Further legislation, which directly addresses the rights of children to be heard, includes Ontario's Provincial Advocate for Children and Youth Act of 2007.²⁷⁵ In this respect, Ontario has established the office of the Provincial Advocate for Children and Youth, through its founding legislation, as an independent officer of the Legislature of Ontario, Canada, who reports directly to the Legislature on matters relating to the interests of children. The Office provides a voice for vulnerable children and affords rights-based education and advocacy for children and youth associated with the child welfare and justice systems in the province. The Provincial Advocate is mandated to perform duties that serve the best interests of the child and to respond to and protect the best interests of the child principle. The Provincial Advocate may also identify systemic problems involving children, conduct reviews and provide education and advice on the issue of advocacy and the rights of children.²⁷⁶ More specifically, the Provincial Advocate is mandated to provide advocacy to children who are pupils of provincial schools for the deaf and blind, as well as demonstration schools.²⁷⁷ The Provincial Advocate can also receive and respond to complaints from children from these schools.²⁷⁸ After receiving and investigating a complaint, the Provincial Advocate may draft a report and provide recommendations and advice to the agencies, including government bodies, relating to its findings.²⁷⁹

South Africa does not have an institution similar to the one found in Ontario, legislatively mandated only to take responsibility for the fulfilment of the best interests of its children, and addressing the complaints of children specifically. Some correlation can however be drawn between the Ontario Provincial Advocate, and the SAHRC. As an independent institution established by Chapter 9 of the South African Constitution,²⁸⁰ the Commission is mandated to promote respect for human rights

²⁷⁵ Provincial Advocate for Children and Youth Act SO 2007 ch 9.

²⁷⁶ S 16 of the Provincial Advocate for Children and Youth Act, 2007.

²⁷⁷ The Demonstration Schools in Ontario were established to provide residential education for children with learning disabilities between the ages of 5 and 21 years. The Provincial Committee on Learning Disabilities determines whether a student is eligible for admission. Demonstration schools develop the abilities of special needs learners in order to enable them to return to programs operated by a local school board within two years.

²⁷⁸ S 15(d) of the Provincial Advocate for Children and Youth Act 2007.

²⁷⁹ S 16(1)(f) of the Provincial Advocate for Children and Youth Act 2007.

²⁸⁰ S 184 of the South African Constitution.

and a culture of human rights. The Human Rights Commission Act of 2013 further mandates the SAHRC to investigate and report on the observance of human rights.²⁸¹ This entails receiving complaints from the public regarding alleged human rights violations, and advocating for these rights amongst the general public and Parliament.²⁸² As with the Provincial Advocate, the SAHRC only makes recommendations upon issuing a report regarding complaints received.²⁸³ These recommendations are not binding.

Children may also report complaints to the SAHRC. In contrast with the Ontario Provincial Advocate, children's rights include only a portion of the work done by the SAHRC. According to the SAHRC's 2014 annual report, 8 550 complaints were finalised during the period reported on. The complaints mostly dealt with by the SAHRC included equality, healthcare, food, water and social security, just administrative action, the rights of arrested, detained and accused persons, and labour issues. Complaints regarding children's rights did not fall under the top five categories of complaints.²⁸⁴

The Ontario Provincial Advocate on the other hand received 2 882 calls for assistance in relation to children's rights issues for the same period.²⁸⁵ These statistics beg the question whether the existence of an independent body to address complaints relating to child rights only, encourages children to make use of such a service and fulfils the general principle of acting in the best interests of children. According to Parkes,²⁸⁶ the UNCRC encourages the creation of National Human Rights Institutions, such as the SAHRC, but specifically mandated to monitor the

²⁸¹ The Human Rights Commission Act of 1994 was amended by the South African Human Rights Commission Act 40 of 2013 in Jan 2014.

²⁸² See s 15 of the South African Human Rights Commission Act 40 of 2013 read with the SAHRC's gazetted Complaints Handling Procedures published in Government Gazette 34963 on 27 Jan 2012.

²⁸³ See s 13(1)(a)(i) of the South African Human Rights Commission Act 40 of 2013.

²⁸⁴ The SAHRC Annual Report 2014 available at http://www.sahrc.org.za/home/21/files/2013_14%20SAHRC%20ANNUAL%20REPORT%20AS%20AT%2031%20MARCH%202014.pdf (accessed on 25 Apr 2015) 29.

²⁸⁵ The Provincial Advocate for Children and Youth 2013/14 Annual Report available at http://digital.provincialadvocate.on.ca/i/428711-opacy-ar2014-en?utm_source=critsend&utm_medium=email&utm_campaign= (accessed on 25 Apr 2015) 11.

²⁸⁶ Parkes (ed) *Children and international human rights law: The right of the child to be heard* (2014) 214.

rights and interests of children.²⁸⁷ UNICEF research has further found that more than 70 countries worldwide boast institutions specifically mandated to address children's rights.²⁸⁸ In these countries, as opposed to the case in South Africa, children's rights and compliance with the UNCRC are not addressed through a broader human rights institution such as the SAHRC, but rather through a dedicated office such as a Children's Ombudsman, or Provincial Advocate in the case of Ontario.²⁸⁹

In the case of Ontario, if a province with an estimated population of around 14 million people receives almost 3 000 calls from children for assistance yearly. How can an office of this nature assist children in a country such as South Africa with the latest estimates pointing toward a population of more than 54 million?²⁹⁰

6.3.3.1.5 Pillar five: the rights of CWD specifically

Provincially, the Child and Family Services Act of Ontario specifically provides for services for children with disabilities. These services include family support services, child welfare services as well as child treatment services. The ambit of these services is set out in the preamble of this Act.

6.3.3.1.6 Pillar six: Article 13 of the UNCRPD

Ontario sets a key standard in addressing the needs of people with disabilities partaking in the judicial system. The Ontarians with Disabilities Act requires the Ontario government as well as the public sector to develop accessibility plans annually.²⁹¹ This Act provides for measures which may be utilized to activate the removal of barriers facing persons with disabilities in the province of Ontario. The

²⁸⁷ See Art 4 and 42 of the UNCRC.

²⁸⁸ UNICEF "Championing children's rights: A global study of independent human rights institutions for children" (2013) available at http://www.unicef-irc.org/publications/pdf/championing2_eng.pdf (accessed 23 Jul 2015/) 1-4.

²⁸⁹ The CORC has even gone so far as to recommend that certain countries consider establishing these specifically mandated institutions, in order to address children's interests within their jurisdictions. In this regard, see the CORC's concluding observations in respect of the Ivory Coast CRC/C/15/add 155 para 12-13, as well as Tunisia at CRC/C/15/Add 181 par 16.

²⁹⁰ See Statistics South Africa's 2014 mid-year population estimates at <http://www.statssa.gov.za/publications/P0302/P03022014.pdf> (accessed on 17 Jul 2015) 2.

²⁹¹ Gordon *et al* "An analysis of the Ontarians with Disabilities Act, 2001" (2002) *Journal of Law and Social Policy* 15.

standards to give effect to this Act were determined and developed under the Accessibility for Ontarians with Disabilities Act of 2005,²⁹² which was signed into law on 13 June 2005. This Act impacts on both the public and private sector and calls for the achievement of accessibility for all Ontarians with disabilities with respect to goods, services, facilities, accommodation, employment, building structures and premises on or before 1 January 2025.²⁹³ In order to adhere to this deadline, businesses, government departments and other bodies must develop, implement and enforce their determined standards of accessibility. In addition, compliance is mandatory.²⁹⁴

In 2005, the Ontario Courts Accessibility Committee²⁹⁵ was established by the Chief Justice and Attorney General to provide recommendations and advice to assist in making Ontario's courts more accessible to people with disabilities.²⁹⁶ In 2006, the Courts Committee issued a report²⁹⁷ containing various recommendations in order to address the fundamental importance of making the court system fully accessible to persons with disabilities. In this regard, the Courts Committee focused its recommendations on persons with disabilities participating as lawyers, judges, jurors, litigants, witnesses as well as courtroom service workers and public observers.²⁹⁸

In order to provide recommendations in relation to the rights of persons with disabilities to obtain access to justice, five key barriers were identified by the Courts Committee as contributing to the difficulty for such persons to have full access to judicial proceedings.²⁹⁹ These included attitudinal barriers, communication barriers,

²⁹² Accessibility for Ontarians with Disabilities Act 2005 SO 2005 ch 11.

²⁹³ S 1 of the Accessibility for Ontarians with Disabilities Act 2005.

²⁹⁴ S 13 of the Accessibility for Ontarians with Disabilities Act 2005.

²⁹⁵ Hereafter referred to as the Courts Committee.

²⁹⁶ Ontario Courts Accessibility Committee Making Ontario's courts fully accessible to persons with disabilities: Report of Courts Disabilities Committee+ (2006) available at www.ontariocourts.on.ca/accessible_courts/en/report_courts_disabilities.htm (accessed on 8 Sep 2013) 1.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid* at par 1.

²⁹⁹ Ontario Courts Accessibility Committee Making Ontario's courts fully accessible to persons with disabilities: Report of Courts Disabilities Committee+ (2006) available at www.ontariocourts.on.ca/accessible_courts/en/report_courts_disabilities.htm (accessed on 8 Sep 2013) 2.

informational barriers, physical barriers as well as sensory barriers.³⁰⁰ Attitudinal barriers include the perception of people working within the judicial system, about people with disabilities. These key role-players lack of sensitivity as well as a lack of knowledge on how to accommodate people with disabilities in the court system, contribute to creating barriers for persons with disabilities to access justice. Pivik *et al*³⁰¹ describe attitudinal barriers as being both intentional and unintentional. Intentional attitudinal barriers include name-calling as well as condescending brashness, whereas unintentional barriers relate to a lack of knowledge, education, understanding or effort on the part of the court system or staff.³⁰² As per Kanter,³⁰³ the right to access to justice includes the right not to be subjected to attitudinal barriers, such as being viewed as unreliable or unable to participate in proceedings as a result of certain stigmas. The elimination of attitudinal barriers goes hand in hand with the training of key personnel, such as judges or legal representatives.

Communication barriers further refer to challenges experienced between individuals and persons with disabilities when attempting to communicate with the court system as a result of the lack of reasonable accommodation. Drainoni *et al*³⁰⁴ include inadequate accommodation for Deaf persons, staff's impatience with speech difficulties as well as service providers' use of a communication style that is inappropriate for a person's comprehension level as forming part of communication

³⁰⁰ See also par 3.2.2 *supra* where the CORC expressed its concern in respect of the combination of social, cultural, attitudinal and physical obstacles which children with disabilities encounter in their daily lives. See also the preamble of the UNCRPD which states that disability is an evolving concept and that disability results from interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

³⁰¹ Pivik *et al* 'Barriers and facilitators to inclusive education' (2002) *Council for Exceptional Children* 102.

³⁰² Although Pivik studied the attitudes of staff in order to facilitate inclusive education, these attitudinal barriers are relevant when considering the attitudes of court staff, judges, magistrates etc as well. See also Flynn *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (2015) 49, 74 and 119 describing that people with disabilities may even be refused to open matters at court themselves, as they are deemed to lack capacity to act in their own name by those in the administration of justice.

³⁰³ Kanter *The development of disability rights under international law: From charity to human rights* (2015) 223.

³⁰⁴ Drainoni *et al* 'Cross-disability experiences of barriers to health-care access' (2006) *Journal of Disability Policy Studies* 106.

barriers. It is therefore important to recognise that the accommodation provided for a child with a disability may not be identical to that given to adults with disabilities.

Furthermore, informational barriers occur as a result of the lack of knowledge regarding available accommodation for persons with disabilities, and how to find them.³⁰⁵ This results in these persons abstaining from approaching the court for appropriate relief as they are unaware of accommodations that may be in place to allow for their participation. This barrier is emphasized when access to justice for CWD are sought. For example, the child may not be cognitively able to participate in the decision-making to approach the court. Should a caretaker or adult act on behalf of the child and bring the child to court, the caretaker may be sceptical as the child may need diaper changes during the court visit or require other services that may not be available. Conversely, these services may indeed be available, but the lack of knowledge will deter the caretaker or adult from approaching the court in the first place.

Lastly, physical and sensory barriers are created when the courtrooms and court processes are inaccessible to persons with disabilities.³⁰⁶ For instance, when there is no Braille material available for people who are blind, or a lack of sign-language interpreters for people who are deaf.

The Courts Committee, in recognising the various barriers preventing persons with disabilities from accessing justice, made six recommendations in order to address these barriers. The first recommendation from the Courts Committee was to establish a public commitment towards achieving a fully accessible court system.³⁰⁷

³⁰⁵ Ontario Courts Accessibility Committee *Making Ontario's courts fully accessible to persons with disabilities: Report of Courts Disabilities Committee+* (2006) available at www.ontariocourts.on.ca/accessible_courts/en/report_courts_disabilities.htm (accessed on 8 Sep 2013) 2.

³⁰⁶ For example: Inaccessible venue or courtroom facilities (for example, stairs not lifts, narrow doors, high buttons/handles/counters, an inaccessible witness box, slippery floors, no nearby parking, steep inclines, heavy doors, round or hard to grip door knobs). Inability to sit or stand in the same position either at all or beyond a particular time and/or fatigue. Communication barriers related to deafness or hearing impairment, blindness or visual impairment, or a speech impairment.

³⁰⁷ Ontario Courts Accessibility Committee *Making Ontario's courts fully accessible to persons with disabilities: Report of Courts Disabilities Committee+* (2006) available at www.ontariocourts.on.ca/accessible_courts/en/report_courts_disabilities.htm (accessed on 8 Sep 2013) 6.

The Courts Committee was of the opinion that a clear policy commitment was required in order to inform the general public that making justice accessible to persons with disabilities was viewed as a priority.³⁰⁸ In order to secure the assistance from the general public, a public statement was recommended identifying reasonable accommodations throughout the judicial processes as a primary consideration.³⁰⁹

The second recommendation requested the Ontario Government to appoint a permanent Ontario Courts Disability Accessibility Committee to oversee progress in making justice accessible to persons with disabilities.³¹⁰ The aim of this recommendation was to monitor progress and to assist in coordinating and planning for barriers to be removed within the justice system.³¹¹

The third recommendation required practical intervention in terms of court service officials.³¹² The Court Committee was of the opinion that there were no clear avenues for a person with a disability who was going to court to seek and arrange for reasonable accommodation.³¹³ No staff member was specifically designated to take responsibility for arranging the required accommodation in an effective manner. The Court Committee therefore recommended that specific court service officials be designated to accommodate and respond to the needs of persons with disabilities in each court house.³¹⁴ The fourth recommendation addressed the environmental

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.* The Courts Committee also elaborated that a commitment must be made that any new policy regarding the provision of reasonable disability-related accommodations will give primary consideration to the method of accommodation identified by the person with a disability.

³¹⁰ Ontario Courts Accessibility Committee %Making Ontario's courts fully accessible to persons with disabilities: Report of Courts Disabilities Committee+ (2006) available at www.ontariocourts.on.ca/accessible_courts/en/report_courts_disabilities.htm (accessed on 8 Sep 2013) 7. This recommendation states that the new permanent committee should include representation from all levels of court, including judges, government officials, as well as members from the bar.

³¹¹ The Courts Committee also recommended that the Ontario Courts Disability Accessibility Committee consult with experts in the field of disability and accessibility in order to ascertain a proper monitoring framework.

³¹² Ontario Courts Accessibility Committee %Making Ontario's courts fully accessible to persons with disabilities: Report of Courts Disabilities Committee+ (2006) available at www.ontariocourts.on.ca/accessible_courts/en/report_courts_disabilities.htm (accessed on 8 Sep 2013) 7.

³¹³ *Ibid.*

³¹⁴ *Ibid.* The Court Committee also provides a full description of the recommended designated person: one staff person as well as an alternate should be designated to provide practical

barriers at court level, and recommended that a Courthouse Accessibility and Accommodations Planning Secretariat within the Ministry of the Attorney General be established.³¹⁵ The mandate of this secretariat would include leading accessibility planning in the context of new court building projects, as well as addressing accessibility challenges in current court buildings.³¹⁶ The fifth recommendation may be seen as the most important requirement and sets out the need for judges, lawyers and court service officials to be educated on disability accessibility and accommodation.³¹⁷ The Court Committee pointed out that there was insufficient knowledge on addressing the court accessibility needs of people with disabilities.³¹⁸ The nature and effect of various mental, physical and/or sensory disabilities, the barriers that impede persons with disabilities from fully participating in the court system, and the ways to enable people with disabilities to effectively take part in all aspects of the court process are all topics that needed to be included in educating these key role-players.³¹⁹

Lastly, the Court Committee recommended that the public be effectively informed regarding the availability of accommodation and services.³²⁰ Information used in an

assistance to address the accessibility needs of those approaching the court system. It is, however, recommended that such person be used for more than one court facility if possible, and that such person be given other responsibilities as well that would not prevent him or her from performing a complete service to persons with disabilities. It is also recommended that such designated person receives full and comprehensive training on accommodating a range of disabilities. Furthermore, the existence of such person at the courts must be publicised in order to create awareness of forthcoming accommodations at court level to people with disabilities, as well as the caregivers and parents of children with disabilities.

³¹⁵ Ontario Courts Accessibility Committee %Making Ontario's courts fully accessible to persons with disabilities: Report of Courts Disabilities Committee+ (2006) available at www.ontariocourts.on.ca/accessible_courts/en/report_courts_disabilities.htm (accessed on 8 Sep 2013) 7.

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ The recommendation by the Court Committee contained a requirement that education on this subject matter be included at tertiary education level, where attorneys, judges and other role-players are educated. An onus is also placed on the educational facilities to create training materials and modules to address the need for education amongst these stakeholders.

³²⁰ Ontario Courts Accessibility Committee %Making Ontario's courts fully accessible to persons with disabilities: Report of Courts Disabilities Committee+ (2006) available at www.ontariocourts.on.ca/accessible_courts/en/report_courts_disabilities.htm (accessed on 8 Sep 2013) 7.

awareness campaign was required to include a variety of services available at court, such as providing people with visual impairments with access to printed documents in alternative formats, as well as transferring cases to accessible court rooms. An important arrangement that was to be shared with the general public was that the scheduling of cases would also address the needs of persons who require frequent breaks, or had limited stamina during certain times of the day. This recommendation in turn would address various challenges experienced by children who approach the court.³²¹ The Court Committee proceeded to make express recommendations regarding various types of disabilities, which will be further discussed under the final chapter hereunder.³²²

6.3.3.2 British Columbia

6.3.3.2.1 Pillar one: the best interests of the child principle

The Child, Family and Community Service Act,³²³ of British Columbia address the best interests of the child specifically in section 4 thereof. This section, similar to its South African counterpart, states that where reference is in legislation to the best interests of a child, all relevant factors must be considered in determining the child's best interests. Section 4 goes on to include examples of what factors must be taken into consideration, and refers to the child's views,³²⁴ as well as the child's physical and emotional needs and level of development³²⁵ as important in determining decision-making affecting such child.³²⁶

³²¹ Ontario Courts Accessibility Committee Making Ontario's courts fully accessible to persons with disabilities: Report of Courts Disabilities Committee+ (2006) available at www.ontariocourts.on.ca/accessible_courts/en/report_courts_disabilities.htm (accessed on 8 Sep 2013) 9.

³²² See ch 7 *infra*.

³²³ Child, Family and Community Service Act RSBC 1996 c 46.

³²⁴ S 4(1)(f) the Child, Family and Community Service Act RSBC 1996 c 46.

³²⁵ S 4(1)(b) the Child, Family and Community Service Act RSBC 1996 c 46.

³²⁶ S 4 of the Child, Family and Community Service Act RSBC 1996 c 46 states as follows: (1) Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example (a) the child's safety (b) the child's physical and emotional needs and level of development (c) the importance of continuity in the child's care (d) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship (e) the child's cultural, racial, linguistic and religious heritage (f) the child's views (g) the effect on the child if there is delay in making a decision.

Further legislation, which directly addresses the principle of the best interests of the child, includes the British Columbia's Representative for Children and Youth Act of 2006.³²⁷ Similar to the Office of the Provincial Advocate, the office of the Representative for Children and Youth in British Columbia is mandated to monitor, address and promote the attainment of rights for children and youth in the province. The Representatives Office follows a child-centred approach, which is:

...based on the rights and interests of the child being the predominant consideration... in evaluating the impact, and the responsiveness and effectiveness, of child- and youth-serving programs and services.³²⁸

The Representative is further an independent office, reporting directly to the provincial legislature. A large part of the Representative's mandate is to investigate critical injuries and deaths of children in the province.³²⁹ This investigation takes place after the completion of the necessary criminal investigation and is focused on determining possible trends, particularly in service delivery, with the intention of preventing similar occurrences.³³⁰ Although operating under a more specialised mandate, the Representative for Children and Youth investigated 261 cases of critical injuries and deaths of children and youth during its 2013/14 financial year.³³¹

6.3.3.2.2 Pillar two: the principle of non-discrimination

The British Columbia Human Rights Code³³² also specifically prohibits discrimination on the basis of disability and age and creates a human rights tribunal only, as opposed to a commission and a tribunal,³³³ to address human rights complaints such as inequality. The British Columbia Human Rights Tribunal, as established by section 31 of the British Columbia Human Rights Code, is an independent, quasi-judicial body and is responsible for addressing and adjudicating human rights

³²⁷ Representative for Children and Youth Act (SBC 2006) ch 29.

³²⁸ See the vision, mission and goals of the Representative at <https://www.rcybc.ca/about-us/vision-mission-and-goals> (accessed on 9 May 2015).

³²⁹ S 11 of the Representative for Children and Youth Act 2006.

³³⁰ *Ibid.*

³³¹ The Representative for Children and Youth 2013/14 Annual Report available at https://www.rcybc.ca/sites/default/files/documents/pdf/reports_publications/rcy-annualreport2014_final.pdf (accessed on 9 May 2015) 17.

³³² Human Rights Code [Rsb 1996] ch 210.

³³³ British Columbia is one of only 2 provinces in Canada which does not have a commission to address human rights. The other province is Nunavut.

complaints. Between 2013 and 2014 the Tribunal received 1 102 new complaints, 43% of which were based on discrimination on the grounds of disability and 6% based on the grounds of age.³³⁴

As pointed out above,³³⁵ the SAHRC, as well as the Equality Courts in South Africa do not receive nearly as many human rights complaints relating to disability or children as the relevant Canadian and Ghanaian authorities and commissions do. One assumption which can be made is that perhaps South Africa does not have as many disability or child related issues as these countries do. This assumption may, however, be challenged as it has been illustrated in an earlier chapter that a disability prevalence is directly linked to the poverty prevalence of a specific area.³³⁶ According to the World Bank, Canada is a high income level country, with a current Gross Domestic Product (GDP) of close to \$1.9 trillion US dollars, whereas South Africa is classified as a middle income country, with a GDP of around \$367 billion US dollars.³³⁷ In respect of the poverty-disability index, therefore, South Africa should hypothetically receive more disability complaints than Canada, which it does not. Another statistic which points to the inverse, is that South Africa has a population of more than 15 million more than the population in Canada. There thus is an increased likelihood that South Africa has a silent community of children and people with disabilities, as these vulnerable people are either unaware of their rights, or the recourse available to them in the case of a grievance, is inaccessible or unavailable.

6.3.3.2.3 Pillar three: survival and development

Section 4 of the Child, Family and Community Service Act³³⁸ from British Columbia includes the child's physical and emotional needs and level of development as an element to inform the best interests of the child.

³³⁴ See the British Columbia Human Rights Tribunal's 2013/14 annual report at http://www.bchrt.bc.ca/shreddocs/annual_reports/2013-2014.pdf (accessed on 6 Apr 2015) 1-2.

³³⁵ See ch 4.

³³⁶ See par 4.3.4 *supra*.

³³⁷ See the World Bank's country specific data at <http://data.worldbank.org/country/south-africa> and <http://data.worldbank.org/country/canada> both (accessed on 3 May 2015).

³³⁸ Child, Family and Community Service Act [RSBC 1996] ch 46.

6.3.3.2.4 Pillar four: the child's right to be heard

Section 1(6)(8) of the Divorce Act³³⁹ of British Columbia determines that a court must consider ~~only~~ the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.⁺ Express provision for the child's views and participation are not made.

Section 24(1)(b) of the Family Relations Act³⁴⁰ stated that if appropriate, the views of the child may be considered by a court. In 2011, this Act was however updated and replaced by the Family Law Act,³⁴¹ which came into force in 2013. This Act reflects the same obligation as contained in section 24 of the previous legislation, and states in section 37(2)(b) that a court must consider the child's views, unless it would be inappropriate to consider them. According to the decision of *BJG v DLG*,³⁴² a court's hearing of the views of children would be inappropriate only if they do not want to be heard or are incapable of expressing their own views.³⁴³

Furthermore, in terms of section 201 of the new Act, a court may decide how a child's evidence is received. The court may either admit hearsay evidence it considers reliable of a child who is absent; or give any other direction that it considers appropriate concerning the receipt of a child's evidence.³⁴⁴ The court may also do both. Section 211 further determines that the court may appoint a person to assess the views of a child in relation to a family dispute. By using the word ~~may~~, it appears that the discretion is also with the court whether or not to appoint such a person and allow for an expert to source the views of the child.

The Child, Family and Community Services Act³⁴⁵ of British Columbia refers to the child's views in numerous sections. Section 2(b) states that one of the guiding principles of the Act is ~~the child's~~ views should be taken into account when decisions relating to a child are made.⁺ Section 3(a) requires children to be informed

³³⁹ Divorce Act RSC 1985 c 3.

³⁴⁰ Family Relations Act RSBC 1996 c 128.

³⁴¹ Family Law Act SBC 2011 c 25.

³⁴² *BJG v DLG* 2010 YKSC 44.

³⁴³ *BJG v DLG* 2010 YKSC 44 par 92.

³⁴⁴ S 201(1) and (2) of the Family Law Act SBC 2011 c 25.

³⁴⁵ Child, Family and Community Services Act RSBC 1996 c 46. The Act also requires the involvement of children over the age of 12 in most stages of a court proceeding, in ss 34, 38, 44, and 49.

about services available to them, and encourages children to participate in matters which affect them. Section 4(1)(f) further indicates that when the child's best interests are considered, consideration must be given to the child's own views.

In the leading matter of *LEG v AG*,³⁴⁶ the Supreme Court of British Columbia had to engage with the rights of children to be heard in matters affecting them. In this matter, the court was faced with a decision on whether to interview children who were the subject of a custody matter, without the consent of their parents. The court held that there were three reasons to interview the children in question, which include obtaining the wishes of children; making sure they have a say in decisions affecting their lives; and providing the judge with information about the child.³⁴⁷ In 2010, the court elaborated on the rights of children to be heard in the *BJG v DLG*.³⁴⁸ Relying on *LEG v AG*, the presiding judge stated the following:

The Convention says that children who are capable of forming their own views have the legal right to express those views in all matters affecting them, including judicial proceedings. In addition, it provides that they have the legal right to have those views given due weight in accordance with their age and maturity. There is no ambiguity in the language used. The Convention is very clear; all children have these legal rights to be heard, without discrimination. It does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation, or both. It does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children's participation.³⁴⁹

Although British Columbia does not have an office or service similar to that of the OCL, legal aid is still available to persons or children who qualify to receive it. The Legal Services Society Act of 2002,³⁵⁰ created the Legal Services Society, otherwise known as Legal Aid, in order to provide legal information, advice and representation services to persons with minimal incomes. The Legal Services Society Act³⁵¹ also determines the extent of services provided by Legal Aid, within a framework of a

³⁴⁶ *LEG v AG* (2002) BCSC 1455.

³⁴⁷ *LEG v AG* (2002) BCSC 1455 par 15.

³⁴⁸ *BJG v DLG* (2010) YKSC 44.

³⁴⁹ *BJG v DLG* (2010) YKSC 44 par 3.

³⁵⁰ Legal Services Society Act [SBC 2002] ch 30.

³⁵¹ *Ibid.*

memorandum of understanding between the Legal Aid and government, which broadly sets out the expectations of both parties and funding determinations.³⁵²

Between 2014 and 2015, Legal Aid spent an amount of almost \$8 million dollars to provide legal representation in child protection matters. The bulk of this amount went to the payment of outsourced lawyers requested to represent children and families in these matters.³⁵³

6.3.3.2.5 Pillar five: the rights of CWD specifically

British Columbia's Child, Family and Community Services Act expressly refers to the rights of children with disabilities. Section 70(1)(k) provides that children have the right to to be provided with an interpreter if language or disability is a barrier to consulting with them on decisions affecting their custody or care. This determination also supports the rights of CWD to be heard.

6.3.3.2.6 Pillar six: Article 13 of the UNCRPD

In British Columbia, no specific legislation on this topic is presently in place relating to Article 13 of the UNCRPD. Paragraph 3.8.2.12 of the Department of Housing in British Columbia's 2007 *Building Access Handbook*, however, particularly states that access to people with disabilities must be provided at each court, which is a public facility.³⁵⁴

6.4 The USA

6.4.1 Introduction

As indicated above, the USA has yet to ratify the UNCRC and UNCRPD. The USA has however made particular strides in its pursuit to provide access to justice for people with disabilities. State and federal laws require that government programmes

³⁵² S 21 of the Legal Services Society Act [SBC 2002] ch 30.

³⁵³ Legal Services Society 2014/15 Annual Service Plan Report (2015) available at http://www.legalaid.bc.ca/assets/aboutUs/reports/annualReports/annualServicePlanReport_2014.pdf (accessed on 22 Sep 2015) 24.

³⁵⁴ Par 3.8.2.12 of the Department of Housing in British Columbia's 2007 Building access handbook available at http://www.housing.gov.bc.ca/pub/building_access_handbook_2007.pdf (accessed on 31 Jul 2015).

be accessible to persons with disabilities. The ADA was signed into law on 26 July 1990 and later amended in 2009.³⁵⁵ This Act prohibits discrimination on the basis of disability in various sectors, including employment,³⁵⁶ state and local government,³⁵⁷ public accommodation,³⁵⁸ commercial facilities,³⁵⁹ transportation³⁶⁰ and telecommunications.³⁶¹ According to the USA Department of Justice, the ADA determines that:

State and local governments are required to follow specific architectural standards in the new construction and alteration of their buildings. They also must relocate programs or otherwise provide access in inaccessible older buildings, and communicate effectively with people who have hearing, vision, or speech disabilities. Public entities are not required to take actions that would result in undue financial and administrative burdens. They are required to make reasonable modifications to policies, practices, and procedures where necessary to avoid discrimination, unless they can demonstrate that doing so would fundamentally alter the nature of the service, program, or activity being provided.³⁶²

In 2004, the USA Supreme Court made the following observations in *Tennessee v Lane* regarding the ADA and upholding the application of this Act to courts and court services:³⁶³

The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem. Recognizing that failure to accommodate

³⁵⁵ Weicker %historical background of the Americans with Disabilities Act+(1991) *Temp. L. Rev* 387-389.

³⁵⁶ S 102 of the ADA.

³⁵⁷ S 202 of the ADA.

³⁵⁸ S 302 of the ADA.

³⁵⁹ S 303 of the ADA.

³⁶⁰ S 223 of the ADA.

³⁶¹ S 401 of the ADA.

³⁶² See the USA Department of Justice's % guide to disability rights laws+(2009) available at <http://www.ada.gov/cguide.htm#anchor62335> (accessed on 8 Sep 2013).

³⁶³ In this matter, the complainant, a paraplegic and wheelchair bound, was due to appear in court for a criminal charge. The court, however, did not have any elevators and the complainant was forced to crawl up two flights of stairs to the courtroom in which his matter was to be heard. When his matter was postponed and he was scheduled to make another appearance, the complainant refused to crawl up the stairs, or be carried up the stairs. Consequently, the complainant was arrested, for failing to appear in his criminal matter. The second complainant was a court reporter and also a paraplegic, who claimed that a number of courthouses were inaccessible to her as a result of her disability. See Molesso %critical point in the disabilities movement: How will Tennessee v. Lane affect claims brought under Title II of the Americans with Disabilities Act?+(2006) *St. John's L. Rev* 707.

persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers so as to facilitate access to justice for people with disabilities – as it applies to the class of cases implicating the fundamental right of access to the courts, [Title II] constitutes a valid exercise of Congress’s authority to enforce the guarantees of the Fourteenth Amendment.³⁶⁴

States therefore have an obligation to address the rights of persons with disabilities expressly within the judicial setting. The Supreme Court’s decision in this matter reaffirms the ongoing responsibility of states to accommodate individuals with disabilities under the ADA without imposing new measures. Instead, the Supreme Court underpins the need for courts to have greater cognizance and understanding about the specific requirements of the ADA. Some of measures undertaken by three separate states will be discussed below, so as to inform on possible best practice in respect of Pillar six: Article 13 of the UNCRPD.

In respect of jurisprudence emanating from the USA, various issues relating to access to justice for people with disabilities have also been heard by different courts. In 1999 Deaf individuals married in a civil courtroom asked for a sign language interpreter, however, they were not provided with the requested interpreters. The court indicated that as the wedding was a service provided by the court, the court ought to have provided the relevant service to the individuals.³⁶⁵ In 1993 the court also held that excluding blind persons from jury service violated their rights under the ADA.³⁶⁶

In respect of assistive devices, the court has also held that providing a chemically sensitive person with devices such as "life-support systems,+ a life-support bubble,+ %equired medical aids,+ was not the responsibility of the court as they constituted personal devices.³⁶⁷ The court has also held that presenting certain programs on the second floor of a court, was a violation of mobility impaired veterans who seek to make use of said programs.³⁶⁸ The USA experience may thus also serve as useful

³⁶⁴ See *Tennessee v Lane* 541 U.S. 509 (2004) para 1993-4.

³⁶⁵ *Soto v City of Newark* 72 F Supp 2d 489 (DNJ 1999).

³⁶⁶ *Galloway v Superior Court of District of Columbia* 816 F Supp 12 (DC 1993).

³⁶⁷ *McCauley v Winegarden* 60 F 3d 766 (11th Cir 1995).

³⁶⁸ *Layton v Elder* 143 F 3d 469 (8th Cir 1998).

foreign law as determined by section 39 of the Constitution, as its courts have also explored issues South Africa has yet to engage on.

6.4.2 Measures undertaken by States to address pillar six

In respect of the rights of persons with disabilities, State and Federal laws require that government programs be accessible to persons with disabilities and place an express obligation on states to address the rights of persons with disabilities.

In 2004 the Supreme Court of Colorado issued a directive to promote and ensure equal access to and full participation in court and probation services and programs by people with disabilities.³⁶⁹ This directive was also aimed at facilitating access to various role-players within the judicial system, such as attorneys, litigants, defendants, witnesses, victims, prospective employees and public observers of court proceedings.³⁷⁰ In 2004, the Georgia Commission on Access and Fairness in the Courts also issued a court accessibility Handbook in order to adhere to its responsibility to provide access to justice for people with disabilities under the ADA.³⁷¹ Further to this, the Judicial Council of California has also implemented rule 1.100 of the California Rules of Court in order to implement the federal ADA.³⁷²

Below follows an analysis of the Guide, Handbook and Rules so as to possibly establish best practice examples for South Africa in respect of its obligations under Article 13 of the UNCRPD.

³⁶⁹ Colorado Judicial Department %Access to the courts: A resource guide to providing reasonable accommodations for people with disabilities for judicial officers, probation and court staff Directive 04-07+ (2004) available at <https://www.courts.state.co.us/userfiles/file/administration/hr/ada/adaresourceguide.pdf> (accessed on 17 Jul 2015). Hereafter referred to as the Guide.

³⁷⁰ The Guide 2.

³⁷¹ Georgia Commission on Access and Fairness in the Courts %A handbook for Georgia court officials on courtroom accessibility for individuals with disabilities+ (2004) available at http://www.georgiacourts.org/files/ADAHandbk_MAY_05_800.pdf (accessed on 15 Sep 2013). Hereafter referred to as the Handbook.

³⁷² See the 2015 California Rules of Court available at http://www.courts.ca.gov/cms/rules/index.cfm?title=one&linkid=rule1_100 (accessed on 31 Jul 2015).

6.4.2.1 The Guide

The Guide expressly states that in the provision of reasonable accommodation for persons with disabilities, primary consideration shall be given to the specific accommodation requested by the person, but that an alternative accommodation may be offered and arranged if equally effective. The caveat of this provision is that modifications in order to provide reasonable accommodation should not fundamentally alter processes, or cause undue burden.³⁷³

The Guide includes a definition of disability³⁷⁴ and provides judicial stakeholders with assistance on how to realise the equal rights of persons with disabilities to approach the court. The onus is placed on the person with the specific disability to alert the court for his or her need for accommodation.³⁷⁵ The court in turn is then given an opportunity to provide the reasonable accommodation at no charge to the individual. The individual is consulted in order to determine what accommodation will be best suited.³⁷⁶ The Guide also includes a list of frequently asked questions to assist, for instance, the court official who is mandated to facilitate reasonable accommodation at court.³⁷⁷ In describing what architectural adjustments may be made in order to accommodate persons with disabilities, the Guide includes a number of accommodations. These include the provision of wheelchair ramps and wheelchair accessible restrooms, the adjusting of the height of public information counters, the labelling of facilities with Braille lettering, the provision of adequate lighting in the courtrooms for those with vision disabilities, as well as the provision of adjustable microphones for witnesses.³⁷⁸ Apart from providing for architectural accessibility, the Guide emphasises the need for communicative accommodations. In order to address the variety of assistances required by persons with a broad spectrum of

³⁷³ The Guide 3.

³⁷⁴ The Guide 3. A person with disability is described as someone who has a physical, mental or communication disability that substantially limits one or more of the major life activities such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. The disability makes it hard for the person to do activities that most other people can do. It also may restrict the person's way of doing things and/or where and for how long the person can do a certain activity or function.

³⁷⁵ The Guide 4 and 10.

³⁷⁶ The Guide 4.

³⁷⁷ The Guide 5-11.

³⁷⁸ The Guide 5.

disabilities, the Guide provides examples of assistive devices and support which may be put in place in order to facilitate the full participation of persons with disabilities at court.³⁷⁹

In respect of assisting persons with hearing impairments, depending on the needs of the individual and the extent of the disability, reasonable accommodation may include providing a sign-language interpreter; allowing the person to sit where he or she can hear better; allowing a telecommunication system to communicate or providing an assistive listening system or computer-aided transcription device.³⁸⁰ As these measures are sometimes specialised in their nature, providing court officials with a list of available accommodations allows them to guide the process of providing for full accessibility to persons with disabilities at court with the relevant knowledge and awareness required.

One important aspect the Guide highlights is that family members or amateurs, who know basic sign language, should never interpret for a court related process.³⁸¹ This is due to an assumption that they would not be familiar with court terminology and protocols and would have difficulty in remaining neutral in the process. For this reason, the Colorado Department of Human Resources Division of Vocational Rehabilitation maintains a list of qualified legal interpreters who have specialist certificates in legal interpreting.³⁸²

Regarding persons with visual impairments, the Guide provides for accommodations such as the provision of forms and instructions in Braille, large print or on audio

379 The Guide 6-11.

380 The Guide 6.

381 The Guide 7.

382 In terms of the guidelines provided, interpreters should hold a generalist certification through the National Registry of Interpreters for the Deaf; have completed a required minimum hours of specialized training for interpreting in the legal setting; and have satisfied the required number of hours of supervised interpreting in the legal setting. Guide 7. See par 4.3.6 *supra* for a full discussion on sign-language interpreters in South Africa. At present, the DOJ&CD is endeavouring to facilitate a partnership with DeafSA. In order to fully allow for participation of hearing impaired persons within the judicial setting, available interpreters, according to the Colorado Guide, must be trained specifically in legal interpretation. In an environment where, as a result of South Africa's history, trained sign-language interpreters are few and far between, identifying those who may have specialist knowledge in relation to legal interpretation will remain challenging.

tape.³⁸³ The Guide also states that court officials may be required to provide assistance at the counter in filling out necessary paperwork.³⁸⁴ Another measure that may be made available is allowing for written materials to be read out loud in the courtroom as well as allowing the person to sit closer than usual if of limited vision.³⁸⁵ The provision of additional lighting is also stipulated as a measure in which the court and its processes may be adjusted in order to allow for full participation of the person with the impairment.³⁸⁶ An interesting consideration in terms of scheduling matters involving persons with sight impairments is to attempt to schedule cases for the midday. This will allow for the maximum level of natural light. Nevertheless, the Guide also recommends the use of specific lighting bulbs, indicating that incandescent bulbs with a high wattage are preferred over florescent as florescent bulbs provide a glaring blue light and does not assist in the full illumination of a room.³⁸⁷ In addition the Guide endorses the use of 14-point or larger black type print or font on yellow paper which increases the readability of materials.³⁸⁸

In respect of addressing accessibility challenges relating to persons with mobility limitations, apart from making architectural adjustments, the court is recommended to accept videotaped testimony from a person who finds it difficult to approach the court.³⁸⁹ This measure may also be useful where it is found to be challenging to bring a child to court. Through this measure, the child may remain in an environment which he or she finds comforting, and the resources required to take a child to court

383 The Guide 8.

384 *Ibid.*

385 *Ibid.*

386 The Guide 8. The following recommendations are also made in the Guide in order to assist people who are visually impaired: %People who are blind or visually disabled often can be assisted by increasing the size of an object, by changing viewing distance, by improving illumination, and by improving contrast. Changing size and distance go hand in hand. Size can be changed in several different ways: an object can be made larger (such as a big-button telephone), materials can be reproduced larger (such as large print), a nearby object can be enlarged (using a magnifier), or a far-away object can be enlarged (using a telescope). Devices can be set into glass frames, some of which are bioptic.+

387 The Guide 8.

388 *Ibid.*

389 The Guide 9.

(albeit an accompanying social worker, adjusted transportation, required medical assistance) can be spared through this accommodation.³⁹⁰

In relation to cognitive or developmental disabilities, the Guide offers a range of measures the court may apply in order to accommodate such persons within the judicial environment.³⁹¹ Most of these measures request the court officials to be patient and to speak clear, slow and concisely, in order to facilitate the maximum participation from the individual. The court is also encouraged in relevant circumstances to allow the individuals to perform their testimony through enactment or gestures. Although these measures do not seem as extraordinary, the recognition for the need thereof is crucial. The level of participation sourced from these individuals, and especially children, may be wholly dependent on the patience and demeanour of the presiding officer or intake clerk.³⁹²

³⁹⁰ This accommodation in turn needs to be measured against the resources required to facilitate the video recording. The Colorado State determines that any accommodation should not fundamentally alter the service or program or cause undue financial or administrative burden. See the Guide 3. The UNCRPD conversely determines in Art 2 that the accommodation should not impose a disproportionate or undue burden, and does not refer to a financial and administrative impact specifically. In the light of the best interests of the child principle, however, the writer argues the impact of such accommodation may be trumped by the paramountcy of the latter principle. See par 3.2.2.2 for a discussion on the best interests of the child into the UNCRC, and par 3.3.3 where the correlation between the best interests of the child principle in the UNCRPD and UNCRC is discussed.

³⁹¹ The Guide also provides the court with guidance regarding what types of disabilities constitute developmental and cognitive disabilities respectively. Cerebral palsy, epilepsy, autism, hearing loss, Down's syndrome, mental retardation, spinal injury or brain injury are categorized as developmental disabilities, where mental retardation, attention deficit hyperactivity disorder (ADHD), dyslexia, Alzheimer's disease, aphasia, brain injury, language delay, and learning disabilities are categorized as cognitive disabilities. See the Guide 9.

³⁹² Participation from children with specific disorders may vary depending on the severity of the disorder. For instance, certain methods may be used in order to prompt a child with Autism to participate in communication. Koegel *et al* recommend that if a child requires more intensive communication intervention, and needs to be prompted to participate in communication, two research-based interventions that may be appropriate are the Picture Exchange Communication System and Pivotal Response Training. The first method increases motivation for the child to participate by, for instance, providing immediate natural reinforcement contingent upon the communication behaviour of the child. The second makes use of a symbol card to allow the child to express him or her by means of using pictures. Both these measures require knowledge and patience. A presiding officer overseeing a matter in a Children's Court may very well dismiss the child's participation on the basis of the child's stage of development, rather than allowing for an intense process of extracting the child's views in order for the child to participate in an appropriate way. See Koegel *et al* Interventions for children with autism spectrum disorders in inclusive school

In respect of the costs involved to accommodate persons with disabilities, the Guide indicates that aids and services necessary for effective participation will be provided to individuals at no cost to the person with the disability. This does exclude devices of a personal nature, such as reading glasses.³⁹³ As many of the recommended accommodations may take time to secure, the person with the disability must give five (5) days notice to the relevant official at the court in order to inform him or her of certain accommodations required. Should the requested accommodation be denied, the requestor may seek review of the decision to deny a certain accommodation.³⁹⁴ Lastly, the Guide also provides basic etiquette to take into consideration when interacting with people with disabilities. It provides guidelines to courtroom officials specifically in order to prevent any form of insensitivity or direct and indirect discrimination. Judges are requested to engage with the person with a disability about his or her disability, in order to ascertain how best to proceed forward with a matter. Recommendations are also made in order to prevent the use of derogatory names and labels. For instance, rather than stating that a person is *crippled*, he or she should be referred to as a person with a physical disability. Similarly, when referring to children without disabilities in the context of disabilities, reference should not be made to *normal* and *abnormal* children.³⁹⁵

According to the website of the Colorado Judicial Department, this Guide is still in use, more than ten years after its publication. This is an indication that the Guide may be useful in assisting people with disabilities to access justice.³⁹⁶ An accommodations request form is also available on the Department's website, making it easy for potential litigants, witnesses and complainants to inform the court about the accommodations they wish to request.³⁹⁷

settings+ (2011) *Cognitive and Behavioral Practice* available at <http://education.ucsb.edu/autism/documents/articleforwebsite.pdf> (accessed 15 Sep 2013)
4. See also s 10 of the Children's Act 38 of 2005 discussed in par 4.3.4 *supra*.

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The Guide 6.

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The Guide 10.

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The Guide 14.

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Email correspondence dated 26 Oct 2015 between the author and the Department of Justice in Colorado confirmed that the guide is still in use, more than 10 years after its publication. The Department also confirmed that the guide has been useful, and facilitates a possible number of 60-100 accommodation requests in Colorado per month.

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See <https://www.courts.state.co.us/Administration/HR/ADA/Request.cfm> (accessed on 27 Sept 2015).

6.4.2.2 The Handbook

Georgia's Handbook generally focuses on two areas: addressing architectural barriers relating to accessing the courts and facilitating proper interaction with persons with disabilities approaching the court. At the outset, the Handbook indicates that the benefits of providing disability-related accommodations outweigh the accompanying costs as civil liberties of persons with disabilities are protected through the advancement of relevant reasonable accommodations.³⁹⁸

Addressing the key aspect of interaction with people with disabilities, the Handbook indicates that negative and unhelpful attitudes from court personnel may hinder persons with disabilities from participating, even if they were able to participate. Court personnel are urged to treat persons with disabilities with the same courteousness, dignity and respect that would be afforded to persons without disabilities. The elimination of attitudinal barriers is therefore vital to the State of Georgia in order to afford persons with disabilities with equal rights to access justice.³⁹⁹ Much advice is provided to court officials in order to assist them in conducting themselves professionally and appropriately when approached by people with disabilities.⁴⁰⁰ One of the main values of the Handbook is that it recognises the potential ignorance on the side of the court official, and assures the official that certain emotions may be typical when confronted by a range of situations. For example, officials are advised the following: "Do not let it bother you if someone refuses your offer of assistance+ or "Don't become anxious if you have to make repeated attempts at listening or speaking to ensure effective communication."⁴⁰¹

³⁹⁸ The Handbook 9.

³⁹⁹ The Handbook 19.

⁴⁰⁰ Officials are recommended not to make assumptions about the person with a disability and only assist when an offer of assistance has been accepted. Court officials are also urged to remain patient, even if they think that the person with a disability is unable to understand or communicate with them. Court officials are also recommended not to ask a person approaching the court whether he or she has a disability. They are advised to rather request whether such person may need an alternative method for facilitating communication.

⁴⁰¹ The Handbook 19.

The Handbook to a large extent echoes the information in the Colorado Guide as it relates to assistive devices in general.⁴⁰² The Handbook, however, provides a more comprehensive approach in assisting court officials with a user friendly tool in order to adhere to their responsibilities under the ADA.⁴⁰³

The Handbook from Georgia has also served as a model document, and is to a large extent applied by the State of Michigan. In its own reference guide, the Michigan State Court Administrative Officers' Handbook for Michigan Courts on Accessibility and Accommodation for Individuals with Disabilities⁴⁰⁴ applies the approaches as set out in the Handbook, with the exception of certain demographical modifications.

During the Judicial Council of Georgia's General Session held in 2014, the Council indicated that the Handbook was in the process of being reviewed and updated.⁴⁰⁵ In its 2015 General session the Council indicated that the updated and reviewed Handbook was to be completed by 2017.⁴⁰⁶

6.4.2.3 The Rules

In California, supplementary state laws apply to people with disabilities. These laws include the Unruh Civil Rights Act⁴⁰⁷ and California Disabled Persons Act.⁴⁰⁸ These Acts guarantee equal rights for people with disabilities in relation to services at

⁴⁰² The Handbook (39-44) describes when courts may wish to use certain assistive devices such as assistive listening systems, communication access, realtime translation, sign language interpreters, text telephone, telecommunications relay services, public service announcements, alternate document formats, accessible websites.

⁴⁰³ See par 6.4.1 *supra* for a discussion on what the state's responsibilities are to the ADA and access to justice.

⁴⁰⁴ The Michigan State Court Administrative Office's Handbook for Michigan Courts on Accessibility and Accommodation for Individuals with Disabilities+ (2005) available at <http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/ADA-Handbook.pdf> (accessed on 11 Jul 2015).

⁴⁰⁵ See http://www.georgiacourts.org/sites/default/files/Judicial%2520Council%2520Materials_0604_final.pdf (accessed on 20 Aug 2015).

⁴⁰⁶ See http://www.georgiacourts.org/sites/default/files/judicial%20council/Judicial%20Council%20Materials_april2015.pdf (accessed on 20 Aug 2015).

⁴⁰⁷ Unruh Civil Rights Act (Civil Code s 51).

⁴⁰⁸ California Disabled Persons Act (Civil Code s 54).

business establishments as well as full and free use of public places. As is the case with Colorado, California has also proactively set guidelines for courts on how to accommodate people with disabilities in their pursuit to access justice. Rule 1.100 of the California Rules of Court states:

It is the policy of the courts of this state to ensure that persons with disabilities have equal and full access to the judicial system.⁴⁰⁹

Under this rule, any person who has a mental or physical disability which impairs or limits major life activities, has a record of such impairment, or is regarded as having such impairment may request an accommodation.⁴¹⁰ Accessibility in this regard may include access to restrooms, moving in and around the court, as well as full participation in the court's programs and services. These may involve the use and provision of assistive devices and technology.⁴¹¹

A key measure of facilitating access to justice for people with disabilities rests with the access coordinator appointed by the court.⁴¹² The access coordinator is mandated to receive the requests for accommodation by any person needing to approach the court and requiring some form of accommodation. The access coordinator is also trained to provide accessible information and advice to people with disabilities in order to prepare them for their approach to court. The definition included in Rule 1.100 of the California Rules of Court indicates that accommodation may include the following:

...making reasonable modifications in policies, practices, and procedures; furnishing, at no charge, to persons with disabilities, auxiliary aids and

⁴⁰⁹ 2015 California Rules of Court available at http://www.courts.ca.gov/cms/rules/index.cfm?title=one&linkid=rule1_100 (accessed on 31 Jul 2015).

⁴¹⁰ S a(1) read with s a(3) of Rule 1.100 of the 2015 California Rules of Court requests for accommodations by persons with disabilities available at http://www.courts.ca.gov/cms/rules/index.cfm?title=one&linkid=rule1_100 (accessed on 31 Jul 2015).

⁴¹¹ S a(3) of Rule 1.100 of the 2015 California Rules of Court requests for accommodations by persons with disabilities available at http://www.courts.ca.gov/cms/rules/index.cfm?title=one&linkid=rule1_100 (accessed on 31 Jul 2015).

⁴¹² S (b) of Rule 1.100 of the 2015 California Rules of Court requests for accommodations by persons with disabilities available at http://www.courts.ca.gov/cms/rules/index.cfm?title=one&linkid=rule1_100 (accessed on 31 Jul 2015).

services, equipment, devices, materials in alternative formats, readers, or certified interpreters for persons with hearing impairments; relocating services or programs to accessible facilities; or providing services at alternative sites.

In respect of the intimidating environment a court may constitute for children, the accommodation providing for an alternative site is imperative. This may imply that the court will, at its own cost, move the hearing of a matter in order to accommodate the disability of the child, should it not be an excessive burden on the court's resources. In its 2007 resource pamphlet on the services available for people with disabilities at court, the Judicial Council of California indicated that although certain measures of accommodation must be considered, the court is not responsible to provide personal devices (for example: wheelchairs, prescription eyeglasses, hearing aids) to individuals with disabilities. Nor will it provide certain services to people approaching court which are of a personal nature, such as assisting a person with eating, dressing and going to the toilet.⁴¹³

This statement once again calls for the need to recognise the two-tier vulnerability of the child and the fact that an approach for adults with disabilities may not necessarily cater to the needs of CWD. A permutation approach is required which means that the child's status as a child as well as a person with a disability must be taken into account. For instance, a child with a disability may have to be escorted to bathroom facilities. Where the child has been at court or waiting to deliver testimony for an extended period of time, assistance will be required to feed the child. In this regard, where the court indicates that it is not the relevant body to provide these services, it should be the court who assures that a relevant service provider is available to provide the required assistance to the child approaching the court. This may include determining whether the child will be accompanied by a parent or caregiver and whether the parent or caregiver will remain at the courthouse to provide any required service for the child.

6.5 Conclusion

⁴¹³ See the California information pamphlet at <http://www.courts.ca.gov/documents/access-fairness-QandA-for-persons-with-disabilities.pdf> (accessed on 20 May 2015).

The purpose of this chapter was to compare the countries Ghana and Canada to the framework established in Chapter 4 hereof: the six pillars. From this comparison, the aim of this chapter was to identify possible gaps and best practices which may be considered in the South African context. Examples from the USA were further used to illustrate best practice models in addressing the sixth pillar of the framework: Article 13 of the UNCRPD.

As opposed to South Africa where disability is only included in the context of non-discrimination, Ghana protects the rights of persons with disabilities expressly in its Constitution.⁴¹⁴ Ghana also has domestic legislation specifically addressing the rights and needs of people with disabilities.⁴¹⁵ Although this legislation came into operation before Ghana ratified the UNCRPD, it encompasses various different sets of rights as reflected in the UNCRPD, such as the right to have access to justice.

In this regard, the Ghanaian Disability Act calls for persons involved in the judicial realm to be specifically trained to work with persons with disabilities.⁴¹⁶ The Ghanaian Disability Act also addresses reasonable accommodation in terms of the needs of persons with all types of disabilities.⁴¹⁷ Boldly so, the Ghanaian Disability Act infers that by the latter part of 2016, all buildings open to the broader public, must be accessible to persons with disabilities as well.⁴¹⁸ In terms of procedural reasonable accommodation, the Ghanaian Disability Act determines that should a person present a disability, such disability must be taken into consideration throughout judicial proceedings.⁴¹⁹ The Ghanaian Disability Act, however, does not elaborate on how far this consideration must stretch, save for indicating that such a person must be provided for accordingly.

The rights of CWD to have access to justice are not addressed directly in Ghanaian legislation. However, various safeguards and mechanisms have been put in place in order to serve this right.⁴²⁰ The Child Panels as well as the Family Tribunals are set

⁴¹⁴ S 29 of the Ghanaian Constitution. See also par 6.2 *supra*.

⁴¹⁵ See para 6.2.3 and 6.2.6 *supra*.

⁴¹⁶ See par 6.2.7 *supra*.

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*

⁴¹⁹ See par 6.2.6 *supra*.

⁴²⁰ *Ibid.*

up to include persons from the community, who may have expertise in the area of the child's specific disability.⁴²¹ Children are also encouraged to participate and children may have legal representation at the Family Tribunal.⁴²² Ghana's Child Panels, which comprise persons from various areas of expertise, support a multi-disciplinary approach when addressing the needs of CWD approaching the court. Not only do they support a quasi-judicial methodology, they also allow for persons who may have skills in working with CWD, to assist in the decision-making. This approach circumvents the necessity of each judicial officer having to be trained on every disability that a child may present. Panels may be assembled to include the expertise needed in a specific matter. This will have the effect that a Child Panel assisting in a matter where the child presents a hearing disability, may be different from the one hearing a matter relating to a child with Down's syndrome. This approach therefore supports the UNCRPD's principle of reasonable, age-appropriate accommodation as well as the key necessity of awareness and training on disabilities.⁴²³

Ghana's Family Tribunal also creates an important benchmark as far as accommodations are concerned. The Family Tribunal may be held in a building other than a court, should specialised and specific accommodations be required in order to address the needs of the child with a disability. These quasi-judicial structures resemble the Family Group Conference as determined by the CJA⁴²⁴ and Children's Act⁴²⁵ in South Africa. Neither the Child Panel nor the Family Tribunal however requires the consent from the parties in order to proceed with a matter through its structures.⁴²⁶ These quasi-judicial structures therefore facilitate access to justice by not forcing vulnerable children through the court processes.

421 See par 6.2.5 *supra*.

422 See par 6.2.5 *supra*.

423 Art 13 of the UNCRPD.

424 S 61 of the CJA.

425 S 70 of the Children's Act.

426 S 61(1)(b) of the CJA states that a Family Group Conference may only take place if both the child and victim consents in matters where the child has been found to be in conflict with the law. S 70 of the Children's Act 38 of 2005 further determines that a Children's Court may order that a matter be referred to a Family Group Conference before the matter is heard by said court. In this regard, the facilitator of the Family Group Conference may be a social worker, or other suitable qualified person, who may be more appropriate to address a matter

However, in neither Ghana nor Canada are the rights of CWD so clearly defined in child related legislation as in the Children's Act of South Africa. This may be because both these countries have specific disability legislation incorporating and domesticating the rights and obligations contained in the UNCRPD.⁴²⁷ As South Africa has yet to incorporate UNCRPD into a comprehensive domestic law, it is necessary that the Children's Act as the hopefully interim legislative mechanism, addresses the specific rights of this vulnerable group.

Canada, and specifically through the province of Ontario, represents a clear commitment towards the rights of children, as well as the rights of people with disabilities to access justice.⁴²⁸ As with most approaches, the rights of CWD to access justice as a separate, recognised group are still underdeveloped. Nevertheless, best practice models may be derived from looking at Ontario's approach to children's rights, as well as its approach to the rights of persons with disabilities.⁴²⁹ The Provincial Advocate is an example of how responsive Ontario's judicial system is to the needs of children. Moreover, the Provincial Advocate addresses the needs of CWD specifically and creates a platform where alternative dispute resolution may be utilised to respond to the needs and rights of these children.⁴³⁰ More importantly, the Provincial Advocate is an independent body speaking on behalf of vulnerable children. Although the SAHRC may operate in much the same manner, it does not focus on children's rights alone and may therefore not advocate enough for the rights of children as well as CWD in the light of their rights to access justice.

Ontario has two pieces of legislation addressing accessibility rights of people with disabilities.⁴³¹ Furthermore, the Courts Committee has expressly addressed the rights of people with disabilities to have access to justice. In order to address challenges emanating from a non-responsive and archaic judicial system, it is

involving a child with a disability. See the discussion on the CJA and Children's Act at par 4.2 *supra*.

⁴²⁷ Canada, nationally, has acts such as the Canadian Rights and Freedoms Charter, as well as the Canadian Human Rights Act. It is, however, the provinces which have specific legislation in respect of disabilities.

⁴²⁸ See para 6.3.2.5, 6.3.3.1.5 and 6.3.3.2.5 *supra*.

⁴²⁹ See par 6.3.2.1 *supra*.

⁴³⁰ *Ibid*.

⁴³¹ See para 6.3.2.5, 6.3.3.1.5 and 6.3.3.2.5 *supra*.

important to identify the various barriers which have created inaccessibility. This allows a focused response and practical recommendations addressing specific and precise challenges and not just a holistic, removed and general approach towards addressing these issues. The barriers identified by the Courts Committee are barriers relevant to accessibility issues throughout the South African judicial system as well.⁴³²

The recommendations emanating from the Courts Committee can be universally applied and serve as a valuable yardstick when comparatively measuring South Africa's ability to address the rights of people with disabilities to have access to justice. In this regard, the measures recommended by the Courts Committee can be expanded to customise recommendations in relation to the rights of CWD to have access to justice. Recommendations such as training, designated officials and public awareness are crucial in order to safeguard the rights of CWD to access justice.⁴³³ Ontario may therefore serve as a valuable gauge in order to progressively address the challenges experienced in South Africa towards the pursuit of ensuring that CWD obtain access to justice.

Domestic legislation supporting the rights of people with disabilities, as well as their specific right to have access to justice, is also established in the Province of Ontario, Canada.⁴³⁴ Domestic legislation determines that by 2025 all buildings open to the public must be made accessible to people with disabilities as well. These include courts.

Although the USA has yet to ratify the UNCRC as well as the UNCRPD, its national disability legislation proactively upholds the rights of people with disabilities since the early 1990s.⁴³⁵ The states of Georgia, California and Colorado's guidance to courts on how to address and overcome the challenges presented by facilitating access to justice for people with disabilities, is stellar to the extent which this right is endeavoured to be protected.⁴³⁶ Information provided in the Guide as well as the

⁴³² See para 6.3.2.6, 6.3.3.1.6 and 6.3.3.2.6 *supra*.

⁴³³ See para 6.3.2.6, 6.3.3.1.6 and 6.3.3.2.6 *supra*.

⁴³⁴ See para 6.3.2.5, 6.3.3.1.5 and 6.3.3.2.5 *supra*.

⁴³⁵ See par 6.4.2 *supra*.

⁴³⁶ *Ibid.*

Handbook point towards universal challenges⁴³⁷ and may therefore be used as a yardstick for other countries as well.

South Africa therefore has a wealth of information available from best practices applied regionally as well as internationally. Access to justice for CWD may therefore be promoted in South Africa, should certain measures be implemented and applied. One of the key trends in countries where disability rights seem to be more clearly upheld, is the fact that domestic legislation was enacted. Clear obligations contained in legislation moves the respective governments to act more proactively in order to address the needs of people with disabilities to access justice. Case law on the rights of persons with disabilities to have access to justice is also more prevalent, which in turn creates precedents for other public bodies to follow. Committees, guides and handbooks further enhance the facilitation of reasonable accommodation as called for by the UNCRPD. In respect of the abovementioned, as well as conclusions drawn from previous chapters, various recommendations may be made in order to ensure that CWD have the right to and assured equal access to justice.

⁴³⁷ See par 6.4.2 *supra*.

Chapter 7: Recommendations and Conclusion

- 7.1. Introduction: The vulnerability of children with disabilities
 - 7.2. Access to justice for children with disabilities: South Africa's obligations in terms of the Constitution and international law
 - 7.3. Responses and recommendations
 - 7.4. Conclusion
-

7.1. Introduction: The vulnerability of children with disabilities

A brief illustration was provided on the estimated prevalence of CWD worldwide in Chapter 1.¹ UNICEF estimated that around 150 million of the world's children live with some sort of disability.² As this number only reflected disability numbers amongst children globally, Chapter 5 endeavoured to determine the number of CWD in the domestic context. This was done to provide information to inform role-players and enable the proper resource distribution by government, as well as ensuring adequate planning and the institution of preventative programmes in respect of the needs of CWD.³ This was done by assessing data gathered mainly from the 2011 South African Census.⁴ Chapter 5, however, illustrated that obtaining a clear picture in respect of how many children in South Africa live with some sort of disability, remains challenging.⁵

The data gathered from Census 2011 on the age of children in South Africa included the categories from 0-4 years, 5-9 years, 10-14 years and 15-19 years.⁶ Information was therefore gathered up to and including persons who had reached the age of 19, but not yet 20. The recognised definition in law of children in South Africa is any person *below the age of 18 years*.⁷ From this calculation, the exact number of

¹ See par 1.4 *supra*.

² *Ibid*.

³ See para 5.2 and 5.3 where the CORC highlighted the importance of gathering data on children with disabilities, as it has an impact on a State Party's resource distribution.

⁴ See par 5.1.2.1 *supra*.

⁵ See par 5.1 where it is reiterated that reliable data on children with disabilities are scarce and largely speculative, as children are in general overlooked when general surveys and national data is collected.

⁶ See par 5.3 *supra*.

⁷ S 28(3) of the South African Constitution, as well as par 2.5 *supra*.

children in South Africa can therefore only be estimated and this number was estimated to be around 18 million in total.⁸

In respect of the prevalence of disability presented by these approximate 18 million children, the data gathered from Census 2011 posed another challenge: no data was gathered on children below the age of five years.⁹ This means that as a result of the age brackets of data collection and the omission of gathering disability data on children below the age of five years, there is no clear picture of the *number* of children below the age of 18 years who live with some form of disability.¹⁰ Census 2011 did, however, provide a picture of the types of disabilities presented by the majority of South Africans. Data indicated that 11% of persons aged five years and older had seeing difficulties, 4,2% had cognitive difficulties, 3,6% had hearing difficulties, and about 2% had difficulties when it came to self-care, walking and communication.¹¹

Chapter 5 went on to illustrate that although there might not be clarity on the exact number of CWD in South Africa, their prevalence can be inferred from the general data gathered by Census 2011.¹² The estimation derived at was that approximately 1.4% of the overall population were CWD.¹³ This still excluded information of children below the age of five years old. It was thus difficult to determine a reliable number of CWD in South Africa.

⁸ See par 5.3 *supra*. Census 2011 found that 19 million respondents were 19 years and under.

⁹ See par 5.3 *supra*. Children below the age of 5 years were excluded due to a number of reasons. One, their disability may be undetected or misunderstood by parents or caregivers, and two, parents may not wish to report on the disability which is linked to the stigma attached to the disability of children in general. See par 5.2 for a discussion on this challenge.

¹⁰ See though par 5.3 where it is indicated that approximately 5.8% of people between the ages of five and 19 presented some form of disability, from the data gathered by Census 2011.

¹¹ See par 5.3 *supra*, as well as a synopsis of the disability findings of Census 2011 available at <http://www.statssa.gov.za/?p=3180> (accessed 18 Jul 2015).

¹² See par 5.3 which reflects on the data gathered from the Census 2011 as well as the care dependency grant.

¹³ See par 5.3 *supra*. Census 2011 illustrated two important aspects: people between the ages of five and 19 make up approximately 20 million of the total population, and that approximately 5.8% of people between the ages of five and 19 presented some form of disability. This number amounts to almost 1.4% of the overall population.

Chapter 5 went further to illustrate that CWD present a higher probability of being abused and neglected and indicated the reasons why these children are at an increased risk.¹⁴

Firstly, research suggests that one in three children with an identified disability may be a victim of some sort of ill-treatment.¹⁵ Furthermore, when CWD are maltreated, they are also more likely to be more seriously injured or harmed than children without disabilities.¹⁶ Research further suggests that children with communication impairments, behavioural disorders, learning disabilities and sensory impairments are predominantly susceptible to abuse.¹⁷ The predominant trend appeared to be that the less a child with a disability was able to communicate, the higher the risk is of abuse was, especially sexual abuse.¹⁸

Secondly, it was also shown that parents or caregivers may be unable to cope with the pressures of raising a child with a disability as a result of the inherent specialised care and resources required to address the needs of said child.¹⁹ This may result in parents or care-givers neglecting the child, and even abusing the child out of frustration.²⁰

¹⁴ See par 5.4 *supra*.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Stalker %Child protection and the needs and rights of disabled children and young people: A scoping study+ (2010) *University of Strathclyde Institutional Repository* 4. The Children's Bureau Washington in the USA indicates in an article published in Mar 2012 that children with disabilities often experience multiple types of maltreatment, with neglect being the most common. See <http://www.childwelfare.gov/pubs/prevenres/focus> (accessed on 25 Jun 2012).

¹⁸ See par 5.3 *supra*.

¹⁹ See also par 4.3.4 for a discussion on the link between disability and poverty. This link inherently also has an effect on how a parents may deal with his or her child with a disability, as poverty and a lack of resources may lead to a parent inevitably neglecting the needs of the child. The costs related to taking care of the child may also seem as burdensome to some families and contribute to the link between poverty and disability.

²⁰ See par 5.4.2 *supra*. Parents may be ignorant to the needs of the child or feel ashamed of the child, which may increase the risk of the child being maltreated by the parents as a result thereof.

Statistics from the SAPS further showed that more than 45 000 crimes were committed against children between April 2013 and March 2014.²¹ The statistics moreover indicated that more than half of these crimes were purportedly sexual offences against children.²² Although no data are available on how many of these children were CWD, it was shown that children with a disability are more vulnerable to sexual offences as their disability may prevent them from reporting and protecting themselves from sexual assaults.²³

Chapter 5 accordingly showed that CWD have an increased risk of being abused and neglected. Against this background, they will thus inherently present an increased need for response mechanisms to address and prevent the abuse and neglect. Courts such as the Children's Court,²⁴ Sexual Offences Courts²⁵ as well as Equality Courts²⁶ may for that reason be called upon where a child with a disability has been neglected,²⁷ sexually abused²⁸ or discriminated against.²⁹ It was also shown that in some cases, children with learning disabilities may even be more prone to come into conflict with the law, which would then bring about the involvement of the CJA.³⁰

It was therefore argued that due to the abuse and neglect profile of CWD, the judicial system must be ready, trained and equipped to receive them throughout its

²¹ See the South African Police Service's media statement at <http://www.saps.gov.za/newsroom/msspeechdetail.php?nid=4936> issued in Jun 2015. (accessed on 1 Jul 2015).

²² During this period, a total of 64 514 sexual offences cases were reported to the SAPS countrywide. As far as sexual offences are concerned, an appalling 40,1% of all cases involved children as victims.

²³ See specifically par 5.4 in this regard, as well as, par 1.4 *supra*.

²⁴ As governed by the Children's Act.

²⁵ As governed by the SOA and CPA.

²⁶ As established by PEPUDA.

²⁷ In terms of s 150 of the Children's Act, when a child has been neglected, the child may be in need of care, and the matter accordingly falls within the jurisdiction of the Children's Court.

²⁸ In this regard, the matter may have to be addressed through the criminal courts, or the recently re-established Sexual Offences Courts. If the child was abused in the home environment, the child may have to be removed from his or her home, which would once again call upon the involvement of the Children's Court into the Children's Act s 153.

²⁹ See par 5.4.4 *supra*.

³⁰ See par 4.3.6 *supra*.

processes, as sadly, and especially in poorer communities, these children will need to approach the courts for intervention and assistance.³¹

7.2 Access to justice for children with disabilities: South Africa's obligations in terms of the Constitution and international law

Chapter 2 aimed to find constitutional support for the rights of CWD to have access to justice.³² In examining the rights of these vulnerable members of society, it was found that the South African Constitution grants a variety of rights to CWD, directly and indirectly.³³

Firstly, the operational provisions of the South African Constitution determine that the government must respect, protect, promote and fulfil the rights contained in the Bill of Rights.³⁴ This protection must be afforded to *all* people, which broad interpretation would include CWD. There are though a number of ways in which the state can adhere to this section 7(2) obligation and it was shown that the choice of how to fulfil this obligation is left to the discretion of the state.³⁵ Nevertheless, one way of allowing for the effective realisation or protection of a right, would be through the enactment of legislation or undertaking other measures.³⁶

Section 8 of the South African Constitution was also explored to indicate that the obligation to respect the rights of CWD may also apply horizontally.³⁷ This means, that in some instances, parents, communities and other children must for instance

³¹ Par 5.5 *supra*.

³² Par 2.1 *supra*.

³³ The direct and indirect applicability of the sections discussed under the South African Constitution relates to the fact that the rights contained in the Bill of Rights are interrelated, but that some rights apply to all, including children, and some rights, like s 28, applies directly to children, and to children only.

³⁴ S 7(2) of the South African Constitution. See also par 2.2 *supra* for a discussion in this regard. The duties of the state may also include negative obligations as per Currie and De Waal (2013) 18-23.

³⁵ See a discussion of *Glenister v President of the Republic of South Africa* in par 2.2 *supra*. Here, it was shown that the state can determine on its own accord how to best address its obligations, as long as it is fulfilled. In this regard, the court did hold that the steps the state takes to respect, protect, promote and fulfil constitutional rights, must be reasonable and effective.

³⁶ See par 2.2 *supra*.

³⁷ *Ibid*.

refrain from discriminating against CWD.³⁸ Although the horizontal application will depend on the circumstances, an example was provided where CWD must for instance be protected against derogatory and hurtful name-calling.³⁹

Chapter 2 then went on to show the direct applicability of sections 9, 10, 28, 34 and 35 of the South African Constitution in supporting access to justice for CWD. In discussing section 9 of the South African Constitution, a parallel was drawn between the discrimination historically faced by children and the discrimination faced by people with disabilities.⁴⁰ The parallel supported the argument that a child with a disability faces discrimination based on their disability as well as age, which therefore compounds the need for equal treatment as a result of this two-tier vulnerability.⁴¹ Section 9 was further discussed in illustrating that unfair discrimination on the basis of age and disability is prohibited and that CWD must be viewed as equal before the law, despite their different needs and requirements.⁴² The importance of substantive equality was highlighted in recognising the injustices of the past and addressing current inequalities. This may be achieved by not treating all persons the same, at all times.⁴³ This means that measures to address the protection of the most vulnerable, such as CWD, must be designed to guarantee genuine effective equality.⁴⁴ It is therefore not enough to have the laws in place

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ See par 2.3 for this discussion.

⁴¹ See also par 1.3 for a discussion on the two-tier vulnerability of children with disabilities. In summary, the two-tier vulnerability refers to the child's vulnerability as a result of his age, as well as his vulnerability as a result of his disability.

⁴² In this regard, *Harksen v Lane* was discussed to show what may constitute unfair discrimination. The important element in this regard is to understand that differentiation between different people does not mean that unfair discrimination took place. See par 2.3 *supra* for the discussion in this regard. This approach is the key when reasonable accommodation is addressed in ch 3.

⁴³ This argument referred to s 9(2) of the South African Constitution which states that to promote equality, legislative and other measures designed to protect or advance persons disadvantaged by unfair discrimination, may be taken. See also Ngwena 'Equality for people with disabilities in the workplace: An overview of the emergence of disability as a human rights issue' (2004) *Journal for Juridical Science* 167-197.

⁴⁴ See par 2.3 and the discussion on Chaskalson *et al* (ed) *Constitutional law of South Africa* (1996) 35-36.

which promote the rights of all people equally. The effects of those laws must be seen to lessen the inherent disadvantage that particular groups experience.⁴⁵

Section 9(2) was furthermore highlighted that special measures such as legislation, which is designed to protect or advance people disadvantaged by discrimination, may be taken.⁴⁶ There *must* be recognition of the different needs of CWD in order to respond to their rights.⁴⁷ The uniqueness of their two-tier vulnerability means that they are not on an equal footing with children without disabilities or even adults with disabilities.⁴⁸ Thus, differential treatment is inevitable in order to ensure the assertion of equal rights. The nature of the differential treatment must legitimately contribute to an achievable and justifiable purpose. In this regard, it was argued that section 9, in supporting the substantive equality approach decidedly moves away from a one-size-fits-all approach,⁴⁹ which divergence is central to the scope of this research. It recognises that in the quest of pursuing equality of outcome, people may be treated differently without necessarily being unfairly discriminated against.⁵⁰ Section 9 as a result assisted in outlining the basis for achieving the right of CWD to have access to justice.

CWD may not be unfairly discriminated against on the basis of their age or disability. Furthermore, in realising substantive equality of outcome, the difficulties they have faced (and still face) in asserting their rights in general must be understood and contextualised. These children may therefore be treated differently, however, should

⁴⁵ Laws in themselves do not ensure equality, but the recognition and active fulfilment of those laws by others (vertical and horizontal role-players) may contribute to result of substantive equality.

⁴⁶ See *Minister of Finance and Another v Van Heerden* (CCT 63/03) 2004 (6) SA 121 (CC) par 32 in this regard, where the Constitutional Court found that differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set by s 9(2).

⁴⁷ Par 2.3 *supra*.

⁴⁸ See par 1.3 with reference to the children's two-tier vulnerability.

⁴⁹ Freedman "Formal versus substantive equality and the jurisprudence of the Constitutional Court: National Coalition for Gay and Lesbian Equality v Minister of Justice" (2000) *Journal for Contemporary Roman-Dutch Law* 314.

⁵⁰ Bekink and Bekink "Children with disabilities and the right to education: A call for action" (2005) *Stell LR* 135.

the differential treatment result in discrimination, the state or other relevant role-player must prove why such treatment is not unfair.⁵¹

The right to dignity as enshrined in the South African Constitution was also addressed.⁵² This discussion showed that the right to dignity may be viewed as the source of all other rights and that dignity is inherently linked to a person's self-worth.⁵³ As asserted by Judge Langa in *MEC for Education v Pillay*, our society must act positively to accommodate diversity and sometimes such accommodation may necessitate that practices be changed, buildings be altered or monetary loss be incurred.⁵⁴ As per section 9 above, section 10 also supports an approach where a one-size-fits-all advance will fail to cater to the needs of CWD.⁵⁵ This correlates with the essence of substantial equality, which is essential in realising the rights of CWD. More is required than mere tokenism and textual redress, as the pursuit of achieving full and equal rights realisation must be seen to be real and transformative, a result which may only be achieved through active recognition of the dignity of CWD.

Chapter 2 then proceeded to unpack section 28 of the South African Constitution. This is the main section addressing the specific rights of children. It was argued that by virtue of having the right to be protected from maltreatment, abuse, neglect and degradation, CWD must also have the right to recourse should these rights be violated.⁵⁶ In subtly pre-empting the discussion contained in Chapter 5 discussed

⁵¹ S 8(1) and (2) of the South African Constitution. Ss 9(3) and 9(4), specifically include references to the state as well as persons so as to expressly indicate that this right operates horizontally as well as vertically. See also *Harksen v Lane* par 50 where it is determined that the impact of the discrimination is measured by taking into account (i) the complainant's position in society and vulnerability, (ii) the nature and purpose of the exercise of power by the respondent, and (iii) with due regard to (i) and (ii) whether the rights and interests of the complainant have been affected *and* whether there has been an impairment of human dignity or a similar serious consequence. See also Rautenbach *Overview of Constitutional Court judgments on the Bill of Rights*. 2011+(2012) *Tydskrif vir die Suid-Afrikaanse Reg* 2.

⁵² S 10 of the South African Constitution. See also par 2.4 *supra*.

⁵³ See par 2.4 *supra* and Ackermann's assertion that human dignity is inherently linked to an evaluation of equality. Ackermann (2013) 19.

⁵⁴ See par 2.4 *supra* where Judge Lange indicates that different approaches may be required to achieve equality, all inherently linked to respecting such a person's dignity.

⁵⁵ See par 2.4 *supra*.

⁵⁶ S 28(1) of the South African Constitution.

above,⁵⁷ it was shown that CWD are at an increased risk of being abused and neglected and that their rights as contained in section 28(1)(d) may consequently be violated more frequently.⁵⁸ CWD also have the right to family care or appropriate alternative care.⁵⁹ Once again, the risk of CWD being neglected is higher than their non-disabled peers, which consequently means that alternative care may have to be considered when the neglect has been reported.⁶⁰

The best interests of the child principle was also addressed, in so far as it called for a child's best interests to be paramount in every matter concerning that child.⁶¹ A consideration of what may fall within the best interests of a child with a disability was argued to be different from his or her non-disabled peers. Therefore what may constitute the best interests of CWD must be considered in the light of a child's specific circumstances.⁶² The factors to be considered also do not constitute an exhaustive list of factors.⁶³

Chapter 2 continued to look into specific rights contained on the South African Constitution relating to access to justice for CWD. Section 28(1)(h), 34 as well as section 35 all reflect some form of constitutional assurance in respect of access to justice. The South African Constitution refers to access to legal representation,⁶⁴ to courts, other tribunals and fora,⁶⁵ as well as a right to a fair civil⁶⁶ and criminal trial⁶⁷ as some elements forming part of the concept of access to justice.⁶⁸

⁵⁷ Par 7.1 *supra*.

⁵⁸ See par 5.4 *supra* for this discussion as mentioned in par 7.1 *supra*.

⁵⁹ S 21(1)(b) of the South African Constitution.

⁶⁰ See par 5.4. Also, see par 2.4, also drawing the link between poverty and disability. This places immense pressure on the caregivers of children with disabilities, which may be one of the many reasons children with disabilities are neglected and abandoned more frequently than their non-disabled peers.

⁶¹ *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC) par 29.

⁶² See par 2.4.

⁶³ See par 2.4 for a discussion of the decision in *AD v DW*.

⁶⁴ S 28(1)(h), s 35(2)(c) and (d) of the South African Constitution as well as par 2.6 *supra*.

⁶⁵ S 34 of the South African Constitution as well as par 2.6 *supra*.

⁶⁶ *Ibid*.

⁶⁷ S 35(3) as well as par 2.6 *supra*.

⁶⁸ The element of access to justice was elaborated upon, and limited further to Art 13 of the UNCRPD in par 4.3.6.

Access to legal representation plays a central role in realising this right.⁶⁹ With reference to children specifically, section 28(1)(h) states that a legal practitioner must be assigned to a child in civil proceedings affecting the child, by the state at its expense.⁷⁰ This may only, as stated in section 28(1)(h), be required if substantial injustice would otherwise result. As mentioned by Skelton,⁷¹ in most cases where a child under 18 is on trial, substantial injustice will occur if he or she does not have a lawyer.⁷² A child and especially a child with a disability will almost always not be able to appoint a practitioner as they will not have the means, ability, or the contractual capacity to do so. In order to provide them with access to justice, a legal representative will inevitably have to be appointed by the state so as to protect their rights and interests, as well as to give them a voice.⁷³ Section 28(1)(h) also refers to the legal representative being qualified, in which respect it was argued that this qualification went further than merely being an attorney or advocate.⁷⁴ It required a sense of understanding of a child's needs and how to communicate with a child, even more so when the child has a disability. The legal representative envisaged in section 28(1)(h) must be able to represent CWD as well, in a supported fashion and not substitute the views and opinions of the child.⁷⁵

Sections 34 and 35 of the South African Constitution were furthermore discussed to illustrate the right of everyone, including CWD, to have civil and criminal matters decided on in a fair public hearing before a court or, where appropriate, another

⁶⁹ In the USA, for instance it has been recognised that, as a minimum, in criminal matters involving the loss of freedom of a person, it cannot be considered that such person has adequate access to justice except if the person is provided with legal counsel. See Grey jnr. 'Access to the courts: Equal justice for all' (2004) *IIP Electronic Journals* 8.

⁷⁰ Zaal 'When children should be legally represented in care proceedings? An application of s 28(1)(h) of the 1996 South African Constitution' (1997) *SALJ* 334; Sloth-Nielsen 'Realising children's rights to legal representation and to be heard in judicial proceedings: An update' (2008) *SAJHR* 495; Du Toit 'Legal representation of children' in Boezaart (ed) *Child law in South Africa* 96-111.

⁷¹ Skelton (ed) *Children and the law* (1998) 45.

⁷² See par 2.6 *supra*.

⁷³ See the discussion of *Soller v G* 2003 (5) SA 430 (W) in par 2.6 which states that a legal representative gives the child a voice without merely being a mouthpiece.

⁷⁴ See also a discussion of this in par 4.3.4, as well as par 4.3.6 which addresses the call for training in general for relevant stakeholders assisting with access to justice for children with disabilities. This will be addressed *infra* within the current ch.

⁷⁵ See para 2.5 and 2.6 where it is also pointed out that the right to legal representation in s 28(1)(h) is not only available to children capable of forming and conveying views.

independent and impartial tribunal or forum. These rights are afforded to everyone, and include the adjudication of matters by other bodies as well, such as the SAHRC.⁷⁶ In this regard, these courts, tribunals and fora must be ready and able to accept the participation of CWD to exercise their rights as afforded to them through sections 34 and 35 of the South African Constitution.

Chapter 2 went further to discuss sections 39 and 233 in order to assess the applicability of international law when interpreting access to justice for CWD.⁷⁷ In doing so, it was established that in attempting to define and delineate this right, international law must, and foreign law may play important roles. This understanding is important because in light of the above, sections 9, 10, 28 as well as 34 and 35, all corroborate some level of the rights of CWD to equal access to the law, dignity, as well as access to courts. However, these sections do not explicitly spell the right to access to justice out: it provides for indirect application by means of addressing the rights of CWD to equality, dignity, special protections, access to courts and fair criminal trials. To further clarify the understanding of what may constitute equal and fair access to justice for CWD, guidance must be sought from international sources.⁷⁸ According to the Constitutional Court, international law can provide a useful framework within which the Bill of Rights can be evaluated and understood.⁷⁹

In view of Chapter 3, two of the most significant conventions relating to the rights of children and the rights of people with disabilities respectively, were examined.⁸⁰ As South Africa ratified both the UNCRC and UNCRPD, it has indicated that it will abide by the rules, standards and regulations of such.⁸¹ These obligations, although not

⁷⁶ The SAHRC is a quasi-judicial body and accepts complaints from the public. See par 6.3.3.1.4 for a comparison between the SAHRC and the Canadian Provincial Advocate and Representative for Children and Youth in so far as accepting and addressing complaints received from children.

⁷⁷ See par 2.7 *supra*.

⁷⁸ This was done throughout the current research by applying pillar six of the framework: Art 13 of the UNCRPD. This Art established three elements in respect of this research in order to inform access to justice for children with disabilities: age-appropriate and procedural accommodations, participation as well as training.

⁷⁹ See *S v Makwanyane* par 35 and *Government of the RSA v Grootboom* par 26.

⁸⁰ The UNCRC and the UNCRPD examined in para 3.2 and 3.3 respectively.

⁸¹ See par 3.2.1 in respect of the UNCRC, and par 3.3.1 in respect of the UNCRPD.

domesticated in its totality, can be consulted in order to provide clarity on what access to justice for CWD entails, and what obligations it may create for certain role-players. These agreements were therefore used to assist in interpreting sections 9, 10, 28, 34 and 35 of the South African Constitution, with the view of providing access to justice for CWD.

The importance of Chapter 3 revolved around highlighting South Africa's obligations in terms of the UNCRC and UNCRPD and establishing a framework against which measures in realising access to justice for CWD can be assessed. The four pillars contained in the UNCRC as well as Article 23, which addressed the rights of CWD, formed the first five measures of assessment within the framework.⁸² These five pillars, as they were referred to throughout this research, were combined with the article in the UNCRPD which expressly addresses access to justice for people with disabilities, and constituted the six pillar framework.⁸³ Each one of these elements of the framework were then unpacked and discussed to create a threshold against which actions taken by the state, for instance, may be measured.⁸⁴

The first aspect for consideration was the principle of non-discrimination, as contained in Article 2 of the UNCRPD.⁸⁵ The UNCRC calls upon States Parties to respect and ensure the rights of each child without discrimination of any kind, and includes age and disability as express grounds for discrimination.⁸⁶ The CORC, by interpreting the obligations placed on States Parties also identified CWD as exceptionally vulnerable to discrimination. It also called on States Parties to conduct campaigns to raise awareness to eliminate discrimination against CWD and to provide effective remedies in case of violations of the rights of CWD.⁸⁷ The CORC also indicated that these remedies must be easily accessible to CWD and their parents and/or others caring for the child.⁸⁸ The first pillar of measurement, non-discrimination, thus allowed for two elements of consideration: does the State Party

⁸² This framework was established in ch 3 *supra*, and applied in ch 4 and 6 thereafter.

⁸³ Art 13 of the UNCRPD.

⁸⁴ See par 3.2.2.1 (best interests of the child), 3.2.2.2 (non-discrimination), 3.2.2.3, (survival and development) 3.2.2.4 (right to be heard), 3.2.2.5 (children with disabilities) and par 3.3.4 (Art 13 of the UNCRPD) *supra*.

⁸⁵ See par 3.2.2.2.

⁸⁶ Art 2 of the UNCRC.

⁸⁷ UNCRC/C/GC/9 par 9(b).

⁸⁸ *Ibid*.

have national legislation which expressly prohibits discrimination against CWD and are remedies available should these children be faced with unjust unequal treatment?⁸⁹

The principle of the best interests of the child constituted the second pillar of the framework. This principle has been described to call for States Parties and private individuals to consider how their decisions may affect the rights of children.⁹⁰ These decisions include decisions which are not directly applicable to children, but which may indirectly concern children.⁹¹ In this regard, it was ascertained whether a State Party had mechanisms to allow for the determination of what may be in the best interests of children in general, and also on the more individualistic front, what may serve the best interests of CWD specifically. In relation thereto, States Parties may have to adopt specific legislation addressing the rights of CWD or have mechanisms which take the individual characteristics of CWD into account through accessible services and court processes.⁹²

The child's survival and development, as the third pillar, was discussed in so far as it allows the different stages of development in CWD to be taken into account by States Parties.⁹³ For instance, the CORC elevates the plight of CWD and urges States Parties to respond to their different needs and support their development.⁹⁴ This may require States Parties to legislate for the protection of these specific children as neglect, abuse and other forms of maltreatment may inhibit their maximum development.⁹⁵

The fourth pillar of the framework, the right of the child to be heard, forms a key element of assessing access to justice rights for CWD.⁹⁶ The question is whether despite the child's disability, the State Party would allow for the child's views to be

⁸⁹ South Africa's response to this pillar was discussed under par 4.3.2 *supra*.

⁹⁰ UNCRC/GC/2003/5 par 12.

⁹¹ *Ibid.*

⁹² Par 4.4 *supra*.

⁹³ *Ibid.*

⁹⁴ Par 3.2.2.3 *supra* as well as UNCRC/C/GC/7/Rev.1 par 10.

⁹⁵ Art 4 of the UNCRC calls for States Parties to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights contained in the UNCRC.

⁹⁶ Par 3.2.2.4 *supra*.

heard and respected. This element will require States Parties to have methods and approaches to allow for the participation of CWD during, for instance, court proceedings which affect them.⁹⁷ As argued in this chapter, the state has a legal duty to *create methods* that allow for child participation at all levels of decision-making.⁹⁸ These methods must be inclusive of the needs of CWD, whether they partake in proceedings directly or indirectly.⁹⁹ Special measures may thus be required to facilitate this participation, such as intermediaries or sign-language interpreters. This element of the framework will accordingly require that measures undertaken by States Parties be assessed with respect to their availability and effectiveness.

Article 23 of the UNCRC constitutes the fifth pillar of the framework as it addresses the rights of children specifically.¹⁰⁰ Where the previous four pillars covered children's rights in general, Article 23 provides for a more focused approach in calling upon States Parties to respond to the rights of CWD. The core message of this pillar is inclusivity, and whether States Parties have included specific legislation to address the needs of CWD. Although Article 23 was criticised in this chapter for not being as strongly worded as other sections such as Article 19 of the UNCRC, this article still requires positive actions from States Parties to include CWD in services provided.¹⁰¹ This may therefore include services related to the justice sector. Where the previous four pillars called for a child-sensitive approach, the fifth pillar highlights the importance of disability sensitivity as well.¹⁰²

In support of the permutation approach, where solutions are sought with one foot in the discourse of children's rights and another within the realm of the rights of people with disabilities, the sixth pillar came from the UNCRPD.¹⁰³ Most of the general rights contained in the UNCRC are reflected in the UNCRPD, such as the right to non-

⁹⁷ *Ibid.*

⁹⁸ Par 3.2.2.4 *supra* as well as Van Bueren (2011) 36.

⁹⁹ See par 3.2.2.4 for a discussion on direct and indirect participation. Art 12 of the UNCRPD also promotes a supported decision-making process as opposed to a substituted decision-making process, which allows the child's views to be heard and support being provided to the child with a disability to make decisions and participate in matters affecting him or her.

¹⁰⁰ See par 3.2.2.5 *supra*.

¹⁰¹ Art 23 for instance only calls for the *recognition* and *encouragement* of the rights of CWD. This recognition is also subject to available resources, and whenever possible. See Art 23(1)&(2) specifically, and the discussion in par 3.2.2.5 *supra*.

¹⁰² See par 3.2.2.5 *supra*.

¹⁰³ See par 3.3.4 *supra*.

discrimination and participation.¹⁰⁴ Article 13 of the UNCRPD, however, provides for the %access to justice+dimension in order to establish a proper framework against which access to justice for CWD can be assessed in the South African context. Article 13 offers content to this right, by highlighting specific responses required when people with disabilities wish to exercise their right to access justice. In this regard, the UNCRPD provides three elements against which equal access to justice can be measured: reasonable accommodation,¹⁰⁵ participation and the training of relevant stakeholders.¹⁰⁶ These three essential elements offer guidance in assessing a judicial system's responsiveness towards the needs of people with disabilities.

In combining these three elements with the %five pillars+of the UNCRC (supported by the UNCRPD), a proper framework was established in order to inform States Parties on how to respond to the rights of CWD with respect to access to justice.¹⁰⁷ Responses from States Parties such as legislation and other measures can be tested against this framework, by establishing whether there is compliance with, for instance, the best interests of the child principle,¹⁰⁸ whether CWD can freely express their views;¹⁰⁹ whether anti-discrimination laws are in place¹¹⁰ or whether a particular justice system allows age-appropriate accommodations for CWD and training for court officials.¹¹¹

7.3. Responses and recommendations

Once it was established in Chapter 2 that the South African Constitution supports the rights of CWD to have access to justice,¹¹² and that international law provides for a

¹⁰⁴ See par 3.3.3 where it is illustrated that the best interests of the child is reflected in Art 7 of the UNCRPD, the principle of non-discrimination is reflected 27 times in the UNCRPD, survival and development is reflected under Art 24 of the UNCRPD and the right to be heard is reflected in Arts 7(3) and 12 of the UNCRPD.

¹⁰⁵ Reasonable accommodation in this regard refers to age-appropriate and procedural accommodations as well.

¹⁰⁶ See par 3.3 *supra*, specifically Art 13(1) and (2).

¹⁰⁷ See par 3.3.4 *supra*.

¹⁰⁸ Pillar one of the framework, see ch 3.

¹⁰⁹ Pillar four of the framework, see ch 3.

¹¹⁰ Pillar two of the framework, see ch 3.

¹¹¹ Art 13 of the UNCRPD.

¹¹² See par 2.8 *supra*.

framework against which the South African response can be tested,¹¹³ Chapter 4 proceeded to assess the South African situation.¹¹⁴

In respect of the first pillar, the best interests of the child principle, South Africa has both domesticated this principle into law, inter alia by the Children's Act,¹¹⁵ and courts have elaborated on the content thereof on numerous occasions.¹¹⁶ What is important in respect of the rights of CWD is that the Children's Act expressly includes that any disability a child may have must be taken into account in determining the best interests of said child.¹¹⁷ This inadvertently requires an individualised approach in that a court, for instance must specifically take account of the child's unique disability.¹¹⁸ The Children's Act also indicates that the best interests of the child are of paramount importance in *every* matter and in *all* proceedings.¹¹⁹ Both Ghana and Canada reflected this principle in domestic legislation, albeit provincial legislation in the case of Canada.¹²⁰ Canada has also gone further than the enactment of legislation, by establishing the Office of the Provincial Advocate for Children and Youth, which Office specifically addresses matters relating to the best interests of children.¹²¹ Similarly, the Representative for Children and Youth in British Columbia is also mandated to monitor and address the attainment of rights of children within the province of British Columbia.¹²²

South Africa does not have any organisation solely mandated to receive complaints from children, or to address matters where a child's interests have been overlooked. Chapter 6 drew some comparisons between these child-centred forums and the

¹¹³ See par 3.4 *supra*.

¹¹⁴ See par 4.1 *supra*.

¹¹⁵ See par 4.2.1 *supra*, in referring to s 7 and 9 of the Children's Act.

¹¹⁶ See par 4.3.1 *supra*.

¹¹⁷ S 7(1)(a)(i) of the Children's Act.

¹¹⁸ S 2(h) of the Children's Act.

¹¹⁹ *Ibid.* In this regard it was argued that the legislature's use of 'every matter' in s 2(b)(iv) of the Children's Act requires a children-interest consciousness from all role-players.

¹²⁰ See para 6.2.2 and 6.3.2.1 *supra*.

¹²¹ See par 6.3.3.1 *supra* for a discussion on the Office of the Provincial Advocate for Children and Youth, which was established in Ontario by the Ontario's Provincial Advocate for Children and Youth Act of 2007.

¹²² See par 6.3.3.2 *supra* for a discussion of British Columbia's Representative for Children and Youth, as established by as well as British Columbia's Representative for Children and Youth Act of 2006.

SAHRC,¹²³ although it was shown that the SAHRC does not seem to be an effective measure to address the rights of children specifically as it was focused on the rights of all persons.¹²⁴ It was also shown that the provinces in Canada receive very high numbers of complaints and enquiries from children, whereas the SAHRC does not essentially receive direct complaints from children, or complaints affecting children.¹²⁵ This despite the fact that the South African population is much larger and much poorer than those of Ontario and British Columbia, which may indicate that if a responsive forum dedicated to the rights and interests of children was available and established, children may start using it.

In respect of the second pillar of the framework, South Africa responded well in respect of having enacted specific legislation to address and prohibit discrimination.¹²⁶ Both Ghana and Canada have also enacted legislation which addresses inequality.¹²⁷ In South Africa the Children's Act calls for all decisions concerning a child to protect the child from unfair discrimination on any ground, including on the grounds of disability.¹²⁸ It was also argued in Chapter 4 that the Children's Act prohibits discrimination and not necessarily unfair discrimination. It therefore reflects Article 2 of the UNCRC, which calls on States Parties to protect children against *all forms of discrimination* and discrimination of *any kind*.¹²⁹ PEPUDA prohibits *unfair discrimination*, a determination which has been vented in case law in the South African context.¹³⁰ PEPUDA serves as a valuable tool in South Africa's quest to address inequality in respect of vulnerable groups such as CWD as it expressly prohibits discrimination on the grounds of disability,¹³¹ and includes failing to take steps to reasonably accommodate the needs of such persons, in this category.¹³² The Equality Court as established by PEPUDA provides an avenue of redress for any person, including CWD, who has been discriminated against. The

¹²³ See par 6.3.3.1 *supra*.

¹²⁴ *Ibid*.

¹²⁵ In this regard, it was shown in the 2014 annual report of the SAHRC that its top five complaints received did not include matters relating to children.

¹²⁶ See par 4.3.2.

¹²⁷ See para 6.2.3, 6.3.2.2, 6.3.3.1.2 and 6.3.3.2.2.

¹²⁸ See s 6(1)(d) of the Children's Act and par 4.3.2 *supra*.

¹²⁹ See par 4.3.2 *supra*.

¹³⁰ See par 2.3 for a discussion on *Harksen v Lane*, as well as ss 1 and 6 of PEPUDA.

¹³¹ S 9 of PEPUDA.

¹³² See par 4.3.2 *supra*, as well as s 9(a), (b) & (c) in this regard.

challenge is that these courts are grossly underutilised and as a result limited jurisprudence is developing around PEPUDA and people with disabilities to create precedent in this regard.¹³³ The recommendation against this background would thus be to increase awareness around the operation of the Equality Court to allow for members of the society who have been discriminated against to access proper recourse. Although the SAHRC has the mandate to respond to matters of discrimination, its findings are not binding and are limited to making recommendations. The Equality Court is therefore the only relevant measure of redress which may provide for a binding decision and even award monetary compensation to complainants, if appropriate.¹³⁴ In improving the operations and visibility of the Equality Court, the state may be seen as providing for effective remedies in case of violations of the equality rights of CWD.

Neither the South African Constitution nor the Children's Act expressly refers to the right to survival, as referred to in the third pillar of the framework, namely the right of the child to survival and development.¹³⁵ It has, however, been argued that the right to survival is reflected under South African law as the right to life and a variety of socio-economic rights.¹³⁶ As with Ghana and Canada, the concept of development is well covered in South Africa's domestic legislation and encourages the autonomy of the child, as the child develops with age.¹³⁷ The CORC has acknowledged that,¹³⁸ with reference to CWD, the inherent right to life, survival and development is a right that warrants particular attention.¹³⁹

The right to be heard, as the fourth pillar, may be seen as one of the most important elements of the framework, as it aims to provide a voice for CWD.¹⁴⁰ In seeking redress or relief in respect of the rights of CWD, which may have been potentially

¹³³ *Ibid.*

¹³⁴ According to s 21 of PEPUDA the Equality Court may make an order for the payment of damages in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment.

¹³⁵ See par 4.3.3 *supra*.

¹³⁶ *Ibid.* See the discussion of Dutschke and Abrahams (2006) 5 and Hodgkin and Newell (2007) 85-95, 94 specifically.

¹³⁷ See par 4.3.4 as well as s 6(2)(e) of the Children's Act. In respect of Ghana and Canada, see para 6.2.4 and 6.3.2.3, 6.3.3.1.3 and 6.3.3.2.3.

¹³⁸ UNCRC/C/GC/9 par 31.

¹³⁹ *Ibid.*

¹⁴⁰ See par 4.3.4 *supra*.

violated, CWD must be given an opportunity to partake and express themselves in a manner which is conducive towards their participation. As stated in Article 12 of the UNCRC, *all* children must be given an opportunity to participate in judicial proceedings either directly, or indirectly. South Africa has responded in principle to the obligation to provide children with an opportunity to be heard, directly or by means of a representative.¹⁴¹ This is apparent even in the case of the curator *ad litem* in terms of common law.¹⁴² It has already been pointed out that sections 28(1)(h), 34 as well as 35 of the South African Constitution all support some level of participation of the child during judicial proceedings.¹⁴³ These rights are supplemented by the Children's Act which determines firstly that, every child who is able to participate in any matter concerning that child, has the right to participate,¹⁴⁴ and secondly, should a child be involved in a matter at the Children's Court without legal representation; the court must ascertain whether it would be in the best interests of the child to be represented by a legal representative.¹⁴⁵ The court may then refer the matter to LASA. The latter must subsequently address the matter in terms of the section 3B of the Legal Aid Act.¹⁴⁶

Similarly, where a child is in conflict with the law, section 82 of the CJA states that where a child is not represented by a legal representative in the Child Justice Court, the presiding officer must refer the child to the Legal Aid Board for the matter to be evaluated by the Board as provided for in section 3B(1)(b) of the Legal Aid Act.¹⁴⁷ LASA therefore plays a key role in implementing the rights of children to have legal

¹⁴¹*Ibid.*¹⁴²*Ibid.*¹⁴³See par 7.2 *supra*.¹⁴⁴

S 10 of the Children's Act.

¹⁴⁵See par 4.3.4 *supra*. The concept of the 'curator' has also been discussed in the context of Art 12 of the UNCRC where the UNCRC advocates supported instead of substitute decision-making for people with disabilities. See also par 3.3 in this regard.¹⁴⁶See par 4.3.4 *supra*. S 3B states that before a court in criminal proceedings directs that a person be provided with legal representation at state expense, the court must take into account certain factors. As this section deals specifically with criminal matters, the Children's Act requires that it be read with the changes required by the context. The court therefore refers the matter to LASA to evaluate the need for representation at state expense, and report back to the court. The report will then include a recommendation whether the person concerned qualifies for legal representation, as well as certain particulars, and any other factor which in the opinion of the board should be taken into account. LASA is guided by the Legal Aid Guide in making a determination in this regard.¹⁴⁷

Act 22 of 1969.

representation in civil and criminal matters. In respect of civil matters where a child requires legal representation, a means test is conducted before LASA will represent a child.¹⁴⁸ This is not the case with criminal matters, but indicates that matters where a child with a disability for instance needs to approach the Children's Court or Equality Court, that his or her means, or his or her parents' means will be taken into account in deciding whether to provide him or her with legal representation.¹⁴⁹ This determination is problematic as it is pointed out in Chapter 4 that disability and poverty are intrinsically linked.¹⁵⁰ Even where the parents or caretakers of CWD have an average income, the expenses related to taking care of a child with a severe disability, for instance, must be taken into account before LASA asks these parents to foot a bill for legal representation, or even refuse legal representation. Similarly, because the care of CWD may be emotionally and financially taxing, placing additional financial burdens on a parent to allow for legal representation of his or her child may further ostracise the child in the eyes of the parent.¹⁵¹ In this regard, the recommendation would be that LASA reviews the circumstances under which legal representation of CWD in civil matters are assessed. The current means test must take into account that a child with a disability may never be able to care for him or herself, even with an inheritance or grant. The mere nature of the vulnerability of CWD seeking legal representation should warrant a negation of the current applicable means test.

In Ontario, Canada, legal representation of children in civil matters is specifically dealt with by the dedicated OCL.¹⁵² In one year, the OCL assisted over 20 000 children, which indicates that a dedicated child-representative office may serve a valuable purpose, as it shows that a great need exists for such services. As with the recommendation *supra* for an institution solely focused on receiving and addressing matters and complaints relating to the interest of children, a dedicated OCL may also

¹⁴⁸ See par 4.3.4 *supra*.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ See par 5.4.2 in this regard, arguing that parents or caregivers may neglect or abuse a child with a disability as a result of the stigma surrounding raising and having a child with a disability. A level of resentment, such as having to spend money on legal representation, may also contribute to the abuse and neglect of the child.

¹⁵² See para 6.3.2.4, 6.3.3.1.4 and 6.3.3.2.4.

serve a positive purpose for children, and especially CWD in South Africa, in providing them with legal representation.

In respect of participating in proceedings, the roles of the intermediary as well as sign-language interpreters have been highlighted.¹⁵³ As per Chapter 4, however, there is a general lack of availability of both of these crucial facilitators as stated in the DOJ&CD's submissions and admission.¹⁵⁴ Sign language is also not a recognised official language in South Africa, which in turn impacts on the availability of people who are able to use sign language or understand sign language. Both the intermediaries as well as the sign-language interpreters are crucial to allow for participation of CWD during judicial or quasi-judicial¹⁵⁵ proceedings. The recommendation in this regard would be that budgets allocated for the training and appointment of these facilitators must be adequate in order to ensure that they are always available should CWD require their services.

As indicated in Chapter 6, the key intention of pillar five is to determine whether a country addresses the rights of CWD expressly and not just under the broader protections awarded to children and people with disabilities respectively.¹⁵⁶ In this regard, the only legislation reflecting directly on the rights of CWD in particular is the Children's Act.¹⁵⁷ In submitting its Periodic Country Report on the United Nations Convention on the Rights of the Child, South Africa reflected on its implementation of the UNCRC for the period between 1998 and 2013. In this regard, South Africa relied heavily on the Children's Act as responding appropriately to the needs of CWD.¹⁵⁸ Despite this, South Africa indicated that, notwithstanding a strong political

¹⁵³ See para 4.3.6.1 and 4.3.6.2 respectively.

¹⁵⁴ *Ibid.*

¹⁵⁵ Such as where a child wishes to complain to the SAHRC.

¹⁵⁶ See par 4.3.5.

¹⁵⁷ Although the Social Assistance Act refers briefly to children with severe disabilities, it does so within the context of the rights of caregivers to claim the care dependency grant from SASSA. Nevertheless see ch 5 for a brief discussion of this Act, as well as the number of caregivers currently receiving this grant.

¹⁵⁸ See the report available at <http://peopletoparliament.org.za/focus-areas/children-rights/campaigns/reporting-on-childrens-rights-in-sa/FBS012%20UNCRC%20report%2015%20-%20PUBLIC%20version%20-2.pdf/download> (accessed on 29 Jul 2015). In most of the 29 mentions of children with disabilities in the report, the Children's Act is included as the country's response to the obligations towards these children. See para 16, 76, 105, 188 and 263.

commitment to address inequities and discrimination affecting people with disabilities, a large gap still exists between policy and practice.¹⁵⁹

Similarly, in its initial country report to the United Nations on the implementation of the UNCRPD for the period between 2008 and 2012, South Africa again relied heavily on the Children's Act as a measure of response to the rights of CWD.¹⁶⁰ The report, however, admitted that South Africa's CWD remain extremely vulnerable to abuse and inequality and that the situation persists as a result of a failure of the judicial system to protect CWD, as well as failure to ensure justice to these vulnerable children where abuse has occurred.¹⁶¹ In this admission, it is clear that the state needs to put measures in place to address these shortcomings in order to provide access to justice for CWD.

South Africa also stands in the shadow of both Ghana and Canada as both these countries have legislation specifically addressing the rights of people with disabilities.¹⁶² South Africa has not domesticated the UNCRPD as yet, and has addressed the rights of people with disabilities, including children, in a piecemeal fashion. Both Ghana and Canada have shown an acute awareness of disability rights as is seen in the statistics from their human rights institutions.¹⁶³ This may be as a result of these countries having put political will behind the domestication of the UNCRPD and developing relevant legislation¹⁶⁴ to respond to their obligations in terms of this international agreement. In this regard, despite having the Children's Act speaking to the rights of CWD, South Africa lags behind.

¹⁵⁹ See par 198 of the Periodic country report on the United Nations Convention on the Rights of the Child, as well as Boezaart (2011) 279.

¹⁶⁰ See par 372 of the report, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fZAF%2f1&Lang=en (accessed on 30 Jul 2015).

¹⁶¹ *Ibid* at par 375.

¹⁶² See para 6.2.6, 6.3.2.5, 6.3.3.1.5 and 6.3.3.2.5.

¹⁶³ *Ibid*.

¹⁶⁴ In the case of Ghana, the Persons with Disability Act 715 of 2006, and Ontario, Canada, the Ontarians with Disabilities Act SO 2001 and Accessibility for Ontarians with Disabilities Act 2005.

The recommendation in this regard is for South Africa to consider enacting domestic legislation addressing the rights set out in the UNCRPD.¹⁶⁵ There are too many gaps between the existing legislation and what is actually called for in terms of the UNCRPD. Enacting specific legislation which should include sections addressing the rights of CWD specifically, may assist in moving closer to responding adequately to the obligations called for under the UNCRPD.

Article 13 of the UNCRPD serves as the final pillar in respect of the framework established in Chapter 3.¹⁶⁶ This pillar focused on the practicalities of providing access to justice for people with disabilities.¹⁶⁷ It also elaborated on what may constitute access to justice for people with disabilities and provided guidance on how to approach the provision of proper and equal services to people with disabilities in seeking to realise their rights to have access to justice.¹⁶⁸ Article 13(1) of the UNCRPD in addition makes reference to age-appropriate accommodations, which automatically suggests that accommodations required for CWD may differ from those required by adults with disabilities.¹⁶⁹ The UNCRPD thus provides three very useful elements against which equal access to justice can be measured: reasonable accommodation, participation and the training of relevant stakeholders.¹⁷⁰ These three essential elements offer guidance in assessing a judicial system's responsiveness towards meeting the needs of people with disabilities. Coupled with the recommendations found in the Access to Justice for Children Report of the United Nations High Commissioner for Human Rights,¹⁷¹ which is to provide for accessible complaints mechanisms for children, access to information about these mechanisms, training for judicial stakeholders on access to justice for children, as well as an opportunity to participate in proceedings, Article 13 offers a proper basis from which any State Party can build capacity and ensure access to justice for CWD.

¹⁶⁵ The SAHRC has already made this recommendation to Parliament in 2012. See par 4.3 *supra*.

¹⁶⁶ See par 4.3.6 *supra*.

¹⁶⁷ *Ibid*. See also Kanter *The development of disability rights under international law: From charity to human rights* (2015) 221-222.

¹⁶⁸ See para 4.3.6, 4.3.7, 4.3.8 as well as 4.3.9 *supra*.

¹⁶⁹ See para 4.3.6.1 and 4.3.6.2 *supra*.

¹⁷⁰ Art 13 of the UNCRPD. See also par 4.3.6 *supra*.

¹⁷¹ A/HRC/25/35 para 54-61.

In respect of the first element of pillar six, South Africa has responded with certain measures in order to accommodate adults and CWD specifically. Accessible court procedures¹⁷² have been put in place in respect of the Children's Act. In this regard, a child may bring a matter to the attention of the Children's Court by him or herself.¹⁷³ As per Boezaart and De Bruin,¹⁷⁴ section 14 of the Children's Act has general application and may not be limited to matters relating to the Children's Act. In this regard, children do not need the permission of their parents to approach a court.¹⁷⁵ CWD who are able to approach a court and who find themselves being abused and neglected, may therefore bring this matter to the attention of the relevant Children's Court in order to obtain relief and assistance. The Children's Court processes are also designed to be informal and non-adversarial, which correspond with the age-appropriate accommodations required under Article 13 of the UNCRC.¹⁷⁶ Similarly, the Equality Court also determines that anyone may bring a matter to the court as long as it falls within the jurisdiction of the court.¹⁷⁷ Section 20(1)(b) of PEPUDA goes further and states that a person acting on behalf of another person, who cannot act in his or her own name, may also institute proceedings. It is therefore possible for a child with a disability to be assisted by a range of representatives in instituting proceedings at the Equality Court. As certain disabilities bring forth communication difficulties, a child may therefore be duly represented by a trusted caregiver or relative, who will be able to understand and assist the child to share his or her views during proceedings.

Age-appropriate accommodations are also catered for throughout the CPA. When CWD have to be subjected to appearing and testifying in a criminal court, CWD are provided with a range of accommodations, and are therefore protected as children. CWD may be allowed to testify in camera or via CCTV.¹⁷⁸ Although these safeguards are available, it remains within the discretion of the court whether a child with a disability will be allowed to make use of the same accommodations. The

¹⁷² See par 4.3.6.1 *supra*.

¹⁷³ S 14 of the Children's Act.

¹⁷⁴ Boezaart and De Bruin (2011) *De Jure* 419.

¹⁷⁵ In the case of the Children's Court, s 53 of the Children's Act determines that the presiding officer will then decide whether the child requires legal representation.

¹⁷⁶ S 52(2) and s 6(4)(a) of the Children's Act.

¹⁷⁷ S 14 of the Children's Act reflects the same wording as PEPUDA in this regard.

¹⁷⁸ See par 4.3.6 *supra*.

discretionary nature of this section of the CPA¹⁷⁹ creates a challenge as it deems those children who testify via CCTV as being the exception rather than the rule.

Chapter 4 also illustrated that courtrooms and court buildings generally intimidate children and that making use of alternative settings when CWD need their matters to be heard, may be an approach requiring consideration.¹⁸⁰ Nevertheless, where CWD have no option but to have their matters addressed in a formal courtroom setting, these courts must be able and equipped to accommodate CWD. This is supported by the Esthé Muller¹⁸¹ agreement as well as section 42(8) of the Children's Act where it states that the Children's Court hearings must, as far as is achievable, be held in a room which is conducive to the informality of the proceedings and be accessible to persons with disabilities and special needs.

Despite the Esthé Muller settlement and the requirements set out in the Children's Act, Chapter 4 indicated that the administrative will and commitment to abide by these standards are being neglected by the DOJ&CS.¹⁸² Budgets for renovation are not prioritised and sometimes re-allocated to other areas of need. Also, the main implementation phases appear to address disabilities where people make use of wheelchairs.¹⁸³ As was seen in Chapter 5, the most prevalent disabilities are in fact related to seeing, cognitive and hearing difficulties, with only 2% of the population having difficulty with movement.¹⁸⁴

In this regard, it is essential to look at the best practices gathered from Ghana and Canada. As pointed out, the Ghanaian Disability Act determines that by 12 August 2016, all buildings open to the public will be accessible to persons with disabilities.¹⁸⁵ In respect of Canada, the Accessibility for Ontarians with Disabilities Act, 2005, calls for the achievement of accessibility for all Ontarians with disabilities with respect to goods, services, facilities, accommodation, employment, building structures and premises on or before 1 January 2025.¹⁸⁶ Both these countries have therefore

¹⁷⁹ S 158 of the CPA.

¹⁸⁰ See par 4.3.6.2 *supra*.

¹⁸¹ See par 4.3.6.2 for a discussion on the Esthé Muller matter.

¹⁸² See par 4.3.6 *supra*.

¹⁸³ See par 4.3.6.1 *supra*.

¹⁸⁴ See par 5.3.2 *supra*.

¹⁸⁵ See par 6.2.7 *supra*.

¹⁸⁶ See para 6.3.2.6, 6.3.3.1.6 and 6.3.3.2.6 *supra*.

determined quite explicitly that by a certain date, excuses of budgetary constraints and other justifications will no longer be valid: people with disabilities must have equal access to services such as courts. South Africa does not have a predetermined timeline and at present it appears that for years to come, the state may still argue resource constraints as a justification for not providing access to services and facilities to adults and CWD. The recommendation in this regard would once again be that a cut-off date be determined by the legislature and that relevant stakeholders such as departments must account for their failure to cater to the needs of those who have all types of disabilities.¹⁸⁷ These efforts to accommodate people and CWD must not be limited to building wheelchair ramps.

Accessible court procedures and buildings form part of the obligations under pillar six. As indicated in Chapter 4, more is required to ensure that CWD gain access to justice on an equal basis with their non-disabled peers. Chapter 4 sets out the reasons why the manner in which a child, and especially a child with a disability is questioned, is very important.¹⁸⁸ In this regard Section 52 of the Children's Act further calls for rules to be made on appropriate questioning techniques for children with intellectual or psychiatric difficulties or with hearing or other physical disabilities which cause difficulties in communication.¹⁸⁹ It was also pointed out that no such rules had been made by the Rules Board as yet.¹⁹⁰ The purpose and role of the intermediary was also discussed in this regard and it was pointed out that there was no indication whether the current number of appointed intermediaries was adequate or not.¹⁹¹ Some intermediaries also serve up to five different courts in jurisdictions with quite some distance between them. This may impact on the availability of the intermediaries to assist CWD in matters affecting them.

It was also pointed out that as opposed to some other jurisdictions, such as Ontario in Canada or Zimbabwe,¹⁹² sign language is not recognised as one of South Africa's official languages. The DOJ&CS has also highlighted the availability of trained sign-

¹⁸⁷ This cut-off date can be included in the legislation which domesticates the UNCRPD as recommended earlier in this chapter.

¹⁸⁸ See par 4.3.6.1 *supra*.

¹⁸⁹ S 52(2)(a)(ii) of the Children's Act.

¹⁹⁰ See par 4.3.6.1 *supra*.

¹⁹¹ *Ibid*.

¹⁹² See par 4.3.6 *supra*.

language interpreters as an issue in respect of providing services to people with disabilities.¹⁹³ Without sign-language interpreters available to assist a child with a hearing disability, there is no way such child will be able to convey his or her testimony, feelings or accounts to a court or presiding officer. It was also pointed out that cognisance must be taken of the fact that children with hearing disabilities may communicate differently from adults with hearing disabilities.¹⁹⁴ An interpreter must therefore be aware of this difference and be able to understand the child in question. As with the intermediary, the sign-language interpreter may serve as a platform for effective participation, as well as a safeguard between adversarial formal court proceedings and the vulnerable deaf child. It is therefore important that the sign-language interpreter for children in court proceedings understands the dialect used by the child, as signs used by deaf children may originate from a different reference framework than the one used by deaf adults.¹⁹⁵

In view of this background, the need for training as detailed in Article 13 of the UNCRPD becomes more important.¹⁹⁶ Training may be the key element in confirming that an approach which may be favourable towards the participation of adults with disabilities may not be conducive towards CWD. The reason for this lies in the child's two-tier vulnerability. Knowledge is required on how to accommodate the needs of people with disabilities, but an extra level of awareness is required when it comes to CWD. Legal representatives such as those available from LASA must be trained to assist children specifically. They must receive training on the specific needs of people and CWD in order to participate, or even in order not to offend or stigmatise them. A legal representative as required by section 28(1)(h) of the South African Constitution will be ineffectual if he or she does not understand that a child with a hearing impairment may need assistance in communicating. He or she must be aware that such child, where he or she is able to verbalise his or her views may need more time to express him or herself, and that this does not mean

¹⁹³ *Ibid.*

¹⁹⁴ See par 4.3.6.2 where it was pointed out that children who make use of sign-language have their own dialect, and that understanding this dialect is important in order to understand the child.

¹⁹⁵ This is in accordance with the submissions to the Law Commission made by DeafSA on 12 Aug 1998.

¹⁹⁶ See par 4.3.6.3 *supra*.

that the child has a cognitive disability. Equally, an intermediary trained to work with children in general, must be made aware of the sensitivities around assisting a child with a disability. Such an intermediary must be made aware of incorrect terminology and possible victimisation if he or she referred to a child with a disability in a derogatory manner such as %handicapped+ or for instance %etarded+. Training on these issues is also appropriate and necessary to presiding officers. As pointed out in Chapter 4, the training provided to presiding officers in the Children's Court did not include any specific mention of CWD. The Ghanaian Disability Act included the express prohibition of calling persons with disabilities derogatory names as a result of their disability.¹⁹⁷ This action is deemed a criminal offence and punishable with imprisonment.¹⁹⁸ In South Africa, should the words uttered be based on a prohibited ground such as disability and have the intent to be hurtful, it may constitute hate speech and fall within the jurisdiction of PEPUDA and the Equality Court.¹⁹⁹ As pointed out earlier, there is limited available jurisprudence emanating from the Equality Courts to provide guidance to presiding officers on words which may actually be hurtful or harmful to people with disabilities.²⁰⁰ The underutilisation or lack of awareness of the Equality Courts and PEPUDA may thus contribute to the fact that presiding officers themselves may not be skilled in making determinations in this regard as yet, as each decision which would emanate from derogatory words used against people with disabilities will at this stage constitute precedent. Training on the awareness of stigmatisation of people with disabilities will therefore not only assist in furthering the rights of CWD to equality, but it may also assist presiding officers in their decision-making.

Ghana's Disability Act states that the training of law enforcement personnel must have, as part of their curricula, the study of disability and disability-related issues.²⁰¹

¹⁹⁷ S 37 of the Disability Act, discussed in ch 6.

¹⁹⁸ A person who is found guilty of this offence is liable on summary conviction to a fine not exceeding fifty penalty units or to a term of imprisonment not exceeding three months or to both.

¹⁹⁹ See par 4.2.6 as well as s 10 of PEPUDA.

²⁰⁰ For instance, the Equality Court has held on a number of occasions that words used against people of colour such as %baboon+ or %monkey+, may be seen as hurtful. See *Strydom v Chiloane* 2008 (2) SA 247 (T) par 251.

²⁰¹ See par 6.2.7 *supra*.

This type of obligation may be helpful in ensuring that disability-sensitive issues are brought to the attention of people working with CWD in the judicial sector.

With regard to recommendations made to address the barriers experienced by people with disabilities in respect of Article 13 of the UNCPRD, the Ontario Courts Committee made practical suggestions on how to best address these challenges within the judicial setting of Ontario.²⁰² These proposals may be very well applied to the South African context and can serve as guidance to the relevant stakeholders on how to better address and facilitate access to justice for people with disabilities. Combined with elements from the USA Handbook and Guides,²⁰³ a useful approach may be formulated and can be fine-tuned to the needs of CWD in South Africa.

The first proposal in this regard, is for the South African Government to illustrate a public commitment towards achieving a fully accessible court system for people with disabilities.²⁰⁴ This public commitment is required in order to inform the general public that making justice accessible to persons with disabilities is viewed as a priority.

The second proposal is to appoint a permanent Courts Disability Accessibility Committee to supervise progress in making justice accessible to persons with disabilities. The aim of this recommendation is to monitor progress and to assist in coordinating and planning for the removal of barriers in the justice system.

The third proposal which can be applied to the South African context is to specifically designate an official at court to take responsibility for arranging the required accommodation for people with disabilities in an effective manner. This person will be responsible for allocating human and other resources in order to respond to the needs of CWD, or whatever accommodation may be required and requested by CWD. Article 4(3) of the UNCPRD requires States Parties to consult with people with disabilities or even CWD themselves in order to eliminate barriers to accessing

²⁰² See para 6.3.2.6, 6.3.3.1.6 and 6.3.3.2.6 *supra*.

²⁰³ As discussed in par 6.4 specifically.

²⁰⁴ The Ontario Courts Accessibility Committee *Making Ontario's courts fully accessible to persons with disabilities: Report of Courts Disabilities Committee+* (2006) available at www.ontariocourts.on.ca/accessible_courts/en/report_courts_disabilities.htm (accessed on 8 Sep 2013) 6.

justice. This means that a needs assessment must be informed by the CWD or their representatives themselves, and not by an ad hoc third party not knowing what may assist the child to approach the court, or for instance, to testify. This determination highlights the importance of appointing a designated court official in charge of arranging accommodations for CWD at court. The court official may be best positioned to explain to the relevant parties what the court process may entail, to which the CWD or his or her representative may respond accordingly with what they may need to fully participate and access the court services.

The fourth proposal is for presiding officers, legal representatives and court service officials to be educated on disability accessibility and accommodation. The nature and effect of various mental, physical and/or sensory disabilities, the barriers that impede persons with disabilities from fully participating in the court system, and the ways to enable people with disabilities to effectively take part in all aspects of the court process, are all topics that need to be included in educating these key role-players.

The fifth proposal is that the public be effectively informed regarding the availability of accommodations and services. The raising of this public awareness must also be specifically aimed at reaching children.

In view of the recommendations and proposals above, it may also be deemed helpful for a checklist to be developed to assist court personnel and other role-players in assisting CWD in courts. In this regard, the ~~%~~Access to justice for CWD checklist, herewith attached as annexure ~~%~~ may be useful in reminding stakeholders what to look out for and how to respond in providing access to justice for CWD. This checklist follows the permutation approach and combines elements of best practice from the disability as well as children's rights discourse in order to provide a useful tool for, in this instance, courts to use in addressing challenges relating to access to justice for CWD.

The checklist includes, amongst others, information on the following:

- ✓ Is there a designated court official in charge of arranging accommodations for CWD at court?

- If not, consider the appointment of the court manager or Equality Court clerk as the contact person and nodal point of arranging accommodations for CWD.
- Once the appointment has been made, ensure that the contact details are made available at the entrance of the court, in large print, as well as Braille. Also provide the details of the contact person on the DOJ&CD's website and circulate it to social workers in the region.
- ✓ Is the court physically accessible for CWD?
 - Accessibility in this regard does not only refer to wheelchair ramps. As Census 2011 showed that the most prevalent disability in South Africa is some form of visual impairment, ensure that directions to the reception area or court manager (depending on who the appointed accommodations officer is) are available in large print and in Braille.
- ✓ Is there a child friendly space or room at the court?
 - Consider decorating the waiting area of the Children's Court with child-friendly pictures and comfortable seating. Ensure that whoever has accompanied the child to the court, knows where the toilet facilities are, as well as a possible canteen.
- ✓ Is there a court available for hearing the matter of the child which is not ordinarily used for criminal matters?
 - This will be in the case of matters other than criminal court cases. Arrange for a courtroom other than the one used in criminal matters and ascertain whether this court is still accessible to CWD. By contacting your local non-governmental organisation who helps CWD on a regular basis, you will be able to ascertain the needs of the child.

The checklist was compiled with reference to the Guide and Handbook from the USA, as well as in view of applicable legislation discussed in this research.²⁰⁵

7.4. Conclusion

CWD have limited access to justice in South Africa. They are vulnerable members of our society. Because of their vulnerability they are abused, neglected and

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See par 6.4 *supra*.

stigmatised. This means they need the intervention and protection of the State, their parents and the public in general more than would a child without a disability. Should CWD be denied access to justice in venting their disputes, the stigma that they are lesser members of society is reinforced. The same stigma that presupposes that they cannot participate in society, that their interests and needs are not the same as that of all other children and that their views do not count.

With proper assistance and resource allocation from responsible stakeholders, CWD can access justice on an equal footing with others. Such access will provide them with redress to their complaints, issues and disputes, as per the protection afforded to them in this regard by the South African Constitution and international agreements.

The late president Nelson Mandela once said that there can be no keener revelation of a society's soul than the way in which it treats its children. In respect of access to justice for CWD, South Africa is in need of revealing a more kind and informed soul, focussed on the rights and needs of all children in its society, including those with disabilities.

Should the two-tier vulnerability of CWD however be overlooked, their rights as worthy members of society will be negated, leaving them without hope for assistance from the justice system, and in the end, unenforceable rights.

The Constitution of South Africa, International law and domestic legislation all call for equal rights for children with disabilities (CWD). This includes equal access to justice. Your Institution may play a valuable role in facilitating access, providing you act within the framework as already established by law. This checklist aims to remind you of important considerations in your endeavours to provide equal access to justice for CWD.

1. Check your language and attitude

When interacting with CWD it is important to use the correct terminology. The correct terminology is *children with disabilities*, as it puts the emphasis on the child, not the disability. Words such as “crippled”, “spas” and “retarded” are unacceptable. Also remember that CWD are no different than other children. Do not make assumptions about the CWD. If you are uncertain about whether or not to provide any assistance to a CWD, ask. Also do not assume that CWD are unable to effectively communicate with you. Their different needs and abilities may require some

assistance, which may allow them to communicate with you in their own way. Be patient.

2. Check your legislation

Various laws address the rights of CWD to access justice. Depending on the matter brought to your office, make sure that you are aware of the relevant legislation applicable to your matter. This may include the Children’s Act 38 of 2005, the Child Justice Act 75 of 2008, The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, Mental Health Care Act 17 of 2002, The Criminal Procedure Act 51 of 1977, The Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000.

3. Check your building and processes

Inaccessibility of buildings as a result of too narrow doorways, small and inefficient restrooms, a lack of elevators, a lack of child-friendly spaces all contribute to CWD being hindered from participating in matters affecting them.

Do you have a dedicated person whom has been assigned to be of assistance to any CWD approaching your office? This person may be referred to as the disability coordinator and can assist in managing and facilitating access to your office for CWD. The contact information of this person must be widely published and made available in all forms of communication such as

Braille and audio, in order to inform any CWD, or person assisting a CWD of whom to contact upon approaching your offices. The disability coordinator will also be responsible for arranging any reasonable accommodations required by the CWD.

4. Check your local resource guide

In some cases, CWD may need the assistance of an intermediary or sign language interpreter. Make sure that you have the contact details of these persons available to ensure that the required assistance is provided to a CWD where needed.

5. Accommodations form

When a child with a disability approaches your office, the CWD or the person assisting him/her may know best what assistance they require in order to participate in the matter affecting them. Certain adjustments to your process and procedures may have to be made in order to provide them with an opportunity to participate, and this is called reasonable accommodation. You may not be able to detect what assistance or accommodation will be needed, and therefore completing an accommodations form may be very helpful. This form (attached herewith) requires the CWD or person assisting them to identify what measures must be taken by your office to allow for the CWD to equally participate in his or her matter.



It will also allow you to consider the requests, and make the necessary accommodations required before the CWD approaches your offices again. For instance, if the CWD has some level of visual impairment, he or she may request that documents relating to his or her matter to be made available in Braille or printed in a larger font. Or, where the CWD is deaf, you may be requested to ensure that a sign language interpreter be made available at the CWD'S next visit to your office.

6. Consideration of accommodations form

Once you have received or assisted the CWD to complete the accommodations form, you must consider the accommodations required. You may wish to discuss this with your supervisor or even the person who will preside over this matter. Once again it is important to remember your legislation. For instance, should your building not be easily accessible to a CWD, you may wish to hold the next session with the child at another location. For instance, the Children's Act 38 of 2005 determines that the children's court hearings must, as far as is practicable, be held in a room which is accessible to persons with disabilities.

Accommodations may consist of a variety of requests, and it is your duty to consider these requests in order to allow for CWD to gain equal access to justice, and to participate in matters affecting them. Once you have considered these requests, and prepared the necessary accommodations required, free of charge, you

must inform the CWD or his/her representative of the outcome of the request within seven (7) days. If any of the requests were deemed as unreasonable due to the financial or resource impact it may have on your office, ask the CWD or his/her representative if there are any alternative measures through which the participation of the CWD can be secured. In order to adhere to the best interests of the child principle, it is imperative that you consider all avenues so as to provide equal access to justice for CWD.

7. Preparations for appearance

Once you have informed the CWD of the accommodations which will be provided, ensure that the CWD is aware of the date of his/her next appearance at your office. On the day of such appearance, ensure that the room which will be used is properly equipped, and not ordinarily used for criminal matters, etc. Secure the earliest time possible for the CWD's appearance so as to ensure that the child's energy and concentration levels are conducive towards participation. Upon his/her arrival, ensure that you inform the CWD or his/her representative of the location of the disability friendly restrooms, as well as the nearest canteen, should one be available. Also ensure that the presiding officer is fully informed about what accommodations will be used during proceedings, and for what purpose.

Lastly, remember the six pillars:

- The best interests of the CWD is paramount in all proceedings;
- The CWD must be allowed to participate in matters affecting him/her, through whichever reasonable accommodation he/she requests;
- The CWD's level of development will determine his/her level of participation, but may not exclude the CWD from being given an opportunity to share his/her views, and for those views to be taken into consideration;
- You may not discriminate against the child based on his/her disability or age;
- The disability of the child is specific to the child, do not assume that you know the needs or experiences of the child; and
- Access to justice for CWD calls for you to assist the child through age-and disability appropriate accommodations, and for you to inform yourself through training and other measures on how to best serve to the needs of CWD.



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