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A rights-based approach to inclusive early childhood education in South Africa

Submitted in partial fulfilment of the degree LLM (Child Law)

by

Nqobile Sibanyoni

20721502

Prepared under the supervision of

Karabo Ozah

At the Faculty of Law, University of Pretoria

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20721502

Abstract

This research focuses on how the South African government can apply the rights-based approach to realise the right to ECD for children with disabilities.

The findings of the research show a significant gap in government-funded ECD services for children with disabilities, which means that children with disabilities do not enjoy the right to ECD on an equal basis with other children. This research attributes this gap to early ECD policy which did not create an enabling environment for children with disabilities. The research acknowledges government's commitment to realise the right to ECD without discrimination as expressed in the recent National Integrated ECD Policy, but submits that given the gap that already exists, government efforts aimed at ECD must be intensified for children with disabilities.

The research also submits that the recognition of ECD as a right in the National Integrated ECD Policy necessitates the realisation of ECD from a rights-based perspective. The historical critique of ECD policy offered in this research shows how government discussions after 1994 envisaged a rights-based approach to ECD. However, subsequent ECD policy development and implementation did not guarantee the State's accountability based on the normative framework guaranteed by the Constitution, United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The research submits that the National Integrated ECD Policy, which is rights-based, signals a return to the vision of realising services for children within a rights-based framework as expressed in the 1996 National Programme of Action for Children. It argues that translating the commitments in the National Integrated ECD Policy into legislation would be a significant step towards ensuring the State's accountability. The research agrees with ECD proponents that strategic litigation would also play a significant role in advancing children's right to ECD. Recent litigation which focused on ECD funding is a way forward.

This research aims to contribute to the movement that seeks to ensure that children with disabilities, enjoy human rights and freedoms on an equal basis with other children.

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Abbreviations

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CRC	United Nations Convention on the Rights of the Child
CRPD	United Nations Convention on the Rights of Persons with Disabilities
DBE	Department of Basic Education
DPME	Department of Performance, Monitoring and Evaluation
DSD	Department of Social Development
ECD	Early Childhood Development
NIP	National Integrated Plan for ECD in South Africa
NPA	National Programme of Action for Children
RDP	Reconstruction and Development Programme
SALRC	South African Law Reform Commission
UN	United Nations
UNCRC	United Nations Committee on the Rights of the Child
WPRPD	White Paper on the Rights of Persons with Disabilities
WP5	Education White Paper 5: Early Childhood Education
WP6	Education White Paper 6: Special Needs Education

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Chapter 1: Overview of the study

1.1. Introduction

The past several decades saw a growing body of neuroscientific research which indicates that the most rapid human brain development occurs during early childhood.¹ Further research argues that children who are not exposed to experiences that nurture brain development in early childhood are at risk of not reaching their developmental potential, which could result in adverse outcomes on adult health and well-being.² Proponents of ECD describe it as the foundation for sustainable development.³

Early South African ECD policy was underscored by this developmental approach.⁴ The recognition of ECD as a fundamental human right by the South African government in its 2015 Integrated ECD Policy⁵ signals government's acknowledgment of ECD as an apex priority rather than only a means to attain developmental goals.⁶ This acknowledgment necessitates the realisation of ECD from a rights-based approach.

This research explores a rights-based approach to ECD in South Africa, focusing on children with disabilities.

1.2. Problem statement

WP5, the first policy on ECD in South Africa, did not indicate how it would be implemented to realise provisioning of ECD for children with disabilities.⁷ WP6, the first policy on special needs education, prioritised children of compulsory school-going age, that is children from grade one and upwards.⁸ The education of children with disabilities in the early childhood category was therefore not provided for either in ECD policy or special needs education policy. Government

¹ See for example N Halfon *et al* "Brain development in early childhood" in Halfon *et al* (eds) *Building community systems for young children* (2001) 1-29 and RC Knickmeyer "A structural MRI study of human brain development from birth to two years" (2008) 28(47) *Journal of Neuroscience* 12176-12182.

² MM Black *et al* "Early childhood development coming of age: Science through the life course" (2017) 389 *The Lancet Series on ECD* 77.

³ S Lo *et al* "Early childhood development: the foundation of sustainable development" (2017) 389 *The Lancet Series on ECD* 9.

⁴ Education White Paper 5 on early childhood education: Meeting the challenge of early childhood development in South Africa (2001) Department of Education para 1.2.

⁵ National Integrated ECD Policy (2015) Department of Social Development.

⁶ R Allie "Count on our tiny, but important voices too!" in E Atmore *et al* (eds) *Thought leaders on early childhood development in South Africa* (2021) 18-19.

⁷ C Storbeck & S Moodley "ECD policies in South Africa – what about children with disabilities?" (2011) *Journal of African Studies and Development* 3.

⁸ Education White Paper 6 on special needs education: Building an inclusive education and training system (2001) Department of Education para 4.2.1.

has now committed to realising the right to ECD without discrimination⁹ but there is already a significant gap in “state funded, regulated and otherwise supported ECD for children with disabilities”, as conceded by the South African government in its initial report to the ACERWC.¹⁰

1.3. Research question

The overall research question that this study addresses is how the South African government can apply the rights-based approach to realise the right to ECD for children with disabilities. This will be answered by considering the following sub-questions:

- i. What does a rights-based approach to ECD entail?
- ii. How has the development of ECD policy in South Africa met or fallen short of the rights-based standard?
- iii. Does South Africa’s ECD policy framework create an enabling environment for children with disabilities?
- iv. What guidance can South Africa take from international law to realise ECD for children with disabilities within a rights-based framework?

1.4. Limitations

In South African policy ECD is a broad term that comprises a range of services including birth registration, healthcare, social security, nutritional support and early learning. An analysis of a rights-based approach to the realisation of each of these ECD components is beyond the scope of this paper. This research focuses on early learning. References to ECD throughout this paper must be understood as referring to the early learning component.

A discussion of the approach of other jurisdictions to ECD would provide interesting insights to the topic. Considering the word limit on this mini dissertation a comparative analysis is not feasible.

⁹ Integrated ECD Policy (n 5 above) page 22.

¹⁰ South Africa’s Initial Country Report on the ACRWC (2013) Department of Women, Children and People with Disabilities 124.

https://acerwc.africa/wp-content/uploads/2018/04/South-Africa_Initial_Report_under_the_ACRWC.pdf (accessed 18 October 2021).

1.5. Literature review

There is a reasonable amount of research analysing the development of South African ECD policy. Rudolph evaluates how colonial power relations influenced early ECD policy development.¹¹ Rudolph *et al* critique the international early childhood discourses that underpin the Integrated ECD Policy.¹² Philpott and Mukathrishna interrogate how the representations of disability and inclusion in ECD policy affect the lives of young children with disabilities.¹³ Storbeck and Moodley highlight the general lack of a focus on children with disabilities in ECD policy.¹⁴

From a policy implementation perspective, Atmore *et al*,¹⁵ Aubrey,¹⁶ Daries¹⁷ and Ashley-Cooper *et al*¹⁸ all describe the progress and challenges around ensuring equitable access to ECD since the formalisation of ECD policy. Notably, the 2012 diagnostic review of South African ECD paradigm and policy commissioned by the DPME made findings that were instrumental to the development of the Integrated ECD Policy.¹⁹

The available research is primarily conducted from educational, social and developmental perspectives. Beckmann and Phatudi note that ECD has generally not been the subject of authoritative legal writing.²⁰ This research aims to contribute to emerging ECD research²¹ from a legal and children's rights perspective.

¹¹ N Rudolph "Revealing colonial power relations in early childhood policy making: an autoethnographic story on selective evidence" (2021) 2(1) *Journal of Childhood, Education and Society* 14-28.

¹² N Rudolph *et al* "Data practices and inequality in South African ECD policy: Technocratic management versus transformation" (2019) 9(1) *South African Journal of Childhood Education* 1-11.

¹³ S Philpott & N Mukathrishna "A critical analysis of key policies shaping services for children with disabilities in South Africa" (2019) 23 *Education as Change* 1-23.

¹⁴ Storbeck & Moodley (n 7 above) 1-8.

¹⁵ E Atmore *et al* "Challenges facing the early childhood development sector in South Africa" (2012) 2(1) *South African Journal of Early Childhood Education* 120-139.

¹⁶ C Aubrey "Sources of inequality in South African ECD services" (2017) 7(1) *Journal of Childhood Education* 1-9.

¹⁷ J Daries "Free quality ECD for all young children" in E Atmore *et al* (eds) *Thought leaders on ECD in South Africa: a collection of thought-provoking essays* (2021) 22-26.

¹⁸ M Ashley-Cooper *et al* "Early childhood development in South Africa: inequality and opportunity" in N Spaul and JD Jansen (eds) *South African schooling: the enigma of inequality* (2019) 87-108.

¹⁹ L Biersteker *et al* "Diagnostic Review of the ECD sector" (2012).

²⁰ J Beckmann & N Phatudi "Access to and the provision of preschool education: the trajectory since 1994 (2012) 27 *South African Public Law Journal* 475-487.

²¹ See for example S Philpott "Too little, too late? The CRPD as a standard to evaluate South African legislation and policies for ECD" (2014) 2 *African Disability Rights Yearbook* 51-74.

1.6. Methodology and structure

This research paper adopts a desktop research methodology and is divided into five chapters.

Chapter one has given an overview of the research topic. It highlighted the problem statement, research question, the limitations of the study and the gap in the available literature on ECD.

Chapter two explores what a rights-based approach in the context of ECD entails and offers a historical critique of ECD policy in South Africa from a rights-based perspective. It examines whether the policy framework creates an enabling environment for children with disabilities to access ECD.

Chapter three considers the situation of young children with disabilities in South Africa within the context of challenges that already exist in the ECD sector.

Chapter four discusses South Africa's ECD obligations under international law and the extent to which South Africa meets or falls short of these standards.

Chapter five sets out recommendations to realising quality ECD for children with disabilities based on the findings of the research.

1.7. Conclusion

This research aims to contribute to the movement that seeks to ensure that children with disabilities, enjoy human rights and freedoms on an equal basis with other children.²²

²² See the preamble to the CRPD. UN General Assembly 61st Session UN Doc A/RES/61/106 (2006).

Chapter 2: ECD policy in South Africa

2.1. Introduction

This chapter offers a critique of ECD policy in South Africa. It discusses its historical context and traces its trajectory since the dawn of democracy. South African ECD policy is extensive. This chapter does not attempt to critique it exhaustively. The critique is limited to how policy meets the rights-based standard and how it caters to children with disabilities.

Children with disabilities in the early childhood category also form part of the broader group of people with disabilities. South Africa's WPRPD²³ consequently contains provisions on ECD. This paper makes brief references to the WPRPD in chapter 4, but the key focus of this chapter is ECD specific policy.

This research is set against the backdrop of a rights-based framework. It is therefore useful to provide a brief discussion of what a rights-based approach in the context of ECD entails.

2.2. A rights-based approach to ECD

The human rights-based approach emerged within the context of development.²⁴ Choondassery describes it as “a conceptual framework evolved from the moral framework of human rights”.²⁵ It premises discussions, policies and processes that address development on human rights standards.²⁶ This approach holds that the fulfilment of development goals is not based merely on moral claims but on the legal rights of the beneficiaries of development programmes against the state as the corresponding duty-bearer.²⁷

According to the UN Statement of a Common Understanding on a Human Rights-based Approach to Development Cooperation,²⁸ development programmes, policies and technical assistance should contribute to the realisation of one or several human rights laid down in international human rights instruments.²⁹ It further provides that programming should be

²³ White Paper on the Rights of Persons with Disabilities (2016) Department of Social Development.

²⁴ A de Man “Critiques of the human rights framework as the foundation of a human rights-based approach to development” (2018) 43(1) *Journal for Juridical Science* 84.

²⁵ Y Choondassery “Rights based approach: the hub of sustainable development” (2018) 8(2) *Discourse and communication for sustainable development* 18.

²⁶ n 25 above.

²⁷ de Man (n 24 above) 84.

²⁸ United Nations Development Group “The human rights-based approach to development cooperation towards a common understanding among UN agencies” (2003). <https://unsdg.un.org/resources/human-rights-based-approach-development-cooperation-towards-common-understanding-among-un> (accessed 23 September 2021)

²⁹ n 28 above para 1.

guided by human rights principles including universality and inalienability; interdependence and interrelatedness; non-discrimination and equality; and accountability and the rule of law.³⁰ Overall, a rights-based approach should strengthen the capacities of rights-holders to make their claims, and of duty-bearers to meet their obligations.³¹ Although drafted from the perspective of development programming, Lundy and McEvoy submit that the principles enunciated in this UN statement constitute the essential characteristics of the rights-based approach more generally.³²

South Africa has given constitutional expression to children's rights through section 28 of the Bill of Rights.³³ Binford regards this move as ground-breaking in that "it was the first time that children's rights were robustly and comprehensively recognised in the express language of a nation's constitution".³⁴ Commenting on section 28, the Constitutional Court has held that "the rights the provision secures are not interpretive guides. They are not merely advisory. Nor are they exhortatory. They constitute a real restraint on Parliament. And they are an enforceable precept..."³⁵

Kilkelly and Liefwaard observe that South African case law increasingly reflects a rights-based approach to the determination of children's issues, and attribute this to the Constitution's children's rights provisions which they describe as "detailed, comprehensive and rights based."³⁶

South Africa has also recognised children's rights through ratifying the CRC³⁷ and the ACRWC³⁸ which both place a duty on states parties to take legal and other measures to realise the rights enshrined in the respective instruments.³⁹ Hasina and Phatudi refer to the combination of the Constitution, the CRC and the ACRWC as the "three major levers for the

³⁰ n 28 above para 2.

³¹ n 28 above para 3.

³² L Lundy & L McEvoy "Childhood, the United Nations Convention on the Rights of the Child and research: what constitutes a rights-based approach?" in M Freeman (ed) *Law and childhood studies: current legal issues volume 14* (2012) 78.

³³ U Kilkelly & T Liefwaard "Legal implementation of the UNCRC: lessons to be learned from the constitutional experience of South Africa" (2019) *De Jure Law Journal* 522; Constitution of the Republic of South Africa Act 108 of 1996, section 28.

³⁴ W Binford "The constitutionalisation of children's rights in South Africa" (2016) 60 *New York Law School Review* 334.

³⁵ Centre for Child Law v Minister for Justice and Constitutional Development and others 2009(6) SA 632 (CC) para 25.

³⁶ Kilkelly & Liefwaard (n 33 above) page 531, 537.

³⁷ UN General Assembly 44th Session UN Doc A/Res/44/25 (1989).

³⁸ OAU Doc CAB/LEG/24.9/49 (1990).

³⁹ Article 1 of the ACRWC and article 4 of the CRC.

fulfilment of children's rights".⁴⁰ They recognise ECD as a right, and also advocate for the realisation of various rights guaranteed in the three levers through ECD.⁴¹

The UNCRC calls for states parties to adopt comprehensive and strategic plans on ECD within a rights-based framework.⁴² According to Byrne and Lundy this entails "a conscious and deliberate effort to identify the extent to which policies align with the CRC and the use of a process that in itself is rights-respecting."⁴³ They submit that fully embedding the CRC in policymaking requires more than stating that a policy is underpinned by the CRC, or a brief mention of a few provisions at the start of the policy. Rather, the policy should meaningfully engage with CRC standards.⁴⁴ Implementing the policies within a rights-based framework requires child rights impact assessments of potential impacts, and child-rights impact evaluations on actual impacts.⁴⁵ Berry *et al* assert that a rights-based approach to ECD demands the recognition of the intrinsic value and abilities of children and not merely a focus on their potential future contribution to the workforce.⁴⁶ Bray and Dawes agree with this sentiment, submitting that "a quality of life during childhood is a legitimate goal in itself, rather than only a means to a better adulthood".⁴⁷

Early government discussions on ECD after 1994 envisioned a rights-based approach, as will be evidenced in later discussion. The question to address is whether subsequent policy development and implementation ensured the state's accountability based on the normative framework guaranteed by the Constitution, the CRC and the ACRWC.

⁴⁰ E Hasina & NC Phatudi "Rights based early childhood development in South Africa" in Pascal *et al* (eds) *Early childhood education and discourse in diverse cultural contexts* (2018) 37.

⁴¹ n 40 above page 35.

⁴² UNCRC General Comment No. 7 (2005) Implementing child rights in early childhood CRC/C/GC/7/Rev.1.

⁴³ B Byrne & L Lundy "Children's rights-based childhood policy: a six-P framework" (2019) 23(3) *International Journal of Human Rights* 358.

⁴⁴ n 43 above page 360.

⁴⁵ n 43 above page 360-361.

⁴⁶ L Berry *et al* "Getting the basics right: an essential package of services and support for ECD" in Berry *et al* (eds) *South African Child Gauge* (2013) 26.

⁴⁷ R Bray & A Dawes "A rights-based approach to monitoring the well-being of children in South Africa" in A Dawes *et al* (eds) *Monitoring child well-being: a South African rights-based approach* (2007) 38.

2.3. Historical context: the apartheid years

Kamerman traces the development of ECD globally to the 19th century when the first kindergartens and nurseries were established.⁴⁸ She attributes more prominent developments in the 1960s to the increase in women entering the workforce and an increased focus on child and family policies, particularly in Europe and the United States.⁴⁹

Before the emergence of the term “ECD” in South African vernacular in the early nineties, the term “educare” was more commonly adopted.⁵⁰ The term “educare” reflected the belief that the care of young children should include the creation of nurturing environments in which they receive educational stimulation.⁵¹

Atmore notes that the establishment of the first educare centres in the 1920s and 1930s was largely in response to the plight of the white child at risk.⁵² Subsequent developments in educare took place within the ideology of racial separation advanced by the apartheid government, resulting in different policies and provisioning for the different racial groups, with white children markedly privileged.⁵³ Padayachie *et al* report that in 1990 69% of government pre-primary spending went to white pre-primary education⁵⁴ despite white children constituting a small portion of the total population of children in South Africa.⁵⁵ The preferential welfare subsidies paid to establishments catering for children between zero and six years and the discriminatory qualifying criteria for these subsidies are further examples of the historical inequities in the sector.⁵⁶

Reflecting on the inequality in the provisioning of educare under the racially segregated system, Rudolph *et al* observe that it resulted in well-funded government preschools which catered for white children only, while most black children were reliant on “limited, community-based and fee-paying educare centres”.⁵⁷ The Government of National Unity described the ECD situation it inherited as “inadequate, fragmented, uncoordinated, unequal and generally

⁴⁸ B Kamerman “A global history of early childhood education and care” (2006) *Background paper prepared for the Education for All Global Monitoring Report 2007 Strong foundations: early childhood care and education* 3.

⁴⁹ n 48 above.

⁵⁰ “Nationwide audit of ECD provisioning in South Africa” (2001) Department of Education 5.

⁵¹ n 50 above.

⁵² E Atmore “A critical analysis of preschool educare in South Africa: towards effective provision for the preschool child” unpublished master’s thesis, University of Cape Town, 1989 16.

⁵³ n 52 above page 40, 140.

⁵⁴ R Padayachie *et al* “Report of the South African study on ECD” (1994) 7.

⁵⁵ n 54 above page 5.

⁵⁶ O Van Den Berg & T Vergnani “Providing services for preschool children in South Africa: Report of an investigation conducted on behalf of the Southern Association for Early Childhood Education” (1986) 58-59.

⁵⁷ Rudolph *et al* (n 12 above) page 7.

lacking in educational value”.⁵⁸ The inherent inequalities in the sector presented enormous challenges to the new government.

2.4. The grassroots of ECD policy in the fledgeling democracy

The RDP, adopted by the new democratic government as its policy framework for achieving socio-economic progress, recognised the need for a special focus on services for children.⁵⁹ The development of ECD in the fledgeling democracy was thus premised on the bedrock of the transformation of South Africa.⁶⁰ A rights-based approach to the transformation involving children may be implied from government’s intention to ratify the CRC, which it expressed in the RDP, and its commitment in the RDP to implement the provisions of the CRC.⁶¹

The commitment to realising services for children within a rights-based framework was expressed explicitly in the NPA.⁶² The NPA stressed the need to ensure that all plans developed for the well-being of children converge in the framework provided by the CRC and RDP.⁶³ The commitment to a rights-based approach is further cemented in government’s intention to use the CRC as one of the guiding components in the implementation of the NPA, and to adopt measures to harmonise national laws and policies with the CRC.⁶⁴

The Education and Training White Paper⁶⁵ published in 1995 emphasised the importance of ECD in the context of reconstruction and development, citing that the health, nurture and education of young children cannot always be adequately provided from resources available in the community.⁶⁶ This white paper proposed two key policy objectives for the education system: the organisation, governance and funding of schools, and the provision of free and compulsory general education for all.⁶⁷ The latter objective envisaged “ten years’ free and compulsory general education for all” starting with a reception year (Grade R) to Grade 9.⁶⁸

The Interim ECD Policy of 1996 was aimed at giving effect to the initiative of introducing a reception year. Implementation of this strategic plan commenced with the launch of a three-

⁵⁸ Interim Policy for ECD (1996) Department of Education para 2.

⁵⁹ White Paper on Reconstruction and Development (1994) Ministry in the Office of the President para 3.12.6.

⁶⁰ L Richter & ML Samuels “The universal preschool year: a study of policy development and implementation” (2017) 44(1) *Child: care health and development* 13.

⁶¹ White Paper on Reconstruction and Development (n 59 above) para 3.12.6.

⁶² National Programme of Action for Children: Framework (1996) Government of National Unity <http://www.gov.za> (accessed 29 August 2021).

⁶³ n 62 above.

⁶⁴ n 62 above.

⁶⁵ White Paper on Education and Training (1995) Department of Education.

⁶⁶ n 65 above para 74.

⁶⁷ n 65 above para 9.2.

⁶⁸ n 65 above para 2.

year National ECD Pilot Project beginning in 1997, which was designed to test the interim policy.⁶⁹

Following the pilot project, the Department of Education commissioned the Nationwide Audit of ECD Provisioning in South Africa (ECD Audit) which was aimed at gathering information to help government plan and develop policy for the delivery of services to young children.⁷⁰ It painted a picture of the national status of ECD and, significantly, provided the first empirical view of the provisioning of ECD in South Africa.⁷¹

The White Paper on Education and Training and the Interim ECD Policy formed the framework for the development of ECD policy, while the recommendations of the ECD Pilot Project and findings of the ECD Audit are said to have further informed the implementation of policy.⁷² The combination of these early initiatives culminated in the adoption of WP5 in 2001.

2.5. Formalising ECD policy: WP5

WP5 acknowledged the importance of investing in ECD from birth, but its policy priority was the implementation of the reception year. Government targeted that by 2010 all learners entering Grade 1 should have been enrolled in an accredited reception year programme.⁷³ This initiative would cater for children between the ages of five and six years.

WP5 did not provide for a compulsory reception year as envisioned by the Education and Training White Paper. It aimed, rather, for universal access and its progressive realisation.⁷⁴ Feza submits that compulsory provisioning would commit government to providing free Grade R to all learners regardless of their geographic location or socio-economic status, thus making the reception year a right.⁷⁵ With universal access, parents are not obliged to enrol their children in a Grade R programme.⁷⁶ The current Schools Act 84 of 1996 makes school attendance compulsory for learners only from Grade 1,⁷⁷ and many children start Grade 1

⁶⁹ Preface to the Interim Policy on ECD (n 58 above).

⁷⁰ ECD Audit (n 50 above) page 172.

⁷¹ ECD Audit (n 50 above) page 3.

⁷² JM Burt "Righting a wrong: rural early childhood education in South Africa" in CT Williams & TL Mann (eds) *Early childhood education in rural communities: access and quality issues* (2011) 158.

⁷³ WP5 (n 4 above) para 1.4.

⁷⁴ NN Feza "Reception year provision" in Reddy *et al* (eds) *Towards a 20-year review: basic and post school education* (2013) 9.

⁷⁵ n 74 above.

⁷⁶ n 74 above.

⁷⁷ Section 3(1).

classes without first attending a Grade R class.⁷⁸ Atmore notes with disappointment that this places ECD on the periphery of the education system.⁷⁹

The adoption of different policy positions in respect of the different age groups resulted in the responsibility for ECD being shared between the DBE (for grade R) and the DSD (for children aged zero to four years).⁸⁰ Atmore notes that this in turn resulted in a lack of clarity regarding which department was responsible for which aspects of ECD.⁸¹ For example, the DSD was responsible for the provision and funding of services for children in the zero to four years age group, while the DBE developed the curriculum for the same age group.⁸² To address challenges such as this, the South African government announced the planned migration of responsibility for ECD centres from the DSD to the DBE 2019.⁸³ The ECD function shift, which was implemented on 1 April 2022, saw the DBE assuming responsibility to support, subsidise and regulate ECD programmes in line with chapter five and six of the Children's Act.⁸⁴ Government aims that this function shift will create opportunities to accelerate the provisioning of ECD and redesign systems for state monitoring and support for ECD.⁸⁵

The different policy positions adopted in respect of the five to six years age cohort (Grade R) on one hand, and the zero to four years age cohort on the other, are examined separately below.

2.5.1. The reception year policy priority

WP5 advocated making public primary schools the main sites for providing the reception year programme, with community-based sites as secondary providers in cases where the public school option was not available for learners due to, for example, the public school not being within reasonable distance. Community-based sites were encouraged to prioritise years prior to the reception year.⁸⁶

⁷⁸ Beckmann & Phatudi (n 20 above) page 485.

⁷⁹ E Atmore "An interpretive analysis of the ECD policy trajectory in post-apartheid South Africa" unpublished PhD thesis, Stellenbosch University, 2019 113.

⁸⁰ Integrated ECD Policy (n 5 above) page 57.

⁸¹ Atmore (n 79 above) page 170.

⁸² Atmore (n 79 above) page 169.

⁸³ President Cyril Ramaphosa: 2019 State of the Nation Address <https://www.gov.za/speeches/president-cyril-ramaphosa-2019-state-nation-address-7-feb-2019-0000> (accessed 27 July 2022).

⁸⁴ ECD function shift – demystifying misconceptions <https://cecd.org.za/news/ecd-function-shift/> (accessed 27 July 2022).

⁸⁵ Frequently asked questions ECD Function Shift https://www.westerncape.gov.za/assets/departments/social-development/ecd_function_shift_faqs.pdf (accessed 27 July 2022).

⁸⁶ WP5 (n 4 above) para 4.1. The policy also provided for the private provision of Grade R in independent pre-primary and primary schools in line with national standards.

Developments towards pre-basic education that had begun to take place in the 1980s shed light on the emphasis that government placed on the reception year. Richter and Samuels point out that the case for pre-basic education first came onto the agenda of the apartheid government.⁸⁷ The 1981 De Lange Commission, tasked with conducting a comprehensive investigation into the provisioning of education in South Africa, pointed to the need for conscious intervention in the pre-basic education phase.⁸⁸ Citing the high failure and dropout rates, particularly among black children in Grades one to four, it recommended a free and compulsory bridging programme targeted at school readiness for six-year-old children.⁸⁹

Various attempts at creating bridging programmes were made, notably the Department of Education and Training Bridging Period Programme, which received anecdotal reports from teachers and school management that it was contributing to preparing children for school.⁹⁰ It appears that the model of bridging programmes, developed from a remedial perspective,⁹¹ was recreated as Grade R and carried forward by the 1994 government.⁹² The government stated its rationale for Grade R in the following terms:

“Confronted with high rates of repetition and dropout in education for the disadvantaged, and political demands to increase equity, the new South African government wants to ensure that all children can benefit from basic education. It is widely agreed that one cause of repetition is inadequate preparation of children at school entry. Many pupils lack the nutrition, health, socialisation and educational stimulation that prepare them for school and life. It is widely believed that preschool could address these issues, and in the process contribute to lowering repetition and dropout rates.”⁹³

Rudolph refers to the prioritising of the reception year as “the single story that has dominated early childhood policy”.⁹⁴ She criticises this proposal as it is based on research published during apartheid, arguing that it emerged without meaningful debate or discussion, and ignored the informal educare sector that was working in marginalised communities.⁹⁵ Atmore agrees with the latter submission, adding that transparent consultations with the ECD non-

⁸⁷ Richter & Samuels (n 60 above) page 13.

⁸⁸ Human Sciences Research Council “Provision of education in the Republic of South Africa: report of the main committee of the HSRC investigation” (1981) 107.

⁸⁹ n 82 above.

⁹⁰ Padayachie *et al* (n 54 above) page 19.

⁹¹ Padayachie *et al* (n 54 above) page 120.

⁹² Burt (n 72 above) page 154.

⁹³ Padayachie *et al* (n 54 above) page iii.

⁹⁴ Rudolph (n 11 above) page 26.

⁹⁵ Rudolph (n 11) above page 19-20.

profit sector and civil society were absent in formulating WP5, leading the ECD sector to see it as being imposed.⁹⁶

Vally further submits that the Grade R policy priority advocated in WP5 was conceptualised contrary to the findings of the ECD Pilot Project in which provinces had agreed on “the importance of the community, intersectoral support, the non-institutional nature of quality services and the central role of community practitioners”.⁹⁷

Regarding government’s preference for school based provisioning for Grade R, Porteus suggests that from the start of the policy process an unresolved tension existed between the community based, multi-age model of provision and the school based model favouring Grade R.⁹⁸ She argues that the policy adopted did not have to be a mutually exclusive choice, and that the decision in favour of the school based Grade R programme was at the expense of community-based sites.⁹⁹ Rudolph *et al* echo this sentiment, citing that the progressive work of the NGO sector was undermined by institutionalising Grade R in public schools.¹⁰⁰ According to Rule the institutionalising of Grade R had a negative effect on community-based provision as it gave many parents incentives to send their five and six-year-olds to school based programmes.¹⁰¹ The school option was cheaper (community-based sites remained largely dependent on parent fees) and it included one free meal a day.¹⁰²

The European Union Agenda for the Rights of the Child¹⁰³ provides for early childhood education and care based on a similar rationale as WP5. It states that “giving children access to early childhood education and care is a foundation for successful lifelong learning, social integration, personal development and later employability.”¹⁰⁴ Herczog comments that the stance taken by the EU makes access to early childhood care and education an investment in the future and not a rights-based opportunity.¹⁰⁵ In my opinion, Herczog’s argument and the observations made by the various scholars above raise hesitancy as to whether WP5 was conceived from a rights-based perspective. It appears that the NPA’s rights-based vision was

⁹⁶ Atmore (n 79 above) page 112.

⁹⁷ S Vally “Citizenship and children’s education rights in South Africa” (2005) 35 *Journal of Education* 34.

⁹⁸ K Portues “The state of play in early childhood development” in L Chisholm (ed) *Changing class: education and social change in post-apartheid South Africa* (2004) 353.

⁹⁹ n 92 above page 355.

¹⁰⁰ Rudolph *et al* (n 12 above) page 4.

¹⁰¹ P Rule “Ten years of early childhood development: a case study of the Little Elephant Training Centre for Early Education” (2005) 35 *Journal of Education* 134.

¹⁰² n 101 above.

¹⁰³ European Commission SOC/415-EESC-2011-1853 <https://resourcecentre.savethechildren.net/pdf/3599.pdf/> (accessed 18 October 2021).

¹⁰⁴ n 103 above page 9.

¹⁰⁵ M Herczog “Rights of the child and early childhood education and care in Europe” (2012) 47(4) *European Journal of Education* 544.

overshadowed by the need to prepare children for Grade 1. This explains the priority placed on children in the five and six-year age group.

Considering that the purpose of WP5 was to prepare children for school, the policy position regarding children under 5 years is vague. In fact, WP5 does not cater for this age group except to propose inter-sectoral collaboration for the development of a strategic plan focused on improving the quality of early learning programmes.¹⁰⁶ This position is contrary to research quoted in WP5 that “the largest part of brain development happens before a child reaches three years.”¹⁰⁷ WP5 also acknowledged the general neglect of provision of ECD services for children from birth to two years, referring to this age group as “the most critical stage in terms of children’s growth and development”.¹⁰⁸ However, it failed to prioritise this critical stage. In my opinion the insistence on rolling out the reception year gives credence to Porteus’ speculation that the decision on the reception year priority was made even before the ECD Pilot Project was complete.¹⁰⁹

An evaluation of the impact of Grade R commissioned by the presidency reported virtually no measurable impact for the poorest three school quintiles and concluded that Grade R further extends the advantage to more privileged schools.¹¹⁰ I submit that the Grade R policy priority must be revisited, especially considering government’s plan to introduce a universal pre-Grade R year,¹¹¹ resulting in two years of compulsory ECD. Kotze *et al* argue that “implementing an additional year of early childhood care and education will not have the expected (and much needed) impact if it will be of the same quality as current Grade R provisioning”.¹¹²

Regarding children with disabilities WP5 acknowledged that they were for the most part not provided for either in the mainstream or in special schools.¹¹³ However, it failed to indicate how the policy would be implemented to realise access for children with disabilities.¹¹⁴ In my opinion government’s preference for the provisioning of Grade R in public schools excluded

¹⁰⁶ WP5 (n 4 above) para 1.4.5.

¹⁰⁷ WP5 (n 4 above) para 1.1.2.

¹⁰⁸ WP5 (n 4 above) para 2.2.1.

¹⁰⁹ K Porteus “Fighting the dragon: globalisation and its attack on equality” (2001) 8(2) *Quarterly Review of Education and Training* 8-17 as cited in Vally (n 97 above) page 34.

¹¹⁰ S van der Berg *et al* “Final report for the Department of Education & Department of Performance Monitoring and Evaluation in the Presidency” (2013) 2.

¹¹¹ President Cyril Ramaphosa State of the Nation Address 2019 <http://www.gov.za> (accessed 11 November 2019); “National Development Plan – 2030” National Planning Commission 300.

¹¹² J Kotze “The readiness of the South African education system for a pre-Grade R year” Stellenbosch Economic Working Papers: 15:15 24.

¹¹³ WP5 (n 4 above) para 2.1.6.

¹¹⁴ Storbeck & Moodley (n 7 above) page 3.

five-to-six-year-olds with disabilities because at the time WP5 was adopted government was still formalising WP6, which was aimed at an inclusive education system in the long-term.¹¹⁵ The short-term to medium-term goal articulated in WP6 was also exclusionary. It stated that government would focus on expanding provision and access to children of compulsory school-going age.¹¹⁶ As already mentioned, Grade R is not compulsory. The corollary is that Grade R provisioning for children with disabilities would not be prioritised in the short-term to medium-term, which was planned to span eight years.¹¹⁷

2.5.2. The case of zero to four-year-olds

WP5 advocated a system of inter-sectoral collaboration for ECD services for children under five years. This led to the adoption of the NIP.¹¹⁸ The vision of the NIP was expressed as:

“To create an environment and opportunities where all children have access to a range of safe, accessible and high quality ECD programmes that include a developmentally appropriate curriculum, knowledgeable and well-trained programme staff and educators and comprehensive services that support their health, nutrition, and social well-being in an environment that respects and supports diversity”.¹¹⁹

It aimed to provide an integrated package of services for children in selected rural and urban nodes, spanning healthcare, nutrition and early learning and stimulation.¹²⁰ It acknowledged the need for different models of provisioning that would take the diverse social, historic and economic backgrounds of children and their caregivers into account.¹²¹ It envisioned the delivery of these services at various sites including homes, formal ECD centres and informal ECD settings, and targeted universal coverage by 2010 through a phased approach.¹²² The first phase envisaged delivery of services at 5000 currently registered ECD sites receiving subsidies, with gradual expansion through the registration and subsidisation of an additional 5400 unregistered ECD sites in the second phase. The third phase was dedicated to establishing informal mother/child programmes and the fourth phase would focus on ensuring stability and strengthening the institutional structures.¹²³

¹¹⁵ WP6 was published in July 2001 whereas WP5 was published in May 2001.

¹¹⁶ WP6 (n 8 above) para 4.2.1.

¹¹⁷ WP6 (n 8 above) para 4.4.12.2.

¹¹⁸ National Integrated Plan for ECD in South Africa 2005 - 2010 (2005) Government of South Africa & UNICEF.

¹¹⁹ n 118 above para 2.1.

¹²⁰ n 118 above para 4.1.

¹²¹ n 118 above para 1.1.

¹²² n 118 above para 2.2.

¹²³ n 118 above para 4.3.2.

Campbell notes that the NIP articulates a broader vision than WP5 but questions whether it takes the realities of children into account, particularly barriers to achieving equitable access.¹²⁴ She points out that the plan does not set specific targets for the implementation of home and community-based programmes, in contrast to the targets set for centre-based programming.¹²⁵ Instead the plan for these programmes is vaguely stated as “delivery of services to parents and young children at household and community level”.¹²⁶ The lack of targets for home and community-based provisioning renders it impossible to measure progress.¹²⁷ Campbell concludes that the plan does little more for home and community-based programmes than recognising their importance on paper.¹²⁸ This skewing in favour of centre-based provisioning excludes the poorest and most vulnerable children¹²⁹ as the lack of ECD centres is particularly stark in disadvantaged communities.¹³⁰ Desmond argues that it further excludes children under two years as there are small numbers of this age group enrolled in ECD centres, leaving them with few ECD services other than healthcare.¹³¹ This undermines the first 1000 days of life,¹³² a critical stage in child development. In my opinion the sidelining of community-based sites also disproportionately affected children with disabilities. According to the ECD pilot project report,¹³³ a greater percentage of children with disabilities attended community-based-sites.¹³⁴ The lack of clear implementation plans for ECD at the community level means that children with disabilities were not prioritised. Storbeck and Moodley note that the NIP generally did not place adequate focus on children with disabilities and the importance of early identification and intervention.¹³⁵

Biersteker argues that the NIP was broadly targeted and adds that it did not “sufficiently differentiate levels of child and caregiver vulnerability” or “provide adequate definitions for vulnerable groups for targeting purposes”.¹³⁶ Berry *et al* submit that the vision of the NIP offered a useful starting point for the delivery of services for children under five years but argue

¹²⁴ P Campbell “A critical examination of the legislative and policy framework governing ECD service provision in South Africa since 1994” unpublished master’s dissertation, University of Cape Town, 2012 74.

¹²⁵ n 124 above page 88.

¹²⁶ n 124 above page 89.

¹²⁷ n 124 above page 89.

¹²⁸ n 124 above page 89.

¹²⁹ n 124 above page 67.

¹³⁰ Daries (n 17 above) page 22.

¹³¹ C Desmond “Background paper 11: cost and impact” in L Biersteker *et al* “Diagnostic Review of Early Childhood Development” (2012) 1.

¹³² L Bamford “The first 1000 days: ensuring mothers and young children thrive” in M Shung-King *et al* (eds) *South African ChildGauge* (2019) 71.

¹³³ Report on the National ECD Pilot Project (2001) Department of Education.

¹³⁴ n 133 above page 2, 126.

¹³⁵ Storbeck & Moodley (n 7 above) page 4.

¹³⁶ Human Sciences Research Council “Scaling up ECD (0-4) in South Africa” (2008) 12.

that there was a need to expand the intentions expressed in the NIP by providing concrete recommendations.¹³⁷

The end of the NIP in 2010 ushered in a new process of ECD reform¹³⁸ culminating in the adoption of the current Integrated ECD Policy, which is considered below.

2.6. Integrated ECD Policy

The Integrated ECD policy sets out government's commitments to developing a comprehensive ECD system that will ensure universal availability and access to ECD services for infants, young children and their caregivers by 2030.¹³⁹ It spans a range of services including child-centred social security, birth registration, healthcare, food and nutrition and early learning, among others.¹⁴⁰ It caters for children from birth until the year before a child enters formal school and envisages an intersectoral programme, with the prioritisation and delivery of identified essential components by 2024.¹⁴¹ Essential components are identified as those services that are immediately realisable rather than being subject to progressive realisation, such as early learning support and services.¹⁴² The policy envisaged the establishment of the necessary legal frameworks and financing mechanisms to support its commitments by 2017.¹⁴³

In contrast to WP5 and the NIP, Hasina and Phatudi observe that the ECD policy is "grounded in a human rights philosophy".¹⁴⁴ It recognises ECD as "a fundamental and universal right to which all young children are equally entitled without discrimination".¹⁴⁵ It mentions the CRC and ACRWC as legal foundations for the public provision of ECD services as a right.¹⁴⁶ Significantly, it states that government is responsible for developing a publicly funded national ECD system.¹⁴⁷ Atmore comments that it is more rights-based, comprehensive and integrated than previous ECD policies.¹⁴⁸

¹³⁷ Berry *et al* (n 46 above) page 29.

¹³⁸ Davids *et al* "The pilot evaluation for the National Evaluation System in South Africa - a diagnostic review of early childhood development" (2015) 3(1) *African Evaluation Journal* 2.

¹³⁹ Integrated ECD Policy (n 5 above) page 49.

¹⁴⁰ Integrated ECD Policy (n 5 above) page 25-28.

¹⁴¹ Integrated ECD Policy (n 5 above) page 49.

¹⁴² Integrated ECD Policy (n 5 above) page 49.

¹⁴³ Integrated ECD Policy (n 5 above) page 49.

¹⁴⁴ Hasina & Phatudi (n 40 above) page 40.

¹⁴⁵ Integrated ECD Policy (n 5 above) page 22.

¹⁴⁶ Integrated ECD Policy (n 5 above) page 18.

¹⁴⁷ Integrated ECD Policy (n 5 above) page 24.

¹⁴⁸ Atmore (n 79 above) page 181.

Regarding children with disabilities the policy identifies inclusive and specialised services as a gap in the current ECD system and commits to prioritising inclusion and support for children with disabilities in all ECD programmes.¹⁴⁹ The policy aims that all children with disabilities will be able to access inclusive ECD services by 2030.¹⁵⁰ To this end, it makes various commitments such as increasing ECD funding for children with disabilities, expanding infrastructure to promote inclusion and training ECD practitioners to provide services for children with disabilities.¹⁵¹ While these commitments made to children with disabilities are progressive, Philpott and Mukathrishna observe a trend in the policy that treats children with disabilities as “a homogenous group with similar needs”, a construct which does not consider the complexity of disability.¹⁵² They argue that the policy creates a binary between children with and without disabilities whereas there is “a continuum of developmental delays, impairments and contextual factors that determine the extent to which all children are able to participate”.¹⁵³ They also question the need to “train a sufficient number of ECD practitioners” for inclusion,¹⁵⁴ and argue that if the aim is inclusion then all ECD practitioners must be trained to cater for diversity.¹⁵⁵ They commend the inclusion of community-based rehabilitation (CBR) programmes for children with disabilities but note that the policy does not mention CBR workers as personnel providing ECD services, or provide for their training.¹⁵⁶

Ashley-Cooper points out that while the prospects of the policy are promising, it is unclear how it will be implemented.¹⁵⁷ The policy envisaged the development of an intersectoral and inclusive ECD guideline aimed at ensuring inclusive ECD services for children with disabilities and developmental delays by 2017.¹⁵⁸ This guideline has not been forthcoming. In my view the absence of concrete plans to realise the commitments to children with disabilities expressed in the policy only gives nominal value to their rights.

Van Niekerk *et al* further question the implementation timelines set out in the policy, arguing that government is putting the lives of children at risk by delaying implementation of the policy

¹⁴⁹ Integrated ECD Policy (n 5 above) page 66.

¹⁵⁰ Integrated ECD Policy (n 5 above) page 66.

¹⁵¹ Integrated ECD Policy (n 5 above) page 66, 103.

¹⁵² Philpott & Mukathrishna (n 13 above) page 15.

¹⁵³ Philpott & Mukathrishna (n 13 above) page 15.

¹⁵⁴ Integrated ECD Policy (n 5 above) page 66.

¹⁵⁵ Philpott & Mukathrishna (n 13 above) page 16.

¹⁵⁶ Philpott & Mukathrishna (n 13 above) page 16.

¹⁵⁷ M Ashley-Cooper et al (n 18 above) page 101.

¹⁵⁸ Integrated ECD Policy (n 5 above) page 66.

as many children will be denied access to ECD services during the time delay.¹⁵⁹ As Rudolph *et al* put it, “young children cannot wait for their rights to be progressively realised”.¹⁶⁰

While the policy has been hailed as progressive by various experts, it has not been translated into legislation outlining clear accountability.¹⁶¹ The current Children’s Act 38 of 2005 frames the state’s role in providing and funding ECD in discretionary terms.¹⁶² Biersteker argues that this “casts the current ECD framework within a service or benefit-based rather than a rights-based framework”.¹⁶³

2.7. Conclusion

This chapter argued that the reception year policy priority advocated by WP5 moved away from the NPA’s intention to provide services for children within a rights-based framework. While the roll-out of Grade R has been the primary focus for early learning stimulation, the policy was not clear on how it would be implemented for children with disabilities. The adoption of the ECD policy in 2015 signaled a commitment to the NPA’s vision of a rights-based approach. What is still lacking is clear government accountability to realise the commitments of the ECD policy.

¹⁵⁹ LJ Van Niekerk *et al* *Effective early childhood development options meeting the needs of young South African children* (2017) 288.

¹⁶⁰ Rudolph *et al* (n 12 above) page 5.

¹⁶¹ Financial and Fiscal Commission Policy Brief “Reducing barriers to inclusive early learning education” (2021) 4.

¹⁶² Section 93(1) of the Children’s Act.

¹⁶³ L Biersteker *et al* (n 19 above) page 49.

Chapter 3: Challenges facing the ECD sector

3.1. Introduction

This chapter considers the situation of children with disabilities in the context of challenges that already exist in the South African ECD sector. It argues that the existence of these challenges even in the absence of efforts to promote inclusive ECD provisioning¹⁶⁴ makes the situation even worse for children with disabilities.

3.2. Funding and registration

The National Norms and Standards for Grade R Funding vests the funding of Grade R in the provincial education departments and allows provinces to cost Grade R funding at 50-70% of the cost for a Grade 1 learner.¹⁶⁵ Government spending on Grade R has increased significantly over the years, but the Financial and Fiscal Commission reports that it still constitutes a small portion of the total education expenditure.¹⁶⁶ In its 2019/20 Budget Brief for South Africa, UNICEF reported large disparities in Grade R funding across the provincial education departments.¹⁶⁷ According to Feza the allowance of a 50-70% of the Grade 1 learner cost contributes to the lack of standardisation in Grade R funding across provinces.¹⁶⁸ Feza argues that the funding of Grade R is compromised by the ambiguity at the policy level of whether Grade R forms part of basic education or not. For example, while Grade R is included in the national curriculum, a separate funding formula applies to it.¹⁶⁹

Government funding to community-based sites for the zero to four-year age group is through means-tested per-learner subsidies paid to registered or conditionally registered sites, currently set at R17 per learner per day.¹⁷⁰

Ngwena and Pretorius contest the use of the term “subsidy” in that it fails to convey the nature of the state’s funding obligation to private sector social services providers. They argue that the

¹⁶⁴ Department of Basic Education & UNICEF “Study on children with disabilities from birth to four years old” (2015) 44.

¹⁶⁵ National Norms and Standards for School Funding (2008) Department of Education para 203-209.

¹⁶⁶ Financial & Fiscal Commission “Investigating the appropriate role of the state in ECD education” (2021) 17.

¹⁶⁷ UNICEF Education Budget Brief South Africa 2019/20 24.

¹⁶⁸ N Feza “Background paper 4: Grade R” in Biersteker *et al* (n 19 above) page 24.

¹⁶⁹ n 168 above page 11.

¹⁷⁰ Department of Social Development media statement 4 June 2020 <http://dsd.gov.za> (accessed 29 September 2021).

term suggests “an essentially benevolent form of state augmentation of private means to assist the recipient in achieving its goals”, a construction which is constitutionally misplaced.¹⁷¹

Many ECD centres report that the subsidy is hardly enough to cover the full costs of the programmes and the shortfall is typically recovered from parent fees.¹⁷² Payment of the subsidy is means tested and there is no standardised national means test as it varies across provinces.¹⁷³

Funding is subject to a dual registration process,¹⁷⁴ which is in turn subject to compliance with minimum norms and standards. Many stakeholders view the regulatory framework around registration as complex and onerous, resulting in barriers to registration (and consequently barriers to funding) which disproportionately affect the poorest children,¹⁷⁵ including children with disabilities. Lutuli criticises government’s lack of a tailored approach to guidelines for informal centres.¹⁷⁶ She argues, for example, that the expectation for ECD sites to provide formal structures within informal areas is a contradiction in terms.¹⁷⁷ In 2017 government introduced an ECD conditional grant, a component of which is aimed at assisting ECD centres with minor building and maintenance improvements to assist them to comply with the norms and standards.¹⁷⁸ This grant is only available to sites that are conditionally registered and there is no mention of upgrading or maintenance assistance to unregistered sites.¹⁷⁹ I argue that the inability to access the maintenance grant leaves unregistered ECD centres in a paradoxical situation. The onerous requirements are a barrier to registration, and they cannot access funds to help them meet the requirements because they are not registered. Ultimately the children bear the brunt. With many sites operating without registration, many children do not receive any government funding towards their early learning.

¹⁷¹ C Ngwenya & L Pretorius “Substantive equality for disabled learners in state provision of basic education: a commentary on *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*” (2012) 28(1) *South African Journal on Human Rights* 99.

¹⁷² Department of Basic Education, Department of Social Development & UNICEF “Tracking public expenditure and assessing quality in ECD in South Africa” (2010) 32, 92.

¹⁷³ S Giese *et al* “Government funding for ECD: can those who need it get it?” (2011) 35.

¹⁷⁴ The process involves registration as a partial care facility and registration of the ECD programme.

¹⁷⁵ Rethinking the Children’s Act for ECD: A position paper adopted by 42 organisations working in the ECD sector in South Africa (2019) 3.

¹⁷⁶ T Lutuli “The impact of Covid-19 on the ECD sector” in E Atmore *et al* (eds) *Thought leaders on ECD in South Africa: a collection of thought-provoking essays* (2021) 41.

¹⁷⁷ n 167 above page 54.

¹⁷⁸ National Treasury Notice 459 of 2017. Government Gazette, 12 June 2017. <http://gpwonline.co.za> 135-136 (accessed 27 November 2021).

¹⁷⁹ n 178 above.

The lack of funding perpetuates the marginalised status of the sector.¹⁸⁰ Children with disabilities are further marginalised as there is no ECD costing for children with disabilities who may require additional funding and resources.¹⁸¹

The existing funding constraints were worsened by the COVID-19 lockdown which saw the payment of subsidies to ECD centres either completely or partially withheld by the DSD.¹⁸² This prompted several organisations to approach the High Court seeking a reinstatement of the subsidies.¹⁸³ The court cited many outcries from the ECD sector that the ongoing withholding of subsidies would lead to the eventual closure of ECD facilities, impacting thousands of children.¹⁸⁴ The Minister of Social Development (the Minister) submitted that she urged provinces to pay the subsidies in full but denied that she has a statutory duty to take action in instances of non-compliance.¹⁸⁵ The court rejected this argument and pointed out that according to the conditional grant framework for 2020/2021 published under the Division of Revenue Act 4 of 2020, the Minister has a duty to take action in cases of non-compliance.¹⁸⁶ The court accordingly ordered the Minister to “ensure without delay that the subsidies are paid to approved ECDs.”¹⁸⁷ The court emphasised that the Minister is under a constitutional and statutory duty to ensure that the subsidies are paid.¹⁸⁸

While the judgment favoured the ECD sector, Ally *et al* regret that the court did not ground its decision within a rights-based framework.¹⁸⁹ They submit that the judgment demonstrates the need for a holistic rights-based framework for ECD.¹⁹⁰

¹⁸⁰ ECD audit (n 50 above) page 34.

¹⁸¹ Early Childhood Development Grant: Department of Social Development presentation, NCOP Appropriations, 23 May 2017. <https://pmg.org.za/committee-meeting/24426/> (accessed 29 September 2021).

¹⁸² *SA Childcare (Pty) Ltd & others v Minister of Social Development & others* (GSI) unreported case no: 36962/2020 para 23.

¹⁸³ n 182 above para 1.

¹⁸⁴ n 182 above para 26-29.

¹⁸⁵ n 182 above para 30.

¹⁸⁶ n 182 above para 18.

¹⁸⁷ n 182 above para 39.

¹⁸⁸ n 182 above para 39.

¹⁸⁹ N Ally *et al* “Litigation and social mobilisation for early childhood development during COVID-19 and beyond” (2022) *South African Journal of Childhood Education* 6.

¹⁹⁰ n 189 above.

3.3. Provisioning and access

The 2001 ECD audit reported that children enrolled in identifiable ECD sites comprised 16% of the estimated 6.4 million South African children between the ages of zero and seven. Children with disabilities accounted for just over 1% of the enrolled children.¹⁹¹ Government and research bodies agree that provisioning and access have since expanded significantly, although they cite vastly different statistics.¹⁹² Many scholars note the lack of reliable data on ECD.¹⁹³ Save the Children South Africa observes the lack of data on child disability in general.¹⁹⁴ A situational analysis on children with disabilities in South Africa observes that data collection on children reveals biases towards children with disabilities as they are typically excluded.¹⁹⁵

In a recent press briefing the Minister of Basic Education conceded that the lack of accurate data and limited information on the ECD landscape are key barriers to effective planning in the sector.¹⁹⁶

Despite the lack of data, research points to inequities in provisioning and access.¹⁹⁷ The lack of provisioning is particularly stark in disadvantaged communities where there is also a lack of other socio-economic rights including basic nutrition, healthcare and social services.¹⁹⁸ Access to ECD was further affected by the declaration of a state of national disaster in the wake of COVID-19 in 2020, which saw the closure of schools, including ECD centres.¹⁹⁹ When schools were eventually allowed to re-open, government did not give guidance on the reopening of ECD centres.²⁰⁰ This led several organisations to approach the High Court seeking the re-opening of ECD centres.²⁰¹ The court granted the order subject to appropriate safety measures being in place.²⁰² According to Lutuli many ECD centres did not have the resources to meet the conditions for reopening.²⁰³ She points out that unlike other sectors, the

¹⁹¹ ECD audit (n 50 above) page 40, 163.

¹⁹² Financial & Fiscal Commission (n 157) page 8.

¹⁹³ See for example J Kotze "Can pre-grade R be the stepping stone to social equality in South Africa" (2015) 5(2) *South African Journal of Childhood Education* 5; Sambu *et al* *South African Early Childhood Review* (2016) 23; Equal Education Law Centre "A report on the state of education: Trends and issues characterizing the education sector over the last 5 years (2014-2019)" (2019) 6.

¹⁹⁴ Save the Children South Africa "Analysis of the children's sector in South Africa" (2015) 19.

¹⁹⁵ Department of Women, Children & People with Disabilities "Children with disabilities in South Africa: a situation analysis 2001-2011" (2012) 74.

¹⁹⁶ Minister Angie Motshekga: Learning losses due to Covid-19 pandemic <http://www.gov.za> (accessed 1 October 2021).

¹⁹⁷ See for example Aubrey (n 16 above) page 8; Ashley-Cooper *et al* (n 18 above) page 87.

¹⁹⁸ Daries (n 17 above) page 22.

¹⁹⁹ Minister Zulu calls on Social Development and its public entities to implement measures to minimise the spread of Covid-19, 17 March 2020. <https://www.gov.za/speeches/minister-zulu-calls-social-delopment-and-its-publivec-entities-implement-measures-minimise> (accessed 23 March 2022).

²⁰⁰ *Skole-Ondersteuningsentrum and others v Minister of Social Development and others* [2020] 4 All SA 285 (GP) para 11.

²⁰¹ n 200 above para 1.

²⁰² n 200 above para 51.

²⁰³ Lutuli (n 176 above) page 41.

ECD sector was not granted relief funds to assist them to comply with safety measures.²⁰⁴ This was worsened by the withholding of subsidies and continued closure of many ECDs.²⁰⁵ This compounded the existing challenges around access to ECD. Wills *et al* report that by the end of 2020 ECD attendance had improved but it was “nowhere near pre-pandemic levels.”²⁰⁶ Lutuli concludes that the ECD challenges that surfaced with COVID-19 show that government does not prioritise the sector.²⁰⁷

While access to ECD remains a challenge generally, access is even lower for children with disabilities.²⁰⁸ This can be primarily attributed to the lack of such services, especially in rural areas (although access in urban areas is not significantly better).²⁰⁹

In *Western Cape Forum for Intellectual Disability v Government of South Africa and Another*²¹⁰ (*Western Cape Forum case*) the High Court held that the State’s failure to make provision for the educational needs of severely and profoundly intellectually disabled children in the Western Cape constituted a breach of those children’s rights to a basic education, equality, human dignity and protection from neglect and degradation.²¹¹ The lack of access to ECD for children with disabilities is clear from research and the State’s concession to the ACERWC.²¹² Drawing from the decision in *Western Cape Forum I* I argue that the State’s failure to create an enabling environment for children with disabilities to access ECD services similarly undermines those children’s rights.

3.4. Conclusion

This chapter’s discussion has shown how the weaknesses in the ECD sector affect all children, although the situation is even worse for children with disabilities. Considering the unique challenges facing children with disabilities in the sector, it is apparent that children with disabilities do not enjoy the right to ECD on an equal basis with other children.

²⁰⁴ Lutuli (n 176 above).

²⁰⁵ See the discussion under para 3.2 above.

²⁰⁶ Lutuli (n 176 above) page 42.

²⁰⁷ G Wills & J Kika-Mistry “ECD in South Africa during the COVID-19 pandemic” (2021) 20.

²⁰⁸ Save the Children South Africa (n 194 above) page 68.

²⁰⁹ Department of Basic Education & UNICEF (n 164 above) page 48.

²¹⁰ 2011 (5) (SA) 87 (WCC) para 52.

²¹¹ *Western Cape Forum* (n 210 above) 52.

²¹² South Africa’s Initial Report to the ACERWC (n 10 above) page 124.

Chapter 4: South Africa's International obligations to realise the right to ECD

4.1. Introduction

This chapter considers South Africa's obligations to realise the right to ECD for children with disabilities under international law. It discusses the recognition of the right to ECD broadly and the right to early learning specifically in the CRC, ACRWC and the CRPD.

4.2. Background to the CRC, ACRWC and CRPD

The CRC is the first comprehensive international binding treaty addressing children's rights.²¹³ The ACRWC is the only comprehensive instrument to guarantee children's rights at a regional level.²¹⁴ The CRPD is the first international legally binding instrument to specifically address the rights of persons with disabilities.²¹⁵ South Africa ratified all three instruments.²¹⁶

The CRC and ACRWC are largely similar and the wording in the ACRWC often mirrors the corresponding provision in the CRC, although there are a few substantive differences.²¹⁷ Some provisions in one instrument do not find a corresponding provision in the other. In fact, many scholars agree that the ACRWC generally adopts higher standards than its international counterpart.²¹⁸ Achilihu comments that both instruments "provide the framework for the discussion of children and their welfare in Africa".²¹⁹ They must therefore be read together.

The purpose of the CRPD is to ensure the enjoyment of the full spectrum of human rights and fundamental freedoms to persons with disabilities (including children) without discrimination, and to promote respect for their inherent dignity.²²⁰ To this end it "promotes the full

²¹³ J Adu-Gyamfi & F Keating "Convergence and divergence between the UN Convention on the Rights of the Child and the African Children's Charter" (2013) 3 *Sacha Journal of Human Rights* 48.

²¹⁴ BD Mezmur "The African Children's Charter @ 30: A distinction without a difference?" (2020) 28 *International Journal of Children's Rights* 694.

²¹⁵ United Nations Human Rights Office of the High Commissioner *Celebrating 10 years of the CRPD* <http://www.ohchr.org> (accessed 24 November 2021).

²¹⁶ The CRC was ratified on 16 June 1995, the ACRWC on 7 January 2000 and the CRPD on 30 November 2007.

²¹⁷ A Skelton "The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments" (2009) 9 *African Human Rights Journal* 489.

²¹⁸ F Viljoen "Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" (1998) *The Comparative and International Law Journal of Southern Africa* 212.

²¹⁹ SN Achilihu *Do African children have rights? A comparative legal analysis of the Convention on the Rights of the Child* (2016) 68.

²²⁰ Article 1 of the CRPD.

participation of persons with disabilities in all spheres of life, challenging customs, stereotypes, prejudice, harmful practices and stigma relating to persons with disabilities”.²²¹

Before discussing the recognition of ECD in these instruments, it is useful to consider how they have been incorporated into the South African legal system.

4.3. Indirect incorporation of international children’s rights law

The relationship between international and domestic law is determined by the traditional dichotomy between monism and dualism.²²² The monist approach considers international law and domestic law as a single system, holding that international law can be applied directly in national legal systems, and that the international norm prevails in the case of conflict.²²³ According to the dualist approach, international law and national law are recognised as two separate legal systems that operate independently.²²⁴ Following this approach, international law is applied domestically once it is translated into the national legal system through the adoption of national legislation.²²⁵

Section 231(4) of the Constitution provides that “an international agreement becomes law in the Republic when it is enacted into law by national legislation...”²²⁶ Based on this provision South Africa follows the dualist approach, which means that an international law instrument is incorporated into the domestic legal system once it is enacted into law.²²⁷

Skelton notes that South Africa has not fully incorporated the CRC, although the Children’s Act and the Child Justice Act 75 of 2008 make reference to the CRC in their respective preambles and contain provisions which can be linked to the CRC and other soft law²²⁸ instruments.²²⁹ It took more than 10 years after the ratification of the CRC for these pieces of legislation to become effective.²³⁰ Even before this the CRC had already been indirectly

²²¹ United Nations (n 215 above) <http://www.ohchr.org> (accessed 24 November 2021).

²²² G Ferreira & A Ferreira-Snyman “The incorporation of public international law and regional law against the backdrop of the dichotomy between monism and dualism” (2014) *Potchefstroom Electronic Law Journal* 17 (4) 1471.

²²³ A Henrickson *International Law* (2019) 13.

²²⁴ n 223 above.

²²⁵ n 223 above.

²²⁶ The exception to this is a self-executing provision of an agreement that has been approved by Parliament, which is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. See section 231(4) of the Constitution.

²²⁷ Scholars recognise South Africa’s approach to international treaties as primarily dualist, although there are some exceptions which are not relevant to the present discussion. See W Mutubwa “Monism or dualism: The dilemma in the application of international agreements under the South African Constitution” (2019) 3(1) *Journal of Conflict Management and Sustainable Development* 27.

²²⁸ Soft law refers to non-binding instruments such as general comments and concluding observations on country reports. Hard law refers to binding instruments such as treaties. See A Guzman & T Meyer “International soft law” (2010) 2(1) *Journal of Legal Analysis* 171-225.

²²⁹ A Skelton “Child Justice in South Africa: Application of international instruments in the Constitutional Court” (2018) 26 *International Journal of Children’s Rights* 400.

²³⁰ Both Acts became effective in 2010.

incorporated. Sloth-Nielsen submits that the inclusion of children's rights (which are explicitly drawn from the CRC) in the Constitution gives the CRC a heightened status in the domestic legal framework.²³¹ Kilkelly and Liefwaard further note that making children's rights justiciable under the Constitution means that the courts' role is pivotal in their enforcement.²³² Sloth-Nielsen and Kruuse posit that given the courts' recourse to both hard and soft international law in the determination of children's rights, South Africa has crossed the invisible line between monism and dualism when it comes to children's rights.²³³ This submission is illustrated in *M v S*,²³⁴ in which the Constitutional Court relied on article 30 of the ACRWC in holding that a court considering a custodial sentence for a primary caregiver of minor children should assess the impact the sentence will have on the children,²³⁵ thus giving effect to article 30 of the ACRWC. Skelton observes an emerging trend of South African courts engaging with South Africa's reports to international treaty bodies, and the treaty bodies' concluding observations.²³⁶ She regards this as a "major jurisprudential development" that gives domestic relevance to international reporting processes²³⁷.

Children's rights jurisprudence has therefore played a significant role in the indirect incorporation of international children's rights law in South Africa.

4.4. Domestication of the CRPD

While South Africa has ratified the CRPD and its optional protocol,²³⁸ neither instrument has been incorporated into South African law.²³⁹ The treaty therefore binds South Africa at an international level.²⁴⁰ This means that South Africa must "refrain from acts that are calculated to frustrate the objects of the treaty" pending its domestication.²⁴¹

In 2016 the South African government published the WPRPD, which is aimed at ensuring that people with disabilities "are accorded and enjoy their full political, human, social and economic

²³¹ J Sloth-Nielsen "Children's rights in the South African courts: An overview since ratification of the United Nations Convention on the Rights of the Child" (2002) (10)(2) *International Journal of Children's Rights* 138.

²³² Kilkelly & Liefwaard (n 33 above) page 522.

²³³ J Sloth-Nielsen "Children's rights jurisprudence in South Africa - a 20-year retrospective" (2019) *De Jure Law Journal* 504.

²³⁴ 2008(3) SA 232 (CC).

²³⁵ *M v S* (n 234 above) para 109.

²³⁶ A Skelton "Incorporating the CRC in South Africa" in U Kilkelly *et al* (eds) *Incorporating the UN Convention on the Rights of the Child into national law* (2021) 26.

²³⁷ Skelton (n 236 above) page 23.

²³⁸ UN General Assembly 61st Session UN Doc A/Res/61/106.

²³⁹ South African Law Reform Commission *Issue Paper No 39: Project 148 Domestication of the CRPD* xiii.

²⁴⁰ F Sucker "Approval of an international treaty in Parliament: How does section 231(2) 'bind the Republic?'" (2013) 5 *Constitutional Court Review* 420.

²⁴¹ Vienna Convention on the Law of Treaties (1969) <https://www.refworld.org/docid/3ae6b3a10.html> (accessed 12 December 2021) article 18.

rights on par with all other people in South Africa”.²⁴² Government envisaged the translation of the WPRPD into legislation to complete its domestication.²⁴³

The SALRC, mandated by government, recently embarked on a project investigating the domestication of the CRPD.²⁴⁴ As it stands therefore, the CRPD is not law in South Africa, but it can influence courts’ decisions given the constitutional injunction to consider international law in interpreting legislation, and to prefer an interpretation that is consistent with international law.²⁴⁵

Ngwena and Albertyn note that the CRPD is “animated by substantive and transformative equality”.²⁴⁶ These values are embraced by the Constitution and South African jurisprudence.²⁴⁷ In my view the equality and non-discrimination clauses in the Constitution are already instrumental in guaranteeing that people with disabilities enjoy the full spectrum of human rights on an equal basis pending the domestication of the CRPD.

4.5. The recognition of the right to ECD in international and regional instruments

The right to ECD is not expressly recognised in the CRC, ACRWC or CRPD. However, the CRC has issued guidance on implementing children’s rights in early childhood in its General Comment No 7 (GC 7).²⁴⁸ GC 7 will be used as a framework for the discussion that follows because similar guidance has not been issued under the other two instruments.

Vaghri *et al* note that GC 7 brought about an increased focus on the rights of young children internationally.²⁴⁹ Acknowledging that ECD has received low priority in many countries, GC 7 calls on states parties to adopt rights based, coordinated, multisectoral and comprehensive ECD strategies backed by information and monitoring systems. It encourages states parties to ensure that ECD services and facilities conform to quality standards including training and appropriate remuneration of staff. It further urges states parties to pay particular attention to children at risk of discrimination, including children with disabilities.²⁵⁰

²⁴² WPRPD (n 23 above) page 42.

²⁴³ WPRPD (n 23 above) page 9.

²⁴⁴ SALRC (n 230 above) page iv.

²⁴⁵ See section 39(1)(b) and 39(2) of the Constitution.

²⁴⁶ C Ngwena & C Albertyn “Special issue on disability: Introduction” (2014) 30(2) *South African Journal on Human Rights* 214.

²⁴⁷ n 246 above.

²⁴⁸ UNCRC General Comment No. 7 (2005) Implementing child rights in early childhood CRC/C/GC/7/Rev.1.

²⁴⁹ Z Vaghri *et al* “From the indicators of General Comment No. 7 to GlobalChild: A decade of work to enhance States parties’ accountability to children” (2019) 27 *International Journal of Children’s Rights* 834.

²⁵⁰ GC 7 (n 248 above) para 22-24.

GC 7 emphasises that early childhood is a critical stage for the realisation of all the rights enshrined in the CRC, but specifically links ECD to the general principles of the CRC²⁵¹ which are considered below.

4.5.1. Life, survival and development

Article 6.2 of the CRC enjoins states parties to “ensure to the maximum extent possible the survival and development of the child.” GC 7 points out that Article 6 encompasses all areas of development and advises states parties that the right can only be implemented through the enforcement of all the other provisions of the CRC, including the rights to health, social security and education and play.²⁵² According to Doek this statement suggests that article 6 is only a principle in implementing the other provisions of the CRC. He argues, however, that article 6 must be seen as “a provision in its own right.”²⁵³ Observing that the CRC generally deals with ECD under article 28 (the right to education), he posits that ECD fits perfectly under article 6.²⁵⁴ Article 28, however, fails to fully encapsulate the right to ECD as education constitutes only one essential component of ECD.²⁵⁵

Sloth-Nielsen and Philpott also take a different stance to the UNCRC, submitting that article 6 “contains the nucleus” of the right to ECD.²⁵⁶ In their opinion the right to survival and development spans far more than programmes aimed at the reduction of infant mortality, to include psychosocial and educational dimensions that are necessary for the full enjoyment of other rights.²⁵⁷ The UNCRC’s interpretation of Article 6 in General Comment No 5²⁵⁸ accords with this viewpoint. It provides that the right to development must be interpreted broadly as a holistic concept encompassing a child’s “physical, mental, spiritual, psychological and social development”.²⁵⁹ The UNCRC advises that the implementation of the right to development should be aimed at achieving the child’s optimal development.²⁶⁰

Article 5.2 of the ACRWC similarly recognises the child’s right to survival and development. Like the UNCRC, the ACERWC regards this right as a principle constituting an essential

²⁵¹ GC 7 (n 248 above) para 1, 9. The UNCRC identified Articles 2, 4, 6 and 12 as general principles in implementing the CRC in General Comment No. 5.

²⁵² GC 7 (n 248 above) para 10.

²⁵³ J Doek “Article 6 CRC and the views of the CRC Committee” (2015) 2 *Stellenbosch Law Review* 264.

²⁵⁴ n 253 above page 270.

²⁵⁵ J Sloth-Nielsen & S Philpott “The intersection between article 6 of the Convention on the Rights of the Child and early childhood development” (2015) 2 *Stellenbosch Law Review* 309.

²⁵⁶ n 255 above page 308.

²⁵⁷ n 255 above page 309.

²⁵⁸ UNCRC General Comment No. 5 (2003) General measures of implementation of the CRC CRC/GC/2003/5.

²⁵⁹ n 258 above para 4.

²⁶⁰ n 258 above para 4.

precondition to the enjoyment of all the rights protected in the ACRWC.²⁶¹ The ACERWC also regards it as a substantive right. In a decision on a complaint against the Government of Senegal, the ACERWC held that the right to survival and development “imposes an obligation on states to ensure an adequate standard of living for children including the right to life and their physical, mental, spiritual, moral, psychological and social development.”²⁶² In this decision the ACERWC found that in failing to take measures to curb forced child begging (involving children as young as four years), the Government of Senegal had failed to ensure the children’s right to survival and development.²⁶³

The description of the right to survival and development above is consistent with the definition of ECD in the Children’s Act. According to section 9(1) of the Children’s Act ECD encompasses the emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of young children. It also accords with the aim of ECD policy in South Africa, which seeks to give effect to every child’s right to reach his or her full physical, mental, social and emotional potential.²⁶⁴ The South African government also draws a link between ECD and the right to survival and development. Its most recent report to the UNCRC mentions progress made in provisioning ECD under the discussion of measures taken to implement the right to life, survival and development.²⁶⁵

I agree that although these instruments do not expressly recognise the right to ECD, it can be implied under the right to survival and development. However, the international position does not necessarily strengthen the recognition of ECD as a right, because it is implied. Domestically the right to ECD is expressly recognised in the ECD Policy.²⁶⁶

A weakness of the CRC and ACRWC is that they limit states’ obligation to realise the right to survival and development “to the maximum extent possible”.²⁶⁷ Hansungule and Boezaart point out that states could argue that they are not able to ensure the right because of scarce resources.²⁶⁸ GC 7 provides that realising ECD within a rights-based framework requires financial resource allocations for ECD. It also provides that “states parties are responsible for

²⁶¹ ACERWC *Centre for Human Rights (University of Pretoria) & La Recontre Africaine Pour La Defense Des Droits De L’ Homme (Senegal) v Government of Senegal* N° 003/Com/0012012 41. <http://www.acerwc.africa/table-of-communications/> (accessed 26 November 2021).

²⁶² n 261 above para 42.

²⁶³ n 261 above para 45.

²⁶⁴ Integrated ECD Policy (n 5 above) page 22.

²⁶⁵ UNCRC *Consideration of reports submitted by States parties under article 44 of the Convention: South Africa* (2015) CRC/C/ZAF/2 26. <https://www.refworld.org/publisher/CRC,,ZAF,,0.html> (accessed 26 November 2021).

²⁶⁶ Integrated ECD Policy (n 5 above) page 21.

²⁶⁷ Articles 6.2 of the CRC and article 5.2 of the ACRWC.

²⁶⁸ Z Hansungule & T Boezaart “The socio-economic rights of children with disabilities in South Africa: A comparison of the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of Persons with Disabilities” (2017) 5 *African Disability Rights Yearbook* 49.

service provision for ECD”.²⁶⁹ However, it does not expressly provide that states parties are responsible for funding ECD services. As mentioned in chapter 2 of this research the State’s obligation to fund ECD in discretionary terms. The express obligation to fund ECD services is therefore absent at the domestic and international levels.

4.5.2. Non-discrimination

Article 2 of the CRC precludes discrimination on several grounds, including disability. GC 7 states that discrimination against children with disabilities may take the form of restricted opportunities for play, learning and education.²⁷⁰ It encourages states parties to monitor the availability of and access to services that contribute to the realisation of children’s rights to survival and development.²⁷¹ This should include systematic data collection, disaggregated by variables relating to children’s background and circumstances.²⁷² The UNCRC has expressed its concern at South Africa’s lack of accurate and comprehensive data on children with disabilities and recommended that South Africa “strengthen systematic and comprehensive collection of data on children with disabilities” and use the outcome to develop evidence-based policies suited to their needs.²⁷³

The ACRWC recognises the right to non-discrimination. However, it does not mention disability as a ground of discrimination.²⁷⁴ Hansungule and Boezaart lament this missed opportunity to affirm the rights of children with disabilities. They submit, however that the inclusion of the catch all “or other status” would include disability.²⁷⁵ While disability is not mentioned as a ground of discrimination, children’s right to non-discrimination is articulated more broadly in the ACRWC. As Chirwa points out, the obligation not to discriminate in the ACRWC binds all actors, and not only the State.²⁷⁶

Article 5.1 of the CRPD guarantees the right to non-discrimination and couples it with the right to equality. It provides that “states parties recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law”.

²⁶⁹ GC. 7 (n 248 above) para 38.

²⁷⁰ GC 7 (n 248 above) para 11.

²⁷¹ GC 7 (n 248 above) para 12.

²⁷² GC 7 (n 248 above) para 12.

²⁷³ UNCRC Concluding observations on the second periodic report of South Africa (2016) CRC/C/ZAF/CO/2 43, 44. <https://www.refworld.org/publisher,CRC,CONCOBSERVATIONS,ZAF,,,0.html> (accessed 15 November 2021).

²⁷⁴ See article 3.

²⁷⁵ Hansungule & Boezaart (n 268 above) page 47.

²⁷⁶ D Chirwa “The merits and demerits of the African Charter on the Rights and Welfare of the Child” (2002) 10 *International Journal of Children’s Rights* 159.

The connection between the right to non-discrimination and the right to equality in the CRPD is particularly important for children with disabilities because the CRC and ACRWC do not expressly recognise a right to equality. The CRC guarantees children with disabilities the right to “enjoy a full and decent life.”²⁷⁷ The ACRWC similarly states that children with disabilities “have the right to special measures of protection.”²⁷⁸ The CRPD takes this a step further and provides that children with disabilities have a right to the full enjoyment of the fundamental rights and freedoms “on an equal basis with other children.”²⁷⁹ Children’s right to non-discrimination is enshrined in the Constitution, and echoed in the Children’s Act.²⁸⁰

Recalling the discussion in Chapter 3 of this paper, ECD provisioning and access for children with disabilities is not on an equal basis with other children. I argue that the limited opportunities to access ECD for children with disabilities constitutes discrimination and is a breach of children’s right to equality and non-discrimination guaranteed in the Constitution and international instruments.

4.5.3. The best interests of the child

Article 13.1 of the CRC advises states parties that the best interests of the child should be a *primary* consideration in all actions concerning children. Article 7.2 of the CRPD mirrors this provision, with specific application to children with disabilities. The best interests principle is also contained in Article 4.1 of the ACRWC which provides that the best interests of the child should be *the primary* consideration in all matters concerning children. Skelton points out that the ACRWC provision reflects a slightly higher standard than the CRC.²⁸¹ The Children’s Act and the Constitution articulate the best interests standard more strongly, providing that the best interests of the child are of *paramount* importance in matters concerning the child.²⁸² Skelton submits that *paramount* suggests an even higher standard than the ACRWC.²⁸³

The UNCRC advises in GC 7 that all “actions concerning children” includes law and policymaking, which must take the best interests of the child into account.²⁸⁴ The ECD Policy recognises the best interests of the child as one of the principles underpinning the policy.²⁸⁵

²⁷⁷ Article 23.1.

²⁷⁸ Article 13.1.

²⁷⁹ Article 7.1.

²⁸⁰ Sections 9 of the Constitution and 6(2)(d) of the Children’s Act.

²⁸¹ A Skelton “Too much of a good thing? Best interests of the child in South African jurisprudence” (2019) *De Jure Law Journal* 558-559.

²⁸² Section 28(2) of the Constitution and section 9 of the Constitution.

²⁸³ Skelton (n 281 above) page 559.

²⁸⁴ GC 7 (n 248 above) para 13.

²⁸⁵ Integrated ECD Policy (n 5 above) page 51.

4.5.4. Respect for the views of the child

Article 12 of the CRC recognises children's right to express their views in all matters affecting them and requires that the views of the child be given due weight in accordance with the child's age and maturity. Article 7 of the ACRWC also recognises children's right to express their opinions in all matters but limits this right to children who are capable of communicating their views. Adu-Gyamfi and Keating argue that this limitation is discriminatory against children with disabilities who are capable of forming views but may not be able to communicate them. They also point out that it is unclear how the views expressed by children should be treated under the ACRWC as it does not require the opinions expressed by the child to be given consideration.²⁸⁶ Article 7.3 of the CRPD expressly recognises the right of children with disabilities to express their views in matters affecting them on an equal basis with other children. It also requires that the views expressed by children with disabilities be given due consideration in accordance with their age and maturity on an equal basis with other children. It further includes the unique addition that children with disabilities have the right to be provided with age-appropriate assistance to realise the right.²⁸⁷

Children with disabilities enjoy additional participation rights under the CRPD. Article 4.3 enjoins states parties to closely consult with and actively involve persons with disabilities (including children) in the development and implementation of legislation and policies to implement the CRPD and in other decision-making making processes through their representative organisations. Article 33.3 further provides for the participation of civil organisations, in particular persons with disabilities and their representative organisations, in monitoring processes.

Moyo argues that while section 10 of the Children's Act largely incorporates Article 12 of the CRC into the domestic legal system, its weakness is that it affords the right to participation only to children who are "of such an age, maturity and stage of development as to be able to participate".²⁸⁸ He points out that in the CRC age and maturity only become relevant in determining the consideration that should be given to the views of the child.²⁸⁹

Acknowledging that the autonomy of young children is frequently overlooked on grounds of immaturity, the UNCRC emphasises in GC 7 that the child's right to express his or her views applies even in early childhood.²⁹⁰ In General Comment No 12 the UNCRC again stresses

²⁸⁶ Adu-Gyamfi & Keating (n 213 above) page 52.

²⁸⁷ Article 7.3.

²⁸⁸ A Moyo "Child protection under South African law: Beyond the Convention on the Rights of the Child?" (2015) 31(1) *South African Journal on Human Rights* 174, 176.

²⁸⁹ n 288 above page 176.

²⁹⁰ GC 7 (n 248 above) para 14.

that Article 12 is not subject to a specific age, citing research that children are capable of forming views from the earliest ages even though they may not be able to express them verbally.²⁹¹

According to Save the Children a weakness of child participation in South Africa is the absence of formal processes that allow children to participate in policy and law reform processes. They argue that child participation has largely depended on the discretion and willingness of relevant government departments, rather than being recognised as a right.²⁹² Philpott also recognises this weakness and adds that the relationship between the State and civil society structures including parent organisations and disability related NGOs is critical.²⁹³ She further argues that the full inclusion of children with disabilities in policies and programmes requires government to fulfil its obligation under the CRPD to promote the participation of such groups.²⁹⁴

While child participation is indispensable even in early childhood, Herczog acknowledges the challenge of implementing it for young children because the way in which they communicate is not always recognised.²⁹⁵ Mac Naughton *et al* submit that child participation in early childhood can be through advocacy on behalf of children or through adults using their experience and expertise to act as intermediary between children and authorities.²⁹⁶

4.6. The right to early childhood education and the standard of reasonable accommodation

The CRC recognises the right to education and encourages states parties to “make primary education compulsory and available free for all”.²⁹⁷ The CRC makes express reference to primary, secondary and vocational education, but does not mention early childhood education.²⁹⁸ The ACRWC and CRPD guarantee the right to education, but also do not mention early childhood education.²⁹⁹

²⁹¹ UNCRC General Comment No. 12 (2009) The right of the child to be heard CRC/C/GC/12 21.

²⁹² Save the Children South Africa “National Child Participation Framework” (2018) 18- 9.

²⁹³ Philpott (n 21 above) page 66.

²⁹⁴ Philpott (n 21 above) page 66.

²⁹⁵ Herczog (n 105 above) page 546.

²⁹⁶ G Mac Naughton *et al* “Early childhood professionals and children’s rights: Tensions and possibilities around the United Nations General Comment No. 7 on children’s rights” (2007) 15(2) *International Journal of Early Years Education* 166.

²⁹⁷ Article 28(1)(a).

²⁹⁸ See article 28(1)(b).

²⁹⁹ Article 11(2) and (3) of the ACRWC and article 24(2)(b) of the CRPD.

Fredman *et al* submit that the right to early childhood education is an implicit element of the right to education.³⁰⁰ Drawing from the CRC's provision that the right to education is aimed towards "the development of the child's personality, talents and mental and physical abilities to their fullest potential", they argue that early childhood education is crucial to this development and is therefore embedded within the right.³⁰¹

In GC 7 the UNCRC's engagement with the right to education is limited to an interpretation that it begins at birth and is closely linked to the right to development.³⁰² The UNCRC further commends those states parties planning on providing one year of free preschool education for all children.³⁰³ In my view the omission of early childhood education in the CRC should have resulted in its stronger focus in GC 7. Instead, as Lundy points out, early childhood education provision is "quite low-key" in GC 7.³⁰⁴

Lundy indicates that the UNCRC's concluding observations on most states parties' reports include recommendations to strengthen efforts to "improve access to quality early childhood care and education".³⁰⁵ The UNCRC often links this recommendation to target 4.2 of the Sustainable Development Goals, which aims that all children will have access to quality ECD by 2030.³⁰⁶ Fredman *et al* note that this is the strongest articulation of the right to early childhood education".³⁰⁷

The CRPD requires states parties to ensure that people with disabilities are not excluded from the general education system.³⁰⁸ It does not mention early childhood education, but it requires states parties to "ensure an inclusive education system *at all levels*".³⁰⁹ According to Philpott the lack of a focus on the preschool years in WP6 means that the policy does not comply with the CRPD requirement to ensure inclusive education "at all levels".³¹⁰ The WPRPD attempts to remedy the situation. It envisages the development of an integrated system that ensures the compulsory enrollment of all children with disabilities in ECD programs.³¹¹

³⁰⁰ S Fredman *et al* "Recognising early childhood education as a human right in international law" (2021) *Social Science Research Network* <http://papers.ssrn.com> (accessed 8 December 2021) 11.

³⁰¹ n 300 above page 28.

³⁰² GC 7 (n 300 above) para 28.

³⁰³ GC 7 (n 300 above) para 28.

³⁰⁴ L Lundy "Implementing the rights of young children: an assessment of the impact of General Comment No. 7 on law and policy on a global scale" in J Murray *et al* (eds) (2019) *The Routledge International Handbook of Young Children's Rights* 19.

³⁰⁵ Lundy (n 304 above) page 20.

³⁰⁶ UN *Transforming our world: The 2030 agenda for sustainable development* (2015) A/Res/70/1 4.2.

³⁰⁷ Fredman *et al* (n 300 above) 4.

³⁰⁸ Article 24(2)(a).

³⁰⁹ Article 24(1).

³¹⁰ Philpott (n 21 above) page 72.

³¹¹ WPRPD (n 23 above) para 179.

The CRPD adopts the standard of reasonable accommodation for the provision of education for people with disabilities.³¹² Following the reasoning that the right to early childhood education is implied under the right to education, the provision of early childhood education must be within the standard of reasonable accommodation.

The WPRPD aims to ensure that children with disabilities have equitable access to all ECD programs and facilities and requires that mainstream ECD facilities and programs be made accessible to children with disabilities.³¹³ In contrast, the Integrated ECD policy does not generally require that mainstream ECD facilities be made accessible for children with disabilities. Instead, it requires guidance to be provided on the placement of children with disabilities either in mainstream or special programs.³¹⁴ It also requires the training of a sufficient number of qualified ECD practitioners to provide services to children with disabilities.³¹⁵ This contrasts with the ECD mainstreaming vision expressed in the WPRPD.

The WPRPD targets a 50% improvement to ECD access and participation for children with disabilities by 2030,³¹⁶ while the ECD policy envisages full access for children with disabilities by 2030.³¹⁷

I have observed that the ECD Policy and the WPRPD, both developed by the DSD and approved by Cabinet on the same day,³¹⁸ contain different standards and targets on access to ECD programmes and facilities by children with disabilities. It appears that there was little coordination regarding the policy position for young children with disabilities as belonging to the group of early childhood on one hand, and persons with disabilities on the other.

4.7. Conclusion

The arguments in favour of the recognition of the right to ECD in international instruments attempt to fit the right under various articles such as the right to life, survival and development. While its implicit recognition can be argued, I agree with Murray *et al*'s submission that considering the growing awareness of the importance of ECD, the CRC must be reframed to acknowledge the rights of children at the critical stage of early childhood.³¹⁹

³¹² Article 5.3.

³¹³ WPRPD (n 23 above) page 95.

³¹⁴ Integrated ECD Policy (n 5 above) page 66.

³¹⁵ Integrated ECD Policy (n 5 above) page 66.

³¹⁶ WPRPD (n 23 above) page 176.

³¹⁷ Integrated ECD Policy (n 5 above) page 66.

³¹⁸ The ECD Policy and WPRPD were both approved by Cabinet on 9 December 2015.

³¹⁹ J Murray *et al* "Introduction: The state of young children's rights" in J Murray *et al* (eds) (2020) *The Routledge International Handbook of Young Children's Rights* 4.

GC 7 significantly expounds on the realisation of children's rights in early childhood. Its weakness is that it is not legally binding. Chapter 2 of this paper mentioned that the foundation of a rights-based approach is the existence of a legal obligation. Therefore, while the UNCRC calls for a rights-based approach to the realisation of ECD, there is no express legally binding obligation to realise the right to ECD.

Despite the non-binding nature of GC 7, it is particularly important for South Africa because South African courts have applied both hard and soft law in the determination of cases involving children.³²⁰ Therefore it still constitutes a valuable benchmark for ECD policy and practice.

³²⁰ See for example *C v Department of Health and Social Development* 2012 (2) SA 208 (CC); *DPP KZN v P* 2006 All SA 446 (SCA).

Chapter 5: A way forward

5.1. Introduction

This chapter summarises the salient points from the research and makes recommendations for a way forward to realise the right to ECD for children with disabilities.

5.2. Summary and recommendations

Chapter two of this research posited that state accountability is indispensable to a rights-based approach. The recognition of ECD as a fundamental and universal human right in the Integrated ECD Policy is important in establishing a rights-based framework for ECD but there is a need for state accountability. Translating the commitments in the Integrated ECD Policy would be a step forward in ensuring this accountability.³²¹ Amending the provisions of the Children's Act to place an express obligation on government to provide and fund ECD would ensure further accountability.

Chapter two also discussed how the vision of the NPA to realise services for children within a rights-based framework was overshadowed by the need to prepare children for Grade 1, which resulted in government placing priority on rolling out the reception year programme through WP5. Children under five years were not prioritised in WP5 and were later catered for in the NIP, which was a good starting point, although it lacked a concrete implementation plan.³²² The Integrated ECD Policy prioritises young children of all ages. Its weakness is that it also lacks an implementation plan. Government needs to finalise the necessary legal frameworks, organisational structures and institutional arrangements to support implementation of the policy.³²³

By government's admission, there is a significant gap in ECD for children with disabilities.³²⁴ This can be attributed to the early policy framework (WP5 and the NIP) not creating an enabling environment for children with disabilities. Consequently, as discussed in chapter three, the challenges that exist in the sector make the situation even worse for children with disabilities. This requires ECD related government efforts to be intensified for children with disabilities.

³²¹ Financial and Fiscal Commission (n 161 above) page 4.

³²² Berry *et al* (n 46 above) page 29.

³²³ See Integrated ECD Policy (n 5 above) page 49.

³²⁴ South Africa's Initial Report to the ACERWC (n 10 above) page 124.

Chapter four considered the recognition of the right to ECD in international law using GC 7 as a framework. GC 7 links ECD to the general principles of the CRC.³²⁵ South Africa falls short when it comes to the principles of non-discrimination and respect for the views of the child. Regarding non-discrimination, government must ensure the availability of comprehensive data on children with disabilities, increase provisioning for children with disabilities and ensure ECD costing for children with disabilities. Regarding respect for the views of the child, government needs to recognise child participation in law reform processes as a right and promote the participation of civil society structures as required by the CRPD.³²⁶

Chapter four argued that the right to early childhood education is implicit in the right to education. ECD for children with disabilities must therefore be realised within the standard of reasonable accommodation as required by the CRPD. There is a need to clarify what reasonable accommodation entails in the South African context. The WPRPD and the Integrated ECD Policy express different standards. There needs to be an alignment of these two policies so that there is a consistent position regarding children with disabilities in ECD.

5.3. Conclusion

This research explored a rights-based approach to ECD in South Africa, focusing on children with disabilities. Recent litigation relating to ECD funding³²⁷ is a step forward in advancing children's rights to ECD. There is a need for more engagement on "whether and how a holistic rights-based approach can be recognised within our constitutional framework".³²⁸ Ally *et al* suggest that "legal mobilisation – including strategic litigation and the leveraging of a holistic rights-based claim to ECD – can play a valuable role in such efforts".³²⁹

³²⁵ GC 7 (n 248 above) para 1.9.

³²⁶ Article 32(1).

³²⁷ See the discussion under para 3.2 above.

³²⁸ Ally *et al* (n 180 above) page 7.

³²⁹ Ally *et al* (n 180 above) page 10.

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