SOUTH AFRICA DISABILITY LEGISLATION & POLICY GAP ANALYSIS

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INTRODUCTION

South Africa in in ratifying the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol in 2007 assumed the obligation to take all appropriate legislative, administrative and other measures to implement the rights of persons with disabilities enshrined in the Convention and to modify or abolish existing laws, regulations, customs and practices which inhibit persons with disabilities from exercising these rights on an equal basis with others.

Since South Africa ratified the CRPD the norms and principles in the UN Convention on the Rights of Persons with Disabilities have to some extent found their way into South Africa legislation and policies. However legislation, policies and programmes addressing the rights of persons with disabilities continue to be fragmented. The South African government in their initial country report to the CRPD Committee on the status of implementation of the CRPD acknowledges that "weaknesses in the governance machinery of the State, and capacity constraints and lack of co-ordination within the disability sector, have detracted from a systematic approach to the implementation of the CRPD. The continued vulnerability of persons with disabilities, particularly children with disabilities as well as persons with psychosocial disabilities, residing in rural villages, requires more vigorous and better co-ordinated and targeted intervention."

The purpose of this report is to examine existing South African legislation, policies and programmes that have a direct or indirect impact on the promotion, protection and fulfilment of the rights of persons with disabilities, as provided for in the CRPD in order to identify current gaps in terms the policy and

legislative framework and its implementation in order to ensure that rights are translated into tangible gains for people with disabilities.

The report will critically analyse the measures that have been taken by the government to realise the rights of persons with disabilities guaranteed in the CRPD and the extent to which these measures protect, promote and uphold the rights of persons with disabilities. The measures examined will include policies, programmes and projects and legislation instituted by government at national level. The report will also examine the extend to which these measures have been implemented.

It is the hope of the authors that this report will result in the existing legal and policy apparatus available and in development becoming appropriately cognisant of the rights and realities of persons with disabilities in South Africa and by so doing ensuring that their experiences of inequality and prejudice are reduced and with time completely diminished.

The report features articles by: Serges Djoyou Kamga reviewing the national implementation and monitoring mechanism on the rights of persons with disabilities; Anton Kok analysing the protection against unfair discrimination afforded to persons with disabilities in the Promotion of Equality and Prevention Of Unfair Discrimination Act 4 Of 2000.Ilze Grobbelaar-du Plessis and Ezette Gericke critiquing the legislative and policy framework protecting the right to employment of persons with disabilities. Jehoshaphat John Njau exploring the gaps in the measures adopted by government to provide for accessibility of persons with disabilities. Zita Hansungule examining the right to primary education for children with disabilities in South Africa which is complimented by Serges Djoyou Kamgas examination of the right to education for students with disabilities at tertiary level. Bernard Bekink interrogating the national provisions

facilitating the right to participation of persons with disabilities in political and public life. B Kuschke discussing disability discrimination in insurance. The right of persons with disabilities to be protected against exploitation, violence and abuse is interrogated by Philip Stevens. Zita Hansungule continuing the discussion interrogates the protection of children with disabilities from sexual violence and abuse and their ability to access the justice system to redress their rights. The report concludes with an analysis of the impact of the United Nations Convention on the Rights Of Persons with Disabilities on South African Health Law Magdaleen Swanepoel and a critique of South Africa's social protection system as it relates to persons with disabilities by Innocentia Mgijima Konopi.

CENTRE FOR HUMAN RIGHTS UNIVERSITY OF PRETORIA

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SETTING THE SCENE OF DISABILITY RIGHTS DISCOURSE [1]

The systemic exclusion and marginalisation of people with disabilities from equal participation in all the major sectors of our societies is a well-documented global phenomenon (World Health Organisation & World Bank 2011). As the United Nations Convention on the Rights of Persons with Disabilities (CRPD) attests, 'despite various instruments and undertakings, people with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world' (CRPD, para (k) of preamble). Undoubtedly, denial of the equality and human dignity of people with disabilities is a palpable, deep-seated injustice. It should not be allowed to persist unchallenged, including in the African region. In the age of human rights, 'rights' are an essential currency for challenging the pervasive denial of the equal citizenship of people with disabilities across the whole gamut of our socioeconomic sectors.

The field of disability rights is experiencing a period of relative growth. In last two decades or so, a steady trend of rising global awareness about disability rights and the imperative of eliminating disability-related discrimination through a rights-based approach has been emerging and taking root (Kanter, 2003). In more recent years, the trend has been galvanised with the adoption of the CRPD by the United Nations Assembly 2006

[1] Extract from University of Pretoria, Faculty of Law, Centre for Human Rights, Master Curriculum on Disability Rights written by *Elizabeth Kamundia.* http://www.chr.up.ac.za/index.php/disability-rights-publications.html

as well as by more concerted international and domestic advocacy efforts to promote the human rights of people with disabilities since the adoption of the CRPD. The African region is part of this trend partly through efforts that preceded the CRPD. The most notable regional development in this regard was the adoption by the African Union of the Continental Plan of Action for the African Decade of Persons with Disabilities in 1999 and the establishment of the Secretariat for the African Decade of Persons with Disabilities (African Union, 2009: 2). From the outset, the focus of the Continental Plan of Action was decidedly on achieving the 'full participation and equality' of people with Disabilities' (African Union. In recent years, the promulgation of disability rights-specific legislation in a number of countries, including Kenya, Malawi, Tanzania, Uganda, Zimbabwe and Zambia is serving to consolidate this trend (Banda & Kalaluka, 2014; Chilemba, 2014; Kamundia, 2014; Mandipa & Manyetera, 2014; Oyaro, 2014; Shuguru, 2013). At a rhetorical level, at least, the signs are that the winds of disability rights are blowing across the African region.

The shift from relating to disability as a predominantly charity issue which, at best, engenders State and private benevolence to a rights-based approach that gives rise to vertical and horizontal obligations has been given human rights imprimatur by the adoption of the CRPD. More than two-thirds of African States have ratified the CRPD. This is not to say that disability rights struggle has been won and that we can be complacent. Indeed, in the preponderant of African jurisdictions, conspicuous gaps in the formulation and domestication of disability rights remain. Furthermore, greater challenges lie ahead in the implementation and actual fulfilment of disability rights. Rather, it is to highlight that opportune historical time for the growth and advocacy of disability rights on the African continent appears to have arrived.

But what are disability rights to begin with? What does 'disability' mean? What social, cultural or philosophical meanings or understandings shape the normative content of disability rights? Do current societal meanings and understandings of disability and disability rights accord with the goals of inclusive equality? The importance of raising these questions is not so much because we do not know what rights are or that we have no idea, at all, what disability means or should mean. The reason for raising these questions is primarily because disability is far from being a simple concept that engenders consensus. Instead, it is 'complex, dynamic, multidimensional and contested' (World Health Organization & World Bank, 2011: 3). The other reason for raising the question is that simply describing something as a 'right' does not guarantee its responsiveness to unmet needs. It is possible to have rights which might turn out to be merely token or even regressive. Ultimately, disability rights will only serve a worthwhile purpose if there are transformative in the sense to being substantively responsive to the legacy of disability-related inequality which is structural in nature.

When interrogating the link between disability and structural inequality, especially, disability raises questions about whether justice can be achieved if we continue to remain firmly attached to the body and biological notions of 'impairment' as the main and intuitive explanation for the inequalities that people with disabilities experience. Do we not have a better prospect of achieving justice and building an inclusive if we abandon preoccupation with the body and begin to treat disability as much more than what is intrinsic to the body? Should we not also admit into the equation of disability our socioeconomic environment in order to see the disabling effects of the barriers it poses for people with disabilities? Indeed, disability rights struggles in the last two more decades have been precisely about freeing

disability from a paradigm that prizes the body, its anatomy and physiology, as the main explanation in favour of an explanation that attributes disability to the barriers that people with disabilities experience in a society constructed on an unstated norm of able bodiedness. If rights are to be protective and reparative juridical instruments in respect of disability, then, they also need to be formulated and implemented in ways which acknowledge the environment as a causative and aggravating link in the creation of disability. And this is precisely what the CRPD has achieved.

In its preamble and substantive provisions, the CRPD seeks to capture the normative inclusion of people with disabilities is firmly anchored in substantive equality. The goal of securing equality and human dignity is the glue that holds the CRPD together. The chief purpose of the CRPD is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity' (CRPD, article 1). An important juridical modality through which the CRPD seeks to ensure the achievement of equality and respect for human dignity is in its consistent emphasis on the duty to accommodate people with disabilities in all sectors of our socio-economic life. The CRPD conceives failure to provide 'reasonable accommodation' as constituting discrimination. There is a duty, therefore, to reexamine our socioeconomic environment to render it accessible to disabled people so that the environment does not continue to be disabling. Moving forward:

i. we need to introduce laws that advance disability rights
ii. we need to change laws that discriminate against persons with disabilities
iii. criminalise discrimination against persons with disabilities

iv. need to undertake other activities that advance disability rights.

1. THE NATIONAL IMPLEMENTATION AND MONITORING OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: SOUTH AFRICA'S EXPERIENCE

Serges Djoyou Kamga*

1 Introduction

During the drafting of the Universal Declaration of Human Rights, Eleanor Roosevelt wrote: 'Where, after all, do universal human rights begin? In small places, close to homes so close and so small that they cannot be seen on any maps of the world. Unless these rights have meaning there, they have little meaning anywhere'.[2] Echoing this view, Olowu underlines that 'the struggle for human rights will be won or lost at the national level'.[3] This assertion suggests that the main site for the achievement of human rights is at the level of the state. Therefore, after the ratification of international human rights instruments, what follows at the domestic level is key to turning such rights into reality. It also means that State Parties to global instruments must ensure national implementation and monitoring of their commitments to rights - in the context of this discussion, disability rights. Such obligation is expressly underlined by the Convention on the Rights of Persons with Disabilities (CRPD)[4] in article 33:

States Parties, in accordance with their system of organization, shall designate one or more focal points within government for

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[2] UNFPA "Integrating Human Rights, Culture and Gender In Programming" (2009) 9.

[3] Olowu *An Integrative Rights-Based Approach to Human Development in Africa* (2009) 73.

[4] Adopted in 2006 and entering into force in 2008.

matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.[5]

States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.[6]

Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.[7]

According to this provision, monitoring and implementation of disability rights entail three approaches: first, States must establish a focal point(s), second, they must establish independent institutions; and, lastly, enable Disabled People Organisations (DPOs) and civil society in general to oversee the implementation of disability rights. As correctly noted by Gatjens,[8] the CRPD is one of the rare instruments[9] to prescribe implementation and monitoring at the national level with specific mechanisms to ensure compliance.

[5] CRPD, art 33(1).
[6] CRPD, art 33(2).
[7] CRPD, art 33(3).
[8] Gatjens "Analysis of article 33 of the UN Convention: The critical importance of national implementation and monitoring" 2011 *Sur International Journal on Human Rights*
[9] The other is the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman Treatment or punishment, adopted on 18 December 2002 and entering into force on 22 June 2006. See art 3.

The aim of this article is to examine the extent to which South Africa complies with article 33 of the CRPD which it ratified, together with its Optional Protocol, on 30 November 2007. To this end, the article first explores whether South Africa has established a national focal point on disability rights, and, if so, how efficient it is in ensuring the mainstreaming of disability rights in the country's policies and practices. Second, it examines whether independent national institutions have been set up to monitor disability rights and, if so, questions related to their impact are analysed. Third, the article interrogates the extent to which DPOs, and civil society in general, are involved in the implementation and monitoring of disability rights. Ultimately, the article finds that even though South Africa follows the CRPD's prescription on monitoring, much more needs to be done for its approach to make a difference in the lives of persons with disabilities.

2 National focal point(s) and the implementation of the CRPD

After the adoption of the 1996 Constitution, which unambiguously guarantees the right to equality, the South African government has set up national focal points in charge of ensuring and coordinating equality and the full inclusion of persons with disabilities in society. The National Office of the Disabled People (OSDP) was set up within the Presidency at the national level and cascaded down to the Premier's Office and local municipalities at the provincial and local government levels, respectively.[10] It is important to note that the establishment of the OSDP was the result of strong advocacy by DPOs, and that this advocacy also established the National

[10] Matsebula *et al Integrating Disability within Government: The Office of the Disabled Persons in Disability and Social changes* (2006) 85.

Coordinating Unit.[11] The OSDP's objective was to mainstream disability rights in national policies hence it drafted the White Paper on an integrated National Disability Strategy, endorsed by government in 1997.

Two years after the ratification of the CRPD and its Protocol, disability rights were allocated to Department of Women, Children and Persons with Disabilities (DWCPD).[12] Similar to the OSDP, the DWCPD ensures that persons with disabilities are not marginalised, are included in the community and have the same rights as those without disabilities. The DWCPD is at the forefront in the monitoring, evaluation, coordination and mainstreaming of disability rights into national priorities. [13] In 2009, the government additionally set up the Parliamentary Portfolio Committee on Women, Children and Persons with Disability.

However, upon closer examination is appears that disability rights may once again become invisible, given the various dynamics that impinge upon its policy-practice environment. Firstly, although the DWCPD and its equivalent Parliamentary Committee are high-ranking institutions, they assume cross-cutting mandates at the risk that children's or women's issues may ultimately compete with disability rights. For instance, although the Parliamentary Portfolio Committee on Women, Children and Persons with Disability reported to the 56th Session of the United Nations (UN) Commission on Women on 20 February 2013,[14] no thematic subject area of the report

[11] As above.
[12] DWCPD's website: http://www.dwcpd.gov.za (accessed 20 June 2015).
[13] For a comprehensive exposé on the mandate of the DWCPD, see Grobbelaar-du Plessis & C Grobler 'South Africa' in *African Disability Rights Yearbook* (2013) 334.
[14] Report of the Portfolio Committee of Women, Children and People with Disabilities on the Report of the 56th session of the United Nations Commission on the Status of Women (UNCSW), dated 20 February 2013, available at http://pmg-assets.s3-website-eu-west-

mentioned women with disabilities, only women in general. This approach ignores the double discrimination against women with disabilities who are marginalised, first for being women and, second, for having a disability. Even though the thematic area chosen originated from key issues debated during the session,[15] women with disabilities were simply invisible, hence the need to have a specific focal point for persons with disabilities at the DWCPD to concretely deal with disability rights. In including this policy mechanism, issues related to women with disability may be more pronounced than presently in the policy-practice environment.

Second, South Africa's lack of a Disability Act is another important hindrance to the realisation of disability rights. The DWCPD is established by the executive power and, under this arrangement, a change of government or responsible Minister is able to negatively affect the efficiency of this Department as the newcomers may not be disability rights-friendly, or may wish to reinvent the wheel which could be detrimental to existing initiatives. Therefore, while a draft Disability Policy[16] has been circulated for comment, this Policy should be adopted and the National focal point and its core functions should be established under the Act. In this respect, South Africa should move from piecemeal legislation on disability and learn from countries such as Kenya,[17] Malawi,[18] Great Britain,[19] and Australia[20] for examples that have disability-specific Acts.

1.amazonaws.com/doc/2013/comreports/130222pcwomenreport.htm (accessed 2 July 2015).

[15] *Idem* par 2.

[16] Draft National Disability Rights Policy, Notice 129 of 2015, Government Gazette, 16 February 2015.

[17] Kenya Disability Act 2003, currently under review.

[18] Malawi Disability Act 2012.

[19] UK Disability Discrimination Act, 1995 & Equality Act, 2010.

[20] Australia Disability Discrimination Act, 1992.

While awaiting an act of parliament establishing focal point(s), it is important to note that besides the DWCPD at ministerial level, all national government departments, provincial administrations as well as district and local municipalities are obliged to establish a disability focal person or unit to synchronise the mainstreaming of disability rights in their offices or organizations. These focal points meet in the National Disability Machinery[21] which comprises, amongst others, the Inter-Departmental Coordinating Unit. This is a positive attempt to synchronise the mainstreaming of disability rights from various offices or organisations and take it to grassroots-level.

However, this positive attempt is hindered by challenges related to the harmonisation and coordination of activities from the national to provincial and various other levels of government.[22] In addition, government's efforts to implement disability rights are hindered by a lack of capacity and financial resources. As far as the capacity challenge is concerned, Research Dynamics is of the view that '[t]here is generally very little or no capacity for integrating disability issues in government departments'.[23] It is therefore imperative that officials designated as focal points are trained to enable them to implement and monitor disability rights-related policies.

As for financial constraints, Research Dynamics observes that '[b]udgetary allocations for initiatives that benefit people with disabilities are generally inadequate and do not permit meaningful execution of initiatives'.[24] Moreover, when the allocation of a budget for disability initiatives occurs, it is

[21] Grobbelaar-du Plessis & Grobler 331.
[22] *Ibid*.
[23] Research Dynamics "Situational analysis of disability integration in 18 government departments" (2000) vi http://www.gov.za/sites/www.gov.za/files/disability_1.pdf.
[24] *Ibid*.

informed by the medical model of disability (whereby a person needs assistance because of his/her disability) which does not enhance the rights of beneficiaries as the social model (whereby the person is a right holder) would do.[25]

Furthermore, there is a scarcity of disability-related research and information in government departments in terms of what is done to implement, monitor and evaluate disability rights by the various focal points. It could, therefore, be argued that the assessment (if any) of the implementation of disability rights is kept away from the public domain. In this perspective, the Council on Higher Education regrets the 'lack of data on disability in South Africa, data which would allow government and relevant organisations to design, plan and implement strategies for disabled persons as well as to measure their impact'.[26] Perhaps the lack of data simply echoes the inefficiency of the focal points in delivering their mandates. The Council on Higher Education explains as follows.

To a large extent, the lack of data on disability reflects the ineffective role that management information systems have had up to now, both at different levels of the state agencies and departments and at the level of the institutions and organisations that deal with disability.[27]

Indeed, the inefficiency of focal points seems to be the main problem. Research shows that only 1 in 5 municipalities, amounting to 15 of 76 or 20%, had disability policies.[28]

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[25] *Ibid*.
[26] Council on Higher Education "Higher Education Monitor – South African Higher Education Responses to Students with Disabilities. Equity of Access and opportunity" (2005) v.
[27] *Ibid*.
[28] Survey on municipal responses to HIV & AIDS, gender equality, youth development and disability in South Africa, Strengthening Local Governance Programme (July 2010) 15.

Consequently, the implementation and monitoring of disability rights by focal points are simply not attended to. Therefore, to address this gap, it is recommended that focal points capacitate themselves, undertake research and collect data on disability rights, work in a transparent manner and ensure that data related to the implementation, monitoring and evaluation of disability rights from all focal points are regularly published and updated. This will not only raise awareness on disability rights, but also showcase what the South African government is doing at various levels.

In sum, although South Africa complies with the requirement of establishing national focal points, the latter needs to derive its legitimacy from an Act of Parliament. The country also has to establish a specific unit with an exclusive focus on disability rights; address coordination challenges between various stakeholders; and resolve capacity as well as budgetary constraints so as to ensure the efficiency of its focal points. This is also imperative to undertake research and collect the necessary data to inform the implementation of disability rights.

3. Independent institution(s) and the monitoring of disability rights

Subsection 2 of article 33 compels State Parties to the CRPD to provide an enabling environment in which an independent institution(s) may function to promote, protect and foster respect for disability rights. It requires states to designate or set up such institution(s) in line with the Paris Principles.[29] In this context, an independent institution is tasked with monitoring the actions the state is taking to give effect to disability rights. It is key

[29] The Paris Principles originated from an international workshop of national human rights institutions, held in Paris in 1991, but were adopted by the United Nations General Assembly in 1993 General Assembly resolution 48/134 of 20 December 1993.

check-and-balance measure needed to monitor government's activities. Unlike Australia, for example, which has a specific human rights Commission to address disability rights, South Africa has none with a specific focus on these rights. Grobbelaar-DuPlessis and Grobbler observe: '[In South Africa] [t]here are no bodies other than courts that specifically address the violation of rights of people with disabilities'.[30]

Nevertheless, the South African Human Rights Commission (SAHRC or the Commission) and the Public Protector, established under chapter 9 of the Constitution, are tasked to protect all human rights - including disability rights.[31] These institutions comply with the Paris Principles requirement which emphasise the full independence of the institution. As a result of their full compliance with the Paris Principles, the Sub-Committee on Accreditation (which collects a list of the institutions that submit to the Paris Principles) had elevated South African national human rights institutions to A-Status (which differs from B-status for half compliance and C-status for non-compliance).[32]

3.1 South African Human Rights Commission and the protection of disability rights

Established under sections 181 and 184 of the Constitution, the SAHRC is mandated to protect the rights of all without discrimination whatsoever. This obligation also applies to its

[30] Grobbelaar-du Plessis & Grobler 325.

[31] Other independent institutions under ch 9 are the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor- General & the Electoral Commission.

[32] For more on accredited national human rights institution, see www.nhri.net; also see De Beco "Article 33(2) of the UN Convention on the Rights of Persons with Disabilities: Another Role for National Human Rights Institutions?" 2011 *Netherlands Quarterly of Human Rights* 91.

promotional[33] and monitoring mandates,[34] which entail advancing and observing all human rights, including disability rights.[35] In this respect, the Commission is tasked to receive complaints from those who allege violation of their rights.[36] It has the power to search and investigate the violation and can *subpoena* in case of urgency. To be more specific, for persons with disabilities, the Commission (empowered by Section 5 of the Human Rights Commission Act)[37] has established a Committee on Disability and Older Persons.[38] This Committee has a sub-committee comprising DPO representatives and academics who advise on how to guarantee the rights of persons with disabilities in light of the CRPD.[39] The sub-committee meets once or twice a year and questions debated are included in both the Commission's work-plan as well as discussions with Government.[40] Some of its members include representatives from the South African Disability Alliance (SADA), the Western Cape Cerebral Palsy Association, Down's Syndrome South Africa, the QuadPara Association of South Africa, the University of the Western Cape Centre for Disability Law and Policy, the

[33] S 184(1)(b).
[34] S 184(1)(c).
[35] S 9(3) of the Constitution expressly prohibits discrimination on the ground of disability.
[36] Nhlapo *et al* "Disability and human rights –The South African Human Rights Commission" in Watermeyer *et al* (eds) *Disability and social change* (2006) 102.
[37] Act of 1994.
[38] Members of the Committee on Disability and Older Persons include DPOs' representatives from Western Cape Cerebral Palsy Association; Down Syndrome South Africa; QuadPara Association of South Africa; and the South African Disability Alliance and Cape Mental Health Society for instance. For more on this, see Grobbelaar-du Plessis & Grobler 326.
[39] SAHRC "Overview of SAHRC Activities on CRPD" http://nhri.ohchr.org/EN/ICC/ AnnualMeeting/25/Statementspresentations/Monitoring%20under%20CRPD%20-%20South%20 Africa.doc (accessed 2 July 2015).
[40] The Baseline Country Report to the United Nations on the Implementation of the Convention on the Rights of Persons with Disabilities in South Africa, par 407.

Cape Mental Health Society as well as the Harvard Law School Project on Disability.[41]

Although DPOs and civil society in general are involved in fostering human rights through the Commission, research shows that DPOs and civil society involved in the work of the Commission are generally reluctant to play a role in gathering the information needed for the preparation of reports on the violation of human rights.[42] DPOs and civil society seem to avoid contributing to the work of the Commission. Echoing the Democracy and Governance Research Programme of the Human Sciences Research Council,[43] Djoyou Kamga and Heleba explain as follows:

The form and especially the regularity of interaction [between the civil society and the Commission] is less than satisfactory. They only meet intermittently as and when there is a need – at seminars, to celebrate Human Rights Day, upon request to compile a report of a hearing, or to assist with an investigation.[44]

This is problematic, and DPOs and civil society will have to work in tandem with the Commission for the benefit of persons with disabilities.[45]

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[41] *Idem* par 407.
[42] Liebenberg "Making a difference: Human rights and development – reflecting on the South African Experience" in Andreassen & Marks (eds) *Development as a human right: legal, political and economic dimensions* (2006).
[43] Democracy and Governance Research Programme of the Human Sciences Research Council 'Assessment of the Relationship between Chapter 9 Institutions and Civil Society. Final report, 15 January 2007. Available at <www.fhr.org.za/attachment_view.php?aa_id=26> (accessed 2 July 2015).
[44] Djoyou Kamga & Heleba *Can economic growth translate into access to rights? Challenges faced by institutions in South Africa in ensuring that growth leads to better living standard* (2012) 97.
[45] This will be discussed further in the section which investigates how DPOs and civil society organisations are monitoring the CRPD. .

However, the Commission should be commended for its role in monitoring disability rights. In 2002, prior to the adoption and ratification of the CRPD and its Protocol by South Africa, and then relying on the United Standard Rules on the Equalization of Opportunities for Peoples with Disabilities[46] and the need to protect equality and dignity in the Constitution, the Commission received numerous complaints and cases and played a significant role in protecting disability rights without these cases reaching the courts. Three cases are relevant. The first case relates to right to education. The Commission was approached with a complaint alleging the exclusion of a child from a school on the ground of disability. In this case, the principal of the school simply denied access to a child who was physically impaired and could not access his classroom (which was located upstairs in a school without lifts). After engaging with the Commission, the principal agreed to move the learner's classroom downstairs and the problem was solved.[47] As correctly noted by Nhlapo *et al*, the lesson learnt here is that the principal was able to understand his obligation to ensure access to education for all.[48]

The second case deals with inaccessible prisons for persons with disabilities. A person with disability was condemned to fifteen years of prison and incarcerated in a prison with no access facilities for physically-impaired prisoners. As a result, he was accommodated in the prison sick area and consequently was bedbound for three years at the time of the complaint.[49] The Commission called on the Department of Correctional Services to take appropriate measures to ensure that prisons are disability-friendly and, more importantly, to ensure that measures taken to

[46] Adopted by the United Nations General Assembly, forty-eighth session, Resolution 48/96 of 20 December 1993.
[47] Nhlapo *et al* 101.
[48] *Idem* 106.
[49] *Idem* 105.

remedy the situation are fully implemented.[50] Although the state has yet to fully comply with these instructions of the Commission as reports suggest,[51] the Commission should be commended for its view and directives on the issue.

The third case deals with a failed operation. A young boy was operated upon, but the surgery failed. As a result, the patient's condition worsened and he became severely physically disabled. Instead of finding solutions for his predicament, the boy was simply discharged from the hospital without further explanation or any attempt made to remedy his condition. Informed of the situation, the Commissioner approached the Provincial Member of the Executive Council for health to request a documented plan for the care to be provided to the patient. Subsequently, reacting to the silence of the MEC, the Commission issued a *subpoena* to the MEC to compel her to take responsibility for the medical malpractice of her personnel. This pressure yielded positive results as the provincial department agreed to design a plan of intervention to be implemented by the local state hospital who committed themselves to administer the necessary care to the patient.[52] This case is significant in ensuring that disability rights become a priority on the agenda of the Department of Health at the provincial level.[53]

Thus, the standards set by the Commission on disability rights are impressive. This trend was further bolstered after the ratification of the CRPD and its Optional Protocol in a case that reached the courts: the case of *Lettie Hazel Oortman v St Thomas*

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[50] *Ibid*.
[51] Raphaely "Detainees on remand in South Africa often endure worse conditions than convicts. This is one paraplegic man's story" available at http://www.theguardian.com/world/2013/feb/22/paraplegic-remand-south-africa (access 3 July 2015); Raphaely "Denying paraplegic bail is 'torture'" *Mail and Guardian* 19 April to 15 May 2013 9.
[52] *Idem* 105.
[53] *Ibid*.

Aquinas Private School & Bernard Langton[54] in Mpumalanga's Equality Court. The case related to discrimination against learners with disabilities at school. The Commission was instrumental in showing how the school failed to accommodate Oortman, a child with disability, at a local school.[55] This led the court to find for the applicant and to compel the school to remove all obstacles 'for the learner in order to enable her to have access to the classroom, washbasin and toilet allocated to the learner by using her wheelchair'.[56] This commitment of the Commission to the rights of persons with disabilities led Grobbelaar-du Plessis and Grobler to argue that '[t]he SAHRC is a status National Human Rights Institution, and constitute the independent monitoring mechanism envisaged in article 33 of the CRPD'.[57]

In spite of this encouraging development, the Commission - especially its section 5 Committee - has two problems: First, similar to the problems related to the focus point, the DWCPD addresses different interests, namely, those of the elderly and those of persons with disabilities. Again, disability issues may remain invisible. Second, the Committee is often limited by a lack of adequate capacity. This was acknowledged by the Commission itself in August 2011 through its submission to the UN High Commissioner for Human Rights on Human Rights of Persons with Disabilities.[58] In its submission, the Commission stated that it needed more time to engage with and understand the significance and implementation of article 33(2) of the

[54] Equality Court Case 1/2010 (December 2010).
[55] Grobbelaar-du Plessis & Grobler 326.
[56] *Ibid*; also see *Baseline Country Report to the United Nations on the Implementation of the Convention on the Rights of Persons with Disabilities in South Africa* 320.
[57] Grobbelaar-du Plessis & Grobler 326.
[58] South African Human Rights Commission Bill of 2013; SAHRC *Submission to the United Nations High Commissioner for Human Rights: Human Rights of Persons with Disabilities: Human Rights Council Resolution* 16/15, http://www.ohchr.org/. Documents/Issues/Disability/PoliticalParticipation/NHRIs/ResponseNHRISouthAfrica.doc (accessed 2 July 2015).

CRPD[59] which calls on the government to 'establish one or more independent mechanisms to promote, protect and monitor the implementation of the Convention taking into account the Paris Principles'. This capacity challenge is aggravated by the fact that the sub-committee at the Commission meets only once or twice a year. This is too seldom, given that discrimination based on disability has become systemic.

3.2 Public Protector and the protection of disability rights

Established under sections 181 and 182 of the Constitution, the Office of the Public Protector is mandated to ensure good governance, promote and protect the rule of law and respect for human rights, including those of persons with disabilities.[60] In this respect, through her investigation of the case in November 2010 of a needy person deprived of a wheelchair, the Public Protector unequivocally called on the Western Cape Department of Health to provide such assisting device in respect of the right to healthcare to a person with a disability.[61] The right to health provided under section 27 of the Constitution applies to all, including persons with disabilities. In this regard, the Public Protector also urged the Department of Health to endeavour to acquire more wheelchairs and to secure the necessary budget.[62]

It could be argued that South Africa provides an enabling environment for the Public Protector and the Commission to monitor human rights; those of persons with disability in particular. This is so because the budgets of these institutions are approved by parliament and not only the executive.

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[59] *Idem* 7.

[60] For more on his/her power, see Public Protector Act 23 of 1994; Public Protector Website http://www.pprotect.org.

[61] Grobbelaar-du Plessis & Grobler 327.

[62] *Ibid*.

Nevertheless, the independence of national institutions is likely to be threatened by the majority party in Parliament. According to the Constitution,[63] the nomination and removal of office bearers of Chapter 9 institutions are submitted to the approbation of the majority of members of Parliament.[64] Therefore, in an environment such as South Africa where the ruling party, the African National Congress (ANC), has the majority in the National Assembly, independent institutions may succumb to pressure and avoid their role not only to secure their reappointment by the Parliament, but also to ensure that they are allocated sufficient funds for their respective offices. Djoyou Kamga and Heleba are of the view that in the South African context dominated by the ANC, 'super majorities for appointment and dismissal are rendered ineffective in securing inter-party support because the governing party can choose the incumbents of the Chapter 9 institutions'.[65]

Similarly, with regard to national focal points on disability, independent institutions also face challenges related to their ability to coordinate and monitor the implementation of human rights and those of persons with disabilities between various spheres of government from the national, provincial to local levels.[66] This challenge is exacerbated by numerous challenges the institutions have to deal with amidst their limited capacity, hence the need to capacitate them with more personnel.

In terms of ensuring the visibility of disability rights in the wider public arena, a key challenge facing independent institutions is

[63] S 193 & S 194.
[64] The exception to this rule applies to the appointment and removal of Commissioners on the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
[65] Djoyou Kamga & Heleba 95 & 96.
[66] *Idem* 96.

that they are generally unknown.[67] In spite of the few successes regarding the realisation of disability rights mentioned earlier, many - especially persons with disability - are not aware that these institutions are appropriate to address their rights. This is because these institutions are generally perceived as holding government accountable for corruption, and other high-profile issues, and hence that they do not focus on disability rights which is perceived to be peripheral in policy and practice spheres. In fact, those in need of these rights are often bogged down by poverty and rather focus on begging for survival and would not even understand what the Human Rights Commission and the Public Protector are. Those able to bring cases to these institutions do not do so 'for fear of reprisal or victimisation'.[68]

Therefore, it is imperative to raise awareness and educate people in general and those with disability in particular, on the role and ability of independent institutions to address disability rights. Television, social networks and other forms of communication could be used to highlight the relevance of these independent institutions in promoting and protecting disability rights. In spite of this, the reality is that these institutions are not courts of law and cannot take binding decisions, but make mere recommendations without the means to compel government to execute them. Langeveldt writes: 'These [institutions] do not have the power to take disciplinary action against government officials. Their role is purely investigatory and administrative'.[69]

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[67] Madonsela "Corruption and governance challenges: the South African experience: address by the Public Protector of the Republic of South Africa at the National Conference on Corruption and Governance Challenges, in Nigeria on 21 January 2010" Available at:<http://www.publicprotector.org/media_gallery/2010/PP%20Speach%20Nigeria%20Corruption%20and%20Governance%20Challenges%20final.pdf > (accessed 2 July 2015).

[68] Djoyou Kamga & Heleba 97.

[69] Langeveldt "The Chapter 9 Institutions in South Africa" Southern Africa Catholic Bishops' Conference, Parliamentary Liaison Office. Briefing Paper 287,(April2012)1.Availableat:

Nevertheless, given that their role is to foster democracy, ensure the rule of law and the respect for human rights (including those of persons with disabilities), they should be approached by the needy as they are able to get results by naming and shaming a government that disregards human rights.

Generally, in spite of the challenges facing independent institutions - such as their independence; the limited involvement of DPOs in their work; weakness in effecting their decisions for greater impact; resources and capacity constraints; as well as lack of awareness on their mandate on disability rights - the national independent institutions are accorded an enormous amount of respect. Therefore, it is imperative that they should be relied upon to monitor disability rights, because there is no evidence that these rights have been neglected in the past as a result of pressure on independent institutions that are accountable only to the Constitution and the law.[70] The South African government should, therefore, invest constantly in raising awareness on the role of these institutions.

4 Monitoring of disability rights by Disability Persons Organisations and civil society organisations

Under section 33(3) of the CRPD, a State Party is obliged to ensure that '[c]ivil society, in particular persons with disabilities and their representative organizations, [are] involved and participate fully in the monitoring process'. This is the application of the disability motto, 'Nothing about us without us'. To ensure the involvement of DPOs in the implementation process, the government through the DWCPD has provided an

http://www.hss.de/fileadmin/suedafrika/downloads/BP_287_The_Chapter_9_Institutions_in_South_Africa_April_2012.pdf> (accessed 2 July 2015).

[70] S 181(2) of the Constitution.

enabling environment through which civil society organisations, in general, may play key roles in promoting and protecting the rights of persons with disability. In this respect, the government established the National Disability Machinery, which is a non-statutory consultative medium between government and DPOs, business and institutions of higher learning.[71] In this context, the South African Disability Alliance (SADA) and Disabled People South Africa are involved in a processes aiming to ensure the participation of DPOs in the implementation of the CRPD. Amongst other activities, in 2012, SADA (made up of 13 national DPOs) started a South African chapter of Disability Rights Promotion International (DRPI) in partnership with York University in Canada. This initiative is aimed at capacitating DPOs in monitoring the implementation of the CRPD.[72]

Furthermore, all national government departments, from the national to local municipality levels, are instructed to establish a disability focal point to ensure the mainstreaming of disability rights in their activities. This entails the involvement of civil society in general, and DPOs in particular, in the development of policies and strategies to address disability rights.[73] If synchronised through the National Disability Machinery, the involvement of various disability units or focal points from different levels of government, as well as DPOs, would be instrumental in taking the discourse of disability rights to grassroots level, and ensuring that the rights of persons with disability are protected by all duty-bearers at all levels.

Moreover, while working in tandem with the government, DPOs should at the same time be the watchdogs that prepare shadow reports on the implementation of the CRPD to be submitted to

[71] Baseline Country Report par 63.
[72] *Idem* par 410.
[73] *Idem* par 63.

various Committees or bodies dealing with the supervision of the implementation of the CRPD at national, regional and global level. Nevertheless, as alluded to earlier, DPOs have not been very consistent in working with the Human Rights Commission. Furthermore, even though DPOs are subsidised by the state,[74] they face financial and human capacity constraints. As far as human capacity is concerned, this problem is aggravated by the fact that many DPOs' members often abandon their organisations to join the government or other organisations (without disability interest).[75] According to Matsebula *et al*, the migration of skills from the disability sector limits the ability of this sector to discharge its function of monitoring.[76]

Besides the exodus of skilled advocates from the disability sector, some DPOs face concerns regarding their legitimacy, on their ability to coordinate actions in disability focal points at all levels of government, as well as within their own circles.[77] In addition, procedural backlogs linked to bureaucracy limit their efficiency in delivering their mandate. [78]

Needless to say, DPOs have a significant role in monitoring the implementation of the CRPD. They should work in partnership with other civil society organisations to constantly improve their capacity, address their legitimacy challenges and ensure the retention of their personnel where organisational policies are formulated and implemented to ensure that robust monitoring

[74] See, for example, Department of Labour "Policy on Transfer of Subsidies to Organisations administrating Programmes for People with Disabilities" available at http://www.labour.gov.za/DOL/downloads/documents/useful-documents/skills-development-act/pesdisabilitypolicy.pdf (accessed 2 July 2015).
[75] Matsebula *et al* 87.
[76] *Ibid.*
[77] *Ibid.*
[78] Dube "The role and effectiveness of disability legislation in South Africa' Disability Knowledge & Research (KaR) Programme" http://tugsa63.org/documents/aditional%20documents/ PolicyProject_legislation_sa.pdf (accessed 2 July 2015).

and evaluation plans are effectively implemented by motivated and able personnel. In this respect, the government should assist DPOs with capacity building, and enhance the coordination of activities between various disability focal points and DPOs to ensure that the National Disability Machinery is conducive to the better implementation of disability rights, to address the challenges being experienced by persons with disabilities.

5 Conclusion

The aim of this article was to explore the extent to which South Africa complies with the provisions of article 33 of the CRPD which compel State Parties to establish focal point(s) to implement the CRPD; set up independent institutions to monitor its implementation; and to ensure that DPOs and civil society organisations in general play a more effective role in the implementation and monitoring process. To ensure the sound national implementation and monitoring of disability rights, the South African government should address the challenges discussed above and constantly update its laws and policies pertaining to disability rights.

In ascertaining to what the extent South Africa has established national focal points on disability rights, it was found that although South Africa has focal points, they need to be established by an Act of Parliament to be strengthened. Furthermore, there is a risk that disability rights may be ignored in a general focal point that deals with issues of women and children at the same time. Moreover, the efficiency of focal points is hindered by coordination, capacity and budgetary challenges which are a daily reality in the work of various stakeholders. In addition, there is a need to enable focal points regarding what is expected from them, to conduct functional

research, and to publish data and indicators on what has been done to implement disability rights.

In respect of whether independent national institutions have been set up to monitor disability rights and their impact in this regard, it was found that although independent national institutions have the potential to address disability rights, they face capacity challenges, do not always receive much-needed support from DPOs, and perhaps more importantly their disability rights mandate is unknown by the public, particularly the population segment they serve.

Lastly, in respect to the extent to which DPOs and civil society in general are involved in the implementation and monitoring of disability rights, it was established that although DPOs and civil society organisations in general are likely to play a major role in implementing and monitoring the CRPD, they still need to improve their capacity, address financial constraints and legitimacy challenges. They further need to develop appropriate knowledge management and human resource retention policies to ensure that policies and programmes are implemented by motivated and capacitated personnel.

2. THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT 4 OF 2000

Anton Kok**

1 Introduction

Since the first democratic elections in 1994, the South African government has worked towards countering a legacy of grossly unequal allocation of resources, wealth and power.[79] One of the more significant legislative attempts to undo the effect of centuries of race-based oppression and marginalisation was the Equality Act. The National Assembly passed the Act on 26 January 2000, the National Council of Provinces approved the Act on 28 January 2000, and the President signed the Act on 2

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[79] In the legislative sphere, the following Acts have been passed, among others: The Restitution of Land Rights Act 22 of 1994, the Land Administration Act 2 of 1995, the Development Facilitation Act 67 of 1995, the Land Reform (Labour Tenants) Act 3 of 1996, the Extension of Security of Tenure Act 62 of 1997, the Housing Act 107 of 2997, the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998, the National Water Act 36 of 1998, the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 55 of 1998. The social democratic Reconstruction and Development Programme (RDP) was replaced with the neo-liberal Growth, Employment and Redistribution programme (GEAR) in 1996 and has been heavily criticised from the left of the political spectrum. See Alexander (2002) 49, 57, 145 and Terreblanche (2002) 103, 108-121 among others. In 2005 the "Accelerated and Shared Growth Initiative of South Africa" (ASGISA) was introduced as an accompaniment to GEAR, with the aim of building a staircase between the first (formal) and second (informal) economy – Calland (2006) 53.

February 2000.[80] Sections 1,[81] 2,[82] 3,[83] 4(2),[84] 5,[85] 6,[86] 29 (with the exception of sections (2)),[87] 32,[88] 33,[89] and 34(1)[90] commenced on 1 September 2000.[91] As it stood then, the Act's prohibition of state and private discrimination could not be enforced – the Act envisaged the creation of informal, accessible "equality courts" in which discrimination complaints were to be heard, but these courts were not yet operationalised. In terms of the Act, equality court personnel had to be trained before the courts could be created.[92] Training commenced in April 2001.

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[80] Gutto (2001) 123 n1.
[81] The definitions section.
[82] "Objects of the Act".
[83] "Interpretation of the Act".
[84] "Guiding principles". S 4(1), which did not come into effect onto 1 September 2000, deals with the adjudication of disputes in terms of the Act.
[85] "Application of the Act".
[86] S 6 contains the general prohibition against unfair discrimination: "Neither the State nor any person may unfairly discriminate against any person".

[87] "Illustrative list of unfair practices in certain sectors". S 29(2), which did not come into force on 1 September 2000, provides that "the State must, where appropriate, ensure that legislative and other measures are taken to address the practices referred to in subsection (1)".

[88] S 32 deals with the establishment of the Equality Review Committee (ERC). GN No R874, *Government Gazette* No 21517, 2000-09-01 established the ERC.
[89] S 33 deals with the powers, functions and terms of office of the ERC.
[90] "In view of the overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status— *(a)* special consideration must be given to the inclusion of these grounds in paragraph *(a)* of the definition of ''prohibited grounds'' by the Minister; *(b)* the Equality Review Committee must, within one year, investigate and make the necessary recommendations to the Minister".

[91] GN No R54, *Government Gazette* No 21517, 2000-09-01.
[92] The relevant parts of s 31(1) read as follows, before it was amended by the Promotion of Equality and Prevention of Unfair Discrimination Amendment Act 52 of 2002: "(1) Despite section 16(1)*(a)* and *(b)*, and until the Minister determines by notice in the *Gazette*, no proceedings may be instituted in any court unless — *(a)* a presiding officer is available who has been designated, by reason of his or her training, experience, expertise and suitability in the field of equality and human rights; and *(b)* one or more trained clerks are available. (2) For purposes of giving full effect to this Act and making the Act as accessible as possible— *(a)* and in giving effect to subsection (1), the Minister may designate suitable magistrates, additional magistrates or judges,

By June 2003, it was deemed that a sufficient number of trained judges, magistrates and clerks existed to allow the establishment of 60 courts.[93] The remainder of the Act, barring the provisions of the Act dealing with the promotion of equality, came into force on 16 June 2003.[94]

As mentioned above, many recent Acts underpin South Africa's transformation, and the Equality Act should be understood as one of the cogs in this legislative wheel, not the wheel itself.

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as the case may be, and clerks referred to in subsection (1) as presiding officers and clerks, respectively, for one or more equality courts ... (3) The Minister must take all reasonable steps within the available resources of the Department to designate at least one presiding officer and ensure that a trained clerk is available for each court in the Republic. (4) The Minister must, after consultation with the Magistrates Commission and the Judicial Service Commission, issue policy directives and develop training courses with a view to— *(a)* establishing uniform norms, standards and procedures to be observed by presiding officers and clerks in the performance of their functions and duties and in the exercise of their powers; and *(b)* building a dedicated and experienced pool of trained and specialised presiding officers and clerks". The amendment came into force on 15 January 2003 (The Presidency, No 95, *Government Gazette* No 24249, 2003-01-15). Since its amendment, the relevant parts of s 31 now read as follows: "(1) Despite section 16 (1) no proceedings may be instituted in any court unless a presiding officer and one or more clerks are available ... (4) The Chief Justice must, in consultation with the Judicial Service Commission and the Magistrates Commission, develop the content of training courses with a view to building a dedicated and experienced pool of trained and specialised presiding officers, for purposes of presiding in court proceedings as contemplated in this Act, by providing- (a) social context training for presiding officers; and (b) uniform norms, standards and

procedures to be observed by presiding officers in the performance of their functions and duties and in the exercise of their powers. (5) The Chief Justice must, in consultation with the Judicial Service Commission, the Magistrates Commission and the Minister, implement the training courses contemplated in subsection (4). (6) The Director-General of the Department must develop and implement a training course for clerks of equality courts with the view to building a dedicated and experienced pool of trained and specialised clerks, for purposes of performing their functions and duties as contemplated in this Act, by providing- (a) social context training for clerks; and (b) uniform norms, standards and procedures to be observed by clerks in the performance of their functions and duties".

[93] GN No 878, *Government Gazette* No 25091, 2003-06-13.
[94] GN No R49, *Government Gazette* No 25065, 2003-06-13.

This part of the report focuses almost exclusively on the Equality Act: it has been described as the most important Act to have been passed by the South African Parliament, second only to the Constitution,[95] and it explicitly targets the effects of past discrimination, which arguably is the reason for the vast disparities in wealth, income and resources in South Africa. The Employment Equity Act is not analysed in this section, although this Act also outlaws unfair discrimination, specifically in the workplace.[96] The Employment Equity Act had a different drafting history, falls under a different government department (the Department of Labour), has been in operation for much longer and has different enforcement mechanisms. Critically, from a South African perspective where up to 40% of the population is estimated to be unemployed,[97] employment-

[95] Eg cf the Minister of Justice's speech at the second reading debate of the Act, 26 January 2000, as reproduced in Gutto (2001) 25: "No doubt, this is yet another legislative milestone and in some circles, indeed, this Bill is regarded in importance as only second to the Constitution". Also see the speech by Dr EH Davies, delivered at the same occasion, reproduced in Gutto (2001) 39: "This afternoon we are debating a major piece of transformatory legislation. This Bill, when it is enacted, will stand second only to the Constitution as a mechanism for preventing discrimination and promoting equality". In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act. Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and Status of Women and Portfolio Committee on Justice and Constitutional Development; 16 October 2006 to 19 October 2006. http://www.pmg.org.za/viewminute.php?id=8330; http://www.pmg.org.za/viewminute.php?id=8349; http://www.pmg.org.za/viewminute.php?id=8373 and http://www.pmg.org.za/viewminute.php?id=8378 (accessed 2007-05-15). During these hearings the SAHRC noted that "the Act was hailed as the most important piece of legislation that was created after the constitution and expectations were created". During March 2007 an *ad hoc* committee of Parliament reviewed the so-called "Chapter Nine Institutions" – the state institutions supporting constitutional democracy and established in terms of chapter nine of the Constitution of the Republic of South Africa, 1996. I accessed the minutes to these proceedings at http://www.pmg.org.za/viewminute.php?id=8738 on 15 May 2007. At these hearings, the chairperson of the SAHRC referred to the Act as "the core of the whole Constitution". Also see Gutto (2001) 8.

[96] The Equality Act excludes all causes of action arising from the Employment Equity Act from the application of the Act (s 5(3)).

[97] Terreblanche (2002) 33; Christie in MacEwen (ed) (1997) 177-178; O'Regan in Loenen and Rodrigues (eds) (1999) 14; Liebenberg and O'Sullivan (2001) 2.

related, court-driven structural adjustments would be completely meaningless for a large portion of inhabitants, whereas the Equality Act holds greater promise in this regard.

As an example of "anti-discrimination legislation",[98] the Act is ambitious in scope. It outlaws unfair discrimination[99] in almost every sphere of society:[100] labour and employment, education, health care services and benefits, housing, accommodation, land and property, insurance services, pensions, partnerships, professions and professional bodies, provision of goods, services and facilities, and clubs, associations and sport.[101] The Act also aims at preventing and prohibiting harassment[102] and hate speech.[103]

2 Overview of main features of the Equality Act

2.1 Definitions

I highlight the definitions that make up the heart of the Act:

> "Equality" encompasses the following:
> "The full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes."

[98] Anti-discrimination legislation typically prohibits "private discrimination", ie discrimination committed by individuals or institutions such as clubs or restaurants, and usually consists of conduct. Currie and De Waal (2005) 267. The Act also prohibits state discrimination.
[99] S 6 read with ss 13 and 14 and the definitions of "discrimination" and "prohibited grounds".
[100] Lane (2005) 28 (internet version) seems to argue that the Act applies to "privately owned yet publicly used spaces" but not to private homes. The Act does not contain any explicit exclusions, but will probably not be utilised to combat instances of "intimate discrimination" – male friends' bridge club, for example.
[101] See the Schedule to the Act that contains an "Illustrative list of unfair practices in certain sectors". The Schedule to the Act "is intended to illustrate and emphasise some practices which are or may be unfair, that are widespread and that need to be addressed" (read with s 29(1)).
[102] S 11 read with the definition of "harassment" in s 1(xiii).
[103] S 10.

This definition of equality refers to the concept of "substantive equality".[104] The Constitutional Court has accepted that the Constitution embraces this understanding of equality, in contrast with "formal equality".[105] If one accepts the premise that the Constitution is a transformative document, then the right to equality cannot be viewed in the traditional, liberal way - a contextual, impact-based, remedial or substantive approach has to be adhered to.[106]

According to the Act, "discrimination" means

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[104] A formal, abstract approach to equality entails treating all individuals in the same manner, regardless of their particular circumstances and without taking into account that their positions in society differ. A substantive approach to equality pays particular attention to the context in which a litigant asks a court for assistance. The position of a particular litigant in society, the group to which she belongs and the history of the particular disadvantage are analysed. This approach emphasises the need to not only get rid of discriminatory laws but to actively and with positive steps remedy disadvantage and to redistribute social and economic power. Albertyn and Kentridge (1994) 10 *SAJHR* 152; Albertyn and Goldblatt (1998) 14 *SAJHR* 250; De Vos (2000) 63 *THRHR* 67; Loenen (1997) 13 *SAJHR* 403. There is something patronising about substantive equality, however, which is probably inescapable – MacKinnon in Dawson (ed) (1998) 365 calls the idea that some people need "special" treatment a "doctrinal embarrassment".

[105] Eg *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) par 73. Perhaps simplifying the concepts, formal equality entails treating people in the same way, irrespective of their differences while substantive equality holds that differences should not be ignored but accommodated. Freedman (2000) 63 *THRHR* 316; Van Reenen (1997) 12 *SAPL* 153; De Waal (2002) 14 *SA Merc LJ* 141. Formal equality masks inequality. De Vos (1999) 63 *THRHR* 67. For example, formal equality holds that everybody should receive the same standard of teaching, irrespective of differences. However, this would mean that a blind student would be disadvantaged if additional steps are not taken to address his or her particular needs. Put bluntly, substantive equality is more expensive than formal equality. Substantive equality is asymmetrical - Wentholt in Loenen and Rodrigues (eds) (1999) 61; Loenen (1997) 13 *SAJHR* 407, 408. The American Supreme Court seems to employ a symmetrical approach to equality by subjecting "race-specific policies designed to harm the historically oppressed" and "race-conscious policies designed to foster racial equality" to the same strict scrutiny. See Higgins and Rosenbury (2000) 85 *Cornell L Rev* 1196. Some American commentators seem to distinguish between "real anti-discrimination laws" and "accommodation" laws and do not seem to accept a substantive approach to equality. Jolls (2001) 115 *Harv L Rev* 643 and further. There is a danger that substantive equality may turn into little more than formal equality if the "accommodation" of difference is read narrowly to merely entail a slight modification of existing structures. Barclay (2001) 19 and *Supreme Court of British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 1 at 41-42.

[106] De Vos "Equality Conference" (2001) 7-8.

> "Any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly—
> *(a)* imposes burdens, obligations or disadvantage on; or
> *(b)* withholds benefits, opportunities or advantages from,
> any person on one or more of the prohibited grounds."

This definition may also be extracted from Constitutional Court judgements.[107]

As is the case in section 9(3) and 9(4) of the Constitution, the Act outlaws direct and indirect discrimination. The intention to discriminate is not required in the case of either direct or indirect discrimination.[108] However, the intention to discriminate may be a factor to consider when deciding on the unfairness of discrimination.[109] Indirect discrimination links with a substantive and asymmetrical approach to equality.[110] Indirect discrimination refers to a facially neutral provision that disproportionately affects particular groups.[111] An often-cited example is the effect of childcare responsibilities on gender

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[107] Eg *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) pars 33 and 39. However, later judgements seem to indicate that mere differentiation on a listed ground will almost automatically constitute discrimination. See *Harksen v Lane* 1998 (1) SA 300 (CC) par 54. This approach negates the pejorative meaning of "discrimination". Also see n 35.

[108] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 43.

[109] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 43; Currie and De Waal (2005) 263.

[110] Loenen (1997) 13 *SAJHR* 404. The Constitution lists the prohibited grounds in a symmetrical fashion without a strong textual indication that the prohibition against race discrimination was primarily put in place to assist blacks, the prohibition against sex/gender discrimination to assist women, and so forth. (Cf Sheppard (2001) 80 *Can BR* 896; Loenen at 407-408). Ss 7, 8 and 9 in the Act make it more clear which particular kinds of harms the legislature had in mind when it prohibited race, sex and disability discrimination.

[111] The Supreme Court of Canada has apparently done away with the difference between direct and indirect discrimination in *British Columbia (PSERC) v BCGSEU* [1999] 3 SCR 3. The Court held liability will be imposed if an act or policy has the effect of differentially treating an individual or a group identified by reference to one of the grounds of discrimination. See Réaume (2002) 40 *Osgoode Hall LJ* 142-143.

equality in the workplace.[112] Substantive equality and a concept of indirect discrimination would, for example, found an argument for the establishment of an in-house crèche or the introduction of "flexi-hours" to offset the disadvantage linked to childcare responsibilities (that overwhelmingly negatively affect female employees).[113]

In contrast to many other anti-discrimination statutes,[114] the Equality Act does not expressly require a comparison between the complainant and a suitable comparator.[115] It would, therefore, seem possible to base a claim on the mere fact that the complainant may be identified by one or more of the prohibited grounds, with the important proviso that the complainant must have suffered some identifiable harm.[116] It would in any event always be open to a respondent to prove to a court that the

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[112] Eg Albertyn and Kentridge (1994) 10 *SAJHR* 165.

[113] Cf Wentholt in Loenen and Rodrigues (eds) (1999) 57 and further. Also see Albertyn and Kentridge (1994) 10 *SAJHR* 166.

[114] Eg see the Queensland Anti-Discrimination Act s 10, Victoria Equal Opportunity Act s 8 (Annexure B.) In *Andrews v British Columbia* [1989] 1 SCR 143 at 164 the Canadian Supreme Court opined that "[Equality] is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises". Also see 3.2.8 above.

[115] Albertyn and Kentridge (1994) 10 *SAJHR* 153-155 point out that the "similarly situated" test as developed in the United States and Canada is "insufficient because it does not supply criteria by which to judge (a) when a person is similarly situated and with whom; (b) when a person should be treated in the same way, or differently; and (c) what kind of different treatment is appropriate. Canadian courts have since developed a greater appreciation for targeting social, political and legal prejudice and vulnerability. Collins (2003) 66 *Mod L Rev* 32 advocates the use of a model of "social inclusion" to avoid a comparative approach: "The policy of social inclusion asks for proof that the rule or practice tends to reinforce the exclusion of an individual member of an excluded group or most members of the excluded group. A comparison can supply evidence of exclusionary effect, but it is not essential to proof".

[116] Bohler-Muller and Tait (2000) 21 *Obiter* 410: "Critical Legal Theorists demand that we deal with individuals *in the context of their disadvantage* and that equality issues have to address the actual conditions of human life" (my emphasis). (The Act refers explicitly to disadvantage and the complainant's context in the Preamble, and ss 3(1)(a), 4(2) and 14(2)(a)). Contra Davis (1999) 116 *SALJ* 407: "Refusing to engage in a fair comparison is hardly the way to develop a coherent jurisprudence of equality".

ostensible discrimination did not take place on a ground identified in the Act.[117]

In its first judgment relating to the Act, the Constitutional Court in *MEC for Education: KwaZulu-Natal and others v Pillay*,[118] left open the question whether the Act requires a comparator.[119] The respondent argued that under the Act is was unnecessary to show a comparator or dominant group and that as long as a rule imposed disadvantage, it could be discriminatory.[120] The appellants argued that although a comparator was not specifically mentioned in the applicable definition in the Act, that a comparator should be implied as a requirement.[121] The Court held that a comparator was present in this matter: "It is those learners whose sincere religious or cultural beliefs or practices are not compromised by the Code, as compared to those whose beliefs or practices are compromised".[122] With respect to the Court, this is a circular argument. This ostensible comparison does not answer the question *how* one establishes if a learner's cultural beliefs were compromised. The Equality Act's definition of "discrimination" achieves that purpose, without the need to resort to a comparison: a learner's cultural

[117] See 3.8.1 ("Burden of proof") below. *Democratic Party v Minister of Home Affairs* 1999 (3) SA 254 (CC) para 12 ("*DP*") could perhaps be read to indicate that an actual *causal connection* must exist between the prohibited ground and the discrimination. See De Waal (2002) 14 *SA Merc LJ* 152. *DP* however dealt with a case of alleged legislative discrimination (or state discrimination), and not private discrimination. Furthermore *DP* interpreted the Constitutional approach to discrimination and not the Act's (possible broader) understanding of "discrimination".

[118] Case number CCT 51/06; unreported.

[119] Para 44 (per Langa CJ) and para 164 (per O'Regan J).

[120] Para 28. The "rule" in this case was the Durban Girls' High School Dress Code which prohbited the wearing of any jewellery except ear rings or ear studs, one in each ear, at the same level. The respondent's child wore a nose stud as part of a Hindu custom and was told to remove the stud, which she refused. Also see p 651-652, Annexure F.2.1, below.

[121] Para 42.

[122] Para 44 (per Langa CJ). O'Regan J in para 164 found the following comparator: "[T]hose learners who have been afforded an exemption to allow them to pursue their cultural or religious practices, as against those learners who are denied exemption, like the learner in this case".

beliefs are compromised if a benefit is withheld from that learner, or a disadvantage is withheld, on the learner's cultural belief. In *Pillay*, the learner was not allowed the benefit of expressing her cultural belief, and that would amount to discrimination. The court's reliance on a comparator in this matter was rather contrived.

The "prohibited grounds" relate to the following:

> "*(a)* race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or *(b)* any other ground where discrimination based on that other ground—
> (i) causes or perpetuates systemic disadvantage;
> (ii) undermines human dignity; or
> (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph *(a)*."

The list contained in (a) follows the Constitution's list of prohibited grounds. The "test" set out in (b) seems to be slightly wider than the test proposed in *Harksen v Lane*.[123] However, the Constitution merely provides a minimum level of protection. No constitutional complaint exists if the legislature chooses to provide more protection.[124] The same would go for the

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123 *Harksen v Lane* does not provide for an unlisted ground that "causes or perpetuates systemic disadvantage", but does refer to "patterns of disadvantage" in par 50. *Brink v Kitshoff* 1996 (4) SA 197 (CC) par 42 refers to "patterns of group disadvantage and harm".

124 See *ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) for a similar approach regarding the Constitutional Principles and the way in which the final Constitution was drafted. In the context of the bill of rights in the final Constitution, the Court noted at par 52 that "the Constitutional Assembly was *entitled to formulate rights more generously* than would be required by the 'universally accepted' norm, or even to establish new rights". (My emphasis.)

(possible)[125] prohibition against unfair discrimination based on socio-economic status, nationality, family responsibility, family status and HIV/AIDS status: if the legislature wishes to include more prohibited grounds than those set out in the Constitution, so be it – it is only when the legislature provides less rights than the minimum prescribed in the Constitution, that a constitutional challenge will lie against the Act.

In cases alleging discrimination on a listed ground, the complainant must show that a benefit was withheld or a disadvantage imposed and that this could be linked to one or more of the grounds listed in the Act. The complainant would probably have to show that, "but for" the listed ground, the harm would not have followed. This will usually be a factual enquiry.

Where it is alleged that discrimination occurred on an unlisted ground, the complainant will also have to show that the ground complained of fits one of the requirements set out in the Act. This would likely occur by way of argument. It is possible that statistical or sociological evidence may also have to be led to, for example, illustrate the vulnerability of people belonging to a group identified by an unlisted ground (eg HIV status).

2.2 Application of the Act

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125 The word "possible" prohibition is used because of the way that the legislature chose to refer to these grounds. The Act contains a directive principle in s 34 that relates to these grounds. A directive principle seems to be something less than a direct prohibition. However, nothing would stop a Court from coming to the conclusion that these grounds are included in par (b) of the definition of "prohibited grounds". It would have been preferable to include these grounds in the definition of "prohibited grounds". As s 34 quite rightly notes, these grounds have a severe impact on society and lead to systemic disadvantage. To be differentiated from others on these grounds will also very likely infringe one's dignity, at least in particular contexts. The Constitutional Court has already found that citizenship constitutes an unlisted ground in *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC).

Section 5(1) states that the Act binds the state and "all persons". The fact that "all persons" are bound by this Act is not surprising. The Constitution explicitly states that "no person" may unfairly discriminate against another. If this Act only bound the state, private individuals would still have been liable for private acts of discrimination in appropriate circumstances, based on section 9(4) of the Constitution.

Section 5(2) contains an "override clause", proclaiming that the provisions of this Act take precedence over any other Act except the Constitution.[126] The Constitutional Court has proclaimed that the South African Constitution is primarily an egalitarian constitution.[127] The Constitution is also the supreme law of the land.[128] One would, therefore, expect that equality values will infuse the entire legal system[129] and that an Act of Parliament dealing with equality would have precedence over any other Act.

2.3 General prohibition of unfair discrimination

Section 6 states that neither the state nor any person may unfairly discriminate against any person.

The wording differs from subsections 9(3) and 9(4) of the Constitution in that the list of prohibited grounds is lacking. Read with section 13 of the Act and the definitions of "discrimination" and "prohibited grounds" in section 1 of the Act, the meaning is broadly similar to the interpretation of the equality clauses in the interim and final Constitution by the Constitutional Court in *Harksen v Lane* and *National Coalition*

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126 According to the South African Institute of Race Relations this provision is "disturbing in its ramifications". *The Star* (19-10-1999) 10.

127 *President of the Republic of South Africa v Hugo* (n 8) par 73, *Brink v Kitshoff* (n 9) par 33.

128 s 2 of the Constitution.

129 Via s 39 of the Constitution.

for Gay and Lesbian Equality v Minister of Justice.[130] (See 2.5 below for a detailed explanation.)

2.4 Specific prohibitions of unfair discrimination: race, gender, disability

Sections 7, 8 and 9 explicitly prohibit unfair discrimination based on race, gender and disability.[131]

All the situations described in the subsections of section 8 still have to comply with the general test of "*unfair* discrimination" as set out in the Act, in the particular context of the case before the court.[132] (See 2.6 below for a detailed explanation.)

Subsections 9(a) and (c) similarly relate to the withholding of an advantage or the imposing of a disadvantage. Subsection 9(b) apparently refers to Part S of the *SABS Code of Practice for the Application of the National Building Regulations* 0400-1990 and the *SABS Code of Practice of the Accessibility of Buildings to Disabled Persons* 0246:1993. These provisions are minimum design obligations relating to certain buildings.[133] The provisions deal with such matters as ramps, lifts, doors, toilet facilities, auditoria and halls, obstructions in the path of travel of disabled persons and parking facilities. Non-compliance with these design obligations will lead to civil liability in terms of the Act. The qualifier "unfairly" was unnecessarily added to subsection (c) as the subsections to section 9 is subject to the

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130 1999 (1) SA 6 (CC). *Harksen v Lane* (n 8) decided section 8 of the interim Constitution. *National Coalition for Gay and Lesbian Equality v Minister of Justice* decided section 9 of the final Constitution. There is no real difference in the approach to these two sections.

131 Also see s 2(c) and 4(2) in which these three grounds are explicitly mentioned.

132 An alternative reading is possible. See n 47 below.

133 Eg domestic residences without lifts and hotels with less than 25 bedrooms do not have to be equipped to be accessible to disabled persons.

general prohibition against *unfair* discrimination as set out in the Act, in the particular context of the case before the court.[134]

2.5 Burden of proof

Section 13 provides as follows:

> "(1) If the complainant makes out a *prima facie* case of discrimination—
>
> *(a)* the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or
>
> *(b)* the respondent must prove that the conduct is not based on one or more of the prohibited grounds.
>
> (2) If the discrimination did take place—
>
> *(a)* on a ground in paragraph *(a)* of the definition of ''prohibited grounds'', then it is unfair, unless the respondent proves that the discrimination is fair;
>
> *(b)* on a ground in paragraph *(b)* of the definition of ''prohibited grounds'', then it is unfair—
>
> (i) if one or more of the conditions set out in paragraph *(b)* of the definition of ''prohibited grounds'' is established; and
>
> (ii) unless the respondent proves that the discrimination is fair."

From *City Council of Pretoria v Walker* and *Harksen v Lane* the following may be stated regarding the burden of proof when dealing with a dispute in terms of section 9 of the Constitution:[135]

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134 An alternative reading is possible. See n 47 below.

135 *Harksen v Lane* (n 8) par 43 also laid down the principle that at the very least, any Act or executive action that merely "differentiates" must have a rational connection with the purpose of that differentiation. The Act does not contain a similar provision. It is not clear whether s 9(1) of the Constitution is horizontally applicable. S 8(1) of the interim Constitution read "*every person* shall have the right to equality before the law and to equal protection of the law" and s 9(1) of the final Constitution states that "*everyone* is equal before the law and has the right to equal protection and benefit of the law". (My emphasis.) The Constitutional Court assumed in *National*

- In human rights litigation generally, the onus is on the applicant to prove an infringement of his fundamental right(s). The onus is then on the respondent to show that the infringement was justifiable in terms of the limitation clause.
- Section 9 litigation follows a slightly different pattern:
- The applicant needs to prove differentiation and needs to prove that the differentiation occurred on one of the listed grounds contained in section 9(3). A presumption of unfair discrimination arises if the applicant succeeds. (The Court seems to accept that differentiation on a listed ground may not always amount to discrimination, but does not expand on this.[136] A possible (banal) example would be separate

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Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6(CC) par 15 that its s 8 jurisprudence applies equally to s 9. The Constitutional Court interpreted s 8(1) of the interim Constitution (and presumably also s 9(1) of the final Constitution) to test whether a rational connection exists between mere differentiation and a legitimate *governmental* purpose it is designed to further or achieve. No *governmental* purpose can possibly be served in the context of private differentiation. A private institution can only have an institutional or private or business purpose when it differentiates. It is therefore possible that s 9(1) does not find application when private differentiation occurs and that private differentiation may occur on an irrational or arbitrary basis. As set out above however, *Harksen v Lane* concerned itself with legislation and executive conduct. That leaves two options. On the one hand it may mean that s 9(1) does not apply directly horizontally because a legislative provision or executive conduct is not attacked when private differentiation is challenged, which means that a private institution may irrationally or arbitrarily differentiate as long as the differentiation does not amount to unfair discrimination. On the other hand, s 9(1) states that *everyone* enjoys its protection. That could mean that when a private institution differentiates, the *Harksen* test must be adapted to read "whether a rational connection exists between the mere differentiation and a legitimate *private or institutional or business* purpose". The Act does not contain a comparable test. The only way in which this principle could be applied to private differentiation would be in terms of s 8(3)(a) of the Constitution. A court could use the "open norm" of public policy to generate a new common law rule; that it would be *contra bonos mores* to differentiate on an irrational or arbitrary basis. The rule would probably have to be refined on a case by case basis to allow for sufficient personal autonomy. (In *Cary v Cary* 1999 (3) SA 615 (C) s 9(1) was seemingly applied horizontally and interpreted to ensure equality of arms between litigating spouses in a divorce action. *Cary* did not refer to the *Harksen* test, however. A more satisfying approach would have been to have reinterpreted Rule 43 in terms of s 39(2) of the Constitution.)

136 See *City Council of Pretoria v Walker* (n 7) par 35: "There may possibly be cases where the *differentiation cannot conceivably result in discrimination* and for that reason does not cross the threshold of section

bathroom facilities for males and females.) The respondent bears the burden of rebuttal of this presumption.[137] If the respondent cannot discharge this burden, the Court will accept that unfair discrimination occurred.

- Alternatively, the differentiation could have occurred on a ground not listed in section 9(3), eg nationality or HIV/AIDS status. In such a case, the applicant needs to prove that differentiation occurred and that the ground on which the differentiation occurred "is based on attributes and characteristics which may have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner". The Court will then accept that the applicant has proven that discrimination has occurred. The applicant will also need to "establish"[138] (which is assumed means "prove") that the discrimination was unfair. If the applicant successfully manages this as well, the Court will accept that unfair discrimination occurred.
- The respondent then bears the onus of justifying the breach of section 9. If it cannot do so, the Court will grant appropriate relief to the applicant.

The Act deals with an equality complaint in a different way:

8(2)". (My emphasis.) De Vos "Equality for All? A Critical Analysis of the Equality Jurisprudence of the Constitutional Court" 1999 *THRHR* 62 71 n49 seems to interpret the Constitutional Court judgements to *never* allow for the possibility that differentiation on a listed ground may not constitute discrimination.

137 A burden of rebuttal is seemingly something less than a full onus. Schmidt *Bewysreg* 3ed (1990) 41-42. *Contra* De Waal, Currie and Erasmus *The Bill of Rights Handbook* 3ed (2000) 194 who are of the opinion that the respondent has to *prove* that the discrimination is not unfair. The authors note at 26 n1 that neither "onus" nor "burden of proof" seems appropriate in constitutional litigation and that a better term might be the American "showing". Seen in this light, not much depends on which litigant carries the burden of proof; both have to present legal arguments, the facts rarely being in dispute in a constitutional matter.

138 *Harksen v Lane* (n 8) 325C-D.

- The applicant needs to show, on a *prima facie* basis, that "discrimination" as defined in the Act took place. This would mean that the applicant needs to show the following on a *prima facie* basis:
- That the applicant has been burdened or disadvantaged or an advantage has been withheld on a ground listed in the Act.[139] (This list follows the list in section 9(3) of the Constitution.) The respondent then bears the onus of either showing that the applicant was not so burdened or that an advantage was not so withheld or that the discrimination was not based on one of the listed grounds.
- Alternatively, the burden or withholding of an advantage could have occurred on a ground not listed in the Act, eg nationality or HIV/AIDS status. In this case, the applicant needs to show *prima facie* that the ground on which the burden was imposed or the advantage withheld is of such a nature that it causes or perpetuates systemic disadvantage or undermines human dignity or adversely affects the equal enjoyment of rights and freedoms in a serious manner that is comparable to the imposing of a burden or the withholding of an advantage on one of the listed grounds. If the applicant succeeds the respondent either needs to prove that the applicant was not so burdened or that an advantage was not so withheld, or needs to prove that the ground on which the discrimination was based is of such a nature that it does not cause or does not perpetuate systemic disadvantage; or that it does not undermine human dignity; or that it does not adversely affect the equal enjoyment of rights and freedoms in a serious manner and that it is not comparable to the

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139 It seems as if "discrimination" carries two different meanings in s 13. It would appear as if "discrimination" in s 13(1) carries the meaning as per the definition in s 1. "Discrimination" in s 13(1)(a) seems to carry the meaning of the definition but without the words "any person on one or more of the prohibited grounds". This last mentioned fragment is covered by s 13(1)(b).

imposing of a burden or the withholding of an advantage on one of the listed grounds. A possible (theoretical) problem arises: assume the applicant shows on a *prima facie* basis that he has been burdened on a ground that is of such a nature that it eg causes systemic disadvantage. The onus now shifts to the respondent to either prove that the applicant was not so burdened, or to prove that the ground on which the burden was imposed, does not fit the definition of "prohibited grounds". Will the respondent be asked to meet the case of the applicant and prove that the ground is of such a nature that it does not cause systemic disadvantage, or may the respondent proceed to prove that the ground does not fit one of the other qualifiers in the definition of "prohibited grounds"? In other words, may the respondent adopt the following approach: "Your lordship, I accept that the applicant has shown on a *prima facie* basis that the ground on which he has been discriminated against causes systemic disadvantage. I will, however, prove that the ground on which he has been discriminated against does not undermine human dignity, and that the applicant's claim should therefore fail". On a literal interpretation of the Act, this approach seems possible but it is submitted that the respondent would need to meet the case of the applicant. If the applicant showed on a *prima facie* basis that the ground eg causes systemic disadvantage, the respondent will need to prove that the ground does *not* cause systemic disadvantage. Otherwise the unsatisfactory position will arise that the applicant's and respondent's arguments remain unanswered by their opponents and that the Court will not have the opportunity to review the *pro* and *contra* arguments relating to a particular qualifier. However, this situation does not pose a serious problem. It is extremely unlikely that an unlisted ground exists that does not fit all of the qualifiers. A ground that causes systemic disadvantage is very likely to

also undermine human dignity, and is very likely to also adversely affect the equal enjoyment of the applicant's rights and freedoms in a serious manner, comparable to discrimination on the listed grounds.

- Assuming the applicant could *prima facie* show that the respondent discriminated against him and assuming that the respondent could not prove the contrary, the respondent has another opportunity to escape liability - he may proceed to prove that the discrimination was fair. Section 13(2) could have been drafted in a simpler fashion. Whether the discrimination was based on a listed or unlisted ground, the discrimination will be seen as unfair unless the respondent can prove that the discrimination was fair. Section 13(2)(b) states that unless the respondent can prove that the discrimination was fair, discrimination on an unlisted ground will be unfair if one of the conditions in paragraph (b) of the definition of prohibited grounds "is established", but the applicant already had to make out a *prima facie* case that the unlisted ground fits one of the conditions in paragraph (b) of the definition.[140] The only leg of the test that remains is for the respondent to prove that the discrimination was fair.

The differences in approach between the Constitutional Court's interpretation of section 9 and the Equality Act are the following:

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[140] "Established" in s 13(2)(b)(i) should be interpreted to mean "shown to exist on a *prima facie* basis by the applicant". As a matter of logic, this burden can only fall on the applicant - it would be nonsensical to expect a respondent in an equality dispute to have to show that a ground for the complaint exists. If "established" is read to mean "*proven* by the applicant", s 13 becomes somewhat farcical. First the applicant would have to show on a *prima facie* basis that the unlisted ground fits one of the conditions of par (b) of the definition of prohibited grounds (to establish discrimination) and second, assuming that the respondent could not prove that discrimination did not take place, the applicant would then have to prove that the unlisted ground fits par (b) to establish unfair discrimination. In other words, the applicant would have to do the same work twice, first to establish a *prima facie* case, and thereafter to discharge an onus.

- Regarding the evidence to be led, the Equality Act expects less from an applicant than section 9 of the Constitution. Section 9 requires the applicant to *prove* "differentiation" (on a prohibited ground). The Equality Act requires the applicant to *establish* "discrimination" on a *prima facie basis*.
- "Differentiation" in terms of section 9 of the Constitution seems simply to mean "distinction" or "difference in treatment" (based on a prohibited ground), while "discrimination" as defined in the Equality Act means a distinction (based on a prohibited ground) that leads to disadvantage.[141]
- In terms of section 9, once differentiation on a listed ground has been proven, a presumption of unfair discrimination arises that the respondent must *rebut*. In terms of the Equality Act, once discrimination has been shown to exist on a *prima facie basis*, the respondent must *prove* the contrary. A burden to rebut is a lesser burden than a full onus.[142] Again, the Equality Act expects less from an applicant than does section 9.
- According to section 9, if discrimination on an unlisted ground is in issue, it is the applicant that has to *prove* discrimination, that the unlisted ground is of such a nature that it offends dignity and that the discrimination was unfair. In terms of the Act, the applicant needs to show on a *prima facie* basis that discrimination on an unlisted ground exists and that the unlisted ground fits one of the conditions of paragraph (b) of the definition of prohibited grounds. Once the applicant has done this, it is the respondent that has to *prove* that the alleged discrimination is not discrimination; alternatively, that it was not *unfair* discrimination.

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141 See n 8 and the minority judgement of Sachs J in *City Council of Pretoria v Walker* (n 7) par 106.

142 Schmidt (n 37) 41-42.

- Summarised, the Equality Act never burdens the applicant with a full onus and affords the same status to unlisted grounds than listed grounds regarding the presumption of unfairness, with the added advantage to the applicant that the respondent not only carries a burden of rebuttal once unfairness has been presumed, but a full onus.

Nevertheless, this is neither controversial nor unconstitutional.[143] As stated earlier, the Constitution sets a minimum benchmark regarding the protection of human rights. What the Equality Act does in essence is to grant more protection to equality than the Constitution does by expecting less from an applicant in an equality dispute than the Constitution. If this argument does not suffice, the Constitutional Court stated in *Prinsloo v Van der Linde*[144] that as long as the onus in a civil case[145] is not imposed arbitrarily, no constitutional complaint exists.[146] The shifting of the onus to the respondent by section 13 is not arbitrary. Seen in light of South Africa's history and the vast inequalities between various sections of the population on various grounds (race, gender, class, etc), it is very appropriate and rational that the respondent should do the "hard work" and provide good reasons why the alleged unfair discrimination is not what it seems. Another possibility exists: at best for a respondent in an equality dispute, the Equality Act infringes section 9 of the Constitution by burdening the respondent with a heavier load than section 9 allows. Such infringement will most likely be justifiable in terms of section 36 of the Constitution, based on the argument directly above.

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143 This aspect of the Bill / Act received wide coverage in the press. See eg *The Citizen* (27-11-1999) 7, *Financial Mail* (3-12-1999), *Beeld* (6-12-1999) 8, *Weekly Mail & Guardian* (29-10-1999) and *Business Day* (3-11-1999) 11.

144 1997 (3) SA 1012 (CC).

145 None of the powers accorded to equality courts listed in s 21 of the Act relate to criminal penalties.

146 par 38.

2.6 The relationship between sections 7-9 and sections 13-14

Sections 7-9 and 13-14 should be read in conjunction with each other:[147]

- The conditions listed in the subsections of sections 7-9 are not mere guidelines or examples of what may constitute discrimination.[148]
- However, the listed conditions are subject to the general prohibition against unfair discrimination. The words "subject to section 6" indicate that the same general approach should be followed in all equality disputes in that all complaints are subject to the general prohibition against unfair discrimination and that all complaints are subject to the same general determination of "discrimination" and "unfair" discrimination set out in sections 13-14. The listed conditions do not, therefore, amount to a list of "automatic findings of unfair discrimination".
- The conditions listed in sections 7-9 amount to *prima facie* cases of discrimination.

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147 If s 7-9 are read separately from s 13-14, the following seems to be the position: The applicant has to prove that his complaint falls within one of the listed conditions in s 7-9. If the applicant succeeds, unfair discrimination would have been established and the claim will succeed. The phrase "subject to section 6" seem to carry no meaning, except possibly to indicate that race, gender and disability discrimination do not carry more weight than other types of discrimination. If s 7-9 are read as a self-standing unit, the applicant has to *prove* his case whereas in all other cases he simply has to show a *prima facie* complaint. The legislature explicitly emphasises race, gender and disability discrimination but then expects more from an applicant if he wants to prove that his case falls within one of the listed conditions. This is nonsensical. Another pointer against this interpretation is s 8(e) and 9(c). In all other cases, the *respondent* has to prove that the discrimination was fair. When s 8(e) or 9(c) applies, the *applicant* has to prove that the discrimination is unfair. This is inconsistent.

148 Compare the wording of s 29(1) that provides that the Schedule to the Act contains practices that *may* constitute unfair discrimination.

- In terms of section 13(1) the applicant has to make a *prima facie* showing that his complaint falls within one of the conditions listed in sections 7-9.
- In terms of section 13(1)(a), the respondent then has to prove that the complaint does not fall within one of the conditions listed in sections 7-9.
- Alternatively, the respondent may attempt to prove that the particular condition does not amount to unfair discrimination in the particular context, in that no burden was imposed or no advantage withheld (this is extremely unlikely) or that the discrimination was fair. (A respondent may be able to prove this from time to time.)
- The Act in effect allows a respondent to argue that although a particular condition seems to amount to unfair discrimination, on closer perusal of the particular facts and particular context, does *not* amount to it.
- This approach broadly accords with the Constitution's method in that unfair discrimination may be found to be justifiable.[149]
- An applicant does not need to refer to any of the listed conditions and may establish a *prima facie* case based on the general prohibition contained in section 6.
- It might not be enough to prove that the applicant's case does not fall within one of the listed conditions as the applicant might also have made out a *prima facie* case based on the general prohibition against unfair discrimination in terms of section 6 of the Equality Act. In such a case the respondent will have to prove that the discrimination was fair in terms of section 13(2).

[149] It is very difficult to distinguish the test of what would be "fair" discrimination from the test of what would constitute "justifiable" unfair discrimination. De Waal *et al* (n 37) 188-189. Also see n 53 below.

A possible constitutional complaint could have been raised against the listed conditions in sections 7-9 if one or more of these conditions could never, in any context, amount to unfair discrimination. Such a condition would have lacked a rational basis for its inclusion in the Act.[150] However, all of the conditions are of such a nature that they could amount to unfair discrimination in particular contexts.[151]

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150 In *In re ex parte President of the Republic of South Africa and others* CCT 31/99 the Constitutional Court said the following: "It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action… The President's decision to bring the Act into operation in such circumstances cannot be found to be objectively rational on any basis whatsoever. The fact that the President mistakenly believed that it was appropriate to bring the Act into force, and acted in good faith in doing so, does not put the matter beyond the reach of the Court's powers of review. What the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner. This the President manifestly, though through no fault of his own, failed to do. *Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful*". (My emphasis.) The same principle applies when legislation is challenged: See *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) par 19 and De Waal *et al* (n 37) 11.

151 If s 7-9 are read as a self-standing unit, s 7(b) could be found unconstitutional, as it is possible to think of circumstances in which the condition listed in this subsection might not amount to unfair discrimination. Read separately from s 13-14, s 7-9 effectively state that the conditions listed in these sections, if proven, amount to unfair discrimination and do not allow a respondent to argue that the particular condition could amount to "fair" discrimination. If a listed condition could in certain circumstances not amount to unfair discrimination, such a condition would lack a rational basis for its inclusion in the Act. It is at least arguable that a "black pride" or "black upliftment" group that restricts membership to blacks could in certain circumstances amount to fair discrimination, in terms of the criteria laid down by the Constitutional Court. Such a group would fall foul of s 7(b) however. This is another pointer against an interpretation that affords self-sufficiency to s 7-9.

2.7 Determination of fairness or unfairness

Section 14 sets out the criteria that a court must analyse to decide whether a respondent has proven that the discrimination was fair:

> "(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.
> (2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:
> *(a)* The context;
> *(b)* the factors referred to in subsection (3);
> *(c)* whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.
> (3) The factors referred to in subsection (2*)(b)* include the following:
> *(a)* Whether the discrimination impairs or is likely to impair human dignity;
> *(b)* the impact or likely impact of the discrimination on the complainant;
> *(c)* the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
> *(d)* the nature and extent of the discrimination;
> *(e)* whether the discrimination is systemic in nature;
> *(f)* whether the discrimination has a legitimate purpose;
> *(g)* whether and to what extent the discrimination achieves its purpose;
> *(h)* whether there are less restrictive and less disadvantageous means to achieve the purpose;
> *(i)* whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(ii) accommodate diversity."

Section 14(1) mirrors section 9(2) of the Constitution and seems to create a complete defence to a claim of unfair discrimination. Albertyn *et al* argue that section 14(1) does not set up an independent test, but should be read as part of a single section 14 inquiry.[152] However, in *Minister of Finance v Van Heerden,*[153] the Constitutional Court held that if a measure properly falls within the ambit of section 9(2) of the Constitution, it does *not* constitute unfair discrimination. Section 9(2) of the Constitution is less explicit about the nature of the defence than section 14(1) in the Act. Section 9(2) states merely that legislative and other measures "may" be taken while section 14(1) of the Act clearly states that "it is not unfair discrimination" to take such measures. See the discussion under heading 3 below as well.

Section 14(2) contains a large number of factors that a Court needs to take into account when deciding whether the alleged discrimination was "unfair".

Section 14(2)(a) makes it clear that each case will be a contextual enquiry. [154] This "context" includes the existing South African social, economic and political circumstances when the specific case is heard.[155] This approach is also in accordance with Constitutional Court judgments.[156] Bohler interprets a contextual approach to equality as "individualised justice".[157]

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[152] Albertyn *et al* (eds) (2001) 38.
[153] 2004 (6) SA 121 (CC) at para 36.
[154] For example, a billionaire's right to vote cannot be taken away because he has so many other privileges that it does not matter to him, but he may be taxed at a higher rate than a low wage earner.
[155] De Vos (2000) 63 *THRHR* 67; De Vos (2000) 117 *SALJ* 19.
[156] Eg *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41.
[157] Bohler (2000) 63 *THRHR* 291.

> Judges should focus more on the context – the results in *this* case to *these* parties – and less on formal rationality – squaring this with results in other cases. This means that the law must be more open-ended …[158]

Section 14(2)(c) contains a number of factors that will be of assistance to a respondent who wishes to disprove that he unfairly discriminated against the applicant: if the discrimination was "reasonable" and "justifiable", followed "objectively determinable criteria" and if the discrimination was "intrinsic to the activity", such discrimination may be found to be fair. This subsection is the result of a very clumsy attempt by the drafters of the Act to address the concerns of mainly the insurance industry and to distinguish between "discrimination" and "(mere) economic differentiation".[159]

Section 14(2)(b) refers the reader to section 14(3) which in turn lists a number of criteria, most of which have their origin in *Harksen v Lane NO*:[160]

Section 14(3)(a): If the discrimination impairs or is likely to impair dignity such discrimination will most likely be held to be unfair.[161]

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[158] "Open-ended" could mean indeterminate. (Cf Van der Walt and Botha (1998) 13 *SAPL* 35). See the discussion below relating to the indeterminacy of the unfairness test contained within s 14 of the Act.

[159] Liebenberg and O'Sullivan (2001) 37 are concerned about the possible effect of this subsection: If market generated inequalities are regarded as reasonable and justifiable differentiation in all circumstances, the goal of substantive equality for women will become increasingly remote. The weight that courts give to this factor in relation to other factors in subsections (2) and (3) is critical". They even raise the possibility that this subsection is unconstitutional as it may be argued that this subsection subtracts from the protection offered by the Constitution in s 9. I argue in chapter 6 below that s 14(2)(c) should be deleted from the Act.

[160] 1998 (1) SA 300 (CC).

[161] Albertyn *et al* (eds) (2001) 40.

Section 14(3)(b): The more severe the impact of the discrimination on the applicant, the more likely that the discrimination will be held to be unfair.[162]

Section 14(3)(c): A powerful or privileged applicant will have to make out a very strong case that he is the victim of unfair discrimination. Section 9 of the Constitution does not protect "pockets of privilege".[163] The more disadvantaged the particular group that the applicant belongs to, the more likely that the discrimination will be held to be unfair.[164]

Section 14(3)(d): If the discrimination is of a minor nature or of small extent such discrimination will more likely be found to be fair. Recurring discrimination is more likely to be unfair.[165]

Section 14(3)(e): Systemic discrimination will more likely be unfair discrimination than non-systemic discrimination.

Section 14(3)(f): If the discrimination has a worthy goal, such as the furthering of equality for all,[166] it will most likely be fair.[167]

Section 14(3)(g): If no rational link exists between the discrimination and its (worthy) purpose, the discrimination will

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[162] Loenen (1997) 13 *SAJHR* 412.
[163] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 48.
[164] Albertyn and Kentridge (1994) 10 *SAJHR* 162; Loenen (1997) 13 *SAJHR* 408, 411 and 412; De Waal (2002) 14 *SA Merc LJ* 154; *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 64. This factor perhaps best illustrates the asymetrical nature of discrimination. Loenen (1997) 13 *SAJHR* 411-412; Kende (2000) 117 *SALJ* 751.
[165] De Waal (2002) 14 *SA Merc LJ* 155. The *kind* of discrimination may affect the outcome of the fairness enquiry. A presidential pardon (*Hugo*) was treated with more deference than other forms of exercise of state power. (Carpenter (2001) 64 *THRHR* 626.)
[166] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) may be used as an example. President Mandela freed a number of female prisoners who had children under 12. The respondent was a male prisoner with a child under 12 and complained that the President unfairly discriminated against him. The Court held that the discrimination was fair, *inter alia* because the purpose of the discrimination was to create a more equal society.
[167] De Waal (2002) 14 *SA Merc LJ* 154.

most likely be unfair.[168] If the discrimination did not achieve the alleged purpose, the discrimination is more likely to be unfair.

Section 14(3)(h): This section has its origin in section 36(1)(e) of the Constitution. If the respondent could have achieved its (worthy) purpose in a less restrictive way, the discrimination is more likely to be found unfair. In theory it is almost always possible to think of less serious ways of achieving the same purpose. This factor should, therefore, not be used to mark almost all instances of discrimination as unfair. A value judgment must be made taking into account all relevant factors. If an entirely inappropriate method had been used to achieve a (legitimate) purpose, such discrimination is more likely to be unfair.

Section 14(3)(i) rewards discriminating respondents who take reasonable steps to alleviate the damage caused by such discrimination. When a respondent takes such steps, the discrimination is less likely to be found to be unfair. If the respondent did nothing to minimise the disadvantage it is more likely that the discrimination was unfair. The Constitutional Court held that this section encompasses the concept of "reasonable accommodation" – see the discussion under heading 3 below.

An argument could possibly be raised that the Act does not provide sufficient protection to a respondent in an equality dispute because it does not offer a respondent the opportunity to argue that *unfair* discrimination may still be *justifiable* – section

[168] In equality litigation based on s 9 of the Constitution, this factor overlaps with the threshold "rational connection" test. Rautenbach (1997) *TSAR* 578 and Rautenbach (2001) *TSAR* 332. The Act does not explicitly prohibit irrational differentiation.

14 only contains a defence based on fairness.[169] The Constitution (at least in theory) allows a respondent to argue that unfair discrimination is still justifiable. (Section 9 read with section 36.) Two counterarguments may be raised:

- It is very difficult to distinguish between factors that establish whether discrimination was "fair" in terms of section 9 of the Constitution, and factors that establish whether unfair discrimination was "justifiable" in terms of section 36.[170] Currie and De Waal argue that section 36 probably does not have any meaningful application to section 9.[171] Van der Vyver is of the view that the "interpretational embarrassment" of having to distinguish between fairness and reasonableness will be resolved by courts by more or less ignoring the fairness criterion and focusing on reasonableness.[172] Courts have actually tended to do the opposite – they have focused on

[169] Vogt believes that "unfairness" and "justification" should have been kept apart. She believes that by combining the two concepts in one section, the drafters broadened the understanding of "unfairness" to an unacceptable degree and makes the guarantee of (racial) equality "practically worthless". She reads s 14 as allowing a respondent to escape censure by "simply testifying that there was a legitimate purpose and that there was no less-restrictive means to reach that purpose". Vogt (2001) 45 *JAL* 201-202.

[170] Carpenter (2001) 64 *THRHR* 420; Carpenter (2001) 64 *THRHR* 626; De Waal (2002) 14 *SA Merc LJ* 156; Loenen (1997) 13 *SAJHR* 410; Watkin (1992) 2 *NJCL* 110. However compare the comments of Kriegler J in *President of the Republic of South Africa v Hugo* para 78. Albertyn and Kentridge (1994) 10 *SAJHR* 175 sees the fairness/unfairness enquiry as dealing with conduct that "finds no justification in the political morality embraced by the Constitution" and the reasonable/justifiable enquiry as focusing on "whether incursions into the freedom from discrimination are permissible because they serve a legitimate social purpose in a way which is proportionate to the end which they seek to achieve". Albertyn and Goldblatt (1998) 14 *SAJHR* 271 admits that the Constitutional Court's formulation of the unfairness test has led to the "two stages of justification … to have become confused". At 272 they "acknowledge that the line between evidence in support of the 'unfairness' justification stage and evidence in support of the limitations justification stage can become relatively blurred since both enquiries may consider similar issues relating to the underlying intention in the enactment of the impugned measure".

[171] Currie and De Waal (2005) 237.

[172] Van der Vyver (1998) 61 *THRHR* 391.

fairness/unfairness and have tended to ignore reasonableness/justifiability.

- The threshold requirement in section 36 is that any limitation of a fundamental right must be "law of general application".[173] In cases of private discrimination, where law of general application is not likely to apply,[174] a "reasonableness" defence will not be available and the discriminator will have to argue that the discrimination was fair. The Act does not make a distinction between state discrimination and private discrimination and both these kinds of discrimination are subject to the same test as set out in section 14. Section 14 incorporates some of the elements of section 36. In cases of private discrimination, a discriminator will therefore be able to argue that the discrimination was fair, alternatively that it was reasonable and justifiable. Therefore, in effect the Act provides *more* protection to respondents in *private* discrimination complaints than the Constitution does.

[173] Albertyn and Goldblatt (1998) 14 *SAJHR* 270.

[174] It is not clear to what extent the requirement of "law of general application" applies in cases of private discrimination. Van der Vyver (1998) 61 *THRHR* 376 is of the view that "law" of general application includes the internal conduct rules of social entities such as a church association, sport body, mercantile company and so on. He refers to the *Barthold Case* 1985 PECHR Series A vol 90 par 46 where it was held that the internal rules of the veterinary board forms part of "law". The Constitutional Court has not yet had the opportunity to express itself on the relationship between s 9 and s 36 in the context of private discrimination. In *Hoffmann* the Constitutional Court held that the SAA was an organ of state (para 23) and further held that its employment practice of refusing to employ HIV positive cabin stewards was not law of general application. (Para 41.) In *Walker*, where decisions by the City Council of Pretoria's officials were under scrutiny, the Court held that the justification query also did not arise as the respondent council's conduct was not authorised, expressly or by necessary implication, by a law of general application (para 82.) Rautenbach (2001) *TSAR* 340 points out that if the "fairness" and "justifiability" defences are not kept strictly apart, the "law of general application" requirement is likely to be subverted. That is exactly what happened when the Act was drafted – fairness/justifiability was seen as one step and the "law of general application" threshold requirement fell away, although some of the other factors listed in s 36 have been incorporated into s 14.

A number of authors are critical of the wording of section 14.[175] The section should probably be redrafted to distinguish between state discrimination and private discrimination, and between discrimination and differentiation.[176]

It is also clear that despite the explicit list of factors to be considered, the test remains relatively indeterminate.[177] Pragmatic judges will be able to take what they want from the test.[178] Consider the following factors as set out in section 14:

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[175] Cf Albertyn *et al* (eds) (2001) 41 and further. Carpenter (2002) 65 *THRHR* 182-183 argues that ss 14(f) – (i) are inappropriate in the context of private or domestic relationships and that this should have been better set out in the Act.

[176] I return to this issue in chapter 6.

[177] Van der Walt and Botha (1998) 13 *SAPL* 35. The authors contend that the indeterminacy follows from "the margin for contextualisation" allowed by this approach. Any test is likely to be indeterminate. Consider the test suggested by Bohler-Muller (2000) 16 *SAJHR* 640: A court must consider all circumstances "and listed to all voices before reaching a conclusion which is the least harmful to the most vulnerable party or group". How are different harms to be compared? How are degrees of vulnerability ascertained?

[178] Cf Kende (2002) 117 *SALJ* 770. Also see Davis (1999) 116 *SALJ* 413: "The Constitutional Court has rendered meaningless a fundamental value of our Constitution and simultaneously has given dignity both a content and a scope that make for a piece of jurisprudential Legoland – to be used in whatever form and shape is required by the demands of the judicial designer". Carpenter (2002) 65 *THRHR* 58, discussing the *Walker* case, believes that "race issues in particular may turn out to be essentially 'undecidable'". Kentridge (1996) 112 *The Law Quarterly Review* 250: "It would be naïve to imagine that there is a single 'right' answer to all the issues which the court will have to decide. Some may say that the search for objective standards is an illusion". In the context of discrimination complaints, s 14 would make many answers possible. Woolman (1997) 13 *SAJHR* 121 offers the following "solution": "What our gut tells us and what we choose to do after extended reflection are sometimes two very different things … The difference between storytelling and cryptic justifications for hard choices is the difference between a good explanation and a bad explanation for the decisions that we take: the better the explanation, the more persuasive it will be – for those who need persuading; the more persuasive the decision, the more legitimate it will be deemed to be". In other words, s 14 offers judges the chance to offer "better explanations" than simply saying "my gut feeling is that the discrimination is fair/unfair". McAllister (2003) 15 *NJCL* 35 criticises the Supreme Court of Canada equality test set out in *Law v Canada (Minister of Employment & Immigration)* [1999] 1 SCR 497 as ultimately unhelpful and too unpredictable.

- The impact or likely impact of the discrimination on the complainant. It is easy enough to state that the more severe the impact, the more likely that the discrimination will be unfair, but *how* should a court decide when the cut-off is reached between permissible and impermissible harm?

- The position of the complainant in society: whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage. Barring white, able-bodied, heterosexual males, all other members of South African society may be described as suffering in one way or the other from patterns of past disadvantage: women, blacks, Indians, coloureds, gays and lesbians, disabled people of all races, HIV-positive people, poor people, and rural people.[179] It may be easy enough to state, as the Constitutional Court has done on one occasion,[180] that black women have been the most disadvantaged group in South African society, and it would follow from this statement that discrimination against (rural) black women would almost always be unfair,[181] but how to decide about the relative disadvantage of other vulnerable groups in South African society?[182]

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[179] Cf Jagwanth (2003) 36 *Conn L Rev* 738: "… the only group which does *not* qualify for preferential treatment is able bodied white men, a group which, at 4.64%, comprises a relatively small percentage of the population".
[180] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 44.
[181] Cf *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) para 7 and *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC) para 118.
[182] To complicate matters even more, the Constitutional Court has said that the prohibition on unfair discrimination was not designed solely to avoid discrimination against people who are members of disadvantaged groups: Carpenter (2001) 64 *THRHR* 634; *Hugo* para 41; *Harksen* para 50. Where a previously disadvantaged group is treated less favourably than another previously disadvantaged group, the issue becomes even more vexed. (Cf *Motala v University of Natal* 1995 (3) BCLR 374 (D)). The Indian Supreme Court in *State of Kerala v Thomas* AIR 1976 SC 490 argued that the "deserving sections" from designated groups should be the benefactors of affirmative action policies – see Nair (2001).

- Whether the discrimination is systemic in nature. The same argument applies to this factor: The vast majority of South Africans have been victims of systemic discrimination in one way or the other and it is not necessarily helpful to state that systemic discrimination is more likely unfair than non-systemic discrimination.

- Whether the discrimination has a legitimate purpose. How is a court to decide when a discriminatory purpose is "legitimate"?

- Whether there are less restrictive and less disadvantageous means to achieve the purpose. It is almost always possible to think of a less extreme way to achieve a particular result. How is a court to decide on the cut-off point?

Two judgments of the Constitutional Court strikingly illustrate the indeterminacy of the "fairness" test.[183] The factors set out in section 14 of the Act have been extrapolated largely from the Constitutional Court's equality jurisprudence. It is therefore illuminating to consider the marginal victories of the state in *S v Jordan*[184] and the applicant in *Harksen v Lane NO*.[185] In the *Jordan* case, six of the 11 presiding judges held that the sex or gender discrimination complained of was fair, and five judges dissented and held that it was unfair discrimination. In *Harksen* five of the nine presiding judges held that the discrimination based on marital status was fair while four judges held that the discrimination was unfair. If the application of the

[183] Carpenter (2002) 65 *THRHR* 58 goes so far as to describe race issues as "undecidable".
[184] 2002 (6) SA 642 (CC).
[185] 1998 (1) SA 300 (CC).

fairness/unfairness test had been an easy, straightforward or determinate task, there would not have been so much divergence among the judges.[186]

Another reason why the fairness test will not yield easy answers lies in the list of prohibited grounds. These prohibited grounds are listed in symmetrical fashion, with the exception of race, sex and disability, with no textual indication whether discrimination on the other grounds are somehow less serious and, therefore, more likely to be fair discrimination. For example: If the argument is accepted that addressing poverty is South Africa's main challenge, then socio-economic discrimination is the worst evil to be combated in terms of the Act, yet socio-economic status is not even explicitly listed in the Act.[187] Is discrimination on some grounds less serious than discrimination on other grounds, or to put it more accurately, is the application of the fairness/unfairness test less or more exacting when dealing with certain kinds of discrimination?[188]

2.8 Promotion of Equality

[186] Compare Goldstone J's remark in *Van Der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) para 19: "[R]easonable minds may well differ on the outcome of similar or even identical cases". Also see Schutz JA in *ABSA Bank Ltd v Fouche* 2003 (1) SA 176 (SCA) 185I: "Notoriously the views of Judges as to what the ordinary man expects sometimes differ. This happens when value judgments have to be made ..."

[187] Cf Fredman (2005) 21 *SAJHR* 172.

[188] Cf Carpenter (2001) 64 *THRHR* 420: "Thus even though the Constitution says nothing about varying levels of scrutiny, there may well be intuitive differentiation between the different kinds of classification that could lead to discrimination". Van der Walt and Botha (1998) 13 *SAPL* 30 argue that the *Harksen* court showed a greater degree of deference to (mere) economic discrimination than to other forms of differentiation and at 38 argue that the judges felt they owed a certain degree of deference to Parliament relating to the regulation of trade and industry. Also see Carpenter (2001) 64 *THRHR* 640. For the same general reason Moon (1988) 26 *Osgoode Hall LJ* 691 criticises the American Supreme Court's "colour-blind" approach to affirmative action. Moon argues that if the goal of the anti-discrimination principle is to overcome societal prejudice, then a racial classification which benefits a historically disadvantaged group should not be subjected to strict scrutiny.

This chapter contains a general injunction to promote equality, followed by a specific directive to the state and persons operating in the public domain to promote equality.

The Act also calls on the state and all persons to promote substantive equality.[189] Section 24 of the Act provides that the state "and all persons" have a duty and responsibility to promote equality. Section 7(2) of the Constitution obliges the state to do this in any event. Section 9(4) of the Constitution states that no person may unfairly discriminate against any other person, which implies a passive approach – every person simply needs to make sure that his or her action (or inaction) does not lead to unfair discrimination. Section 24 of the Act goes further and directs all persons to actively pursue and promote equality. Sections 26 and 27 seem to limit this duty and responsibility to individuals who contract directly or indirectly with the state or exercise public power. It also appears that this duty only arises in relationships with other (public) bodies and when dealing with public activities. Section 27(2) of the Act states that the Minister of Justice must develop regulations that will require persons to prepare equality plans, abide by prescribed codes of practice or report to a body on measures to promote equality. In this regard, regulations have been published for comment,[190] but yet have not been given legal effect.

Section 29 refers to the Schedule to the Act that contains an illustrative list of unfair practices in certain sectors. This list includes practices from labour and employment, education, health care services and benefits, housing, accommodation, land and property, insurance services, pensions, partnerships, professions and bodies, provision of goods, services and

[189] S 24 read with the definition of "equality" in s 1(1)(ix).
[190] GN No 563, *Government Gazette* No 26316, 2004-04-30.

facilities, clubs, sports and associations. If section 29 was not phrased carefully, this list could have been found unconstitutional, as it could have been seen to oblige courts to come to particular decisions in particular contexts. However, section 29(1) states that this list contains practices that "are or *may"* be unfair. Also, most of the practices listed in the Schedule contain qualifiers such as "unfair", "reasonably", "reasonable" and "practicably". These qualifiers are mirrored in the Constitution's equality and limitation clauses.

The list seems to be only a range of examples of what kind of practises the legislature had in mind when it drafted the Act, and will be very helpful to unimaginative lawyers who could have instituted actions on behalf of their clients based on situations similar to those listed in the schedule since the coming into force of the interim Constitution in 1994, based on the indirect horizontal application of the Bill of Rights, and since the coming into force of the final Constitution, based on the direct horizontal application of the bill of rights (or at least the right to equality).

3 Comparison between the Convention on the Rights of Persons with Disabilities and the Equality Act

Below I identify possible gaps between the framework adopted in the Equality Act and the Convention on the Rights of Persons with Disabilities. The comparison proceeds sequentially.

Preamble

(e) "attitudinal and environmental barriers". The Equality Act does not define disability. The Preamble of the Equality Act envisages a caring South African society, but the definition of discrimination does not explicitly refer to attitudinal barriers.

(f) "promotion… of policies, plans, programmes and actions at the national … levels" The parts of the Equality Act that pertain

to the promotion of equality have not been operationalised more than a decade after the Act was promulgated.

(j) "recognizing the need to promote and protect the human rights of all persons with disabilities" As directly above.

Article 1

"Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal footing with others". The Equality Act does not contain a definition of disability.

Article 2

Definition of "discrimination on the basis of disability". The Equality Act does not contain a definition of disability discrimination. The definition in the Convention contains the phrase "on an equal footing with others". As discussed above, the definition of "discrimination" in the Equality Act does not contain an explicit command to compare the position of the complainant with others/other similarly situated individuals. The phrase "on an equal footing with others" is restrictive and the Equality Act arguably allows for a more expansive approach.

The Convention's definition contains the word "discrimination", while South African equality and discrimination law uses the concept "unfair discrimination". The definition in the Convention broadly tracks the definition of "discrimination" in the Equality Act. The definition in the Equality Act also includes the withholding of a benefit, which is not explicitly stated in the Convention's definition. In terms of South African equality law, where any distinction, exclusion or restriction had the purpose or effect of impairing or nullifying the recognition, enjoyment or

exercise of human rights and freedoms, the enquiry would still have to consider if this impairment/nullification was unfair in the particular context.

Definition of "reasonable accommodation". The Equality Act does not contain a definition of this phrase. The definition of discrimination also does not incorporate this phrase. Section 9 of the Equality Act contains the following phrase: "Subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including … (c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities *or failing to take steps to reasonably accommodate the needs of such persons*" (our emphasis). However, as discussed above, section 9 is explicitly made subject to section 6 (the general prohibition of discrimination). However, the failure to take steps to reasonably accommodate the needs of disabled persons will in most - if not all - cases amount to the withholding of a benefit or the imposition of a burden, as required in terms of the definition of "discrimination" in the Equality Act. Section 14(3)(i) contains the following factor to be considered in determining the fairness or unfairness of the alleged discrimination: "(i) whether and to what extent the *respondent has taken such steps as being reasonable in the circumstances* to (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or (ii) accommodate diversity". The Constitutional Court in *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) paras 71-78 offered an interpretation of sections 14 and 21 of the Equality Act that allowed the phrase "reasonable accommodation" a more prominent position in the Act than would appear from a first blush literal reading. The Court held that the phrase connotes that "sometimes the community, whether it is the state, an employer or a school, must take positive measures and possibly incur additional hardship or

expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms" (para 73). The Court pointed out the relevance of reasonable accommodation to disability law and continued:

> "Disabled people are often unable to access or participate in public or private life because the means to do so are designed for able-bodied people. The result is that disabled people can, without any positive action, easily be pushed to the margins of society: Exclusion from the mainstream of society results from the construction of a society based solely on 'mainstream' attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them" (par 74).

The Court explained that the concept demands a contextual enquiry centred on proportionality "that will depend intimately on the facts" (par 76). In the context of section 14 of the Equality Act, the Court cautioned that the test for fairness must not be reduced to a test solely based on reasonable accommodation, as Parliament carefully set out a number of factors to be considered (par 77). The Court then identified factors that would indicate the centrality or otherwise of the concept of reasonable

accommodation to a particular discrimination dispute: "[W]here … discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but which nevertheless has a marginalising effect on certain portions of society. Second, the principle is particularly appropriate in specific localised contexts, such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck" (par 78). Where a respondent does not of own accord attempt to reasonably accommodate the complainant, and where an equality court holds that this failure, combined with a consideration of the other factors listed in section 14, leads to a finding of unfair discrimination, it may order that the respondent must reasonably accommodate the respondent/group or class of persons in terms of section 21(2)(i) of the Equality Act.

Definition of "Universal design". The Equality Act does not contain this term. Depending on the facts of a particular discrimination dispute, the lack of universal design could amount to unfair discrimination in terms of the definition of "discrimination" in section 1 and the test for unfairness in section 14 of the Act.

Article 3

(e) "Equality of opportunity". The Equality Act defines equality as encompassing equality of "outcomes".

Article 5

"Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention". Section 9(2) of the 1996 Constitution and section 14(1) of the Equality Act contain the same sentiment but it is expressed in different words. Section 9(2) of the Constitution

states that "[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination *may be taken*". Section 14(1) of the Equality Act puts it even more categorically: "*It is not unfair discrimination* to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons". As pointed out above as well, section 9(2) only states that legislative and other measures "may" be taken while section 14(1) of the Act clearly states that "it is not unfair discrimination" to take such measures. The Constitutional Court developed a test in terms of which section 9(2) should be understood in *Minister of Finance v Van Heerden.*[191] I submit that the same test would apply when section 14(1) is considered. Paraphrased, the Constitutional Court's approach may be set out as follows.

Three questions must be considered: (i) does the measure target persons or categories of persons who have been disadvantaged by unfair discrimination; (ii) is the measure designed to protect or advance such persons or categories of persons; and (iii) does the measure promote the achievement of equality (par 37).

The first question is unlikely to detain a court's attention in many cases. The second question is aimed at determining whether the measure taken is reasonably capable of achieving the stated outcome – ie the measure must be reasonably likely to achieve the end of advancing the interests of the group prejudiced by unfair discrimination. The measure taken may not be "arbitrary, capricious or display naked preference" (par 41). Section 9(2) "does not postulate a standard of necessity between the legislative choice and the governmental objective" (par 42). The sponsor of the remedial measure is not required to "show a necessity to disfavour one class in order to uplift another";

[191] 2004 (6) SA 121 (CC) at para 36.

remedial measures are "not predicated on a necessity or purpose to prejudice or penalise others" (par 43).

The third question focuses on the long-term effects of the remedial measure on the broader South African society. The Court was quite direct in this regard: "It must be accepted that the achievement of this goal may often come at a price for those who were previously advantaged" (par 44). However, the remedial measure "should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened" (par 44). Insofar as the Convention refers to "necessary" measures to accelerate or achieve *de facto* equality, the South African approach is broader and courts will not insist on proof of necessity.

Article 8

The parts of the Equality Act pertaining to the promotion of equality have not entered into force more than a decade after the Act's promulgation.

3. PERSONS WITH DISABILITIES AND THE RIGHT TO WORK AND EMPLOYMENT

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1 Convention on the Rights of Persons with Disabilities

The civil, cultural, economic, political and social rights specified in the United Nation's Convention on the Rights of Persons with Disabilities (CRPD) are rights that apply to all human beings.[192] The Convention provides a set of standards on disability rights that focus on an inclusive approach to persons with disability, encapsulated in the social model to disability.[193] This means that a society and the state are accountable for disabling persons through its environmental and psychological barriers, which limit the interaction of people through the barriers it creates. Consequently, the CRPD argues that employment - as a necessary means to gain financial independence in the world of work - should create an environment adhering to a standard that is open, inclusive and accessible to persons with disabilities.[194] The focus of the CRPD is on the actions that states must take to ensure that persons with disabilities enjoy their rights, including the right to work and employment, on an equal basis with others.[195]

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[192] Also see the "Core International Human Rights Instruments and their Monitoring Bodies" http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx (accessed 30 Junie 2015).

[193] See Ferraina S "An analysis of the legal meaning of Article 27 of the UN CRPD" Key challenges for adapted work settings 2012, http://digitalcommons.ilr.cornell.edu/gladnetcollect/560 (accessed 30 June 2015).

[194] Ibid.

[195] United Nations *From Exclusion to Equality – Realizing the rights of persons with disabilities*: *Handbook for Parliamentarians on the Convention*

State parties to the Convention - such as South Africa[196] - have an obligation not only to prevent violations of these rights, but also to prevent the violation of these rights by third parties. In the context of the right to work of persons with disabilities, the state must also require that employers provide just and favourable working conditions for these persons.[197] Favourable working conditions, amongst others, include providing reasonable accommodation[198] to persons with disabilities in the workplace and employment.[199] The state has an obligation to take appropriate legislative, administrative, budgetary, judicial and other actions towards the full realisation of the rights contained in the Convention.[200]

1.1 Article 27 of the CRPD: The right to work and employment

The Convention sets out specific areas for state action. The right to work and employment are rights that are explicitly protected in the CPRD and are set out in article 27 of the Convention. Article 27(1) determines that the state has to recognise the right of persons with disabilities to work, on an equal basis with others. This includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and a work environment that is open, inclusive and accessible to persons with disabilities.

Article 27 further stipulates that the state should safeguard and promote the realisation of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to:

- Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career

on the Rights of Persons with Disabilities and its Optional Protocol (2007) 15.

[196] The Convention on the Rights of Persons with Disabilities (CRPD) and Optional Protocol adopted by the General Assembly (GA) of the United Nations (UN) on 13 December 2006 (Resolution A/RES/61/10624). South Africa, as State party to the convention, signed the CRPD and its Optional Protocol on 30 March 2007, and ratified the CRPD and Optional Protocol on 30 November 2007

[197] Art 4(1)(e) of the CRPD.

[198] Art 2 of the CRPD.

[199] Art 27(1)(i) of the CRPD.

[200] *Handbook for Parliamentarians on the CRPD and its Optiona Protocol* (2007) 20.

advancement and safe and healthy working conditions;[201]

- Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;[202]
- Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;[203]
- Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;[204]
- Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;[205]
- Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;[206]
- Employ persons with disabilities in the public sector;[207]
- Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;[208]
- Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;[209]
- Promote the acquisition by persons with disabilities of work experience in the open labour market;[210]

[201] Art 27(1)(a) of the CRPD.
[202] Art 27(1)(b) of the CRPD.
[203] Art 27(1)(c) of the CPRD.
[204] Art 27(1)(d) of the CRPD.
[205] Art 27(1)(e) of the CRPD.
[206] Art 27(1)(f) of the CRPD.
[207] Art 27(1)(g) of the CRPD.
[208] Art 27(1)(h) of the CRPD.
[209] Art 27(1)(i) of the CPRD.
[210] Art 27(1)(j) of the CPRD.

- Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.[211]

Article 27(2) further requires the state to ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

However, establishing a right to work and employment is not the same thing as ensuring that the right is realised. This is why article 27 of the Convention obliges states to provide the appropriate enabling environment for persons with disabilities throughout the full employment cycle so that they can fully enjoy their rights on an equal basis with others. [212] In order to create an enabling environment for persons with disabilities in the workplace, the state must, amongst other, examine labour (and other laws) to determine whether they prohibit discrimination in the workplace.

In realising article 27 of the CRPD, other principles and appropriate measures have to be taken that relate to the right to work and employment. These are fundamental to the enjoyment of persons with disabilities' right to work. This means that the right to work and employment intersects with other provisions of the CRPD. Such is awareness-raising,[213] so that persons with and without disabilities in the workplace understand their rights and responsibilities. Furthermore, article 3 addresses aspects regarding accessibility as a general principle of the CRPD, and article 9 provides for appropriate measures to be taken to enable persons with disabilities to live independently and participate fully in all aspects of life including, amongst others, the workplace. In this regard it is important to note that persons with disabilities must be reasonably accommodated in the workplace. Failure to afford a person "reasonable accommodation" in the workplace amounts to discrimination on the basis of disability.[214] Discrimination on the basis of disability in the workplace constitutes any distinction, exclusion or restriction on

[211] Art 27(1)(k) of the CPRD.
[212] Art 5 of the CRPD; H*andbook for Parliamentarians on the CRPD and its Optional Protocol* (2007) 15.
[213] Art 8 of the CRPD.
[214] Art 2 or the CRPD; *Handbook for Parliamentarians on the CRPD and its Optional Protocol* (2007) 60. This means that any legislative definition of discrimination on the grounds of disability should include the denial of "reasonable accommodation" as an act of discrimination.

the basis of disability, which has the purpose or effect of impairing or nullifying the *recognition*, *enjoyment* or *exercise* of the right to work on an equal basis with others. This means that it encompasses all forms of discrimination, including the denial of reasonable accommodation, in the workplace.[215]

The Convention defines "reasonable accommodation" in article 2 as necessary and appropriate modifications and adjustments where needed in a particular case, which do not impose a disproportionate or undue burden. Reasonable accommodation ensures that an enabling environment is created for persons with disabilities to enjoy or exercise all human rights and fundamental freedoms on an equal basis with others in the workplace.[216] Article 27 provides for the state to safeguard and promote the realisation of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to ensure that reasonable accommodation is provided to persons with disabilities in the workplace.[217] This means that not only should positive steps be taken to ensure reasonable accommodation through accessible buildings, but reasonable accommodation must also create an accommodative working environment for the individual with a disability. In the case of employment, reasonable accommodation might thus involve the following: [218]

- Physical changes to buildings and the working environment;
- Acquiring or modifying equipment in the working environment;
- Accessible[219] technology such as computers and internet technology;
- Providing a reader or interpreter or appropriate training or supervision;
- Adapting testing or assessment procedures; and
- Altering standard working hours or allocating some of the duties of a position to another person.

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[215] "Discrimination on the basis of disability" http://www.ohchr.org/EN/Issues/Disability/Pages/TrainingmaterialCRPDConvention_OptionalProtocol.aspx ", Module 5 of the United Nations Human Rights Office of the High Commissioner (accessed 25 June 2015).
[216] Art 2 of the CRPD.
[217] Art 27(1)(i) of the CRPD.
[218] *Handbook for Parliamentarians on the CRPD and its Optional Protocol* (2007) 60.
[219] Art 9 of the CRPD.

Although accommodation of the particular needs of persons with disabilities is required in the workplace, the requirement under article 2 of the CRPD is *reasonable* accommodation. Reasonable accommodation should, therefore, not impose a disproportionate or undue burden on the employer. This means that if the accommodation required in the workplace imposes a disproportionate or undue burden on the employer - the failure to provide such accommodation to a person with a disability will not constitute discrimination on the basis of disability.[220]

The obligation to reasonably accommodate a person with a disability in the workplace should be established by legislation or any other regulations of the state party.[221] It is important to note that the request to accommodate a person with a disability should be addressed first to the employer as the duty-bearer. This means that the employer and person with a disability should be engaged in an interactive dialogue regarding the accommodation(s), to identify the necessary changes to the workplace or environment. If there is an agreement among them, the employer provides the reasonable accommodation and the process ends. However, if there is no agreement regarding the accommodation, the employer must prove the objective justification in order to avoid responsibility of the reasonable accommodation and discrimination on the basis of disability.[222] In this regard the employer must prove that at least one of the objective criteria - such as relevance, proportionality, possibility and financial and economical feasibility of the accommodation - was not met to avoid responsibility for discrimination on the basis of disability.[223]

It is important to note that the right to work also relates to other provisions in the CRPD. To fully understand this relationship to other rights, the General Comments and Concluding Observations of the Committee on the Rights of Persons with Disabilities (the "Committee"), which is constituted under article 34 of the CRPD, should be considered. The following

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[220] *Handbook for Parliamentarians on the CRPD and its Optional Protocol* (2007) 60.

[221] See the The Employment Equity Act 55 of 1998 (EEA) & Labour Relations Act 66 of 1995 (LRA).

[222] "Discrimination on the basis of disability" http://www.ohchr.org/EN/Issues/Disability/Pages/TrainingmaterialCRPDConvention_OptionalProtocol.aspx, Module 5 of the United Nations Human Rights Office of the High Commissioner (accessed 25 June 2015).

[223] The duty-bearer must prove that at least one of the objective criteria was not met to avoid responsibility for discrimination on the basis of disability.

paragraphs briefly discuss the aspects of the applicable General Comments, Concluding Observations and relevant jurisprudence by the Committee on the Rights of Persons with Disabilities.

1.2 General Comments of the Committee on the Rights of Persons with Disabilities

During the Committee's eleventh session,[224] General Comments on article 9 regarding accessibility were adopted. Reference to accessibility and the relationship to other rights such as article 27 of the CRPD were also considered by the Committee. In paragraph 41 of the General Comments, the Committee noted that persons with disabilities cannot effectively enjoy their work and employment rights if the workplace itself is not accessible. The Committee noted that besides the physical accessibility of the workplace, persons with disabilities need accessible transport and support services to get to their workplaces. Furthermore, the Committee noted that all information pertaining to work, advertisements of job offers, selection processes and communications at the workplace that are part of the work process must be accessible through sign language, Braille, accessible electronic formats, alternative script, and augmentative and alternative modes, means and formats of communication. The Committee further noted in paragraph 41 of the General Comment on accessibility that all trade unions and labour rights must be accessible to persons with disabilities, as well as training opportunities and job qualifications.

1.3 Concluding Observations of the CRPD Committee on Article 27 of the CRPD

Similar to all other international human rights instruments, the CRPD has a monitoring component. State parties are required in terms of article 35 of the CRPD to submit a comprehensive periodical report to the Committee on the progress made in implementing their treaty obligations. The Committee assesses the reports periodically submitted by state parties and generate concluding observations. These concluding observations consist of the Committee's collective assessment of the state parties' reports and recommendations for the enhanced implementation

[224] During the Committee on the Rights of Persons with Disabilities Eleventh session of 31 March–11 April 2014 General comment No. 2 (2014) on Article 9: Accessibility.

of the rights under the CRPD.[225] The concluding observations of the Committee are not legally binding, but have great interpretative importance. This means that the observations by the Committee assist state parties, such as South Africa, in clarifying their legal obligations in terms of the CPRD. For purpose of this chapter, it is important to examine the concluding observations adopted by the Committee on the right to work and employment in clarifying the legal obligations of South Africa as envisaged by the CRPD.

To date the concluding observations reveals that the Committee has substantively engaged in expounding state parties' obligations provided for in article 27(1)(h).[226] Article 27(1)(h) relates to state parties' obligation to promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures. This emphasises that state parties need to take all necessary legislative and other measures including the adoption of incentives, to guarantee the rights of persons with disabilities to employment, in both the public and the private sector equitably.[227] In interpreting the provisions of article 27(1)(h) the Committee noted in its observation that the provision intrinsically envisions that state parties must collect appropriate data, including statistical and research data, and monitor compliance of employment regulations amongst private sector employers.[228] It should therefore be the duty of the state to ensure that all persons with disabilities are effectively protected from discrimination in both the public and private employment spheres.

Article 4(1)(e) of the CRPD furthermore requires state parties to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private

[225] M O'Flaherty 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 27 *Human Rights Law Review* 1; United Nations Committee on the Rights of Persons with Disabilities, Concluding Observations of the Committee on the Rights of Persons with Disabilities of Tunisia, (2011), CRPD/C/TUN/CO/1 par. 33-34.

[226] The Committee to date has considered the initial state reports and issued concluding observations for Argentina, Australia, Austria, Azerbaijan, Belgium, China, Costa Rica, Denmark, Ecuador, EL Salvador, Hungary, Korea, Mexico, New Zealand, Paraguay, Peru, Spain, Sweden and Tunisia.

[227] United Nations Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Belgium, (2014), CRPD/C/BEL/CO/1 par. 39.

[228] United Nations Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Argentina, (2012), CRPD/C/ARG/CO/1 par. 43; and article 31 of the CRPD.

enterprise.[229] Article 4(1)(e), read with article 27(1)(h) of the CRPD, therefore requires states to adopt legislative and other measures to prohibit and effectively penalize discrimination against persons with disabilities in the workplace. The state plays an integral part in employment policies,[230] and has a duty to monitor and enforce compliance thereof in the labour market. Mechanisms should furthermore be put in place by the state for the monitoring of working conditions of persons with disabilities.[231]

1.4 Jurisprudence regarding article 27

In terms of article 34 of the CRPD, the Committee has to monitor compliance of state parties with their treaty obligations. The Committee is empowered to hear complaints related to violations of the CRPD that have been submitted by individuals, groups or by third parties. It is important to examine these communications brought against a state party under the Optional Protocol of the CRPD, and the Committee's views of the rights of persons with disabilities. In examining the relevant findings of the Committee, state parties can take note of the Committee's interpretation and views on article 27 of the CRPD, which they could incorporate into domestic legal reform with regard to the right to work and employment of people with disabilities.

(i) Liliane Gröninger v Germany[232]

In *Liliane Gröninger v Germany* the Committee had to make a finding, amongst others[233] on article 27 of the CPRD, and the failure of the state to promote the right to work, by failing to facilitate the inclusion of a person with disabilities into the labour market.[234] The Committee noted in paragraph 6.2 of the

[229] Art 4 (1) (a) (e) CRPD. The obligation to protect and to promote rights in some instances imposes a positive obligation on the state to introduce, where necessary, appropriate legislative, administrative, financial, judicial or other suitable measures to allow the realisation of the rights of persons with disabilities. See also sec 7(2) of the Constitution.
[230] United Nations Committee on the Rights of Persons with Disabilities: Concluding Observations on the initial report of Denmark, (2014), CRPD/C/DNK/CO/1 par. 58.
[231] United Nations Committee on the Rights of Persons with Disabilities: Concluding Observations on the initial report of Azerbaijan, (2014), CRPD/C/AZE/CO/1 par. 43.
[232] Communication No. 2/2010 Views adopted by the Committee at its eleventh session (31 March – 11 April 2014).
[233] General principles, general obligations, equality and non-discrimination; awareness-raising; work and employment (articles 3, 4, 5, 8 and 27 of the CRPD).
[234] Subject matter and substantive issues of communication No. 2/2010.

Communication that article 27 of the CRPD implies an obligation on the part of state parties to create an enabling and conducive environment for employment. This obligation includes the private sector.

Of importance for purposes of this chapter is the interrelatedness of article 27 with other articles of the CRPD observed by the Committee. In this regard the Committee observed in paragraph 6.2 that article 4(1)(a) of the CRPD imposes a general obligation on the state to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the CRPD that relates to work and employment. Regarding article 3 of the CRPD and the right to work and employment, the Committee observed that in state parties' legislation, policies and practice, the state party should be guided by respect for a person with disability's inherent dignity, individual autonomy, including:

- the freedom to make one's own choices and independence of persons;
- non-discrimination;
- full and effective participation and inclusion in society; and
- equality of opportunity.

(ii) Marie-Louise Jungelin v Sweden[235]

In *Marie-Louise Jungelin v Sweden* the Committee had to make a finding regarding the recruitment process, as well as appropriate modification and adjustments to the workplace in terms of article 5 and 27 of the CRPD.[236] The Committee noted in paragraph 10.4 that in terms of article 27(1)(a), (e), (g) and (i) of the CRPD, state parties have the responsibility to prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuation of employment, career advancement and safe and healthy working conditions; to promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment; to employ persons with disabilities in the public sector; and to ensure that reasonable accommodation is provided to persons with disabilities in the workplace.

[235] Communication No. 5/2011 of the views adopted by the Committee at its twelfth session (15 September – 3 October 2014).
[236] Subject matter and substantive issues of Communication No. 5/2011.

The Committee further recalled article 2 of the CRPD regarding "reasonable accommodation", and the necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, which where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. However, in *Marie-Louise Jungelin v Sweden,* the Committee considered that when assessing the reasonableness and proportionality of accommodation measures, state parties enjoy a certain margin of appreciation.[237] In assessing the reasonableness and proportionality of accommodation, it is generally for the courts of parties to the CRPD to evaluate facts and evidence in a particular case. This "margin appreciation" applies, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.[238]

The Committee further observed in paragraph 10.4 that article 5(1) and (2) of the CRPD impose a general obligation on the state party to 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. The general obligation on state parties includes the prohibition of all discrimination on the basis of disability and the guarantee to persons with disabilities of equal and effective legal protection against discrimination on all grounds.

(iii) AF v Italy[239]

In *AF v Italy* the Committee had to make a finding regarding article 27 and the right to employment, the recruitment process, and applying national legislation relating to the right to employment of persons with disabilities.[240] In the communication the Committee reconfirmed that state parties have the responsibility to prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions. State parties must promote employment opportunities and career advancement for persons with disabilities in the labour market, and provide assistance in finding, obtaining, maintaining and returning to

[237] Communication No. 5/2011, par. 10.5.
[238] *Ibid*.
[239] Communication No. 9/2012 of the views adopted by the Committee on the Rights of Persons with Disabilities, at its thirteenth session on 25 March – 17 April 2015.
[240] Subject matter of Communication No. 9/2012.

employment. The Committee further reaffirmed the obligation of state parties to employ persons with disabilities in the public sector and to ensure that reasonable accommodation is provided to persons with disabilities in the workplace.[241]

2 Constitution of the Republic of South Africa, 1996

South Africa is a state party to the CRPD[242] which explicitly recognises disability as a human rights issue.[243] The South African constitutional framework (and labour legislation), also endorse the rights of persons with disabilities in the workplace as a human rights issue, consistent with its international obligations.[244] In paragraph 2 of this chapter, the rights of persons with disabilities to work and employment under the Constitution of the Republic of South Africa, 1996 ("the Constitution") are examined.

2.1 Chapter 2 of the Constitution (the Bill of Rights) and the right to work and employment of persons with disabilities

The Bill of Rights is the cornerstone of democracy in South Africa and the rights of all people, including persons with disabilities, are entrenched in the overarching "democratic values of human dignity, equality and freedom".[245] An important feature of the Bill of Rights is that it binds all government institutions and the courts,[246] and that it protects all people in South Africa, including people with disabilities. The

[241] *Ibid*, par. 8.3.
[242] The CRPD and Optional Protocol adopted by the GA of the UN on 13 December 2006 (resolution A/RES/61/10624). South Africa signed the CRPD and its Optional Protocol on 30 March 2007 and ratified the CRPD and Optional Protocol on 30 November 2007.
[243] UN Human Rights Office of the High Commission for Human Rights *Monitoring the Convention on the Rights of Persons with Disabilities Guidance for human rights monitors Professional training series No 17* (2010) 8.
[244] Legislation that indirectly refers to people with disabilities and more specifically disabled employees, does not fall within the scope of the discussion in this chapter. This method was also used by T Degener in 'Disability discrimination law: A global comparative approach' in A Lawson & C Gooding (eds) *Disability rights in Europe* (2005) 87, where she states that '[i]n the context of equal rights, disabled people have until recently been a forgotten minority. Consequently, it was assumed (based on experience of German and international law) that an anti-discrimination statute which did not expressly mention disability (or health status) *would probably not, in practice, be applied for the protection of disabled people*' (our emphasis).
[245] Sec 7(1) of the Constitution.
[246] Sec 8(1) of the Constitution.

provisions of the Bill of Rights are enforceable by the courts.[247] The word "everyone" is used in a number of provisions of the Constitution and includes citizens and non-citizens within the boundaries of the Republic of South Africa. [248]The word "everyone" is sufficiently comprehensive to include persons with disabilities, and for purposes of this chapter, persons with disabilities in the workplace. This means that the Bill of Rights, amongst other things, protects the right to dignity of employees with disabilities,[249] the right to equality[250] of employees with a disability and their right to bodily and psychological integrity.[251] Every employee with a disability further has a right to privacy[252] and to freedom of expression,[253] association,[254] movement and residence,[255] as well as a right to choose a trade, occupation or profession freely.[256] Employees with disabilities further have a right to fair labour practices,[257] health care,[258] education[259] and access to courts.[260] However, these rights and others may be limited in terms of section 36 of the Constitution[261] to the extent that such limitation is reasonable and justifiable in an open and democratic society.

Section 7(2) of the Constitution provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. The state's obligation may be positive or negative in nature.[262] It not only prohibits the state from interfering with the exercise of the above rights, but it compels the state to act. The obligation to protect and to promote rights in some instances

[247] Sec 8(3) of the Constitution.

[248] Sec 8(2) - (3) of the Constitution determine that the Constitution is binding and applicable to natural persons; I Currie & J De Waal *The Bill of Rights handbook* (2005) 35; and *Mohammed v President of the Republic of South Africa* 2001 3 SA 893 (CC).
[249] Sec 10 of the Constitution.
[250] Sec 9 of the Constitution.
[251] Sec 12(1) of the Constitution.
[252] Sec 14 of the Constitution.
[253] Sec 16 of the Constitution.
[254] Sec 18 of the Constitution.
[255] Sec 21 of the Constitution.
[256] Sec 22 of the Constitution.
[257] Sec 23 of the Constitution.
[258] Sec 27 of the Constitution.
[259] Sec 29 of the Constitution.
[260] Sec 34 of the Constitution.
[261] The limitation clause.
[262] Currie & De Waal (2005) 13-18.

imposes a positive obligation on the state to introduce, where necessary, appropriate legislative, administrative, financial, judicial or other suitable measures to allow the realisation of the rights of persons with disabilities.

The interpretation by the courts of the rights contained in the Bill of Rights has resulted in the development of a body of constitutional jurisprudence relevant to workers, employers and their representative bodies.[263] The Constitution, and specifically the rights contained in the Bill of Rights, could potentially affect labour law in three ways. Firstly, the rights contained in the Bill of Rights could be applied to test the validity of labour legislation aimed at compliance with fundamental rights. Secondly, they could be employed to interpret existing labour legislation, which has been promulgated in compliance with the fundamental rights contained in the Bill of Rights. And, finally, the rights could be used as a tool to develop the common law in those instances where compliance with any particular human right is not at stake.[264]

In the paragraph below, sections 9 (the right to equality) and 23(1) (the right to fair labour practices) of the Bill of Rights and the relevant labour legislation applicable to persons with disabilities, and more specifically employee's with disabilities, are set out.

2.2.1 Section 9 the right to equality of Constitution and persons with disabilities' right to work and employment

In terms of section 9(1), "everyone" - including workers and/or employees with a disability - is equal before the law and has the right to equal protection and equal benefit of the law. Section 9(2) further provides that equality includes the full and equal enjoyment of *all rights* and *freedoms*. This means that a worker

[263] A Van Niekerk *et al Law@work* (2008) 33 - 53.

[264] Van Niekerk *et al* 34 give recognition to H Cheadle in this regard. Cheadle delivered an address at the annual Butterworhts LexisNexis Current Labour Law seminar, 2007. It is, however, important to note that it is inappropriate for a litigant to rely on any provision of the Constitution if legislation has already been enacted to give effect to the specific principle provided for in the relevant constitutional provision. It is therefore not fitting for a litigant to bypass labour legislation by relying on a constitutional right to where specific labour legislation has already been introduced to give effect to the labour provision of the Constitution. *SA National Defence Union v Minister of Defence* [2007] 9 BLLR 785 (CC) confirmed *NAPTOSA v Minister of Education, Western Cape* 2001 2 SA 112 (C) and *Minister of Health v New Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC) in this regard.

or employee with a disability has an equal right to work, to be economically active and to be part of mainstream society. The section further provides that legislative (such as equality[265] and labour laws[266]) and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken in order to promote and achieve equality.[267]

Section 9(3) provides that *the state* may not unfairly discriminate directly or indirectly against anyone on one or more of the listed grounds. The grounds specifically mentioned in section 9(3) are "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth". Of importance to the employer is the provisions of section 9(4) which determine that *no person* may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection 9(3). This section, therefore, also prohibits any other person, including private individuals and institutions such as employers from the public or private sector, from discriminating unfairly against workers with disabilities on one or more of the listed grounds. Section 9(4) requires that "national legislation must be enacted to prevent or prohibit unfair discrimination". Enacted legislation includes the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)[268] and the Employment Equity Act (EEA).[269] It is important for the employer to note that the legislature introduced specific measures in the EEA to protect persons with disabilities, in particular, as a designated group for purposes of equal treatment and affirmative action.[270]

Of importance to the employer is section 9(5), which provides that discrimination on one or more of the grounds listed in subsection 9(3) is unfair unless it is established that the discrimination is fair. In terms of this provision, discrimination based on disability in the workplace is unfair, unless it has been

[265] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).
[266] Employment Equity Act 55 of 1998 (EEA).
[267] See SR Van Jaarsveld & BPS Van Eck *Kompendium van Arbeidsreg* (2006) 137.
[268] Act 4 of 2000.
[269] Act 55 of 1998, see the discussion in paragraph 3 of the chapter.
[270] See the discussion in paragraph 3 of the chapter of the Employment Equity Act 55 of 1998 (EEA) and affirmative action.

established that such discrimination is fair by reason of, for instance, valid inherent requirements for the work concerned.

2.2.2 Section 23(1) and persons with disabilities' right to fair labour practices

Section 23(1) of the Constitution guarantees everyone's right to fair labour practices. From this provision it is clear that every employee, employer, or other organisation or institution involved in labour relations has the right to fair labour practices in terms of the Constitution.[271] It goes without saying that employees with a disability are also entitled to protection in terms of this provision.[272] However, it is not appropriate for an aggrieved employee or person with a disability to approach the courts based on an infringement of a constitutional principle if legislation has already given effect to the relevant human right.[273] The most significant labour laws that provide protection to workers/persons with disabilities are the Employment Equity Act (EEA)[274] and the Labour Relations Act (LRA),[275] as well as the codes published in terms of these laws. These acts and codes give effect to the equality clause,[276] the right to fair labour practices,[277] as well as international and foreign norms in respect of fair labour treatment of people with disabilities.[278] The constitutional provision, however, does play a significant role whenever legislation giving effect to a human right is being interpreted, and when the common law has to be developed in absence of existing legislative provisions giving effect to constitutional principles.

3 National legislation

The South African labour legislation endorses the rights of persons with disabilities in the workplace. In the following

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[271] Van Jaarsveld & Van Eck 137.

[272] *NEHAWU v University of Cape Town* 2003 *ILJ* 95 (CC) by 110H – 111A: '[t]he concept of fair labour practice is incapable of precise definition … [It should be] given content by legislation and thereafter be left to gather meaning … from the decisions of specialist courts and tribunals. … In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity based jurisprudence generated by the unfair labour practice provisions of the 1956 LRA [Labour Relations Act] as well as the codification of unfair labour practice in the LRA.'

[273] See par. 3 this chapter, and more specifically par. 3.1 and 3.2.

[274] Act 55 of 1998.

[275] Act 66 of 1995.

[276] Sec 9 of the Constitution.

[277] Sec 23(1) of the Constitution.

[278] n 1 above.

paragraphs persons with disabilities' right to work and employment within labour laws - as a human and fundamental right consistent with the CRPD - will be examined. [279]

3.1 Employment Equity Act 55 of 1998 (EEA)

The EEA constitutes a key legislative and policy intervention that gives effect to the provisions relating to the removal of policies and practices which may result in inequalities. The Preamble to the EEA states the following key issues in the application of the Act concerning employment equity, to amongst other, designated groups such as people with disabilities: [280]

- To promote the constitutional right of equality and the exercise of true democracy;
- To eliminate unfair discrimination in employment;
- To ensure the implementation of employment equity to redress the effect of discrimination;
- To achieve a diverse workforce broadly representative of our people;
- To promote economic development and efficiency in the workplace; and
- To give effect to the obligations of the Republic as a member of the International Labour Organisation.

Although the EEA is not a disability-specific piece of legislation, specific emphasis is placed on equity and the right to equal protection and benefit of the law of, *inter alia*, people with disabilities[281] as a designated group.[282]

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[279] Specifically the Employment Equity Act 55 of 1998 (EEA) and the Labour Relations Act 66 of 1995 (LRA).

[280] Preamble of the EEA.

[281] According to the definitions of the EEA "people with disabilities" means people who have a long term or recurring physical or mental impairment, which substantially limits their prospects of entry into, or advancement in, employment. In this regard, see item 5.2 of the Revised draft Code of Good Practice on the Employment of Persons with Disabilities, GG No. 38872 of 12 June 2015 which states that persons with disabilities incled those who have long-term physical, mental, intellectual or sensory impairment which ininteraction with various barriers may hinder their full and effective participation in society on equal basis with others.

[282] According to the definitions of the EEA "designated groups" means black people, women and people with disabilities who are citizens of the RSA by birth or descent; or became citizens of the RSA by naturalisation before 27 April 1994 or after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies.

The EEA strives towards the attainment of two goals. The first goal of the EEA is to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination. The second goal of the EEA is to promote the implementation of affirmative action measures to eradicate inequalities that were institutionalised by previous political policies.[283] Chapter II of the EEA gives effect to the first goal, which broadly coincides with the principles of formal equality as enshrined in subsections 9(1), (3) and (4) of the Constitution.[284] It provides that everyone, including workers or employees with disabilities, is equal before the law and that unfair discrimination on a list of grounds, including disability is, proscribed. The EEA provides that every employer must take steps to promote equal work opportunity in the work-place by eliminating unfair discrimination in any employment policy or practice.[285] The EEA further provides that no person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on any one or more grounds, including, amongst other, disability or any other arbitrary ground.[286] In the past, barriers such as ignorance, fear and stereotyping have resulted in persons and employees or workers with disabilities being unfairly discriminated against in society and employment. It is important for the employer to note that unfair discrimination is perpetuated in many ways. The most significant of these are unfounded assumptions about the abilities and performance of persons with disabilities; an inaccessible workplace, including the manner in which jobs are advertised which might exclude or limit access to the advertisement; selection tests that can further discriminate unfairly against persons/potential workers with disabilities; and arrangements regarding interviews which might exclude or limit the opportunity of persons with disabilities to prove themselves for employment.[287] Chapter III gives effect to the second goal of the EEA, namely, the constitutional promise of substantive

[283] Sec 2(b) of the EEA.
[284] See the discussion of equality and sections 9(1), (3) and (4) in par. 2.2.1 of this chapter.
[285] See sec 5- 6 of the EEA - F. Chapter II – Prohibition of unfair discrimination.
[286] See sec 6(1) of the EEA.
[287] Foreword to the Code of Good Practice to the EEA.

equality and affirmative action that is contained in section 9(2) of the Constitution.[288]

This means that the EEA provides for affirmative action measures to achieve substantive equality, and it is therefore not unfair to take affirmative action measures consistent with the purpose of the EEA, or to distinguish, exclude or prefer any person on the basis of an inherent requirement of the job.[289]

3.1.1 Unfair discrimination

Section 6(1) of the EEA prohibits unfair discrimination in the workplace. It states that "[n]o person may *un*fairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, HIV status, conscience, belief, political opinion, culture, language and birth".

This prohibition applies to all workers or employees and job applicants, irrespective of the size of the employer's undertaking.[290] Section 6(2) provides that it is not unfair discrimination if an employer differentiates on the basis of a valid "inherent requirement" of the job or in the event of the implementation of affirmative action measures in accordance with the EEA.

The EEA further defines "people with disabilities" as "people who have a long-term or recurring physical or mental impairment, which substantially limits their prospects of entry into, or advancement in, employment".[291] Only people who simultaneously satisfy all three criteria laid down in the definition are regarded as "people with disabilities". This means that a person can only be regarded as a worker or person "with a disability" if the disability is:

i) "long-term or recurring";
ii) "a physical or mental impairment"; and

[288] In this regard also see the discussion regarding the concept of 'equality' in par 2.2.1 of this chapter.
[289] See sec 6(2) of the EEA.
[290] Sec 4(1) provides that Chapter II of the EEA applies to 'all employees and employers' and also covers any 'employment policy or practice' which includes 'recruitment procedures, advertising and selection criteria'.
[291] Sec 1 of the EEA.

iii) "which substantially limits" the person's "prospects of entry into, or advancement in, employment".

Section 6 of the EEA must be read with the Code of Good Practice: Key aspects on the Employment of People with Disabilities (Code of Good Practice)[292] in paragraph 3.1.5 below, which contains further guidelines regarding the interpretation of this definition. In *IMATU v City of Cape Town*[293] the Labour Court, for the first time, had the opportunity to consider the definition in the EEA in the context of the Code of Good Practice. The Court in the first instance considered whether the situation was covered under one of the listed grounds, namely, "disability", of section 6(1). The Court found that the EEA did not contain a restricted number of grounds and that the employer's differentiation was comparable to some of the other grounds covered by section 6(1). The Court held that the employee's condition could be categorised as potentially discriminating. Item 5 of the Code of Good Practice provides that "[t]he scope of protection for people with disabilities in employment focuses on the *effect of a disability on the person in relation to the working environment, and not on the diagnosis of the impairment*". People are considered persons with disabilities if they satisfy all the criteria in the definition:

(i) having a physical or mental impairment;
(ii) which is long term or recurring; and
(iii) which substantially limits their prospects of entry into, or advancement in employment.

According to item 5 of the Code of Good Practice, a diagnosis should be made of the effect that the impairment may have on the person in *relation to the work environment*.[294] It is important to note that item 5 of the revised draft Code of Good Practice[295] supports the CRPD and in its interpretation. However, item 5.3

[292] The Code of Good Practice was published in terms of sec 54 of the EEA in *GG* 23702 of 19 August 2002, which is currently under review by the Department of Labour. The Revised Draft Code of Good Practice on the Employment of Persons with Disabilities was published in terms of sec 54(2) of the EEA in GG 38872 of 12 June 2015.
[293] 2005 11 BLLR 1084 (LC)
[294] O Dupper et al *Essential Discrimination Law* (2004) 163.
[295] Item 5 of the Revised Draft Code of Good Practice on the Employment of Persons with Disabilities was published in terms of sec 54(2) of the EEA in GG 38872 of 12 June 2015.

of the revised draft Code of Good Practice read with the CRPD, is not intended to restrict the interpretation of the definition, but to recognise that disability may result from the interaction between a person and his or her working environment as a result of attitudinal or environmental barriers.[296] The introductory part of item 5.3 is followed by a relative restrictive definition of disability, where all three of the conditions are used as criteria for determining whether a person is a person with a disability or not. It is important for the employer to note that the Code of Good Practice and the revised draft give interpretive guidelines for all three the criteria in item 5.3.

The employer should not - when using the definition of "persons with disabilities" in section 1 of the EEA and the Code of Good Practice's interpretive guideline(s) - impose a "blanket ban" on the prospect of entry into or advancement in employment of workers or persons with disabilities of whatever nature. The employer should scrutinise each job application or employee's case on merit before a decision is made regarding compliance with the inherent job requirements.

3.1.2 Reasonable Accommodation

Section 1 of the EEA defines reasonable accommodation as "any modification or adjustment to a job or to the working environment that will enable a person from a designated group[297] to have reasonable access to or participate or advance in employment".

Section 1 of the EEA must be read with item 6 of the Code of Good Practice: Key aspects on the Employment of People with Disabilities (Code of Good Practice)[298] and the revise draft Code of Good Practice in paragraph 3.1.5 below, which requires employers to make "reasonable accommodation" for people with disabilities in particular. The aim of accommodation is to reduce the impact of the impairment of the person with a disability to

[296] UN Human Rights Office of the High Commissioner for Human Rights *Monitoring the Convention on the Rights of Persons with Disabilities Guidance for Human Rights Monitors Professional training series No. 17* (2010) 15 New York and Geneva, 2010.

[297] Sec 1 of the EEA determines that designated groups that must enjoy the benefit of affirmative action are black people, women and persons with disabilities.

[298] The Code of Good Practice was published in terms of sec 54 of the EEA in *GG* 23702 of 19 August 2002, which is currently under review by the Department of Labour.

fulfil the essential functions of a job. Reasonable accommodation does not only mean that obstacles and/or barriers should be eliminated at the workplace, but it also requires positive measures to be taken in order to adapt policies, practices and the working environment in promoting accessibility in the workplace[299] of persons with disabilities. According to item 6.4 of the Code of Good Practice, employers should adopt the most cost-effective means that is consistent with effectively removing the barriers to perform the job. This means that the employer need not accommodate a qualified applicant or an employee with a disability if this would impose an unjustifiable hardship on the business of the employer.

The Code of Good Practice also explains in item 6.13 what an "unjustifiable hardship" is. According to item 6.14 of the Code, an unjustifiable hardship on the business of the employer is action that requires significant or considerable difficulty or expense. This involves, *inter alia*, considering the effectiveness of the accommodation and extent to which it would seriously disrupt the operation of the business.

3.1.3 Disputes concerning unfair treatment of people with disabilities

The EEA regulates disputes concerning unfair treatment applicable as well to people with disabilities in the workplace. In this regard disputes concerning unfair treatment should be done in writing to the CCMA within six months[300] after the act or omission that allegedly constituted the unfair discrimination.[301] Condonation of the six months' time limit is allowed by the CCMA if any party shows good cause to refer a dispute after the relevant time limit.[302] An applicant, such as a person with disability, referring a dispute to the CCMA must satisfy the CCMA that a copy of the referral has been served on any other

[299] Item 6 of the Code of Good Practice, ad revised draft Code of Good Practice. The Code provides examples of reasonable accommodation. This could entail the adaptation of computer hard- and software, the provision of training and evaluation material, and amendments to work time and leave. See also C Ngwena 'Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue' 2004 *Journal for Juridical Science* 179.

[300] Sec 10(2) of the EEA.

[301] In sec 10(1) of the EEA "dispute" excludes a dispute concerning an unfair dismissal, which is regulated by sec 191 of the LRA. See also the definition of dismissal and automatically unfair dismissal in sec 186 and sec 187 of the LRA.

[302] See sec 10(3) of the EEA - Disputes.

party to the dispute, and that the referring party has made a reasonable attempt to resolve the dispute.[303] Compulsory conciliation is regulated by the CCMA, even if there is a bargaining council.[304] In the case of an unresolved dispute after conciliation, any party may refer the dispute to the Labour Court for adjudication.[305][306]

It is important to note that the burden of proof is on the employer against whom the allegation concerning unfair discrimination on a listed ground of section 6(1) of the EEA is made. The employer has to prove on a balance of probabilities that such discrimination did not take place as alleged, or is rational and not unfair, or is otherwise justifiable.[307] However, if unfair discrimination is alleged on an arbitrary ground, the burden of proof is on the complainant. The complainant then has to prove, on a balance of probabilities that the conduct of the employer was not rational, amounted to discrimination and was unfair.[308]

3.1.4 Affirmative action measures

The second goal of the EEA in chapter III places an obligation on "designated employers" to implement affirmative action measures in respect of persons from "designated groups".[309] "Designated employers" are defined as municipalities, organs of state, employers with 50 or more employees and employers with less than 50 employees, but with a total annual turnover higher than that of a small business in terms of the EEA.[310] As

[303] See sec 10(4)(a)-(b) of the EEA.
[304] See sec 10(5) of the EEA. See the relevant provisions of Parts C and D of Chapter VII of the LRA, with the changes required by context, as it applies in respect of a dispute in terms of Chapter II of the EEA.
[305] See sec 10(2)(a) of the EEA.
[306] See sec 10(6)(a)(i)-(ii) and (b) of the EEA. An exception applies where parties can apply for arbitration by the CCMA, provided that they meet the following requirements as set out by the EEA: The employee alleges unfair discrimination on the grounds of sexual harassment; or, in any other case, that the employee earns less than the ceiling amount stated in the determination made by the Minster of Labour on terms of section 6(3) of the BCEA; or, any party to the dispute may refer it to the CCMA for arbitration if all parties to the dispute consent to arbitration of the dispute.

[307] See sec 11(1) of the EEA.
[308] See sec 11(2) of the EEA.
[309] Sec 13 of the EEA.
[310] Sec 1 of the EEA. According to the definitions of the EEA, "designated employer" means (a) a person with 50 or more employees; (b) a person who employees less than 50 people but has an annual turn-over that is equal to or above the applicable annual turn-over of a small business in terms of Schedule 4 of the EEA'; (c) a municipality (see ch 7 of the Constitution); (d) an organ of state as defined in section 239 of the Constitution, but excl the NADF, the

previously indicated, designated groups that must enjoy the benefit of affirmative action are black people, women and persons with disabilities.[311]

Although the duties of affirmative action only apply to "designated employers"[312] (except where otherwise provided),[313] the EEA allows for voluntary compliance by an employer who is not a "designated employer" in terms of the definition of the EEA.[314] However, every designated employer *must*, in order to achieve employment equity, implement affirmative action measures for people from designated groups.[315] Section 13(2) of the EEA provides that the designated employer (a) must consult with its employees as required by section 16 of the EEA; (b) conduct an analysis as required by section 19 of the EEA; (c) prepare an employment equity plan as required by section 20; and (d) report to the Director-General (DG) on progress made in implementing its employment equity plan, as required by section 21. [316]

Affirmative action measures are designed to ensure that suitably qualified people from the designated groups have equal access to employment opportunities, and are equally represented in all occupational levels of the workforce of designated employers.[317]

NIA and the SASS; and (e) an employer bound by collective agreement in terms of section 23 or 31 of the LRA, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement

[311] Sec 1 of the EEA. According to the definitions of the EEA "designated groups" means black people, women and people with disabilities who are citizens of the RSA by birth or descent; or became citizens of the RSA by naturalisation before 27 April 1994 or after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies.. Black persons are further defined as 'a generic term which means Africans, Coloured and Indians'.

[312] According to the definitions of the EEA, "designated employer" means (a) a person with 50 or more employees; (b) a person who employees less than 50 people but has an annual turn-over that is equal to or above the applicable annual turn-over of a small business in terms of Schedule 4 of the EEA'; (c) a municipality (see ch 7 of the Constitution); (d) an organ of state as defined in section 239 of the Constitution, but excl the NADF, the NIA and the SASS; and (e) an employer bound by collective agreement in terms of section 23 or 31 of the LRA, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement

[313] See G. Chapter III - Affirmative Action of the EEA, and sec 12 and 13 of the EEA.

[314] See sec 14 of the EEA.

[315] See sec 13(1) of the EEA.

[316] See sec 13(2) of the EEA.

[317] See sec 14 of the EEA.

According to section 15(2) of the EEA, affirmative action measures must include:[318]

a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;
b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;
c) reasonable accommodation for people from designated groups to ensure that the enjoy equal opportunities and are equitably represented in the workforce of a designated employer;
d) subject to subsection (3), measures to –
    (i) ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce and
    (ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development

The reason why designated employers are duty-bound to favour persons or workers with disabilities when making appointments and considering promotions, is that there are strong indications that unemployment, low salaries and stereotyping are common occurrences for persons with disabilities.[319]

As stated above, designated employers do not have a choice regarding whether they want to implement affirmative action measures or not.[320] Such employers must, in consultation with their employees, devise an affirmative action plan and, depending on the size of the undertaking, must annually or

[318] See sec 15(2) of the EEA. Sec 15(3) measures referred to in subsection (2)(d) include preferential treatment and numerical goals, but exclude quotas.
[319] In a 2002 South African Human Rights Commission's report under the title 'Towards a Barrier-free Society: A Report on Accessibility and Built Environment', available at http://www.sahrc.org.za/home/21/files/Reports/towards_barrier_free_society.pdf2002.pdf 22 (accessed 2 February 2015) it is mentioned that 'as a result, people with disabilities experience high unemployment levels and, if they are employed, often remain in low status jobs and earn lower than average remuneration. In terms of the Act, all legal entities that employ more that 50 people must submit Employment Equity Plans to the Department of Labour, showing how many people with disabilities are employees and what positions they hold'.
[320] Sec 13(1) of the EEA provides that '[e]very designated employer *must*, in order to achieve employment equity, implement affirmative action measures' [our emphasis].

biannually report to the Department of Labour on their progress in pursuance of their affirmative action plans.[321] Consultation with employees regarding these affirmative action measures is compulsory in terms of the EEA.[322] Employees or nominated representatives with whom a designated employer consults regarding an affirmative action plan in terms of sub-sections 16(1)(a) and (b), must reflect the interests of all employees from across the all occupational levels of the employer's workforce, employees from designated groups and employees who are excluded form designated groups.[323]

The designated employer is further required to conduct an analysis.[324] The employer *must* collect information and conduct an analysis to identify employment barriers which adversely affect people from designated groups in terms of its employment policies, practices, procedures and the working environment.[325] An analysis conducted in terms of subsection 19(1) must include a profile of the designated employer's workforce within each occupational level in order to determine the degree of underrepresentation of people from designated groups in various occupational levels in that employer's workforce.[326]

According to section 20(1) of the EEA, a designated employer *must* prepare and implement an employment equity plan. The employment equity plan should achieve reasonable progress towards employment equity in that employer's workforce.[327] An employment equity plan prepared in terms of subsection 20(1) must state the following:[328]

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[321] Sec 13(2) of the EEA describes the duties on designated employers. Sec 21 provides that employers with more than 150 employees must submit reports annually and employees with less than 150 employees must report every second year.

[322] See sec 16(1) of the EEA. A designated employer *must* take reasonable steps to consult and to attempt to reach agreement on the matters referred to in section 17: (a) with a representative trade union representing members at the workplace or nominated by them; or (b) if no representative trade union represents members of the designated groups at the work-place with its employees or representatives nominated by them.

[323] See sec 16(2) of the EEA. Sec 16(3) This section does not affect the obligation of any designated employer in terms of sec 86 of the LRA to consult and reach consensus with a work-place forum on any of the matters referred to in sec 17 of the EEA.

[324] See sec 19(1)-(2) of the EEA.

[325] See sec 19 (1) of the EEA.

[326] See sec 19(2) of the EEA.

[327] See sec 20(1) of the EEA – Employment Equity Plan.

[328] See sec 20 (2) of the EEA.

a) the objectives to be achieved for each year of the plan;
b) the affirmative action measures to be implemented as requires by section 15(2);
c) where underrepresentation of people from designated groups in various occupational levels has been identified by the analysis, the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals;
d) the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;
e) the duration of the plan, which may not be shorter than one year or longer than five years;
f) the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;
g) the internal procedures to resolve any dispute about the interpretation or implementation of the plan;
h) the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan; and
i) any prescribed matter.

However, a person, such as a person with a disability, may be suitably qualified for the job as a result of any one of, or any combination of, that person's formal qualifications, prior learning, relevant experience, or capacity to acquire within a reasonable time, and ability to do the job.[329] When determining whether a person is suitably qualified for the job, an employer must review all the factors listed in subsection 20(3) and determine whether that person has the ability to do the job in terms of any one, or any combination of those factors.[330] In making a determination under subsection (4), an employer may not unfairly discriminate against a person solely on the grounds of that person's lack or relevant experience.[331] In the

[329] See sec 20 (3) of the EEA.
[330] See sec 20 (4) of the EEA.
[331] See sec 20 (5) of the EEA. An employment equity plan may contain any other measures that are consistent with the purposes of the EEA in terms of section 20(6).

implementation of such a plan an employer may, for example, favour persons with disabilities above other more suitable candidates who do not have a disability in an attempt to reach goals in respect of representativeness.[332] Chapter II of the EEA, which relates to formal equality, expressly provides that the implementation of affirmative action measures that coincide with the goals of the EAA does not constitute unfair discrimination against other candidates.[333] The EEA does not establish an enforceable right against an employer in favour of employees with disabilities who are not enjoying the benefits of affirmative action, by way of, for example, appointment or promotion. It does, however, establish a duty on employers to institute affirmative action measures and affords such employers a valid defence against allegations of unfair discrimination against those who may feel that they have been prejudiced by such affirmative action measures.[334]

However, if a designated employer fails to prepare or implement an employment equity plan in terms of the EEA, the Director-General (DG)[335] may apply to the Labour Court to impose a fine in accordance with Schedule 1.[336][337] The designated employer *must* submit a report to the DG once every year on the first working day of October or on such other date as may be prescribed.[338] The report referred to in subsection (1) must

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[332] In *Department of Correctional Services v Van Vuuren* 1999 20 *ILJ* 2297 (LAC) the Labour Appeal Court considered the following set of facts: Ms Van Vuuren, a white female, was 'strongly recommended' for a position by an interviewing panel whereas four other candidates were merely 'recommended'. The employer decided to appoint a black person who was only 'recommended' based on an affirmative action policy that had been implemented. The employer admitted that the black candidate was appointed only because of his race. Having found that the employer had not deviated from the collectively agreed upon affirmative action policy, the Court held that the decision to appoint the black man was just and fair. It held that the decision was 'dictated by weighing up the comparative past inequalities suffered by the respondent and the other applicants'.

[333] Sec 6(2)(a) of the EEA.

[334] In *Harmse v City of Cape Town* 2003 24 ILJ 1130 (LC) and *Dudley v City of Cape Town 2004 25 ILJ 305 (LC)* opposing points of view were adopted regarding the question whether the EEA established an enforceable right in favour of employees from the designated groups. However, in *Dudly v City of Cape Town* 2008 12 BLLR 1155 (LAC) the Labour Appeal Court settled the debate when it held that the EEA did not create such a right, but that it did establish a defence in favour of employers who applied affirmative action.

[335] See sec 13(2) of the EEA.

[336] See sec 21(4B) of the EEA. Sec 21(5) of the EEA is deleted by s 112 (b) of Act 47 of 2013 (the EE amendment Act).

[337] See sec 20(7) of the EEA.

[338] See sec 21(1) of the EEA regarding the Report. Sec 21(2) is deleted by s 112 (b) of Act 47 of 2013 (the EE amendment Act).

contain the prescribed information and must be signed by the chief executive officer of the designated employer.[339]

Of further importance, when reporting in terms of section 21(1) of the EEA, every designated employer must submit a statement to the Employment Conditions Commission (ECC), established by section 59 of the Basic Condition of Employment Act (BCEA),[340] on the remuneration and benefits received in each occupational level of that employer's workforce.[341] Where disproportionate income differentials or unfair discrimination by virtue of a difference in terms of conditions of employment are reflected, a designated employer must take measures to progressively reduce such differentials.[342] These measures may include collective bargaining; compliance with sectoral determinations made by the Minister in terms of section 51 of the BCEA; applying norms and benchmarks set by the ECC; and relevant measures contained in skills development legislation.[343] The ECC *must* research and investigate norms and benchmarks for appropriate income differentials and advise the Minister on appropriate measures for reducing disproportionate differentials.[344]The ECC may not disclose any information pertaining to individual employees or employers.[345] However, parties to a collective bargaining process may request the information contained in the statement contemplated in sub-section (1) for the collective bargaining purposes subject to subsections 16(4) and (5) of the LRA.[346]

3.1.5 Code of Good Practice: Key aspects on the Employment of People with Disabilities (Code of Good Practice)

The EEA further stipulates that codes of good practice in respect of vulnerable groups may be published. In this regard the Code of Good Practice was published in August 2002 in terms of section 54(1)(a) of the EEA.[347] The current Code of Good

[339] See sec 21(4) of the EEA.
[340] Act 75 of 1997, as amended.
[341] See sec Section 27 (1) of the EEA regarding the income differentials and discrimination. Sub-section 1 substituted by s 12(b) of Act 47 of 2013.
[342] See sec 27 (2) of the EEA as substituted by s 12 (b) of Act 47 of 2013.
[343] See sec 27(3) of the EEA.
[344] See sec 27(4) of the EEA.
[345] See sec 27 (5) of the EEA.
[346] See sec Section 27(6) of the EEA. See sec 27 amended by s 12(a) of Act 47 of 2013. See Chapter IV for the regulation of the Commission for Employment Equity – sec 28-33. See Chapter V for the regulation of the Commission for Employment Equity – sec 34-50.
[347] As published under GNR 1345 of 2000. The Code set out in the schedule is issued by the Minister of Labour, on the advice of the Commission for Employment Equity, in terms of sec 54(1)(a) of the EEA 55 of 1998.

Practice is based on the Constitutional principle that no one may unfairly discriminate against a person on the grounds of disability.[348] As stated in the Foreword of the current Code of Good Practice on the employment of people with disabilities in South Africa, disability is a natural part of the human experience. Disability can never diminish the rights and dignity of people who have a disability to contribute to the economy and to be economically independent. On 12 June 2015, the revised draft Code of Good Practice on the Employment of Persons with Disabilities was published.[349] Although the current Code of Practice is under review by the Department of Labour, it will form part of the discussion in this paragraph[350] and, where necessary, reference will be made to the revised draft Code of Good Practice.

The Code of Good Practice is not an authoritative summary of the law and does not create additional rights and obligations. However, courts and tribunals must take the Code of Good Practice into account when provisions of the EEA are being interpreted. This further means that the Code of Good Practice provides guidance to employers or employees and their organisations in respect of the development, implementation and refinement of disability-equity policies and programmes at the workplace.[351]

The Code of Good Practice is part of a broader equality agenda for persons with disabilities to have their rights recognised in the labour market.[352] The foreword to the revised draft Code of Good Practice highlights that discrimination towards people with disabilities is a socially-construed action and can be avoided by ensuring better knowledge, understanding and awareness about disabilities and the challenges encountered by people with disabilities. Furthermore, the revised draft Code of

[348] Legal Framework and Guiding Principles of the Code of Good Practice.
[349] The Revised Draft Code of Good Practice on the Employment of Persons with Disabilities was published in terms om Section 54(2) of the EEA of 1998 (as amended), on advice of the Commission for Employment Equity for public comment, in *GG* 38872 of 12 June 2015.
[350] The Code of Good Practice was published in terms of sec 54 of the EEA in *GG* 23702 of 19 August 2002. It is to be noted that in 2004 the Department of Labour issued additional guidelines in the 'Technical Assistance Guidelines on the Employment of People with Disabilities' that must be read in conjunction with the EEA and the Code of Good Practice. These guidelines are practical in nature and are based on the prohibition on unfair discrimination and affirmative action measures.
[351] Code of Good Practice on the Employment of People with Disabilities, Status of the Code, 3.4.
[352] Foreword to the Code of Good Practice.

Good Practice aligns itself with the CRPD[353] in defining discrimination on the basis of disability as any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[354] The revised draft further acknowledges that discrimination on the basis of disability includes all forms of discrimination, including denial of reasonable accommodation.[355] This means that persons with disability should be able to effectively participate in and be included in society and the workplace, both in the public and in its private sectors. In order to achieve their full inclusion, both socially and economically, an accessible, barrier-free physical and social environment is necessary.

Unfair discrimination against people with disabilities perpetuates in various ways, amongst other, low status jobs, low-income thresholds and higher levels of unemployment.[356] The Code of Good Practice in particular strives to present an employment guideline whereby employers and employees can understand their rights and obligations, and promote fair treatment and equal employment opportunities. The revised draft articulates the focus of the scope of protection for people with disabilities in employment on the effect of a disability on the person in relation to the working environment, and not on the diagnosis or the impairment.[357]

According to the Code of Good Practice, as seen from the discussion above in paragraph 3.1.1, people with disabilities are those who have a long term or recurring physical or mental impairment, which substantially limits their prospects of entry into or advancement in employment.[358] A "substantial

[353] Art 2, definitions, of the CRPD.
[354] See part 5.1 of the revised draft Code of Good Practice.
[355] Ibid.
[356] See the Integrated National Disability Strategy White Paper (hereafter refer to as White Paper) Presidents office, Independent Living Institute at http://www.independentliving.org/indexen.html (24 June 2015). As stated in the White Paper statistics on the prevalence of people with disabilities are unreliable for various reasons. "There is a serious lack of reliable information on the nature and prevalence of disability in South Africa. This is because, in the past, disability issues were viewed chiefly within a health and welfare framework. This led naturally to a failure to integrate disability into mainstream government statistical processes."
[357] See part 5.3 of the revised draft Code of Good Practice.
[358] See part 5 of the Code on the Definition of people with disabilities.

limitation" would entail an impairment, which by its very nature, duration or effects, substantially limits the personal ability to perform the key functions of the job for which they are considered.[359] The Code of Good Practice also refers to "long-term or recurring" as an impairment that has lasted, or is likely to last for at least twelve months. "Recurring" refers to an impairment that is likely to happen again and to be substantially limiting. This includes a chronic condition, even if the effects may fluctuate.[360] However, a medical assessment has to be done to evaluate whether medical treatment or any other device[361] would control, correct, limit, prevent or remove its adverse effects on the person.[362] Certain conditions or impairments (in accordance with public policy) are furthermore excluded from the Code's definition of a disability,[363] as well as conventional physical and mental characteristics and common personality traits.[364]

With regard to "reasonable accommodation", as seen from the discussion in paragraph 3.1.2 above, the Code of Good Practice advises employers and employees to reasonably accommodate people with disabilities.[365] The aim of the accommodation is to reduce the impact of the impairment of the person's capacity to fulfil the essential function of a job.[366] The focus for the employer is on the most cost-effective means that are consistent with the effective removal of barriers.[367] These barriers impair work performance and equal access to the benefits and opportunities of employment.[368] According to the Code of Good

[359] See part 5 of the Code. An impairment can be either physical, mental or both. "Physical" entails a partial or total loss of bodily function or part of the body. It includes eyesight and hearing impairment. "Mental" impairment refers to a clinically recognised condition or illness that affects a person's thought processes, judgment or emotions.
[360] See part 5 of the Code on the Definition of people with disabilities.
[361] For example spectacles, contact lenses, hearing aid etc.
[362] See part 5 (ii)-(iii) of the Code.
[363] The conditions or impairments are included in the open-list of exclusions, but are not limited to: sexual behaviour disorders against public policy, self-imposed adornments for example boy piercings and tattoos, compulsive gambling, the tendency to steal or light fires, any disorders that effect a person's physical or mental state resulting from the intake of illegal drugs or alcohol, unless the affected person is participating in a recognised program of treatment, or any normal deviations in height, weight and strength.
[364] See part 5 (iv) of the Code.
[365] See part 6 of the Code.
[366] See part 6.3 of the revised draft Code.
[367] See part 6.4 of the revised draft Code.
[368] See part 6.1 of the Code. The Code specifically mentions training as part of the need to reasonably accommodate the person with a disability in part 6.9(iv) and (vii). See also part 9 of the Code pertaining to placement which

Practice, reasonable accommodation includes adaptations such as:[369]

i. to gain accessibility to facilities;
ii. to existing equipment or acquiring new equipment including computer hard- and software;
iii. re-organizing workstations;
iv. changing training and assessment materials and systems;
v. re-structuring jobs so that non-essential functions are re-assigned;
vi. adjusting working conditions, including working time and leave; and
vii. to provide specialized supervision, training and support in the workplace.

Employees' work performance may be evaluated against the same standards as other employees at the workplace.[370] It may therefore be necessary - in order to be fair to the employee with a disability - to adapt the manner in which performance is measured.[371] However, the Code of Good Practice advises that a balance should be maintained regarding the effect of any significant or considerable difficulty to adaptions and costs at the workplace for the employer, to prevent "unjustifiable hardship".[372] This means that the Code of Good Practice did not envisage a serious disruption of the operation of a specific business.[373]

The Code of Good Practice further explains that safeguards against unfair discrimination should be implemented throughout the full cycle of employment – from recruitment to promotions and termination of employment.[374] Recruitment and selection should entail clear identification, description of the inherent requirements of the vacant position, the necessary skills and capabilities to perform to job, as well as reasonable selection

involves orientation and initial training of a new employee, subject to reasonable training.

[369] See part 6.9 (i)-(vii) of the Code, and 6.11 of the revised draft Code.

[370] See part 6.12 of the revised draft Code.

[371] See part 6.10 of the Code and part 6.12 of the revised draft Code.

[372] See part 6.11 of the Code and part 6.13 of the revised draft Code.

[373] See part 6.13 of the Code.

[374] See part 6.3(i)-(iv) of the Code. The need to reasonably accommodate may present itself to the employer during the voluntarily disclosure of a disability or in view of the fact that such a need may be self-evident to the employer. See part 6.4, 6.5 of the Code.

criteria, preferably in writing, to afford the job applicants with disabilities easy access to such information.[375]

Medical and psychological testing and other similar assessments must comply with sections 7 and 8 of the EEA with regard to relevancy or appropriateness to the nature of the work for which the applicant/employee is assessed.[376] Employers are compelled to ensure that such tests, whether they are applied to establish the employee with a disability's health, or his/her ability to perform a job, do not unfairly exclude or are biased in the manner of application, assessment or interpretation. [377] The Code advises employers to firstly assess whether a person is proficient to perform the key aspects of the job, after the job offer has been made, or in the case of assessment concerning membership to the employee benefit scheme.[378]

Tests after the employee's illness or injury may require that the employee, who appears to be unfit for the job, agree to a functional assessment of the disability. The employer may determine whether the employee can "safely" perform the tasks related to the key functions of the job, or to identify reasonable accommodation required for the employee to execute the tasks.[379]

In order to maintain a safe and healthy working environment for all employees, the Code of Good Practice advises employers not to employ employees where that person's disability would represent an actual risk to him or her or any other worker, in instances where the risk cannot be eliminated or reduced by applicable reasonable accommodation.[380] An employer who can objectively prove that the work would expose such a person, or others, to substantial health risks at the workplace, without any possibility of reasonable accommodation to mitigate the risk, may withdraw a conditional job offer.[381]

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[375] See part 7.1 of the Code and part 7.3 of the revised draft Code. For additional information on recruitment see 7.1.2 to 7.1.7 of the Code and 7.3.1 to 7.3.7 of the revised draft Code. Braille or audiotape may as required, be included in such notices, where reasonable in the circumstances.
[376] See part 7.6.1 of the revised draft Code.
[377] See part 8 of the Code.
[378] *Ibid.* Costs for any testing must be done at the expense of the employer. See part 8.15 of the Code.
[379] See part 8.2.1 of the Code.
[380] See part 8.3.2of the Code.
[381] See part 8.3.3 of the Code.

Placement of a new employee with a disability requires that an employer have to make an effort to include disability sensitization in the training and orientation/induction programs at the workplace. The Code of Good Practice highlights the importance of equal treatment, accessibility and responsiveness to these programs for those with and without a disability, subject to reasonable accommodation.[382]

The retaining of people who incur a disability during employment is crucial. In this respect the employer should consult, assess and reasonably accommodate such an employee through rehabilitation, transitional work programs and flexible work hours.[383] Frequent absences from work should be evaluated to establish the need for reasonable accommodation to assist the employee. Termination of employment is only advised if there is no reasonable accommodation of the employee, provided that the employer meets the requirement for fair selection criteria that does not unfairly discriminate against an employee with a disability.[384]

The disclosure of an employee's disability is a private matter subject to the written consent of the employee. It must be treated with the utmost respect, privacy and confidentiality. The information must be kept in separate records and the employers, medical and health services personnel may only obtain private information for a legitimate purpose,[385] and information that has become redundant must be destroyed. [386]

The disclosure of an employee's disability, which is not self-evident, may occur at any time at the initiative of the employee.[387] An employer may request the employee to provide evidence based on relevant medical tests, at the employer's expense, of such a disability. Any additional information required by the employer must be relevant for executing the employee's functions and the degree of the disability. Measures to ensure reasonable accommodation of the disability may only

[382] See part 9 of the Code.
[383] See part 11 of the Code.
[384] See part 12 of the Code.
[385] See part 14 of the Code and sections 7 and 18 of the EEA.
[386] See part 14 of the Code.
[387] See part 16.5(i)-(iii) of the Code. Employees with disabilities may choose not to disclose or to disclose their non-visible disability status in a confidential way which assures confidentiality of identity and their impairment.

be implemented after consultation with the employee and in conjunction with relevant staff.[388]

Employers who provide or arrange occupational benefit or insurance plans (or indirectly through a fund or scheme), may not unfairly discriminate directly or indirectly against people with disabilities on the ground of their disability.[389] People with disabilities may not be refused membership on the ground of their disability. Vocational rehabilitation, training and temporary income replacement benefits should be offered if reasonable by designated employers for those employees who are ill or injured and absent of work for extended periods. Financial compensation should be offered to those who can resume employment, at lower income levels than before the illness or injury, in order to maintain a level of employment security.[390]

Lastly, the Code of Good Practice supports employment equity planning regarding people with disabilities for the Preparation, Implementation and Monitoring of Employment Equity Plans. The Department of Labour has the responsibility to distribute copies of this Code to trade unions, to employers and employers' organisations, to contribute to the education and awareness of people with disabilities.[391]

3.1.6 Technical Assistance Guidelines on the Employment of People with Disabilities (TAG)

The Technical Assistance Guidelines on the Employment of People with Disabilities (TAG) was intended to complement the Code of Good Practice with the practical implementation of aspects of the EEA relating to the employment of people with disabilities in the workplace. The TAG builds on the Code of Good Practice to set practical guidelines and examples for employers, employees and trade unions to promote equality, diversity and fair treatment in employment through the elimination of unfair discrimination.[392] The TAG addresses, amongst other things, reasonable accommodation, recruitment and selection processes, and the placement and retaining of

[388] See part 14 of the Code.
[389] See part 15 of the Code. Benefits refer to fringe benefits, medical benefits, group disability benefits, retirement schemes and life assurance schemes.
[390] See part 15 of the Code.
[391] See part 17 of the Code and part 17.1 of the revised draft Code.
[392] Foreword to and purpose of the Technical Assistance Guidelines on the Employment of People with Disabilities (TAG), by the Minister of Labour in August 2002.

people with disabilities. However, the current TAG is under review by the Department of Labour.

3.2 Labour Relations Act 66 of 1995 (LRA)

It is important to note that the primary goal of the LRA is to give effect to the constitutional obligations contained in section 23(1) of the Constitution. This goal is made clear in section 1(a), where it is stated that it is the purpose of the LRA to give effect to the fundamental rights contained in the Constitution and the obligations incurred by the state as a member of the International Labour Organisation (ILO). As mentioned previously, section 23(1) states that "everyone" has the right to fair labour practices and it is clear that it also applies to persons or workers with disabilities. This constitutional right to fair labour practices is wide and non-specific enough to include persons or workers with disabilities. However, the constitutional right to fair labour practices should not be confused with the definition of "unfair labour practice" as contained in the LRA. The definition of "unfair labour practices" contained in the LRA only covers *specific* practices perpetrated by employers.[393]

This means that the LRA, broadly speaking, protects employees (including employees with a disability) against unfair dismissal and specific unfair labour practices.[394] The LRA further safeguards all workers' right to freedom of association,[395] promotes collective bargaining,[396] and enshrines every worker's right to strike.[397]

For purposes of this chapter, the focus falls on the protection the LRA affords to workers or employees with a disability in respect of unfair labour practices perpetrated against them, and unfair dismissal on grounds of incapacity due to injury and illness.[398]

3.2.1 Persons with disabilities are protected against unfair labour practices

In terms of section 186(2) of the LRA, the term "unfair labour practice" means any unfair act or omission that arises between an employer and an employee relating to the unfair conduct of

[393] Van Niekerk *et al* 166 - 167.
[394] Chapter VIII of the LRA.
[395] Chapter I of LRA.
[396] Chapter II of LRA.
[397] Chapter IV of LRA.
[398] Sec 185 of LRA.

the employer in the "promotion, demotion, probation … or training of an employee or relating to the provision of benefits". The definition also covers the "unfair suspension" or "other unfair disciplinary action short of dismissal" of an employee, including workers/employees with a disability.[399] This means that a worker or employee with a disability also has the option of referring a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) based on, for example, non-promotion, demotion or the unfair provision of benefits should it relate to an employee's or worker's disability.[400]

3.2.2 Persons with disabilities are protected against unfair dismissal

Section 186(1) of the LRA describes a number of occurrences covered by the term "dismissal". This section includes the termination of a contract of employment by an employer: with or without notice;[401] the non-appointment of employees on fixed term contracts after such an expectation has been created by the employer;[402] the refusal of an employer to allow an employee to resume employment after taking maternity leave;[403] and the termination of the contract by an employee because the employer made continued employment intolerable.[404]

Before a dismissal can be deemed fair, two main requirements are set by the LRA. A dismissal is deemed to be fair if the employer succeeds to prove that there was a fair reason for dismissal (also referred to as substantive fairness), and that the dismissal was effected in accordance with a fair procedure.[405]

Of importance for the employer is the fact that certain categories of dismissal are classified as being "automatically unfair dismissal".[406] Amongst others, it is automatically unfair should an employee be dismissed (with or without notice) on grounds of the person's or worker's "disability". However, the LRA adds

[399] Also included in the definition is any 'occupational detriment' in contravention of the Protected Disclosures Act 26 of 2000. The Act is also referred to as the 'whistle blower's act'.
[400] Sec 10 of the EEA.
[401] Sec 186(1)(a) of the LRA.
[402] Sec 186(1)(b) of the LRA.
[403] Sec 186(1)(c) of the LRA.
[404] Sec 186(1)(d) of the LRA.
[405] Sec 188 of the LRA.
[406] Sec 187(1)(f) of the LRA includes a list of grounds upon which an employee may not be dismissed. The other grounds include, but are not limited to, race, age, gender, sex, political opinion etc.

an important *qualification* to this protection in so far as it specifically states that the dismissal of an employee on a ground such as disability may be fair if it is based on the inherent requirements of a particular job.[407]

A number of disabilities can be encountered at the workplace.[408] They include, for example, physical disability due to illness and injury; mental incapacity due to stress, illness trauma, and so on;[409] and chronic illnesses that result in continuous absence from work. Should an employee or worker with a disability be subjected to an automatically unfair dismissal, the employee or worker would be entitled to lodge a claim for reinstatement or a compensation order up to a maximum of 24 months' remuneration calculated from the day of the dismissal.[410]

It is important for the employer to note that both the EEA and the LRA protect employees or workers with disabilities against unfair discrimination when they apply for work, when they qualify for promotion in terms of the provisions of the EEA, and against unfair dismissal in terms of the LRA.[411]

(i) Code of Good Practice: Dismissal

Schedule 8 of the LRA contains a Code of Good Practice: Dismissal,[412] which provides guidelines regarding substantive fairness and the different procedures that apply to dismissal on different grounds. These grounds are misconduct;[413] incapacity based on poor work performance;[414] incapacity on grounds of ill health or injury;[415] and the operational requirements of the employer.[416] Any person considering the fairness of a dismissal,

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[407] Sec 187(2)(a) of the LRA; J Grogan *Workplace law* (2005) 147; *Schmahmann v Concept Communication Natal (Pty) Ltd* 1997 *ILJ* 1333 (LC); and *Archer v United Association of SA* 2005 *ILJ* 790 (CCMA).

[408] Van Jaarsveld & Van Eck 137.

[409] *Spero v Elvey International (Pty) Ltd* 1995) 16 *ILJ* 1210 (IC); and *Automobile Association of SA v Govender* DA23/99) [2000] ZALAC 19 (20 September 2000).

[410] Sec 194(3) of the LRA. Van Jaarsveld & Van Eck (n -- above) 168 - 169; *Van Niekerk v Minister of Labour* 1996 *ILJ* 525 (K); *Walters v Transitional Local Council of Port Elizabeth* 2000 *ILJ* 2723; and *POPCRU v SA Police Service* 2003 *ILJ* 254.

[411] Van Jaarsveld & Van Eck 168.

[412] Amended by Act 42 of 1996 and by Act 12 of 2002.

[413] Item 4(1) of the Dismissal Code.

[414] Item 9 of the Dismissal Code.

[415] Item 10 of the Dismissal Code.

[416] This is also referred to as retrenchment. Secs 189 and 189A provide comprehensive requirements regarding the procedures that must be followed in this regard.

whether it be the chair of a disciplinary or incapacity enquiry, or a presiding officer of a tribunal or court, is compelled to take the Code of Good Practice: Dismissal into account before making a decision.[417]

The Code provides that employers must distinguish between temporary and permanent injury and illness, and must also consider the extent of the employees' inability to render normal services. If the employee's absence is likely to be unreasonably long, the employer must investigate all the possible alternatives short of termination, such as adapting the employee's duties or securing alternative employment, before contemplating dismissal.[418] There is a more onerous duty on the employer to accommodate the employee who is injured at work or contracts a work-related illness.[419]

The Code directs that an employer should adopt a staged enquiry before contemplating the dismissal of an employee on grounds of incapacity. During this process the employee (with a disability) must be granted the opportunity to state her or his case and to be represented by a trade union official.[420] It is more appropriate to refer to this procedure as an incapacity enquiry rather than a disciplinary enquiry as this does not relate to misconduct.

In terms of the Code, employers should follow a four-staged enquiry before dismissing an employee on grounds of disability. Firstly, the question is whether the employee/worker with a disability is unable to perform his or her work. Secondly, if the answer to this question is in the affirmative, the next question is to what extent the employee/worker with a disability is unable to do his or her work? Thirdly, the employer must consider whether the employee's/worker's (with disability) working conditions can be adapted, and lastly, if this is impossible, whether there is any alternative work which the employee/worker with a disability could be required to do.[421]

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[417] Sec 188(2) of the LRA.
[418] Item 10(1) of the Dismissal Code.
[419] Item 10(4) of the Dismissal Code. See also *Free State Consolidated Gold Mines (Operations) Bpk v Labuschagne* 1999 *ILJ* 2823 (LAC).
[420] Item 10(2) of the Dismissal Code.
[421] *Standard Bank Ltd v CCMA & Others* [2008] 4 BLLR 357.

It is important to note that, if these steps were not followed, the dismissal would not only be unfair, but would also automatically constitute unfair dismissal. The dismissal of an employee/worker with a disability who was not incapacitated at the time of the dismissal is regarded as one of the worst forms of discrimination possible.

3.3 Basic Conditions of Employment Act 75 of 1997 (BCEA)

All employees with disabilities are included and afforded rights in terms of the basic minimum standards enshrined in the BCEA. The purpose of the BCEA confirms that the Act applies to all employees at the workplace, including those with disabilities, namely, to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution. In order to achieve its primary objective, the BCEA establish, enforce and regulate the variation of basic minimum standards of employment to all employees in order to advance economic development and social justice.[422]

According to the BCEA basic condition of employment constitutes a term in any contract of employment except where it is replaced by more favourable term(s) and condition(s) in the employment contract, or where such provision has been replaced, varied or excluded in accordance with the provisions of the BCEA.[423]

Certain employees, including those with disabilities, are excluded by the application of chapter 2 of the BCEA. They are senior managerial employees, those engaging as sales staff that travel to the premises of their customers and regulate their own working hours, and those who work less than 24 hours per month for an employer. However, every employer must regulate the working time of each employee,[424] including those excluded by chapter 2 of the BCEA. With regard to working time of employees, due regard must be paid to the provisions of any Act regulating occupational health and safety, the health and safety of all employees, the Code of Good Practice on the Regulation

[422] See sec 2 of the BCEA.
[423] See sec 4(a)-(c) of the BCEA. The core rights in the BCEA are however not affected by such a collective agreement. For example by an collective agreement included in and outside of a bargaining council.
[424] See sec 7 of the BCEA.

of Working Time,[425] and to the family responsibilities of employees.[426]

3.4 Skills Development Act 97 of 1998 (SDA)

The purpose of the Act is to develop the skills of the South African workforce. In addition to developing these skills, a further purpose of the SDA is to improve quality of life, employment prospects and mobility, as well as productivity in the work-place. The SDA further strives to promote self-employment and the delivery of social services. While employers are encouraged to use the workplace as an active training environment to acquire new skills and to offer new job opportunities to new entrants to the labour market, employees are motivated to participate in learning programmes.

A further aim of the SDA is to improve employment prospects for persons with disabilities who were previously disadvantaged by unfair discrimination. This is achieved by redressing the disadvantages of the past through training and education of, amongst other, workers of the designated groups such as workers with disabilities.

3.5 Skills Development Levies Act 9 of 1999 (SDLA)

The SDLA regulates the proportion of funds available for skills development, and the administration, imposition and recovery of a levy payable by an employer to a Commissioner.[427] It further provides for the Sector Education and Training Authorities (SETA's) to contribute to the cost of work done by the Quality Council for Trade and Occupations. SDLA discourages the accumulation of surpluses and to carry over unspent funds at the end of each financial year.[428] The Act aims to create a framework within which extensive use is made of public education and training providers for the provision of learning programmes.

3.6 The Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA)

[425] See sec 87(1)(a) of the BCEA.
[426] See sec 7 of the BCEA.
[427] See sections 1-14 of the Act. "Commissioner" refers to the South African Revenue Service appointed in terms of sec 6 of the SA Revenue Service Act 34 of 1997.
[428] See ch 2 of the Act.

COIDA provides for compensation through the Compensation fund for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases and to provide for matters connected therewith.[429]

3.6.1 Application of COIDA

COIDA applies to all employers, casual and full-time workers who, as a result of a workplace accident or work-related disease are injured, disabled, became ill or died. COIDA excludes workers who are totally or partially disabled for less than 3 days; anyone receiving military training; members of the South African National Defence Force, or the South African Police Service; any worker guilty of wilful misconduct, unless they are seriously disabled or killed; anyone employed outside the RSA for 12 or more continuous months; and workers working mainly outside the RSA and only temporarily employed in the RSA.

3.6.2 Duties of employers

Employers must register with the Compensation Commissioner at the Department of Labour. The State, Parliament provincial governments and local governments may be exempted from furnishing details regarding the nature of the business.[430] Any person who carries on a business in South Africa, or a body corporate resident outside South Africa not registered in terms of South African law, must furnish the Compensation Commissioner the address of their head office, and the name and address of their chief officer in the Republic.[431]

Employers need to keep records for a period of four years of all its employees, wages paid and the time worked.[432]

Employees who are injured during the execution of their duties or scope of the employee's employment must notify the employer in writing of an accident as soon as reasonably possible and of the intention to claim compensation.[433] The employer

[429] Compensation fund refers to the Fund established by sec 15 of COIDA.
[430] See sections 80(4) and 84(1).
[431] See sec 80(5) stating the chief officer is deemed an employer in terms of COIDA. Contractors who enter into contracts for the execution of work must also register as an employer to fulfil the duties of an employer in terms of sec 89.
[432] See sec 81.
[433] See sec 38.

must notify the Compensation Commissioner of the accident within seven days if the employee alleges that he sustained injuries that arose out of, and in the course of the employee's employment. Claims for compensation are processed on the prescribed forms for this purpose and must be lodged within 12 months of the date of death or injury of the employee.[434]

3.6.3 Requirements for a claim

In order to institute a claim for compensation in terms of COIDA, certain requirements have to be met: Firstly, proof of an employment relationship must be provided.[435] Secondly, an accident had to occur that caused the injuries (internally or externally or both), or resulted in the death of the employee. Lastly, the accident had to occur during the scope of employment or arose out of, and in the scope of the employee's employment. A claim for compensation in terms of COIDA can also be instituted for accidents that occurred during the transportation of employees - free of charge to and from work - in a vehicle supplied by the employer, and driven by the employer, or someone on his behalf. It is important to note that the employee had to promote the employer's interests while the accident or resultant death occurred.[436] However, if an employee sustains injuries (or died as a result thereof) while the employee abandoned his duties in furtherance of the employee's own interests, he or she does not enjoy the right to claim under COIDA.[437] An employee whose injuries occurred as a result of serious and wilful misconduct, or the injuries sustained lasted for three days or less, may not claim compensation in terms of COIDA.

According to section 35 of COIDA, no employee or dependant of an employee may claim damages from the employer of the injured, or deceased employee in respect of injuries, death or an occupational disease.[438] However, an employee may apply to the Director-General for an increased amount for compensation in

[434] See sec 43.
[435] See sec 27 granting the Director-General the authority and discretion to deal with a claim in the event of an employment or trainee contract that appears to be invalid.
[436] See sec 22(5).
[437] See sec 22. The income of the compensation fund and the reserve fund, including income from any investments, shall be exempt from income tax, see sec 21.
[438] See sec 35.

addition to the compensation ordinarily paid.[439] An employee who is injured through the negligence of a third party, may claim compensation in terms of COIDA and from the third party.[440]

3.6.4 Compensation of a disablement

i) A temporary total disablement

Compensation is calculated with regard to two categories. The first category is temporary total disablement, and the second category is permanent disablement. A temporary total disablement is calculated as periodic payments. A periodic payment is subject to a maximum weekly or monthly income - whichever is relevant to the employee's situation (as prescribed by the Minister on an annual basis) - according to 75% of the monthly earnings of the employee with the disability. If an employee earns in excess of the prescribed amount, the compensation is calculated as the prescribed amount by the Minister on an annual basis. If the temporary disablement lasts longer than 12 months it is considered a permanent disablement.[441]

ii) A permanent disablement

The amount of compensation for permanent disablement is calculated with due regard to the degree of disablement. The degree of disablement is calculated as follows: [442]

- 30% disablement: A lump sum of 15 times the employee's monthly earnings at the time of the accident (subject to the prescribed monthly income);
- Less than 30% of disablement: A lump sum of the percentage of disablement multiplied by the monthly earnings, multiplied by 15 and divided by 30. The

[439] See sec 56.
[440] See sec 36. The employee must institute a claim against the third party in a court of law to recover his/her damages and the court, in awarding the damages will have regard to the amount to which the employee is entitled in terms of COIDA.
[441] See sec 47(1).
[442] If an apprentice or a person who is in the process of being trained is permanently disabled as a result of an accident during the scope of employment, his earnings are calculated as if he had recently qualified, or his earnings will be considered equal to that of a qualified person in a similar trade or occupation with five years more experience as the disabled employee, whichever is more favourable. This applies to an employee under the age of 26 years at the time of the accident who is permanently disabled. See sec 51.

prescribed maximum and minimum applicable to 30% disablement are equally applicable in this instance;

- 31- 99% disablement: A monthly pension for life of the percentage of disablement divided by 30, and multiplied by 75% of monthly earnings up to the prescribed amount; and
- 100% disablement: A monthly pension for life equal to 75% of the employee's earnings, subject to the prescribed amount.

iii) Death of an employee

A widow/widower of the deceased employee will receive the following:

- A lump sum of twice the monthly pension that would have been payable if the employee had been 100% disabled (75% of monthly earnings up to the maximum prescribed amount); plus,
- A monthly pension of 40% of the monthly pension payable if the employee had been 100% permanently disabled which is 40% of the 75% of the monthly earnings up to the maximum amount;
- The entitlement to this allowance is for life and remarriage does not change this;
- Children under 18 years will receive a monthly pension of 20% of 75% of the monthly earnings up the prescribed amount until their 18th birthday, marriage or death before the age of 18;
- The total amount of the pension payable to the widow/widower and children may not exceed the amount similar to what the employee would have received in the case of 100% disablement; and
- Funeral costs will be paid in terms of COIDA. The amount to be determined by the Director-General (DG).

iv) Compensation for occupational diseases

Schedule 3 of COIDA regulates the scope of occupational diseases presumed to arise out of, and in the scope of employment. An employee may be entitled to compensation by the Fund if the employee satisfies the DG that he/she contracted any other disease, which arose out of and in the scope of employment. The employee must notify the employer as soon as

possible in writing of such a disease. The employer must report this to the DG.[443]

An employee is entitled to apply for increased compensation in a case of an accident, or where the employee contracts an occupational disease due to the negligence of the employer.[444] This allows for additional payment by the DG to the normal compensation provided by COIDA. Such an application must be lodged within 24 months from the date of the accident or commencement of the disease.[445]

4 Policies, strategies and programmes relating to work and employment of persons with disabilities

4.1 Draft Policy on Reasonable Accommodation and Assistive Devices in the Public Service

The legal mandate for the development of policies and guidelines is founded in the Constitution and South Africa's legislative framework.[446] People with disabilities are members of South African society and as such have specific needs which muct be included in South African society and workforce. Unfortunately the predominant focus in society and the workplace is on people without disabilities. However, the Draft Policy on Reasonable Accommodation and Assistive Devices in the Public Sector aims to remove these barriers for people with disabilities in order to be included in the Public Service through reasonable accommodation measures and assistive devices.

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[443] See *Urquhart v Compensation Commissioner* (2006) 27 *ILJ* 96 (E) it was confirmed that a psychiatric disorder or psychological trauma is as much a personal injury as any other physical injury. Nothing in the definition of "accident" or occupational injury" in COIDA indicates to the contrary. See also *Odayar v Compensation Commissioner* 2006 (6) SA 202 (N) and *Marsland v New Way Motor & Engineering* (2009) 30 *ILJ* 169 (LC).

[444] Negligence by the employer includes the negligence of any employee acting on behalf of the employer as well as an engineer, or any person responsible for the safety and operation of machinery at the workplace. Any patent defect related to the condition of the premises, place of employment, equipment, material and machinery used in the employer's business. See sec 56.

[445] COIDA forbids any employee or dependant of an employee to claim damages from the employer of the injured or deceased in respect of injuries, death or an occupational disease arising out of employment. See sec 35.

[446] See sec 9 of the Constitution, sec 6 of the EEA (and sec 2 of PEPUDA as discussed in this contribution).

The aim of the Draft Policy on Reasonable Accommodation and Assistive Devices[447] in the Public Service is, therefore, to provide a uniform set of guidelines on reasonable accommodation and the provision of assistive devices[448] for employees in the Public Service. According to the Department of Public Service and Administration (DPSA), an assistive device should always be evaluated in the context of being essential to the specific *inherent requirements* needed to perform a particular job. The test for establishing the need for an assistive device is that such a device should be a key instrument - without which the particular employee would not be able - to perform the inherent functions of the job.[449]

DPSA refers to the Disabilities Education Act (IDEA) of the United States of America that defines "assistive device" as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified or customized, that is used to increase, maintain, or improve functional capabilities of a person with a disability".[450]

Assistive devices can be categorised as a personal assistive device, or an employment assistive device. Personal assistive devices are inherent to the specific needs of a person, which may be prescribed for the person and used only by the particular person. These devices include artificial limbs, hearing aids, prostheses or specific wheelchairs to support a person in all aspects necessary to fulfil the needs of that person to maintain a degree of personal independence.[451] Employment assistive devices provide specific assistance in the context of employment to fulfil the inherent requirements of a particular job, which add value to the performance of particular functions.[452] An employer is obliged to

[447] "Assistive device refers to any device that is designed, made, or adapted to assist a person to perform a particular task without which such a person would not otherwise be able to perform a particular task." See p6 of dpsa.
[448] Own emphasis. An example of such a device would be zoom text for people with visual impairment or specialised wheelchairs.
[449] See dpsa p 6.
[450] See dpsa p 7.
[451] See dpsa p 8.
[452] *Ibid.*

provide such a device to the employee within the context of reasonable accommodation measures which correspond with the unique nature of each employee's disability. An employee may voluntarily disclose the disability-related need, or it may be reasonably self-evident to the employer.[453]

An employer's duty to provide reasonable accommodation measures starts when a person with a disability commences employment, until such a person with a disability leaves the workplace. In general employers are not obliged to provide transport for employees with a disability to and back from the workplace, only for official purposes and duties of the employees. However, if it is within the means of such an employer and on mutual terms, it is encouraged to provide transportation to those employees who might not otherwise be able to utilize public transportation.[454]

When an employee with a specific device leaves Public Service employment, the assistive device must be disposed of in terms of the Public Finance Management Act[455] and the Treasury Regulations.[456] In the case of a transfer from one department to another, such a device must be accompanied by a certificate of transfer, approved by the transferring Accounting Officer of an asset, and entered into the asset register of the receiving department.[457] The Accounting Officer of the new employer must issue a receipt of the transfer of such a device.[458]

5 Conclusion and recommendations

[453] See dpsa p 10.
[454] See dpsa p 13.
[455] See sec 42 of the PFMA. The disposal of State assets must be at market-value in terms of price quotations, competitive bids or auction, whichever is advantageous to the State. See sec 16A7 of the Treasury Regulations. State institutions must be contacted to establish their need for such equipment before the disposal thereof. Computer equipment may be transferred free of charge to the identified institution.
[456] See dpsa p 14.
[457] An Accounting Officer must draw up an inventory of assets to be transferred and supply the receiving officer with substantiating records, including personnel records of staff being transferred. See sec 42 of PFMA.
[458] See dpsa p 14.

From this chapter it was gathered that people with disabilities enjoy similar constitutional rights as those of employees without disabilities. The rights of these employees and the duty of employers who employ people with disabilities, are regulated by various pieces of legislation, codes of conduct and policies. The state has an obligation through various sources of law and regulations to create awareness of the rights of people with disability at the workplace (both public and private) and to implement policies and regulations to assist employers and employees alike, and to improve the standard of work and dignity of those who are employed whilst having to cope with their disability.

State parties to the CRPD, such as South Africa, must promote employment opportunities and career advancement for persons with disabilities in the labour market, and provide assistance in finding, obtaining, maintaining and returning to employment. Employees with a disability are entitled to various forms of assistance, which is uniquely linked to their disability and to the inherent requirements of the job that they perform. Employers are obliged to provide reasonable accommodation within their means, to assist employees to perform their job, be that with special devices, accommodation of the workplace in general, whether in the private or public sector of the labour market. Important aspects linked to the right to work and employment are accessible education and accessible transport and support services to get to workplaces.

South Africa, as state party to the CRPD, needs to note that all information pertaining to work, advertisements of job offers, selection processes and communication at the workplace that are part of the work process must be accessible through sign language, Braille, accessible electronic formats, alternative script, and augmentative and alternative modes, means and formats of communication. Furthermore, state parties such as South Africa have the responsibility to prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions; to promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment; to employ persons with disabilities in the public

sector; and to ensure that reasonable accommodation is provided to persons with disabilities in the workplace.

4. GAP ANALYSIS: ACCESSIBILITY AND TRANSPORT FOR PERSONS WITH DISABILITIES IN SOUTH AFRICA

Jehoshaphat John Njau*

1 Introduction

This section of the research project is aimed at accessing initiatives taken by South Africa in the promotion, protection and enhancement of accessibility and transportation frameworks and the impact these initiatives have had on persons with disabilities in South Africa against the standards set by the CRPD.

Accessibility and transportation are significant areas of the economy and when efficiently recognised, appreciated and developed can be effectively deployed to fight poverty by providing an inclusive accessible environment that will improve access to education, health, employment, communication, and other important social services that will substantially improve not only the livelihood of persons with disabilities, but of the country as a whole.

After the ratification of the CRPD,[459] South Africa has made efforts in the area of accessibility and transportation to accommodate persons with disabilities and these efforts have ranged from national to local government campaigns intending to increase and promote accessibility and transportation-enabling frame-works for persons with disabilities.

The initiatives that have been adopted in South Africa after the adoption of the CRPD have to a large extent improved the

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[459] On the 30th November 2007.

accessibility and transportation systems and networks and benefited and improved the lives of persons with disabilities in the last seven years.[460] However, a lot more can be done to offer better access and transportation infrastructure for persons with disabilities, which will advance and create a barrier-free environment that will offer a state that supports persons with disabilities and leading them to a self-determined life as intended by the CRPD.[461]

Against this backdrop an analysis is undertaken of the initiatives taken by South Africa on accessibility and transportation legislative frame works and their impact on persons with disabilities. The analysis highlights what remains to be done to promote, protect and enhance the livelihood of persons with disabilities in South Africa. The analysis emanates from the states parties obligation to adopt, promulgate and monitor national accessibility standards.[462] Therefore since South Africa does not have a specific designated disability legislation in place, adopting a suitable legal framework is the first step.[463]

2 Scope of the analysis

The review is intended to analyse the legislative gaps and weaknesses as well as enforcement mechanisms that have been put in place, and highlight why there is a need to adopt legislation in order to effectively protect the right to access and transportation of persons with disabilities in South Africa.

3 State's obligations as provided for under the CRPD

[460] Amongst others; South Africa National Parks program that has resulted to major changes to most of its National Parks to ensure that they are accessible to persons with different disabilities.
[461] Art 1 of the CRPD.
[462] Art 9, para 2 of the CRPD.
[463] CRPD, General Comment No 2: Article 9, para 27, page 8.

The principles and standards of accessibility and transportation for persons with disabilities are articulated in article 9 of the CRPD and General Comments adopted by the Committee on the Rights of Persons with Disabilities.

3.1 Article 9 of the CRPD

In summary, article 9 of the CRPD lays the accessibility founding principle, that is, accessibility is a crucial aspect to the fulfilment of the rights of persons with disabilities. The article stresses that accessibility should be structured in such a way that seeks to ensure that barriers to transportation, accessing public services and information for persons with disabilities should be eliminated and eradicated in state parties to the CRPD.[464] It is

[464] Art 9 of the CRPD;
1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:
(*a*) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;
(*b*) Information, communications and other services, including electronic services and emergency services.
2. States Parties shall also take appropriate measures:
(*a*) To develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;
(*b*) To ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;
(*c*) To provide training for stakeholders on accessibility issues facing persons with disabilities;
(*d*) To provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;
(*e*) To provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;
(*f*) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information
(*g*) To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;
(*h*) To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

through article 9 of the CRPD that accessibility has been recognised, for the first time, as a separate right in a United Nations human rights treaty.[465]

As captured in the first paragraph of article 9, the purpose of the article is to "enable persons with disabilities to live independently and participate fully in all aspects of life". In other words, the article acknowledges that empowering persons with disabilities in their environment is part of the right to accessibility allowing persons with disabilities to live independently and fully participate in social, economic and political spheres of life.[466] For example, if voting booths and ballot papers are inaccessible, this will impede the rights of persons with disabilities to vote and participate fully in political life.[467]

3.2 The Committee on Article 9 – *Nyusti & Takacs v Hungary* Communication

The Committee's views on article 9 came as a result of communication brought by Nyusti and Takacs (authors) from Hungary who felt Hungary as a state party to the CRPD had violated their right as provided for by article 9 of the CRPD.

[465] J Lord 'Accessibility and Human Rights Fusion in the CRPD: Assessing the scope and Content of the Accessibility Principle and Duty under the CRPD' delivered at the General Day of Discussion on Accessibility, Committee on the Rights of Persons with Disabilities, Geneva (7 October 2010). http://bayefsky.com/getfile.php/id/486191370/misc/days (accessed on the 10th of July 2014.

[466] Anna Lawson 'Accessibility Obligations in the UN Convention on the Rights of Persons with Disabilities: Nyusti and Takacs v Hungary', South African Journal on Human Rights, 30.2 (2014) 380.

[467] As above.

In summary what transpired in *Nyusti & Takacs v Hungary*[468] *'s* case was that *Nyusti and Takacs* were both visually impaired and had entered into contracts with OTP Bank in Hungary. Flowing from these contracts, they could use the bank's ATMs. However, none of them was able to use the bank's ATMs as no ATM had brailed keyboards or audible instructions and voice assistance for banking card operations.[469]

Having sought assistance from the bank to locate accessible ATMs as well as requesting the bank to remodel the ATMs by installing accessible features for virtually-impaired persons to no avail, Nyusti and Takacs decided to bring a civil action against OTP bank and argued that the bank violated their right to equal treatment as provided for in their country's domestic laws.[470]

The court of first instance held that OTP bank had violated Nyusti's and Takacs's rights to dignity and equal treatment. These violations were in contravention with domestic law and, specifically, the Equal Treatment Act. OTP was ordered by the court to retrofit at least a minimum number of ATMs across the country and within the area where Nyusti and Takacs were residing and the authors were awarded damages of 200 000 Hungarian Forints.

The matter went on appeal and Nyusti and Takacs argued that OTP bank should have been required to retrofit all and not just some of its ATMs as such retrofitting would amount to only 0.12 per cent of OTP bank's 2006 net annual income, hence not a disproportionate burden on the bank.

[468] (Communication No. 1/2010, CRPD/C/9/D/1/2010)
[469] Communication No. 1(n 10 above) para 2.1.
[470] Communication No.1 (n 10 above) para 2.2 & 2.4.

The court of appeal found that indeed Nyusti and Takacs were discriminated against, but that such discrimination was indirect discrimination rather than direct discrimination as held by the court of first instance. The appeal court found that OTP bank was not required to retrofit any of the ATMS or pay damages because it was exempted from the obligation to provide for equal treatment.[471]

Furthermore, the court rejected Nyusti's and Takacs's argument of OTP retrofitting all their ATMs to make them accessible, stating that this was not supported by the constitutional principle of freedom of movement.[472]

On 14 April 2008, the authors submitted a request for an extraordinary judicial review to the Supreme Court, in which they asked the Court to alter the decision of the Metropolitan Court of Appeal.[473] On 4 February 2009 the Supreme Court rejected both the request for judicial review by Nyusti and Takacs and sided with the court of appeal's reasoning and added that the parties concluded a contract for private current account services, the content of which may be freely established by the parties in that Nyusti and Takacs took note of the contractual terms, including the facility of limited use, and by signing the contract, they agreed to their disadvantaged situation through implied conduct.[474]

Nyusti and Takacs proceeded to submit a communication to the Committee on the Rights of Persons with Disabilities after exhausting their domestic remedies. They argued that Hungary does not entirely fulfil its obligations by mere enactment of

[471] Communication No.1 (n 10 above)para 2.13.
[472] As above.
[473] Communication No.1 (n 10 above) para 2.14.
[474] Communication No 1 (n 10above) para 2.16

CRPD norms. It is up to the relevant authorities, including the courts who act on behalf of the state, to apply and interpret these norms in such a manner so as to ensure efficient accessibility as provided for in terms of Article 9 of the CRPD. They further argued that the Metropolitan Court of Appeal and the Supreme Court interpreted the laws contrary to the Convention, therefore the protection afforded by the state could not be considered sufficient or efficient.[475] In light of this, the authors concluded that they were victims of a violation by the state party of their rights under article 5, paragraphs 2 and 3; article 9 and article 12, paragraph 5, of the Convention, and were therefore entitled to just compensation.

3.3 The Committee's observations and recommendations on the implementation of Article 9

The Committee acknowledged that Hungary already identified that, in order to solve the problem outlined by Nyusti and Takacs, there was a great need for measures to be put in place to safe-guard the gradual achievability of accessibility norms as provided for by article 9 due to the costs involved in implementing accessibility norms and standards.[476]

In its concluding remarks, the Committee found that Hungary had failed to comply with article 9 state obligations because none of the measures taken by Hungary to enhance accessibility of ATMs ensured the accessibility of the banking card services provided by the ATMs.[477] In its recommendation to Hungary the Committee stated the following:

[475] Communication No 1 (n 10 above) para 3.1.
[476] Communication No 1 (n 10 above) para 9.5.
[477] Communication No 1 (n 10 above) para 9.6.

"The State party is under an obligation to take measures to prevent similar violations in the future, including by:

(a) Establishing minimum standards for the accessibility of banking services provided by private financial institutions for persons with visual and other types of impairments.

(b) The Committee recommends that the State party create a legislative framework with concrete, enforceable and time-bound benchmarks for monitoring and assessing the gradual modification and adjustment by private financial institutions of previously inaccessible banking services provided by them into accessible ones. The State party should also ensure that all newly procured ATMs and other banking services are fully accessible for persons with disabilities;

(c) Providing for appropriate and regular training on the scope of the Convention and its Optional Protocol to judges and other judicial officials in order for them to adjudicate cases in a disability-sensitive manner;

(d) Ensuring that its legislation and the manner in which it is applied by domestic courts is consistent with the State party's obligations to ensure that legislation does not have the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of any right for persons with disabilities on an equal basis with others."[478]

3.4 Committee on the Rights of Persons with Disabilities, General Comment No 2 (2014)

[478] Communication No 1 (n 10 above) para 10.

The Committee on CRPD adopted General Comment No. 2 on Article 9: Accessibility in April 2014. The Committee emphasised the importance of accessibility as a requirement for equal participation in society and provided a more detailed explanation of states parties' obligations to respect, protect and fulfil this right. In its discussion on "accessibility," the Committee included "access to the physical environment, to transportation, to information and communication, including information and communications technologies and systems, and to other facilities and services open or provided to the public".[479] The Committee identified a lack of adequate monitoring, a lack of stakeholder training, and insufficient involvement of persons with disabilities as common challenges to states parties' implementation of Article 9 domestically.[480] As will be highlighted herein, the challenges and inadequacies faced by Hungary as stated by the Committee are also experienced by South Africa.

The Committee further clarified that accessibility standards apply to both public and private entities, stating that "as long as goods, products and services are open or provided to the public, they must be accessible to all, regardless of whether they are owned and/or provided by a public authority or a private enterprise".[481] In this regard, "State parties are also required to take measures to ensure that private entities that offer facilities and services that are open or provided to the public take into account all aspects of accessibility for persons with disabilities …", and they should include such stakeholders in training, and address discrimination by such actors in national legislation.[482]

[479] General Comment No. 2 (n 5 above) para 1.
[480] General Comment No. 2 (n 5 above) para 2.
[481] General Comment No. 2 (n 5 above) para 13.
[482] General Comment No. 2 (n 5 above) paras. 18, 19, 31.

The Committee also advocated for the use of "universal design", which makes society equally accessible to all persons. State parties must ensure that all products, facilities, and services meet consistent accessibility standards.[483] The Committee did, however, distinguish between the obligation to ensure that all new facilities, goods, and services are accessible and the obligation to ensure that existing infrastructure and services are accessible. With the respect to the former, state parties have an obligation to guarantee immediate accessibility, but with respect to the latter, states may implement accessibility standards gradually, taking into consideration financial constrains state parties may encounter in setting up infrastructure.[484] The Committee's decision was based on the later, that is, the Hungarian government did not take adequate steps to progressively realise Nyusti's and Takacs's right to accessibility.

4 An Inclusive Environment

Most crucial to the understanding of accessibility is the concept of "inclusive environment". An inclusive environment refers to a built environment that takes into consideration the potential ability and needs of all users.[485] Therefore, an inclusive environment is an expansive state which will go beyond physical and structural features of the building to include accessible services, management and an understanding of lifestyles.

For South Africa to fully realize the accessibility and transportation standards set by the CRPD, an inclusive environment is an important component to that realization.

[483] General Comment No. 2 (n 5 above) para. 15.
[484] General Comment No. 2 (n 5 above) para. 24.
[485] C Karusseit & AGibberd 'Towards inclusion: a critical appraisal of legislation and the South African Standard, Part S: review article' (2009) 16 *ActaStructilia* 4.

5 Implementation of Accessibility Norms and Standards in South Africa

5.1 The Constitution, 1996

The Constitution of the Republic of South Africa, 1996 is the supreme law of South Africa hence the provisions and obligations imposed by it must be fulfilled and upheld by all organs of the state: it binds the legislature, the executive and the judiciary. The Constitution applies to natural and juristic persons alike, and dictates how the law should be applied and enforced. The Constitution mandates the state to "respect, protect, promote and fulfil the rights of all persons in the Bill of Rights" and this includes the rights of persons with disabilities.

The Constitution also provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality.[486] By implication this means the advancement, by legal and other measures, such as legislation, policies and programmes focused on accessibility and transportation systems and networks, that will benefit persons with disabilities.

Section 9(3) of the Constitution[487] specifically provides for the protection against discrimination on the ground of disability. The right not to be discriminated binds not only the state, but also the private sector, and requires them to provide an accessible and inclusive environment that will not exclude persons with disabilities.

Section 10 of the Constitution also provides that everyone has an inherent dignity and the right to have their dignity respected and protected. This means that providing an inclusive environment

[486] S. 9 of the Constitution.
[487] Act 108 of 1996.

is part and parcel of ensuring that the right to dignity of persons with disabilities is respected and protected.

Section 24 of the Constitution provides that everyone has the right to an environment that is not harmful to their health or well-being. Not having an inclusive environment is indeed detrimental to the health and/or well-being of persons with disabilities.

The approach taken by the Committee in the *Nyusti and Takacs* case is in line with South Africa's Constitution which provides for the doctrine of progressive realisation[488] in the realisation of socioeconomic rights such as the right to accessibility.[489]

In *Government of the Republic of South Africa and Others v Grootboom and Others*,[490] the Constitutional Court held that socioeconomic rights are justifiable in South Africa.[491] The Court, however, acknowledged the challenge around enforcing socioeconomic rights and it raised the necessity to carefully explore the socioeconomic right in question (right to housing) on a case-by-case basis, taking into consideration the terms and context of the appropriate constitutional provision and its application to the socioeconomic right in question.

[488] Art 4 (2) of the CRPD which states; With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.
[489] *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).
[490] As above
[491] *In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

The Constitutional Court held that, in interpreting socioeconomic rights, a consideration of two types of context was required;

i) The right had to be understood in their textual setting, which required a consideration of Chapter 2 of the Constitution.
ii) The right had to be understood in its social and historical context.

The right to accessibility as a socio-economic right in South Africa can thus not be seen in isolation; it has to be interpreted in the light of its close relationship with other socio-economic rights, and applying the Constitution and, more specifically, chapter 2 thereof as a whole.

South Africa as a state party to the CRPD has to take positive and progressive actions in the realisation of article 9. These actions include:

i) Review their legal framework and implement appropriate accessibility legislation in consultation with persons with disabilities and other relevant stakeholders.
ii) States must also establish minimum standards for services provided by both public and private enterprises.
iii) Additionally, bodies that have the authority to ensure that plans and strategies are implemented and enforced should continually monitor compliance with accessibility standards.
iv) Provide for appropriate and regular training on the scope of the Convention and its Optional Protocol to the judges and other judicial officials in order for

them to adjudicate cases in a disability-sensitive manner.

v) Ensuring that the country's legislation and the manner in which it is applied by domestic courts is consistent with the state party's obligations to ensure that legislation does not have the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of any right for persons with disabilities on an equal basis with others.[492]

5.2 Legislation

In South Africa, the legislative arm of the government has a very important role to play in the ratification of international instruments. It was through this branch of government that the CRPD was ratified in 2007, highlighting the significant role Parliament played in ensuring that CRPD norms and principles are adopted by South Africa as ratification was the very first step of showing commitment to implement CRPD in the country.

Since its adoption, CRPD norms and principles have to some extent found their way into South Africa legislation. Nevertheless, as will be noted in the analysis below, there is still great challenges facing the adoption of the right to accessibility in the country's legislative framework, as well as reducing the gap between the legislative provisions and implementation.

It is essential to examine the different legislative measures that have been enacted in South Africa in the area of accessibility and transportation and determine whether these measures are consistent with the Convention in terms of protecting, promoting and providing for the rights of persons with disabilities in South

[492] Communication No. 1 (n 10 above) para 10.2.

Africa and ensuring the effective adoption of minimum standards for accessibility in the inclusive environment.[493]

A. Legislation governing access to buildings

Accessible buildings play a significant role in fulfilling the purpose of article 9, that is, accessible buildings ensures independent access to buildings for persons with disabilities and through that independence removes the limitation on participation and access to other important human rights. For example, inaccessible court buildings will affect the rights of persons with disabilities, such as the right to a fair trial, inaccessible buildings will affect their right to school and equality in education, hospital and health.[494]

a) National Building Regulations and Building Standard Act

Buildings and access to buildings are significant areas and have a major role to play in ensuring persons with disabilities have inclusive and barrier-free access to buildings and related/supporting infrastructure.

In South Africa, the piece of legislation responsible for governing buildings and accessibility thereof is the National Building Regulations and Building Standard Act.[495]

Gaps/Short Comings/Limitations of the Act

i) The Act is very outdated[496] and has not been revised when South Africa entered a new constitutional dispensation and also when the country became a

[493] States are required as soon as they have ratified a convention to make the necessary changes to their domestic laws to ensure its conformity with the CRPD. Human Rights Committee, general comment No.31, para. 13.
[494] General comment No. 2 (n 5 above) para 37.
[495] 103 of 1977.
[496] It was last amended in 1989.

signatory to the CRPD so as to bring the Act in line with the provisions of not only the accessibility provisions under CRPD as alluded above, but also in line with the country's Constitution.

ii) Section 14 of Act 103 of 1977 provides for issuing of Certificates of Occupancy in Respect of Buildings. In the interest of ensuring that buildings are accessible to persons with disabilities, a condition should be added to this provision to the effect that no certificate of occupancy will be issued by the relevant local authority if the building in question does not comply with and meet the standards required to make the building accessible to persons with disabilities. For example, the placement of ramps, relevant signage and markings at the parking lots, and accessible toilet facilities.

iii) The Act should have provided for both new and existing buildings a time frame and the nature of interventions required for progressive conformity to meet accessibility standards and norms.

iv) The Act should have provided for the post-occupancy evaluation of buildings to ensure that the accessible standards of buildings are maintained to meet the needs of persons with disabilities.

v) The Act provided a limited definition of disability and this contributed to the Act's failure to sufficiently address and meet the specific requirements of various disabled user groups.

vi) Enforcement of the national building regulation is controlled at micro-level by the local building council and their inspectors. However, these inspectors often lack the skills to make sound judgements creating a gap for property developers and building professionals to evade or ignore accessibility requirements, because the non-statutory guidelines of the South Africa National Standards (SANS) are not legally enforceable.[497] This lack of enforcement is evident throughout the country, with the result that the majority of public buildings in South Africa are inaccessible.

vii) There should have been cross-referencing between SANS and other sections of the Act,[498] so as to cover anomalies, inconsistencies and misconceptions in the application of regulations.

viii) The Act should have made reference to the Constitutional rights to equality and dignity and required accessibility for building users with disabilities and special needs.

ix) There should have been adequate measures for safety, health and accessibility provided for by the Act in the built environment to cater and accommodate persons with disabilities.

x) The Act has provided inadequate administrative enforcement mechanisms for the approval of public building plans and this has resulted in the majority of

[497] Karusseit & Gibberd (n 25 above) 77.
[498] Act 103 of 1977.

public buildings being in contravention of regulations. There is a need to have bodies set up and entrusted with powers to impose penalties for non-compliance with accessibility requirements as provided for in the regulations and supporting guidelines, providing documents such as Part S.[499]

b) ***South Africa National Standards (SANS) - PART S - Facilities for Persons with Disabilities***

South Africa National Standards (SANS) - Part S is a non-statutory set of guidelines giving technical information for the practical application of the National Building Regulations and Building Standard Act (the Act).[500] The Act governs the accessibility of the built and accessible environment and in its governance it has primarily relied on the application of one aspect of the Regulations, Part S, which was first introduced in South Africa in 1985 to address the needs of persons with disabilities. The guidelines provided by Part S assists the construction industry on the different structural building requirements to be met in ensuring that the buildings and supporting facilities are accessible to persons with disabilities.

The latest version of Part S was published in April 2011 and is a more comprehensive document in comparison to the previous versions.

[499] According to the Disability Right Policy of the Gauteng Provincial Government, an audit conducted by the GPG in 2006 found that many government-leased and owned buildings, including police stations and clinics, do not meet the minimum SABS standards for use by people with disabilities.

[500] Act 103 of 1977.

Gaps/Shortcomings/Limitations of the Part S

i) Part S has failed to provide for structural features to be put in place on constructed buildings or existing buildings which do not have public safety measures and fire protection for persons with disabilities.[501]

ii) Part S provides insufficient definitions of the specific requirements for particular disabled user groups. Part S provisions are primarily for disabled users in wheelchairs and those with other forms of disabilities have been ignored and this has led to generalisation.

iii) Part S has failed to provide for car parking for disabled persons as a requirement for areas with less than 50 parking spaces as it provides and directs provision for parking for persons with disabilities only if there are more than 50 parking spaces.[502]

iv) In spite of Part S going a step further in terms of requiring auditoriums to accommodate persons in wheelchairs and other assistive devices, it did not provide guidance in as far as the auditorium accommodation ensuring that the persons with disabilities accommodated should be in a position to participate (see and hear what is taking place).[503]

v) Part S guidelines should not have taken a narrow approach and only focus on buildings, the guidelines

[501] For instance Part S should have instructed for emergency buildings escape routes accommodation of wheelchair users; deaf people require visual emergency signals, while blind people need audible ones. Alarm activators, mobile fire extinguishers and escape route bolts must be accessible to wheelchair users

[502] Part S page 10.

[503] Part S page 23.

should have been expansive enough to cover schools, hospitals and other public domain buildings, transport and big shopping complexes as opposed to solemnly focusing on hotels and office buildings.

vi) Part S has not addressed the structural accessibility of sporting facilities in South Africa. There is minimal access, particularly for persons with disabilities from previously disadvantaged groups, to a variety of sporting activities and facilities which cater for their needs. This has been as a result of structural barriers of most of the sporting event arenas and stadiums.

B. Legislation governing access to housing

The right to accessible housing is an important human right acknowledged by various international human rights instruments and treaties.[504] The Constitution provides that everyone shall have the right to access adequate housing.[505] Access to adequate housing means that the state should commit to creating a conducive environment for all citizens, those with and without disabilities. In *Government of the Republic of South Africa v Grootboom* the Constitutional Court interpreted the right to have access to adequate housing as follows:

> Housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all these, including the building of the house itself. For a person to have access to adequate housing all of these

[504] Universal Declaration of Human Rights, 1948, Art 25; European Convention on Human Rights and Fundamental Freedoms, 1950, Art 8(1);International Covenant on Economic, Social and Cultural Rights, 1966, Art 11;International Convention on the Elimination of All Forms of Discrimination against Women , 1979, Art 14(2)(h) and International Convention on the Rights of the Child 1989, Art 27(3).
[505] S 26(1) of the Constitution.

> conditions need to be met: there must be land, there must be services, and there must be a dwelling. The right of access to adequate housing also suggests that it is not only the State that is responsible for the provision of houses, but that other agents within society, including individuals themselves, must be enabled by legislative and other measures to provide housing.[506]

While progress has been made in ensuring access to physical buildings as addressed by the National Building Regulations and Building Standard Act,[507] houses often are not accessible to persons with disabilities, and new residential areas are often not designed in ways which can be accessible for persons with disabilities.

The Constitution Court in *Grootboom* stated that reasonableness should be used a measurement of policy and legislative steps taken by the state to ensure the right of access to adequate housing. The same reasonable test used in *Grootboom* will be used in the analysis of the legislative steps taken by South Africa to ensure accessible housing for persons with disabilities in view of its CRPD obligations to do so.

a) **Housing Amendment Act 4 of 2001**

> While progress has been made in ensuring access to physical buildings as addressed by the National Building Regulations and Building Standard Act,[508] houses often

[506] (CCT11/00) [2000] ZACC 19, para 41.
[507] Some government-owned and leased buildings have been renovated to be accessible to persons with disabilities. The Gauteng Provincial Government succeeded in ensuring that many of its buildings, key tourism sites like Maropeng, and community institutions are physically accessible to persons with disabilities.
[508] Some government-owned and leased buildings have been renovated to be accessible to persons with disabilities. The Gauteng Provincial Government succeeded in ensuring that many of its buildings, key tourism sites like

are not accessible to persons with disabilities, and new residential areas often are not designed in ways which can be accessible for persons with disabilities.

The Housing Amendment Act 4 of 2001 is a significant piece of legislation that provides guidance to the National Department for Housing (NDH) on fulfilling its statutory and constitutional obligations. The Act has three key objectives – it:

i) Prescribes fundamental principles binding all spheres of government in respect of housing development;
ii) Provide the framework within which the housing delivery process must operate; and
iii) Provide for the facilitation of a sustainable housing development process.

Gaps/Short-comings/Limitation of the Act

The Act fails to ensure equal access to housing and connected amenities for persons with disabilities as follows:

i) The Act does not provide for development and promotion of housing policies to provide for accommodation and measures required to accommodate persons with disabilities.
ii) Furthermore, special provisions and reasonable measures should have been taken by the Act to provide for preferential treatment of persons with disabilities in the formalisation of informal settlements.

Maropeng, and community institutions are physically accessible to persons with disabilities.

C. Legislation covering access to a safe working environment

The importance of access to a safe working environment for persons with disabilities cannot be over emphasised.

Occupational Health and Safety Act (Act 85 of 1993)

In South Africa Occupational Health and Safety Act[509] is aimed at providing for the health and safety of persons at work and for the health and safety of persons in connection with the activities of persons at work. The main objective of the Act is to ensure that the employer provides a working environment that is safe to all employees and the needs of employees with disabilities are included. For example, evacuation procedures should take into account the needs and requirements of an employee with a disability and guarantee his or her safe evacuation from the work place/sire in case of an emergency.[510]

Gaps/Shortcomings/Limitations of the Act

i) There is insufficient protection of persons with disabilities by the Act, considering the extensive application of the Act, which includes, amongst others, all employers and employees with and without disabilities in the workplace, ensuring a working environment that is safe and that which does not expose employees to health risks and hazards and in that provides an environment that is safe for persons with disabilities, one would

[509] 85 of 1993.
[510] As above section 9.

expect the Act to provide strong penalties for employers who fail to provide a safe environment and in that exposing persons with disabilities to the risk of injuries.

ii) In cases where able and disabled persons were injured at work for failure or lack of an inclusive environment, the compensation given in terms of the Act has proven to be inadequate and in many cases inequitable, particularly for those employees who have suffered injuries which have resulted in permanent disabilities that reduced their earning capacity.[511]

iii) The Act should have ensured that injured employees are entitled to rehabilitation or re-skilling programmes should they suffer injuries warranting rehabilitation or re-skilling initiatives by the employer of injured employees who have been disabled as a result of the injuries sustained at work. In most instances, because of poor or lack of an inclusive environment in many work places, persons with disabilities have suffered injuries but because there has not been a legislative provision entailing the injured employee to a rehabilitation program by the responsible employer, this has resulted in the affected employee failing to return to work or if they do return to work, they fail to meet the

[511] http://www.ihrg.org.za/oid%5Cdownloads%5C4%5C10_8_6_47_31_AM_Section%2008%20%20Compensation%20(Final).pdf page 8-33. (accessed on the 11th of July 2015).

minimum requirement of the position they were serving before they were injured.[512]

D. Legislation Covering Accessibility and Equality

Failing to ensure the right to accessibility on equal basis can be considered a discriminatory act, regardless of whether the perpetrator is a public or private entity.

i) Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

The Act is aimed at preventing and prohibiting unfair discrimination against both persons with and without disabilities in South Africa. Deducing from the wording of article 9(1) of the CRPD, "on an equal basis", this should mean that failing to ensure the right to accessibility on equal basis may be considered a discriminatory act, regardless of whether the perpetrator is a public or private entity.

The duty of the South Africa as a state party to the CRPD is ensure access to the physical environment, transportation, information and communication, and services open to the public for persons with disabilities should be seen from the perspective of equality and non-discrimination.[513] This will mean denial of access to the physical environment, transportation, information and communication, and services open to the public for persons with disabilities should constitute an act of disability-based discrimination prohibited by article 5 of the CRPD.

[512] As above page 8-34.
[513] General Comment No. 2 (n 5 above) 10.

Gaps/Shortcomings/Limitations of the Act

Very close to the heart of ensuring the provision of an inclusive environment and an accessible system is the functional justice system and how it calls to book those who have been found contravening the Constitution and the equality principles as provided for by the Act,[514] and further failing to provide, protect and promote accessible and an inclusive environment.

In its efforts to ensure that there is a functional justice system, South Africa created Equality Courts. These are special courts designed to protect and interpret the constitutional rights of members of South Africa communities. Equality Courts have been established through the Protection of Equality and Prevention of Unfair Discrimination Act.[515] These courts are primarily set up to address the issues that dominated the court system for many years in South Africa. These are high costs, the intimidating nature of the courts and lengthy litigation that made courts inaccessible.

To date, more than ten years since the first sitting of the first equality court in 2003, the equality courts are not widely known.[516] This can be attributed to the government's failure to publish regulations governing the Equality Courts and the promotion thereof as required by the Act.[517]

[514] No 4 of 2000.
[515]Section 16 of the Act 4 of 2000.
[516] W Holness & S Rule 'Barries to Advocacy and Litigation in the Equality Courts for Persons with Disabilities' (2014) (17) 5 *Potchefstroom Electronic Law Journal* 1927.
[517] No 4 of 2000.

Even though the Act nominates Magistrate Courts as Equality courts, this has not been the case as provided for by the Act,[518] and this failure has gone against the rationale behind having Equality Courts operating in Magistrate Courts so as to ensure ease of accessibility and establishment. Not having a functional justice system makes it difficult to ensure that the equality principles are adequately interpreted and upheld in the country's effort to protect and provide an inclusive environment for persons with disabilities.

E. Legislation Covering Access to Land Transportation

Land transportation sector is an important area in providing for an accessible environment for both "non-disabled" persons and persons with disabilities. An accessible land transportation system provides access to places of employment, health centres (hospitals), education (schools) and other social activities. It contributes to and plays a significant role in the development and growth of society. Therefore, in South Africa there is a great need to strive to achieve an effective and accessible land transportation system and network that will protect, promote and meet the needs of persons with disabilities and, in doing so, open doors and create opportunities for persons with disabilities to better themselves in living an empowered life.

To achieve an accessible land transportation network will require progressive laws and regulations set in place to ensure that the governance of land transportation in

[518] As above and GN R859 in GG 32516 of 28 August 2009.

South Africa meets the standards of accessibility set by the CRPD.

The involvement of persons with disabilities is an important component if South Africa is to bring about an inclusive land transportation system. Persons with disabilities will provide practical insight into the specifics needed to provide a system that will meet and fulfil their needs. An engagement and involvement of this nature can be achieved by the formulation of intentional strategies to address the needs of disabled passengers and other disabled land transport users such as disable drivers and pedestrians.[519] These strategies will provide the country and the law-makers with a concise and precise approach aimed at exploring various options available for addressing the needs of disabled users of the transportation systems in South Africa. To date, South Africa has not yet fully ensured that public land transport is accessible to persons with disabilities.

i) National Land Transport Transitional Act 5 of 2009

In South Africa the piece of legislation responsible for land transportation is the National Land Transport Act 5 of 2009. The Act was enacted to provide for the restructuring and transformation of the national land transport system of South Africa.

Gaps/Shortcomings/Limitations

[519] The strategies will include amongst others; accessible public buses and trains, access to roads/streets/railways, shelters and bus stops and stations. Also marketing and sharing of information and raising awareness amongst the communities around creating an accessible environment for person with disabilities.

i) The Act fails to address disabled learner's transportation needs. Most scholars with disabilities find it difficult to access transportation to and from their schools because of the inaccessible transportation infrastructure.[520]

ii) Public transportation in South Africa is relatively expensive compared to international benchmarks: services cost users 32% more than world averages, primarily because of the distance public transportation users travel as well as other factors such as the high running costs of the means of transportation.[521] Therefore, it goes without saying that there is a great need for the government through its legislation and legislatives bodies, to review the high cost of transportation because one way of meeting accessibility needs is by offering affordable transport services.

iii) The needs of persons with disabilities are not fully integrated in the design and construction of new roads and in the upgrade of existing road and railway infrastructures.[522] This is as a result of the Act failing to adopt and provide guidelines on the ways in which our roads, railways, pathways, stations and other supporting road railway features should be constructed so as to comply with international

[520] 1004 National Road Traffic Act (93/1996): Draft National Learner Transport Policy (published on the 13th of November 2014) page 9.
[521] Hans Wittmann 'Total Costs of Logistics In South Africa Need To Be Reduced' (2010) 9 *Sciencescope* 5.
[522] As above.

roads and railway norms and standards to accommodate persons with disabilities.

iv) The Act fails to provide for stronger laws and the enforcement of such laws, coupled with programmes focused on road safety targeted at minimising and reducing accidents (and so preventing new disabilities through road safety measures).[523]

v) Provisions should have been made for the provision of subsidies for public and private transportation for persons with disabilities. As it has been established persons with disabilities are amongst the poorest and most marginalised members of our communities, therefore having government subsidising their cost of travel will reduce their ordinary costs of living.[524]

F. Access to information and information systems

Access to information is a human right provided for under section 32 of the Constitution of South Africa. When granted and made available, access to information makes for more efficient and effective workers, and more responsive and responsible citizens. So, rather than considering access to information as the platform for the education of young South Africans, there is a need to rethink access to information as an empowering right, as a special and unique right for everybody. Access to information

[523] Draft policy (n 64 above) 9.
[524] Example persons on wheel chairs have been found to pay double the taxi fare for transportation to cover themselves and the wheelchair or any other assistive divice. L Wegner & A Rhoda 'The influence of cultural beliefs on the utilisation of rehabilitation services in a rural South African context: Therapists' perspective' (2015) (4) 1 *African Journal of Disability* 6.

should systematically be integrated into the economy and society as the preserver and transmitter of knowledge and information.

For the majority of persons with disabilities in South Africa a lack of information is the main impediment to their development. This state of affairs is due not only to a scarcity of adapted material resources, but also to a lack of appreciation of the developmental role which access to information plays. This is why, despite attempts by government since the transition to democracy in 1994, the literacy level and access of adapted reading materials suitable for persons with disabilities still leave much to be desired by international standards as set by the CRPD.[525] What is clear is that if the South African government does not create the right conditions for the development of this sector, no amount of support from its social and private partners will help us succeed in this endeavour.

Section 32(2) of the Constitution, namely, that "[n]ational legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden of the state", offers a perspective on how the right of access to information should be approached in South Africa. The analysis below will look at whether legislation enacted to give effect to the right to access to information has succeeded and how we still have to go to ensure the full enjoyment of this right by persons with disabilities.

a) Library as a primary source of information

In 2010, South Africa had 7 384 publicly-funded libraries, made up of:

- 366 public libraries within the six metropolitan areas;

[525] For example, only 10% of South Africans are users of the Internet, compared with over 70% of the citizens of the knowledge societies of Northern Europe.

- 1 386 public libraries affiliated to the nine provincial library services;
- 210 Higher Education libraries;
- 5 310 school libraries;
- 112 special and government departmental libraries; and
- 2 national libraries (one being the South African Library for the Blind) (South African Yearbook 2011/2012, 2012).

By June 2013, community library conditional grants had funded 414 new public libraries and the upgrading of 244 libraries (Department of Arts and Culture, 2013). However, it seems that six provinces have seen the grants as an opportunity to reduce their library funding which, as the report by Cornerstone Economic Research warns, undermines national government's national policy objective to revitalise the country's libraries (Department of Arts and Culture, 2013b: 67).[526]

Given South Africa's developmental imperatives and the particular socio-economic challenges faced by persons with disabilities, the low number of school libraries and public libraries is of concern.

South African libraries are under the governance of the Constitution and legislation, ensuring that the right of access to information through libraries is delivered.

i) **National Library of South Africa Act, No 2 of 1998**

The Act is aimed at collecting, recording, preserving, and giving access to the national documentary heritage and the world's information resource centre. The amalgamation of the South African Library in Cape Town and the State Library in Pretoria

[526] The Library and Information Services (LIS) Transformation Charter page 25.

to form the National Library of South Africa supports what was marked as one of the biggest achievements of the Act and a step in the right direction in consolidating efforts to ensure broad access to information through the National Library.[527]

Gaps/Shortcomings/Limitations

i) Prior to the relevant constitutional provisions, the legislative responsibility of looking after National Libraries was shared between provinces and local authorities with local authorities providing and maintaining buildings and staff, and provinces providing professional and technical service. Difficulties arise from Part A of Schedule 5 of the South African Constitution[528] and the absence of provincial legislation that stipulates that the municipalities must render a library service. Internationally public libraries are legislated as a municipal function. This *lacuna* in the legislation has contributed immensely to the deterioration of service and infrastructure of national libraries. We hope that future public library legislation will correct this anomaly and establish certainty on the matter.

ii) A legislative monitoring and evaluation framework of public libraries is lacking and this framework would have been significant in ensuring that there are set norms and standards in favour of accessible libraries for persons with disabilities and measures taken to ensure that these norms and standards are followed through.

iii) The Act should have provided funding guidelines for the National and should libraries to ensure that these

[527] 1st November 1999.
[528] Act 108 of 1996.

institutions are provided with the means to provide access to information for persons with disabilities. A lack of funds has been one of the biggest excuses as to why the information available in libraries is not accessible to persons with disabilities. Examples are materials in braille.

iv) As a national legislative document aimed at ensuring information and knowledge is accessible across the country, the Act has failed to ensure an equitable distribution of libraries across the country as most of the national libraries are out of reach of the poor, as former townships, informal settlements and rural areas are under-served.[529] There is currently only two National Libraries in South Africa, one in Pretoria and one in Cape Town.

v) National libraries as well as school libraries are still inaccessible. They are still in old buildings whose infrastructure has not been adapted to comply with the accessibility standards set by the CRPD. Most of the information in most libraries is not in an accessible format, for example for visually-impaired and leaning disabled users.

vi) Emphasis should have been put in the Act of the use and incorporation of Information and Communication Technology (ICT) in the transformation of libraries to be in line with international standards, especially in transforming library facilities into an accessible environment for all.

[529] Today there are 1800 public libraries: 24 libraries per million people – 25000 people per library.

ii) South African Library for the Blind Act 91 of 1998

The focus of this Act is on blind and print-handicapped readers and on improving access to library and information services by South African people with disabilities.

Gaps/Shortcomings/Limitations

i) One could argue one significant shortcoming of the Act is its failure to create provision for the Library for the Blind synergy and collaboration with other public libraries and school libraries as an effort to ensure tailored services and support for visually-impaired members of public libraries.

ii) The Act has failed to create partnerships with the persons with visual impairments and so doing the Act has gone against the motto of persons with disabilities: 'Nothing about us without us'.

iii) Lack of strong monitoring and enforcement mechanisms has led to incomplete developments. For example, the conversion from the existing analogue system of the South Africa Library of the Blind to digital is incomplete and only partially funded. The digitisation process is essential if the library is to continue to exchange books with other major libraries for the blind in the world.

6 Conclusion and Recommendations

The preceding discussion shows up the need for laws governing accessibility and transportation in South Africa to be comprehensively reviewed and moved towards universal access regulations, accommodating persons with disabilities and those without.

In light of the above analysis and legislative gaps highlighted, the following recommendations for the effective implementation of article 9 are made:

- There is a need for consultation with persons with disabilities and disability rights civil societies ensuring organisations representing and working with persons with disabilities are thoroughly consulted and engaged in the legislative processes.[530]
- A comparative study in terms of progressive international accessibility and transportation standards, such as those of the United States of America, the United Kingdom and Australia will give valuable assistance in ensuring the transformation sought is achieved.
- The above standards can also be achieved by collaborating with other State parties and international organizations as envisaged by article 32 of the CRPD.
- There is a need to mainstream accessibility standards that prescribe various areas that have to be accessible, such as the physical environment in laws on constructions and planning, transportation networks such as railway, road, public aerial and water transport.
- There is a need to create legislative structures responsible for reviewing country's compliance with accessibility norms and standards.[531] Such structures should find and define non-compliance

[530] Participatory decision-making processes in accordance with article 4, paragraph 3 of the CRPD.
[531] Article 33 of CRPD requires State parties to designate focal points within their governments for matters relating to the implementation of the CRPD, as well as to establish national frameworks to monitor implementation which include one or more independent mechanisms.

as a prohibited act of discrimination.[532] The following scenarios where lack of accessibility has prevented a person with disabilities from accessing a service or facility open to the public should be considered acts of disability-based discrimination:[533]

a) Where the service or facility was established after relevant accessibility standards were introduced;
b) Where access could have been granted to the facility or service (when it came into existence) through reasonable accommodation.

- Persons with disabilities who have been denied access – discriminated against should be provided with accessible and effective legal remedies at their disposal.
- The legislative measures should be supported thoroughly and followed by the training of engineers, architects, judges, teachers, and private and civil servants involved in policy-making to raise awareness and educate members of the public on the values of providing an accessible environment for persons with disabilities as provided for by article 9 of the CRPD. [534] Such training should also be focused on the practical implementation of the CRPD, and should be accessible to, and inclusive of, persons with disabilities and representatives from

[532] General Committee No. 2 (n 5 above) para 29.
[533] General Comment No.2 (n 5 above) para 31.
[534] Art 9, para 2 (c) of the CRPD.

organisations representing the rights of persons with disabilities.[535]

- Measures should be taken to ensure the CRPD is widely disseminated in all eleven (11) national languages in accessible formats to all interested parties, that is, all governmental departments, persons with disabilities and their representative organisations and NGOs.
- As an important part of ensuring the implementation of article 9, South Africa as a CRPD member state should conduct a thorough screening exercise of national legislations as conducted above so as to ensure their full compliance with article 9 of the CRPD.
- A clear timeframe for compliance and conformity with article 9 of the CRPD should be articulated in legislative measures as well as penalties in cases of non-compliance. For example, financial penalties or criminal charges for non-compliance within the allowed timeframe.
- As part of monitoring implementation of the accessibility provision in terms of article 9 in the country, a checklist of all the services open and available to the public must be drawn together with measures needed to ensure the services are accessible to persons with disabilities.[536]
- Persons with disabilities should be involved in product developments and this will provide relevant practical insight in the production and

[535] These measures form part of article 4, para 1 of CRPD…taking "all measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.

[536] Art 9, para 2 (b) of the CRPD.

improve the existing needs and effectiveness of accessibility tests.[537]

- Measures should be put in place by the state to ensure that all newly procured goods and services are fully accessible for persons with disabilities.[538]
- A continuous capacity building of local authorities responsible for monitoring implementation of the accessibility standards is of paramount importance.[539] This can be done by developing an effective monitoring framework and set up efficient monitoring bodies with adequate capacity and appropriate mandates to make sure that plans, strategies and standardization are implemented and enforced.[540]
- The modes and means of teaching should be evaluated to ensure that they are accessible in order to promote equal access to the right to education for persons with disabilities as provided for by article 24 of the CRPD.[541] For example use of sign language, braille, alternative scripts and augmentative and alternative modes.
- The modes and means of providing health care should be accessible through sign language, braille, accessible electronic formats, alternative scripts and augmentative and alternative modes.[542]
- With rich cultural and historical sites, South Africa should strive to provide access to these

[537] General Comment No. 2 (n 5 above) para 19.
[538] General Comment No. 2 (n 5 above) para 30.
[539] General Comment No. 2 (n 5 above) para 35.
[540] As above.
[541] General Comment No. 2 ((n 5 above) para 39.
[542] As above.

sites to persons with disabilities and in doing that recognize the right of persons with disabilities to take part in cultural life on an equal basis with others.[543]

- There is a need for South Africa as a State party to the CRPD to adopt gap analysis such as this as a first step towards identifying barriers to accessibility in the country followed by setting time frames with specific deadlines and provide both the human and material resources necessary to remove existing barriers.

[543] Art 30 para 5 of the CRPD.

5. THE RIGHTS AND WELFARE OF CHILDREN WITH DISABILITIES IN SOUTH AFRICA: AN ANALYSIS OF INCLUSIVE EDUCATION LAWS AND POLICIES

*Zita Hansungule**

1 Introduction

The Convention on the Rights of Persons with Disabilities (CRPD) has brought about a paradigm shift in the manner in which signatory states should view and address the rights of all persons with disabilities, including children.[544] Signatories must ensure that their national legal frameworks recognise that persons with disabilities are people with rights and not objects of charity.[545] The CRPD encourages a rights-based social model of disability that requires disability to be seen as a human rights issue; the re-alignment of legal frameworks to a human rights focus; and that attitudes and barriers that stigmatise and marginalise children with disabilities are changed.[546]

The CRPD, as well as the Constitution of the Republic of South Africa, prohibit discrimination against children with disabilities and promote their inclusion in society and its institutions; promote the consideration of the best interests of the child in

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[544]P Martin, P Proudlock and L Berry 'The rights of children with disabilities to social assistance: A review of South Africa's CDG' in P Proudlock (ed) *South Africa's progress in realising children's rights: A law review (*2014) 85.

[545]See above

[546] P Martin et al (n1 above) 86.

matters concerning them; and promote respect for the views of children.[547]

The discussion below looks at selected pieces of current legislation that have a direct and indirect impact on the promotion, protection and fulfilment of the rights of children with disabilities to inclusive education as set out in the CRPD. The discussion will identify the manner in which such legislation protects children with disabilities as well as gaps, including implementation gaps, which must be dealt with.

The term 'disability' is given several definitions and descriptions; however, for the purposes of this report disability is viewed not as a shortcoming but as the "dynamic and culturally determined interaction between a [child's] individual functioning and the social meaning and response imposed upon that function".[548]Disability is as a result of the way in which society and environments are arranged.[549] A child 'has a disability' because of environmental barriers, prejudices and exclusions from society that limit their opportunities and prevent them from fully participating in the life of their community and society.[550]

2 Article 24: Right to Education

Article 24 of the CRPD places the obligation on states parties to recognise the right of persons with disabilities to education and to ensure an inclusive education system. This should be done to encourage the following in children with disabilities:

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[547]S Philpott 'Realising the right of children with disabilities to early childhood development in South Africa' Phd thesis, University of the Western Cape, 2013 226 to 228.

[548]AE Hesselink-Louw, K Booysens and A Neethling 'Disabled children as invisible and forgotten victims of crime' (2003) *ActaCriminologica* 16(2) 167.

[549] I Grobbelaar-du Plessis and T van Reenen*Aspects of Disability Law in Africa* (2012) xxv.

[550]I Grobbelaar-du Plessis (n6 above) xxv; AE Hesselink-Louw (n5 above) 167.

- The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity.
- The development of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential.
- Their effective participation in a free society.

Section 29 of the Constitution further provides that everyone has the right to a basic education. This right does not contain clauses such as 'progressive realisation' and 'through reasonable measure', this means that realisation of this right is a matter of priority.[551]

The UNESCO Guidelines on Inclusion describe inclusion in the following manner:[552]

> *Inclusion is concerned with providing appropriate responses to the broad spectrum of learning needs in formal and non-formal educational settings. Rather than being a marginal issue on how some learners can be integrated in mainstream education, inclusive education is an approach that looks into how to transform education systems and other learning environments in order to respond to the diversity of learners. It aims towards enabling teachers and learners both to feel comfortable with diversity and to see it as a challenge and enrichment of the learning environment, rather than a problem. Inclusion emphasizes providing opportunities for equal participation of persons with disabilities (physical, social and/or emotional) whenever possible into general*

[551]T Boezaart 'A constitutional perspective on the rights of children with disabilities in an education context' (2012) *Southern Africa Public Law* (12) 456.

[552] UNESCO Guidelines for inclusion: Ensuring Access to Education for All (2005) 15.

education, but leaves open the possibility of personal choice and options for special assistance and facilities for those who need it.

There are two main legal documents that have been developed to ensure inclusive education in South Africa and, in turn, the realisation of the right to basic education for children with disabilities. These are the Schools Act 84 of 1996 and the Education White Paper 6 on Special Needs Education on 2001 (White Paper 6). These two documents lay the foundation for the promotion of inclusive education in South Africa for children with disabilities.[553]

3 Schools Act 84 of 1996

Section 5(1) of the Schools Act provides that public schools must admit learners and meet their educational requirements without any form of unfair discrimination. Section 12 of the Act places an obligation on provincial departments of basic education to ensure that learners are provided with education at ordinary public schools, where practicable, and provide relevant educational support services for the learners.[554] The provincial departments must also ensure that the physical facilities at public schools are accessible to persons with disabilities.[555]

When a decision has to be made about admitting a learner with special education needs, the provincial head of the Department of Basic Education and the principal must take into the account the rights and wishes of the learner's parents as well as the best interests of the learner.[556]

[553]P Martin 'Children's rights to basic education: A review of South Africa's laws and policies' in P Proudlock (ed) *South Africa's progress in realising children's rights: A law review* (2014) 135
[554]Section 12(4) of the Schools Act.
[555]Section 12(5) of the Schools Act
[556]P Martin (n129 above)134.

The Act allows individuals or organisations to establish independent education institutions.[557]Boezaart points out that organisations that provide services, such as education to children with disabilities, are common occurrences and that the state may provide subsidies to these organisations.[558]

3.2 Education White Paper 6 on Special Needs Education

The White Paper 6 outlines the government's strategy to transform the education system to make it more efficient, equitable and just.[559] This is done to ensure that the availability and accessibility of education for all learners, regardless of their learning abilities and special education needs.[560]The White Paper 6 commits to accomplishing the following:

- Making education available to children requiring low levels of support through ordinary public schools which have trained educators and facilities are available to learners with disabilities;
- Making full-service schools available and equipping them to meet the needs of learners requiring moderate support; and
- Making available special schools equipped to meet the education needs of learners needing high levels of support.[561]

White Paper 6 also aims to fully realise inclusive education by 2021 by, amongst other things, accomplishing the following:

- Make available and equip 500 full service schools in the country, with one each of the 50 school districts; and

[557]Section 45 of the Schools Act.
[558]T Boezaart (n127 above) 457 and section 48 of the Schools Act.
[559]Department of Social Development 'Baseline Country Report to the United Nations on the implementation of the Conventions on the Rights of Persons with Disabilities' (2013) 36
[560]P Martin (n129 above) 134.
[561] P Martin (n129 above) 135

- Provide sufficient special schools to accommodate all learners with mild to moderate disabilities.

In addition to full-service schools and special schools, it is vital that ordinary public schools have sufficient infrastructure, transport, qualified teachers and curricula to accommodate the various learning needs (including differentiated teaching methodologies and assessments to ensure appropriate teaching and learning).[562]

Lastly, White Paper 6 commits to a number of support measures for the purpose of enabling and supporting the implementation of an inclusive education system:

- Building capacity in all education departments;
- Establishing district support teams;
- Identifying, designating and establishing full-service schools;
- Establishing multi-disciplinary institution-level support teams;
- Establishing mechanisms for the early identification of learning difficulties;
- Developing the capacity of all educators in curriculum development and assessment;
- Mobilising public support; and
- Developing an appropriate funding strategy.[563]

While acknowledging the importance and progressiveness of White Paper 6, Donohue and Bornman point out that it lacks clarity and is ambiguous on certain issues.[564] They argue that the elimination of this ambiguity will promote better inclusion and participation of children with disabilities.[565]

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[562]P Martin (n129 above) 134.
[563] See above.
[564]D Donohue and J Bornman 'The challenges of realising inclusive education in South Africa' (2014) *South African Journal of Education* 34(2) 6.
[565]D Donohue (n140 above) 7.

They point out that implementation strategies in the White Paper 6 lack specificity and detail.[566]For example, research indicates that education officials are unclear about how ordinary schools and special schools would be transformed and about the parameters of barriers to learning and how they would be addressed.

They also posit that there is no clarity on the means by which White Paper 6 will be implemented. The Department does not seem to have sufficient funding allocated to inclusive education implementation. In addition, White Paper 6 states that new curriculum and assessments initiatives will have to focus on the inclusion of diverse learning needs; however, there is no detailed explanation of how this is to be done. As a result there seems to be a lack of teachers with the knowledge and capacity to practically implement inclusive education in their classroom settings without considerably adding to their workload. Training does not sufficiently re-orientate teachers on inclusive methods of teaching.

Boezaart notes that the National Department of Basic Education has published a number of guidelines for the implementation of the White Paper 6, however, documents such as guidelines, policies, norms and standards do not qualify as law.[567]

a. Children with severe to profound intellectual disabilities

The White Paper 6 does not provide for the needs of children with severe or profound intellectual disabilities. This was dealt with in the High Court case of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC). The Western Cape Forum for Intellectual Disability brought an application to the Western Cape High Court to enforce the right to basic education of the

[566]D Donohue (n140 above) 7 to 9.
[567]T Boezaart (n127 above) 467.

children.[568] It was argued that neither the national government nor the provincial government provided schools for children with severe to profound intellectual disabilities in the Western Cape.[569]This service was only provided by Special Care Centres, run by Non-governmental organisations that were underfunded.[570]

The Forum argued that the government's provision of education to children with severe or profound intellectual disabilities was:[571]

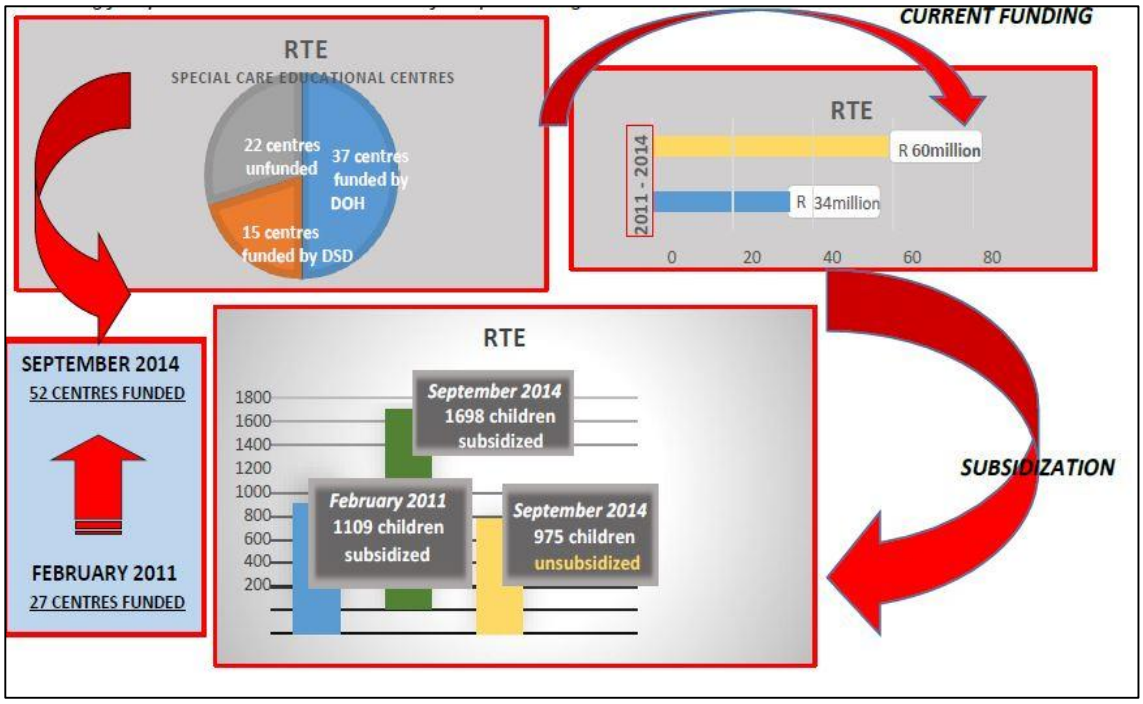
- much lower than what was provided to other children;
- did not cater for the educational needs of children with severe to profound intellectual disabilities; and
- only made available through non-governmental organisations.

In response to the above the High Court found that the Department failed to take reasonable steps to provide children with severe to profound disabilities with their educational needs.[572] The court found that the Department had breached the Constitutional rights of the children to basic education, protection from neglect or degradation, equality and human dignity.[573] The Department was given 12 months to develop and put measures in place to ensure this access, an extension was granted.[574]

The Department has through a consultative process with other departments and NGOs, made progress that include the continued development of a Draft South African policy

[568]T Boezaart (n127 above) 469.
[569] See above
[570] See above
[571] See above
[572] Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa 2011 (5) SA 87 (WCC) at 111B to 112B.
[573] See above.
[574] See above.

framework for the provision of quality education and support to children and youth with profound intellectual disability" and a "Draft learning programme for children and youth with profound intellectual disability".[575]Below is a visual representation of some of the progress so far in relation to funding of Special Care Educational Centres in the Western Cape:



Source: Western Cape Forum for Intellectual Disability: Right to Education 'Visual representation of change' (2014)[576]

b. Progress in ensuring the right to education for children with disabilities

The implementation of the White Paper 6 has led to the following selected developments:[577]

- Special schools have increased from 375 in 2002 to 453 in 2014;

[575]Person communication via e-mail from Tessa Wood (Director of the Western Cape Forum for Intellectual Disability) 04 April 2015.
[576]Personal communication via e-mail from Tessa Wood (Director of the Western Cape Forum for Intellectual Disability) 04 April 2015.
[577]Department of Basic Education 'Report on the implementation of Education White Paper 6 on Inclusive Education' (2015) 9 to 17; P Martin (n1 above) 136.

- The number of learners enrolled in special schools increased from 108 240 in 2011 to 116 888 in 2013;
- 553 ordinary schools were converted to full-service schools by 2013;
- More than 80 000 children with disabilities were in ordinary schools, public and independent schools in 2013 (this is,however, a drop from the 123 418 in 2012, the Department of Education attributes this to the inability of schools to identify and record learners with disabilities); and
- There were 793 full service schools in 2014 and 24 724 learners enrolled in the full service schools.

These selected figures indicate progress in the implementation of White Paper 6, however, it should be noted that there are a still some challenges relating to the collection and collating of data that need to be dealt with. These challenges make it difficult to determine the actual situation on the ground and the exact progress of implementation of inclusive education in South Africa. Problems include a lack of capacity of schools to identify learners with disabilities; the inability of ordinary schools to accurately identify and record learners with disabilities; inaccuracy of data collected leading to instances such as ordinary schools in the Western Cape reporting that they had no blind learners in 2013.

Implementation challenges

Despite the above and other improvements, there still exist a number of challenges in the drive to make education available to children with disabilities.[578]A large number of children with disabilities are either excluded from compulsory education or are unable to effectively access compulsory education.[579]

[578] Department of Social Development (n 31 above) 39
[579] See above

The following are some barriers and challenges that children with disabilities have to face in their attempts to access education:[580]

- There are not enough special schools or full-service schools to meet the demand of children with disabilities needing to access education, particularly in rural areas. This is a result of admission policies being too restrictive.
- Special schools have long waiting lists and do not take children with severe and profound intellectual disabilities and are not equipped to accommodate children with some physical disabilities, incontinent children and children with autism.
- The standard of curriculum delivery in special schools is not on an equal basis with other learners in the schooling system.
- Lack of transport for learners in rural areas that have travel long distances to special schools or full-service schools.
- High levels of violence and abuse against learners with disabilities in special school hostels.
- There are high levels of incorrect referrals of children to special schools as opposed to mainstream schools.
- Poor levels of provision of learning materials for learners with disabilities with different needs; this includes difficulties in obtaining material in braille for learners that are blind.
- Children with disabilities in mainstream school do not receive quality education as a result of failure to implement inclusive principles.

[580] Department of Basic Education (153 above) 36, 50 to 53; P Martin (n1 above) 139 to 143; South African Human Rights Commission 'Report: delivery of primary learning materials to schools' (2014) 46.

The above barriers and challenges can be attributed to a combination of factors, including the following:

- Insufficient funding is allocated to the implementation of inclusive education, particularly at a provincial level. Budgeting structures do not make provision for the expansion of inclusive education; they just make provision for special schools. The Department of Basic Education funding principles relating to inclusive education are not enforceable norms and standards that guide provincial spending.
- The extremely slow and delayed implementation of White Paper 6 does not fall in line with the 20 year implementation schedule. The implementation in the first phase (2002 – 2008) was very slow as only 30 ordinary schools were selected for conversion to full-service schools; 34 special schools were selected for upgrading and conversion, and 30 district support teams were established.
- The White Paper 6 is a broad statement of government policy, it is not law. It needs to be turned into a legal document with more power in relation to holding government accountable to specific objectives and deliverables.
- Section 3(2) of the Schools Act requires the Minister of Basic Education to set a compulsory school-going age for children with disabilities. This has not been done, making the job of ensuring that children with disabilities access education harder;
- Education was not legally available to children with severe and profound disabilities, but the Western Cape High Court found that failure to provide and fund access to education for these children is in contravention of the Constitution. The task for civil society is to monitor

government's fulfilment of the right to education for children with severe and profound intellectual disabilities.[581]

Recommendations

Set out below are some recommendations to ensure the adequate and full implementation of inclusive education:

- The White Paper 6 must be developed into law that governs inclusive education in South Africa. The Department of Education has indicated that plans are being made to amend the Schools Act; however, there is no information available on whether these amendments will include turning the White Paper into law.
- Training and sensitisation of educators and department officials on inclusive education and the needs of learners with disabilities should be improved and minimum qualification requirements for educators should be developed.
- The broadening of Inclusive education should be included in the National Treasury budget structure and the provincial departments should be held accountable for the manner in which they allocate funding to inclusive education.
- The policies on learner transport and special school hostels must be finalised and implemented.
- A minimum compulsory education age for children with disabilities must be set.[582]

[581]P Martin (n129 above) 142.
[582]P Martin (n129 above) 143.

2. REFLECTIONS ON HOW TO FOSTER THE INCLUSION OF DISABLED STUDENTS IN HIGHER EDUCATION IN SOUTH AFRICA

*Serges Djoyou Kamga**

1 Introduction

Higher education is essential to acquire good employment, earn high income, social status, a better life and human dignity in general.[583]For persons with disabilities, higher education is considered to be a vehicle for improving the quality of life and address the 'disabilisation' of poverty or ensured that disability does not go hand in hand with poverty.[584] In this respect, broadening access of students with disabilities in high education would increase their chances to improve their standards of living. Article 24 of the Convention on the Rights of Persons with Disabilities (CRPD)[585] provides:

> States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure *an inclusive education system at all levels and lifelong learning*.[586]

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[583]T Chataika 'Inclusion of disabled Students in higher education in Zimbabwe ' in J Lavia and M Moore (eds) *Cross-Cultural Perspectives on policy and practice- Decolonizing community contexts* (2010) 117.

[584]For more on disability and poverty see, T Barron and J Manombe Ncube (eds.) *Poverty and Disability* 2010; N Groce et al 'Poverty and Disability –A critical review of the literature in low and middle-income countries (2011), Working Paper Series: No. 16

[585] P Wehman *Life beyond the classroom: Transition strategies for young people with disabilities*(2006)

[586] CRPD, art 24 (1). My emphasis.

> States Parties shall ensure that persons with disabilities are able to access *general tertiary education*, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.[587]

South Africa is party to the CRPD and its Optional Protocol[588] and is therefore expected to give effect to this instrument. Furthermore, prior to the adoption of the CRPD, and specifically after apartheid, the country adopted a constitution informed by the need to protect human dignity and equality. For the right to education, the Constitution provides:

Everyone has the right to basic education including adult basic education and *to further* education which the state through reasonable measures must make progressively available and accessible.[589]

To give effect to this provision, various policies were adopted to ensure the enrolment of learners with disabilities in higher education. These policies include:

- The Integrated National Disability Strategy,[590] (INDS)
- The Education White Paper 3: Transformation of the Higher Education System,[591]
- The National Plan for Higher Education,[592]

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[587] CRPD, art 24 (5). My emphasis
[588]South Africa ratified the CRPD and its optional Protocol on 30 November 2007, see article 24
[589] 1996 Constitution, Act 108, sec 29 (1) (a)&(b). My emphasis.
[590] Integrated National Disability Strategy, 1997, Office of the Deputy President.
[591] Doe, 1997.
[592]Ministry of Education (2001).

- The Education White Paper 6: Special Needs Education [593]
- The 2012 Green paper Green Paper for Post-school Education,[594]
- The South African White paper on post-school education and training[595]

Yet, in spite of this normative arrangement, statistics indicates that from 22 of the 23 public universities 5 807 students with disabilities were enrolled in higher education institutions in 2011, accounting for only 1 per cent of the total enrolment. [596] This percentage shows that persons with disabilities still face barriers to high education.[597]

The aim of this article is to engage with barriers to inclusion of students with disabilities in higher education and explore solutions to foster their inclusion. To this end, the article critically examines legal and policy documents as well as the state's practice. It also examines the appropriateness of support for students with disabilities in higher education by exploring the practice at various South African universities. Ultimately the article shows that although policies and legislative measures are in place, they need to be supplemented by practical adequate measures that will open the doors of higher education to students with disabilities.

The paper is divided into four parts including this introduction. Without trying to be exhaustive, but to

[593] Department of Education, July 2001
[594] Department of Higher Education and Training (DHET), 2012.
[595] DHET,2013.
[596] Department of Higher Education and Training (DHET) 'White Paper for post-school education and training building an expanded, effective and integrated post-school system' as approved by Cabinet on 20 November 2013, p 45
[597] Department of Higher Education and Training (DHET) 'White Paper for post-school education and training building an expanded, effective and integrated post-school system' as approved by Cabinet on 20 November 2013

stimulate more research on the inclusion of students with disabilities in the post-secondary education, the second part examines legislative and policy deficiencies, the third part explores the adequacy of support for students with disabilities in higher education and the final part provides conclusions and recommendations.

2 Addressing legislative and policy deficiencies

To build an inclusive society and an inclusive tertiary education in particular, various legislative and policy measures listed above were adopted. This section examines the adequacy of legislative and policy measures for the inclusion of learners with disabilities in high education.

2. 1 Legislative and policy measures for the inclusion of learners with disabilities in high education from 1997-2001

This section examines the adequacy of 1997 INDS, the 1997 Education White Paper 3: Transformation of the Higher Education System, the 2001 National Plan for Higher Education and the 2001 White Paper 6 on Special Education: Building an Inclusive Education and Training System

The INDS provides direction on education at all level of learning including tertiary. It prohibits discrimination and marginalisation against students with disabilities across the board. Nevertheless, its focus on the higher education is extremely thin as it merely acknowledges that the 'inclusion of students with disabilities in [higher education] has not been clearly defined or researched'.[598] Besides acknowledging that

[598] Integrated National Disability Strategy, Office of the Deputy President 1997, 41.

as many as 70% learners with disabilities of school going age were outside of the general education and training system,[599] the INDS failed to focus on the exclusion of disabled learners in the higher education sector. One way of addressing the question could have been to remedy the exclusion of black disabled learners as regulated under apartheid.[600] These learners were included in the concept of 'non-traditional students'[601] who were perceived as 'uneducable' from their childhood and therefore were not given the opportunity to go to primary and then secondary schools and thereafter universities.[602] As the early legislation addressing disability right, the INDS supposed to set the tone in transforming the society into one where everyone is equal starting with equal access to all levels education. Unfortunately, it failed to do so.

In attempt to close the gap, the Education White Paper 3: Transformation of the Higher Education System,[603] aiming to tackle unfair discrimination in the sector was adopted. This piece of legislation is important for outlining mechanisms to ensure that students with disabilities access the 'system as a whole and individual institutions'. One of the goals of the transformation process is to build a higher education system that promote[s] equity of access and fair chances of success to all who are seeking to realise their potential through higher education, while eradicating all forms of unfair discrimination and advancing redress for past inequalities.[604] Nevertheless, in this document, the concept of

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[599] Integrated National Disability Strategy, 1997, Office of the Deputy President.
[600] C Howell 'Disabled Students in South Africa' in B Watermeyer *et alDisability and Social Change –A South African Agenda*(2006)
[601] Department of Education (DoE), 2001a: 28; also Howell (n 11 above) 164.
[602] Howell, (n 8 above).
[603] DoE, 1997.
[604] DoE (1997) 14.

transformation is generic and to some extent the specificity of disabled students appears sparingly under the prohibition of discrimination on the various grounds including disabilities and the need to increase access for disabled learners.

In an effort to close the gap left by the INDS, the National Plan for Higher Education[605] acknowledges the plight of disabled students who have been historically excluded by the apartheid higher education system, and undertakes to repair the injustices of the past. Nevertheless, it refers to disabled students very sparingly. As observed by Matshedisho 'the document [contains] only thirteen lines on equity for disabled students in higher education'.[606] Furthermore and perhaps more importantly, it cautions about enrolling students who 'do not have the potential to pursue further their study' and also 'that retain students who have no chance of success'.[607] This sort of warning is a deterrent for the admission of learners with disabilities into the tertiary education. The situation was compounded by the lack of leadership from the Ministry of Education which instead of providing a general direction on the insertion of disabled student into the tertiary education, requested higher education institutions in each region to develop regional strategies for access to learners with disabilities.[608] This encourages a piecemeal approach to legislations, guidelines and strategy to inclusive education. The National plan of Action could have provided a clear strategy for all institutions of higher learning to inform methods and approaches for inclusion of students with disabilities.

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[605] DoE, 2001.
[606] K R Matshedisho 'The challenge of real rights for disabled students in South *Africa' South African Journal of Higher Education* (2007) 708
[607] DoE, 2001:26.
[608] Ministry of Education 2001, 41; Matshedisho (n 24 above) 708.

The other piece of legislation of interest is the White Paper 6 on Special Education: Building an Inclusive Education and Training System.[609] It focuses more on the education of learners with disability at the level of basic education. Nevertheless, it should be commended for attempting to include children with disabilities in the basic education as it is where education begins; it is the bridge without which no one reaches the university. Yet, when referring to tertiary education, White Paper 6 states:

> The National Plan for Higher Education . . . commits our higher education institutions to increasing the access of learners with special education needs. The Ministry therefore, expects institutions to indicate in their institutional plans the strategies and steps, with the relevant time frames, they intend taking to increase enrolment of these learners.[610]

It also urged institutions to provide access for physically disabled learners only. This reduces disability to physical only or exclusion of other disabilities as it is clear that there will not be resources for blind and deaf learners.[611]

In sum, an examination of the legislative and policy arrangements for the inclusion of learners with disabilities in the tertiary education from 1997 to 2001 shows that these policies where not adequate for their generality with very little focus on the high education sector. The piecemeal aspect of these measures as well as the lack of strong leadership in relevant departments did not ease the integration of disabled learners into the tertiary education. These shortcomings kept

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[609] DoE, July 2001.
[610] Matshedisho (n 24 above); DoE (2001) 31.
[611] DoE (2001) 31.

learners with disabilities away from universities. The Foundation of Tertiary Institutions of the Northern Metropolis (FOTIM) that handled a Disability in Higher Education Project in South Africa[612] observes:

> Traditionally limited attention has been placed on addressing issues of access, retention, progression and participation of students with disabilities within the South African tertiary environment. This is notwithstanding the fact that students with disabilities have been identified in various governmental policy documents as being historically disadvantaged and deserving of special attention.[613]

2.2 Legislative and policy measures for the inclusion of learners with disabilities in high education from 2012 to date

In 2012 the Department of Higher Education and Training (DHET), through the Green Paper for Post-school Education and Training undertook to work

> [T]owards developing a National Disability Policy and Strategic Framework which will seek to create an enabling and empowering environment across the system for staff and students with disabilities. Institutions may then customise the policy in line with their institutional plans as the policy will act as a benchmark for good practice.[614]

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[612] From 2009 until 2011. Through this project, FOTIM released data from 15 Disability Units at 23 High Education Institutions in the country.
[613]FOTIM 'Disability in Higher Education' project report (2011) 10.
[614] The Green Paper Green Paper for Post-school Education, 2012; the Baseline Country Report to the United Nations on the Implementation of the Convention on the Rights of Persons with Disabilities in South Africa, para 255.

This approach is likely to harmonise and institutionalise mechanisms for an efficient inclusion of learners with disabilities. The Green Paper for Post-school Education and Training provides some hope for students with disabilities' access at the universities. It recognizes the historical exclusion of disabled learners and proposes to address structural barriers to their inclusion. Among other, Disability Units (DUs) will be well equipped and capacitated to provide adequate support to learners with disabilities. Similarly the curriculum will be revised, teachers and academics trained to meet the needs of learners with disabilities.

While the DEHT should be commended for its commitment, it should not assist students with disabilities with mere subsidies which are simply voluntary,[615] and not compulsory. There is a need 'to develop a clear funding model'[616] if the integration of learners with disabilities in higher education is to be sustainable. For a systemic change, sustainable funding is essential to equip all universities with viable DUs and undertake permanent measures for disability mainstreaming.

Following the Green Paper for Post-school Education and Training, the DHET reiterated its commitment for and inclusive higher education through White paper on Post-school Education and Training. The latter emphasises the significance of 'including support staff, management and lecturers in the process of disability inclusion, thus pointing

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[615] C Ngewna and L Pretoria '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 AfricaSouth African Journal on Human Rights* (2012) 99.

[616] Higher Education South Africa (HESA) 'Response of HESA to the Green Paper for Post-School Education and Training' https://www.ru.ac.za/media/rhodesuniversity/content/institutionalplanning/documents/HESA%20Final%20Response%20to%20Green%20Paper%20for%20PSET%20May%202012.pdf (accessed 13 July 2015).

to a systemic approach to inclusion".[617] More importantly, the DHET commits to:

> [B]uild its own internal capacity to support a new approach to addressing disability within post-school institutions, including information management, conducting research into disability in the post-school sector, policy development and support, and providing the necessary resources to institutions to enable transformation in this area.[618]

This is a positive development which is likely to lead to better monitoring and evaluation of what institutions of higher learning are doing to ensure access for learners with disabilities. Nevertheless, the main observation is that disability rights remain the site of piecemeal legislations and policies, hence the need for a disability right specific legislation. Without being the crystal ball to solve all disability rights problems and establish an inclusive high education sector specifically, explicit disability legislation is likely to harmonise disability rights and provide direction on achieving inclusive higher education. It will address the synergy deficit between national policies dealing with the inclusion of students with disabilities and strengthen existing legislations. Therefore, while acknowledging that a draft Disability Policy[619] has been circulated for comments, it is imperative to adopt it and ensure that aspects related to education focus on inclusive education at primary and

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[617] M Lyner-Cleophas *et al* 'Increasing access into higher education: Insights from the 2011 African Network on Evidence-to-Action on Disability Symposium – Education Commission' *African Journal of Disability* (2014) 1.

[618] DHET (2013) xv.

[619] Draft National Disability Rights Policy, Notice 129 of 2015, Government Gazette, 16 February 2015.

secondary level as this will prepare the ground for access to the tertiary. Furthermore, adopting a disability specific legislation will be in line with the requirement of the CRPD which entails a review of national policies, and in this case on the right to inclusive education in higher education.

Overall, the transformation of the South African society goes through an equitable higher education system which opens its doors to all, especially to learners with disabilities. For this to happen, it is imperative to address the inadequacy of support for students with disabilities in higher education.

3 Addressing the inadequacy of support for students with disabilities in higher education: The social model approach

It is crucial to start from the premise that disability is essentially located in the environment and is consequently 'social restrictions and constraints imposed on persons with impairments in their pursuit of full and equal participation'.[620] In other words a person using crutches or braille becomes disabled when s/he cannot access a building because of stairs or cannot read books which are not brailed. Ensuring that the society and the higher education is adjusted to meet the need of students with disability is the social model which stands in opposition to the medical model which find the problem in the person and not in the environment.[621] According to the medical model, disability is simply the outcome of physiological impairment caused by illness.[622]

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[620] S F M Crous 'The academic support needs of students with impairments at three higher education institutions' *South African Journal of Higher Education* (2004) 230.

[621] S Brisenden 'Independent living and the medical model of disability' *Disability, Handicap & Society* (1986) 173; R W Mackelprang and R O Salsgiver *Disability: A Diversity Model Approach in Human Service Practice* (2014)

[622] As above.

In line with the CRPD, this article subscribes to the social model in seeking ways to get more students with disabilities into postsecondary education. Therefore, to break environmental barriers, this section examines the adequacy of services and support afforded to students with disabilities who arrive at the university. Without the pretention to be exhaustive, the focus of this section will be on Disability Units and the responsiveness of the curriculum identified as the cornerstones for disabled students' access to our universities.[623]

3.1 Establishing a responsive Disability Unit in tertiary institutions

The Disability Unit (DU) can be defined as a unit established at the universities to make sure that students with disabilities acquire the necessary 'accommodations and support they need in order to fully participate in the teaching and learning processes'.[624] According to the Department of Education, setting up DUs aims to support the equal participation of students with disabilities in all aspect of university life and to eradicate unlawful disability discrimination, including disability based persecution.[625] Mindful of the importance of the DUs that are the first point of entry for students with disabilities,[626]many South African universities have

[623] Crous (n 38 above).
[624] S Ntombela and R Soobrayen 'Access challenges for students with disabilities at the University of KwaZulu-Natal: A situational analysis of the Edgewood Campus' *Journal of Social Science* (2013) 150.
[625] DoE, 2005.
[626] A Naidoo 'Students with Disabilities' Perceptions and Experiences of the Disability Unit at the University of KwaZulu-Natal: Howard College Campus' (2010) Unpublished Thesis, Pietermaritzburg: Faculty of Humanities, Development, and Social Sciences, University of KwaZulu-Natal.

established a unit, and offer various reasonable accommodation measures for needy students.[627]

However, the DUs exist only in eleven higher education institutions out twenty three in the country.[628] This is simply not enough for a country where the right to equality and dignity for all is provided for by the Constitution[629] and where everyone has the right to education and to 'further education'.[630] Furthermore, in some institutions where DUs exist, the majority of students (65,4%) are oblivious of their university's policy concerning students with impairments.[631] Most students (84,1%) are unaware of the presence of a DU on the campus.[632] This begs the question of disability awareness on campus. The setting up of DUs should be followed by awareness raising, education of the academic community as whole through posters, brochures and other initiatives on the work that the Unit does. This should be the first step towards the accommodation of students with disabilities in the institution.

The other problem facing DUs is the staffing. Some DUs are understaffed, with one officer having to do the work of a full team that should be made of people with different types of expertise.[633] In a research at the University of Kwazuku Natal, Ntombela and Soobrayen observe:

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[627] A K Tugli *et al* 'Perceived challenges of serving students with disabilities in a historically disadvantaged tertiary institution, South Africa'. *African Journal for Physical, Health Education, Recreation and Dance* (2013) 347 and 348

[628] The Baseline Country Report to the United Nations on the Implementation of the Convention on the Rights of Persons with Disabilities in South Africa, (n 32 above) para 256.

[629] Sec 9 and 10 .

[630] 1996 Constitution, sec 29.

[631] Crous (n 38 above) 238.

[632] Crous (As above).

[633] Ntombela and Soobrayen (n 42 above) 152.

> The Disability Support Officer manages the administrative component, the reformatting program, advocacy, counselling and support, support programs for teaching practice, collaboration with internal and external stakeholders, student funding and other functions of this office. The office relies solely on student assistants to reformat notes yet this is a labour intensive program.[634]

In another study at the same university, Naido discovered that insufficient human and financial resources and uneven ratio of staff to students was prejudicial to the success of students with disabilities.[635] This situation is not unique to the University of Kwazulu Natal. Similar findings were made at the University of Venda where personnel at the DU were 'overworked as a result of inadequate resources, shortage of staff and poor support systems.'[636]The situation is worsened by the fact that in general, the personnel of the DUs do not have job security as they are contract workers.[637] This can demotivate them and lead to their exit for greener pastures or for permanent employment in a different field or organisation. Given that the DUs need a specific type of expertise, that such personnel must be trained and nurtured, not securing permanent position for these employees is problematic for the existence of the Units. Therefore to be efficient and sustainable, the DUs must ensure that they are staffed with qualified permanent employees who are well paid and motivated to do their work.

[634] As above.
[635] Naidoo (n 44 above).
[636] AK Tugli (n45 above) 346.
[637] Ntombela and Soobrayen (n 42 above) 152.

One of the questions related to the DUs is whether a unit could be part of a Student Service Bureau or it could function autonomously in order to be more efficient. On the one hand, incorporating the Unit into the general student services may lead to its invisibility, to its being hindered by bureaucracy which creates unnecessary backlogs that kept it away from the university top management. On the other hand, isolating the Unit may lead to further discrimination of students with disabilities as it could be perceived as the office of 'the disabled' and not be the concern of non-disabled students and staff, which is not recommended.

Nevertheless, the independence of the Unit could lead to better planning in terms of budgetary provisions, appointments of qualified staff and better services for the needy students.[638] This was confirmed by FOTIM that found that the incorporation of the DUs in other university services was not good for the efficiency of the units.[639] Therefore, it called for the independence of the DUs as to enable them to develop relevant programmes, nurture better campus-wide communication and more collaboration with other departments and systems that students relate with, considering the cross-cutting nature of disability.[640] In the same perspective, independent DUs with a direct line to the university top management would limit the backlogs, permit the involvement of 'academics at a higher level of negotiation for necessary resources and awareness, which could help to effect meaningful inclusion of students in the various faculties'.[641]

[638]FOTIM (n 31 above).
[639]FOTIM (as above).
[640]FOTIM (as above); also Lyner-Cleophas *et al* (n 35 above) 2.
[641] Lyner-Cleophas *et al* (as above); also FOTIM (n 35 above).

Yet, it could be argued that the autonomy or the incorporation of the Unit into general services for student does not provide the key for its success, but the idea underpinning its work. The latter should be informed by the social model of disability, it should be equipped with motivated experts, adequate equipment commensurate with various types of disabilities and an adequate budget to provide needed services. Whether the DU is independent or not, the Department of Higher Education and Training should find the necessary funding to enable the universities through the units to acquire assistive devices and expertise (including education psychologists)[642] needed to accommodate students and personnel with disabilities.

3.2 Ensuring curriculum responsiveness

A responsive curriculum aims to make sure that students with disabilities receive all the essential support needed to obtain the skills, knowledge and competencies required.[643] This suggests that the inclusion of students with disability entails a flexible curriculum which will not only enable the entire class to learn, but will also be appropriate for students with disabilities. In this perspective, universities should ensure the inclusion of students with disabilities by incorporating notions of universal learning design into faculty instruction and curricula. According to the CRPD

> Universal design' means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design.

[642] Lyner-Cleophas *et al* (n 35 above) 3.
[643] AK Tugli (n 45 above).

> "Universal design" shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.[644]

In other words, universal learning design is a multifaceted mechanism of teaching and learning that enable all learners to participate and benefit from education. According to FITOM, the universal design 'is an educational approach for instructing all students through developing flexible classroom materials, using various technology tools, varying the delivery of information and/or adapting assessment methodologies'.[645] In this context, flexibility is the rule. Thus alternative test arrangements, prolonged time for examination or the use of assistive devices commensurate with students' impairments[646] would assist for an effective inclusion of students with disabilities.

However some universities simply have a curriculum which does not accommodate the needs of students with disabilities. Research shows that the exclusion of disabled students from most South African universities is related to lack of reasonable accommodation. The latter entails adjusting the environments, practices and tools to meet the need of all including those of persons with disabilities in a setting characterised by diversity.[647] In this respect, reasonable accommodation measures request that recommended books, study guides examination papers and even calendars and registration forms are in accessible formats for all learners

[644]CRPD, art 2.

[645] FOTIM (n 31 above) 13 & 14.

[646] D Quick *et al* 'Opening doors for students with disabilities on community college campuses: What have we learned? What do we still need to know*?' Community College Journal of Research and Practice* (2003).

[647] See CRPD, art 2; L V Martel 'Reasonable accommodation: The new concept from an inclusive constitutional perspective' *Sur International Journal on Human Rights* (2011) 88.

including those with disabilities.[648] Tugli *et al are* of the view that 'critical and wider issues pertain to the curriculum, teaching, learning, assessment, progression and social integration as well as the trauma of coping and managing their various disabilities'[649] are significant in excluding students with disabilities from our Universities. This led FITOM to urge the DUs to:

> [M]ove beyond the built environment, technology and assistive devices to interrogate the learning and teaching methodologies at their institutions. More awareness must be created with faculty staff about disability issues and how to respond appropriately to the needs of students, and the imperative to incorporate concepts of universal design into faculty instruction and curricula that ultimately benefit ALL students in their learning process.[650]

In a similar vein, Morley and Croft claim that '[i]t is often a lack of planning to make buildings and curricula accessible, and a lack of academic and non-academic support that creates barriers for disabled students' retention and achievement'[651]

The curriculum developers should be mindful of the presence of learners with disabilities who have the same right to education as their non-disabled counterparts. They should therefore ensure that their work accommodates learners who have different abilities and are able to meet diverse needs in a classroom. This entails, for example, ensuring that learning

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[648] Crous (n 38 above) 244.

[649] Tugli et al (n 45 above) 347.

[650] FITOM (n 31 above)14.

[651] L Morley and A Croft 'Agency and Advocacy: disabled students in higher education in Ghana and Tanzania' *Research in Comparative and International Education Volume 6 Number 4 (2011)* 385.

and assessment material are available in various formats as to leave no learners behind. Moreover, curriculum designers should allow learners with disability to specify their preferred format for examination. They should be given a choice between oral and written examination for example.[652]

The other exclusionary factor is the capacity of teachers to attend to or to accommodate students with disabilities or their level of awareness of disability issues.[653] In this regard, statistics[654] are disquieting. In South Africa, there are 781 educators with basic Braille understanding but without any qualifications; 89 educators tasked to teach visually impaired learners do not have any knowledge of Braille at all; 985 educators teaching deaf learners know basic South African Sign Language but do not have any qualifications; 266 educators (21%) teaching deaf learners have no knowledge of South African Sign Language at all. Ntombela and Soobrayen observe:

> The persistence of exclusionary practices and attitudes is exacerbated by the fact that most university tutors have no expertise to work with students who have disabilities and that not all of them hold positive attitudes towards inclusion generally, a condition that affects their ability to provide support for all students [655]

In the same perspective, researching in an undergraduate Civil Engineering program in South Africa, Mayat and Amosun argue that the insufficient interactions between

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[652] Crous (n 38 above).

[653] Ntombela and Soobrayen (n 42 above) 151.

[654] Statistics South Africa Census 2011 'Profile of persons with disabilities in South Africa' (2011) 108.

[655] Ntombela and Soobrayen (n 42 above) 151.

students with disabilities and academic staff reduces the capacity of the staff to accommodate learners with disabilities, even though they were not reluctant to accommodate the needy students.[656] Although they were reports that a curriculum for South African Sign Language is currently being drafted for higher education,[657] training should be systematic and extended beyond Free State University, the University of the Witwatersrand and University of South Africa which are the only sites for such trainings. [658]

Furthermore, attitudinal barriers from teachers, staff and other students compel some disabled students to hide their disability for fear of marginalization and victimisation. A survey of three higher education institutions in South Africa discovered that only 0.4% of the students' population reported having any form of disability compared to almost 10% or more in the more developed countries such as the USA, UK and Germany.[659] This is an illustration of the amount of pressure learners with disabilities have to go through in our tertiary institutions. As a result of such pressure, these learners struggle in class and are unable to learn as 'they feel pushed to the margins and disempowered'.[660]

It is submitted that ensuring the responsiveness of a curriculum goes beyond the designing disability friendly course material and providing necessary assisting devices to

[656] N Mayat and S L Amosun 'Perceptions of academic staff towards accommodating students with disabilities in a Civil Engineering Undergraduate Program in a University in South Africa' *Journal of Postsecondary Education and Disability* (vol 24) 53.
[657] The Baseline Country Report to the United Nations on the Implementation of the Convention on the Rights of Persons with Disabilities in South Africa, (n 32 above) para 241.
[658] As above.
[659] Crous 2004 (n 48 above).
[660] Ntombela and Soobrayen (n 42 above) 151.

encompass teachers and other academic staff's training on handling a diverse classroom with specific attention to disabled students. It includes the training of academic staff on implementing universal learning design in faculty instruction and curricula development.[661] Key performance agreements should include the ability to implement the concepts of universal learning design. Ntombela and Soobrayen write:

> The quality of students' experiences of teaching and learning depends largely on how aware, able and willing staff is to support all students. This speaks to the need for [higher education] institutions to provide on-going staff development and support programs across the board.[662]

In sum the lack of infrastructure, negative attitudes from others, lack of appropriate services and programmes for learners with disabilities lead one to believe that the need of these learners in higher education are yet to be understood. In this context, the DHET needs to work extra hard to address the deficiency of curriculum flexibility and inclusive education practices across the tertiary education sector in the country. In this regard, under the leadership the DHET, institutions of higher learning should always be proactive in setting up support structures and mechanisms for the accommodation of students with disabilities before they are even admitted to the institutions.

4. Conclusion and recommendations

The aim of this article was to engage with barriers to inclusion of students with disabilities in higher education and explore

[661] FOTIM (n 31 above) 14.
[662] Ntombela and Soobrayen (n 42 above) 155.

solutions to foster theirs inclusion. Firstly, the article found that although early legislative and policy measures dealing with education recognized the plight of learners with disabilities knocking at the tertiary education, they did not address the inclusion of these learners adequately. They often focused on basic education, used discriminatory terms referring to learners with disabilities, shifted responsibility in terms of who should provide leadership, and always use a piecemeal approach. Nevertheless, it was also found that 2012 and 2013 policies on disabilities in the higher education are a beacon of hope for attempting to clearly prescribe how to ensure the inclusion of learners in the tertiary education.

Nonetheless, to remedy the inadequacy of policy and legislative initiative related to the inclusion of disabled children in the education in general, it is essential to adopt a disability rights specific legislation to harmonise piecemeal legislations and policies related to disabilities in general and specifically provide guidance on how to foster inclusion in higher education.

Secondly, the article found that the inadequacy of support offered to students with disabilities in institutions of higher learning exclude these students. In this respect, ill equipped and understaffed DUs as well as lack of flexible curricula including teachers and staff training and disability awareness are problematic.

In terms of remedies, it is imperative to equip, capacitate and fund DUs and ensure that their work is social model oriented. Similarly, there is need to implement a universal learning design that encompasses planning for accessibility of buildings, flexible curricula, training and awareness of

academic and non-academic staff on disability issues. Only then, will the doors of higher education be opened to students with disabilities.

7. THE PARTICIPATION OF PERSONS WITH DISABILITIES IN POLITICAL AND PUBLIC LIFE

Bernard Bekink*

1 Introduction

During 2015, the Foundation for Human Rights (FHR), in cooperation with the Department of Justice and Constitutional Development, initiated a Disability Research Project (DRP) in order to determine whether the South African state does promote, protect and realise the rights of persons with disabilities, as required by the CRPD, according to current South African domestic law.

The main aim of the DRP is to provide a clear indication of South Africa's position with regards to the promotion, protection and fulfilment of the rights of persons with disabilities, as well as to conduct a comprehensive examination of existing South African legislation that have a direct or indirect impact on the promotion, protection and fulfilment of the rights of persons with disabilities, as provided for in the CRPD.[663] The DRP has been divided into various focus areas, which areas indicate South Africa's obligations as a state party to the Convention.

The DRP further aims to provide the government of the Republic of South Africa (RSA) with the necessary information for the formulation of a coherent National Disability Strategy (NDS).

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[663] See the First Draft report to the United Nations on the implementation of the CRPD by the Department of Women, Children and People with Disabilities of November 2012, available at www.gov.za/files/Draft%20Country%20 as accessed on 30/06/2015, hereafter referred to as the Draft SA Baseline report on the CRPD.

As indicated above, the DRP consists of various subparts that have been divided according to specific focus areas which are provided for in the CRPD. This report, therefore, specifically deals with the rights and the requirements of the CRPD pertaining to the rights of persons with disabilities in relation to their participation in political and public life.

2 Basic background to the CRPD

2.1 Introduction

The CRPD is an international human rights treaty of the United Nations (UN), with the main aim to protect the rights and dignity of persons with disabilities.[664] State parties to the CRPD are specifically required to promote, protect and ensure the full enjoyment of the basic rights of persons with disabilities and also to ensure, therefore, their enjoyment of equality as a human being under the law. In essence, the CRPD serves as a major catalyst in the global movement that views people with disabilities as full and equal members of society with human rights.[665]

The text of the CRPD was adopted by the General Assembly (GA) of the UN on 13 December 2006 and it opened for signature by state parties on 30 March 2007. At the time of writing of this report, 159 signatories and 156 state parties have signed up to the Convention. Compliance with the CRPD is monitored by a committee established by the Convention, which is called the Committee on the Rights of Persons with Disabilities.[666]

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[664] See the CRPD. Refer also to the UN Enable report at www.un.org/disabilities/default.asp?id=150 as accessed on 30/06/2015 and hereafter referred to as the UN Enable report.
[665] See the UN Enable report.
[666] Refer again to the UN Enable report.

In 1987, at a global meeting of experts, convened to review progress by the international community to enhance and protect the rights of persons with disabilities, it was recommended that the UN General Assembly should draft an international convention on the elimination of discrimination against persons with disabilities. Many government representatives argued at the time that existing human rights documents were insufficient in relation to the protection and enhancement of the rights of persons with disabilities. In 2000, a variety of disability non-governmental organisations (NGOs) issued a declaration, calling on the international community to support a convention on the rights of persons with disabilities.

Against this background, the General Assembly established an *ad hoc* committee to consider proposals for a comprehensive and integral convention to promote and protect the rights and dignity of persons with disabilities, based on a holistic approach. This led to the creation of the current Convention, which became one of the fastest supported and negotiated human rights instruments in international law.[667] The CRPD and its optional protocol was adopted on 13 December 2006 at the UN headquarters in New York and is regarded as the first comprehensive human rights treaty of the 21st-century. The Convention entered into force on 3 May 2008,[668] and follows decades of work by the UN to change attitudes and approaches towards persons with disabilities.

The CRPD discards the approach of viewing persons with disabilities as "objects" of charity, medical treatment and social protection, rather viewing persons with disabilities as "subjects" with rights, capable of claiming those rights and making decisions about their lives based on free and informed consent as well as being active members of society.[669] The CRPD is further

[667] See the UN Enable report.
[668] See the UN Enable report.
[669] Note again the UN Enable report.

intended as a human rights instrument with an explicit social development dimension. In essence, it adopts a broad categorisation of persons with disabilities and it also reaffirms that all persons with all types of disabilities must enjoy basic human rights and fundamental freedoms. It clarifies and further qualifies how all categories of rights apply to persons with disabilities and it further identifies areas where adaptations have to be made in order for persons with disabilities to be able to effectively exercise their rights, and where their rights have been violated, where protection of rights must be reinforced.

2.2 General provisions of the CRPD

The CRPD begins with a comprehensive preamble which, inter-alia,[670] recalls the principles proclaimed in the Charter of the UN, which in turn recognise the inherent dignity, worth and equality as inalienable rights of all members of the human family, as the foundation of freedom, justice and peace in the world. It also recognises that the UN, in the Universal Declaration of Human Rights (UDHR) and other International Human Rights instruments, has proclaimed and agreed that every person is entitled to all the rights and freedoms set forth therein, without distinction of any kind. The preamble also reaffirms the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and also the need for persons with disabilities to be guaranteed enjoyment of such rights without discrimination. Further recognition is given to the International Covenant on Economic Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and also other international conventions which recognise that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that

[670] Refer to the preamble of the CRPD available at www. accessed on

hinder their full and effective participation in society on an equal basis with others. The preamble also recognises that any discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of that person. Mention is made that, despite various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world still occur. This is specifically the case in relation to women and children with disabilities who are often at a greater risk of violence, injury or abuse.[671]

According to article 1 of the CRPD, the purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity. Under the definition section, reference to language also includes spoken and sign languages and other forms of non-spoken languages. Of particular importance is the definition of discrimination on the basis of disability, which is: "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". Such definition includes all forms of discrimination, including any denial of a reasonable accommodation.[672] The CRPD further provides for certain general guiding principles, which are the following:

[671] Refer to the preamble of the CRPD.
[672] See article 2 of the CRPD.

- respect for inherent dignity, individual autonomy, including the freedom to make one's own choices, and independence of persons;
- non-discrimination;
- full and effective participation and inclusion in society;
- respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- equality of opportunities;
- accessibility;
- equality between men and women; and
- respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.[673]

Article 4 of the CRPD sets out certain general obligations and it states that state parties have committed themselves to ensure and promote the full realisation of all the human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. State parties are also required to adopt appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention. State parties undertake to take all appropriate measures, including the enactment of legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.[674]

In essence, articles 4-32 confirm and define the rights of persons with disabilities and the obligations of state parties toward them. Many of the rights incorporated into Convention specifically moderate rights affirmed in other UN conventions such as the ICCPR and the ICESCR. Such rights include: the right to

[673] Refer to article 3 (a)-(h) of the CRPD.
[674] See article 4 (a)-(l) of the CRPD

equality and non-discrimination, the rights of women and children with disabilities; the right to access ability; the right to life and equal recognition before the law; access to justice and liberty and security of the person; freedom from torture or cruel inhumane or degrading treatment or punishment and freedom from exploitation, violence and abuse; the protection of the integrity of the person; personal mobility and freedom of expression and opinion and access to information; respect for privacy; and the right to education and health.[675]

2.3 Core provisions pertaining to the participation of people with disabilities in political and public life

Reports have shown that the denial or restriction of legal capacity has been used to deny political participation, especially the right to vote, to certain persons with disabilities.[676] In order to fully realise the equal recognition of legal capacity in all aspects of life, it is important to recognise the legal capacity of persons with disabilities in public and political life. Against this background it has been argued that a person's decision-making ability or perhaps even physical capabilities cannot be a justification for any exclusion of such persons, based on their disabilities, from exercising their political rights, including the right to vote, to stand for election and the right to serve as a member of a judicial body.[677]

In following on the aforementioned, Article 29 of the CRPD confirms that all state parties to the Convention are required to provide and protect certain political rights of people with disabilities. The CRPD states that state parties shall guarantee persons with disabilities political rights and the opportunity to

[675] Refer in general to the international human rights instruments as reprinted in Mtshaulana *et al Documents on International Law* (1996) at 172-266.
[676] Note the UN Committee on the Rights of Persons with Disabilities report of 19 May 2014 paras 48-49 at 12.
[677] Refer to para 48 of the UN Committee report above at 12.

enjoy such rights on an equal basis with others, and shall undertake the following:[678]

(a) To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter-alia, by:

(i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

(ii) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;

(iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;

(b) To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encouraged their participation in public affairs, including:

(i) Participation in non-governmental organisations and associations concerned with the public and political life

[678] See article 29 of the CRPD.

of the country, and in the activities and administration of political parties;

(ii) Forming and joining organisations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.

The CRPD further provides for international cooperation, national implementation and monitoring as well as the establishment of a Committee on the Rights of Persons with Disabilities.[679] The Convention provides for states to make reservations regarding the content and application of the Convention.[680] The Convention incorporates an optional protocol to the Convention on the rights of persons with disabilities. The optional protocol to the Convention is regarded as a supplementary agreement to the Convention which allows its parties to recognise the competence of the Committee on the Rights of Persons with Disabilities to consider complaints from individuals. The optional protocol entered into force with the Convention on 3 May 2008 and the Committee comprises a body of human rights experts tasked with monitoring and implementing the Convention.[681] Under the optional protocol state parties to the Convention agree, *inter alia*, to recognise the competence of the Committee to receive and consider communications from or on behalf of individuals or groups of individuals, subject to its jurisdiction, who claim to be victims of violence by that state party of the provisions of the Convention.[682]

[679] See articles 32 to 39 of the CRPD.
[680] Note article 46 of the CRPD.
[681] Refer to the optional protocol of the CRPD at www.UN.org/disabilities/documents/convention/convoptprot-e.pdf as accessed on 1 July 2015, hereafter referred to as the optional protocol to the CRPD.
[682] See article 1 of the optional protocol to the CRPD.

3 Applicable statutory provisions impacting on the political and public life of persons with disabilities in current South African legislation

3.1 Constitution of the RSA, 1996[683]

It is widely recognised that, with the commencement of the Interim Constitution of the Republic of South Africa[684] and its successor, the Constitution of the Republic of South Africa, 1996, the South African state underwent a radical constitutional changes. An entire new and democratic constitutional dispensation was created and all law and conduct, including the provisions and application of public international law, such as the CRPD, must now be applied and implemented within the framework of the new constitutional context. In this regard the following important constitutional provisions which are especially important to persons with disabilities are identified and discussed briefly.

The Constitution was adopted on 8 May 1996 and commenced on 4 February 1997. According to the preamble to the Constitution, the Constitution recognises the injustices of the past and also states that South Africa belongs to all who live in it, united in our diversity. Diversity and past injustices include people with disabilities. Furthermore, the Constitution, as a collective agreement among the people of South Africa, confirms that it has been adopted as the supreme law of the Republic and with various aims. Such aims include the healing of divisions of the past, the establishment of a society based on democratic values, social justice and fundamental human rights; the laying of foundations for a democratic and open society in which the government is based on the will of the people and

[683] Hereafter referred to as the Constitution of the RSA, 1996 or as the Constitution.
[684] See Act 200 of 1993, hereafter referred to as the Interim Constitution.

where every citizen is equally protected by law; the improvement of the quality of life of all citizens and to free the potential of each person; and, finally, the building of a united and democratic South Africa which is able to take its rightful place as a sovereign state in the family of nations.[685]

According to chapter 1 of the Constitution the Republic of South Africa is one, sovereign, democratic state founded on, *inter alia*, the following values: human dignity; the achievement of equality; the advancement of human rights and freedoms; adult universal suffrage; non-racialism and non-sexism; the supremacy of the Constitution; and the rule of law.[686] The Constitution proclaims and confirms that, as it is the supreme law of the Republic, any law or conduct inconsistent with the Constitution is invalid, and that the obligations imposed by the Constitution must be fulfilled.[687]

The Constitution further confirms a common South African citizenship where all citizens, including citizens living with disabilities, are equally entitled to the rights, privileges and benefits of citizenship. Furthermore, apart from providing for 11 official languages, the founding chapter of the Constitution provides for the establishment of a Pan South African Language Board via national legislation and that this board is obligated to promote and create conditions for the development and use of all official and other important languages, including sign language.[688]

The new constitutional dispensation additionally provides, for the first time in South African constitutional history, for a comprehensive Bill of Rights with the aim of protecting the rights of all people in the Republic and to act as a cornerstone of

[685] See the preamble to the Constitution of the RSA, 1996.
[686] Note s 1 (a) to (d) of the Constitution of the RSA, 1996.
[687] Refer to s 2 of the Constitution of the RSA, 1996.
[688] Note s 6 (5) (a) (iii) of the Constitution of the RSA, 1996.

the new democracy in South Africa. According to section 7 of the Bill of Rights, the state is obligated to respect, protect, promote and fulfilled the rights in the Bill of Rights. However, rights set out in the Bill of Rights are not absolute and they are subject to the limitations contained or referred to in section 36, or as are provided for elsewhere in the Bill of Rights.[689] The Bill of Rights applies to all law, and it binds the legislature, the executive, the judiciary and all organs of state. A natural or juristic person is also bound by the rights in the Bill of Rights if, and to the extent that, they are applicable.[690] The Bill of Rights further provides for a variety of universally-recognised human rights. Such rights, particularly important to people with disabilities, include: the rights to equality; human dignity; life; privacy; freedom of religion, belief and opinion; freedom of expression; assembly, demonstration, picket and petition; freedom of association; political rights; freedom of trade, occupation and profession; and various other civil and political as well as socio-economic rights.[691] On the issue of political rights the Constitution provides as follows:

> Political Rights
>
> 19. (1) Every citizen is free to make political choices, which includes the right-
>
> (a) to form a political party;
>
> (b) to participate in the activities of, or recruit members for, a political party; and
>
> (c) to campaign for a political party or cause.
>
> (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

[689] See s 7(1)-(3) of the Constitution of the RSA, 1996.
[690] Read the application clause in s 8 of the Constitution of the RSA, 1996.
[691] Refer to ss 9 to 35 of the Constitution of the RSA, 1996.

(3) Every adult citizen has the right- (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and (b) to stand for public office and, if elected, to hold office.[692]

As mentioned above, the rights in the Bill of Rights are not absolute and may be limited in terms of the requirements of section 36 (the limitation clause) or as is provided for elsewhere in the Bill of Rights. According to the general limitation clause, the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and after taking certain factors into account. No law, however, may limit any right entrenched in the Bill of Rights except as is provided for in subsection 36(1) or in any other provision of the Bill of Rights.[693] Finally, the Bill of Rights additionally provides for the enforcement and interpretation of the rights of the Bill of Rights. It is specifically stated that, when interpreting the Bill of Rights a court, tribunal or forum must not only promote the values that underlie an open and democratic society based on human dignity, equality and freedom, but must also consider international law and may consider foreign law. Furthermore, when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.[694]

Chapter 4 of the Constitution provides that the National Assembly consists of women and men elected as members in

[692] Read s 19 (1)-(3) of the Constitution of the RSA,1996.
[693] See s 36 (1)-(2) of the Constitution of the RSA, 1996.
[694] Read ss 38-39 of the Constitution of the RSA, 1996.

terms of an electoral system that is prescribed by national legislation, is based on the national common voters roll, and provides for a minimum voting age of 18 years. Furthermore, it is provided that every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly except, *inter alia*, a person declared to be of unsound mind by a court of the Republic.[695] Public access to and involvement in both the National Assembly and the National Council of Provinces are also provided for. Both houses of Parliament must therefore facilitate public involvement and also conduct their business in an open manner which includes reasonable measures of public access and involvement.[696] Similar provisions are also determined in relation to provincial and municipal spheres of government.[697]

According to the Constitution, the judicial authority of the RSA is vested in the courts. The courts, when deciding a constitutional matter in its jurisdiction, must declare any law or conduct that is inconsistent with the Constitution to be invalid, to the extent of its inconsistency. It is further provided that any appropriately qualified women or man, who is a fit and proper person, may be appointed as a judicial officer. Disqualifications to hold judicial office based on general disabilities such as physical disabilities are thus not constitutionally provided for.[698] Apart from judicial bodies, the Constitution provides for the creation of various state institutions with the aim to strengthen constitutional democracy in the Republic. It is especially the institutions such as the South

[695] See ss 46-47 of the Constitution of the RSA, 1996.
[696] Note ss 59 and 72 of the Constitution of the RSA, 1996.
[697] See ss 105 and 158 of the Constitution respectively. As members of either the NA or a provincial legislature, even people with certain disabilities can be elected as the President of the RSA or as a premier of a province. Read also s 86 of the Constitution. According to s 158(1), every citizen who is qualified to vote for a Municipal Council, is eligible to be a member of such council, except someone who is disqualified from voting for the NA because he/she has been declared to be of unsound mind.
[698] Note, for example, the physical disabilities of now retired Justice Alby Saks that he sustained in a letter bomb.

African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, and the Electoral Commission that play an important role in the realisation and enhancement of the political rights of people, including such rights pertaining to persons with disabilities.[699] These institutions should be independent and are subject to only the Constitution and the law. They must also be impartial and must exercise their functions without fear, favour or prejudice.[700] In conclusion, the Constitution provides for certain general provisions, including the recognition and application of international law. An international agreement, such as the CRPD, binds the Republic only after it has been approved by resolution in both houses of Parliament. However, any international agreement only becomes law in the Republic when it is enacted into law by national legislation.[701]

3.2 Applicable national legislation

As mentioned earlier, the CRPD has the purpose to promote, protect and to ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Furthermore, state parties that are signatories to the Convention undertook to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without

[699] Refer to chapter 9 of the Constitution of the RSA, 1996.
[700] See ss 181(1)-(2) of the Constitution. The Chapter nine institutions are further given additional powers as are prescribed by national legislation. Note also s 190(2 of the Constitution. Under the Constitution, members of any commission, must be women or men, who are SA citizens, are fit and proper and comply with certain requirements as are prescribed by national legislation. Read s 193(1) of the Constitution. In principle, persons with certain disabilities are therefore not excluded from membership of such commissions, permitted that they comply with the general criteria for appointment.
[701] Refer to ss 231-233 of the Constitution of the RSA, 1996. These sections must be read with s 39 of the Bill of Rights which obligates the consideration of International law, when interpreting the rights in the Bill of Rights.

discrimination of any kind on the basis of disability. State parties further agree to adopt appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention. State parties are obligated to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities. State parties committed themselves to refrain from engaging in any act or practice that is inconsistent with the Convention and also to ensure that public authorities and institutions act in conformity with the Convention.[702] Following on its duties and responsibilities under the Convention, the South African Parliament has enacted or amended the following national statutory instruments:

3.2.1 The Electoral Act[703]

Following on the requirements of section 19 of the Bill of Rights, the South African Parliament has enacted and amended the Electoral Act of 1998. The purpose of the Act is to regulate elections of the National Assembly, the provincial legislatures and certain aspects of municipal council elections and also to provide for other related matters thereto. In relation to the provisions of article 29 of the Convention, the Electoral Act provides for the following provisions:

According to the Electoral Act, every person, in interpreting or applying the Act must do so in a manner that gives effect to the constitutional declarations, guarantees and responsibilities contained in the Constitution and also take into account any appropriate code. The Act further applies to every election of the National Assembly and also elections of a provincial legislature. The Act applies to an election of a Municipal Council or a by-

[702] Refer again to article 4 of the CRPD.
[703] See Act 73 of 1998, hereafter referred to as the Electoral Act.

election for such Council, only to the extent as stated in the Local Government: Municipal Electoral Act.[704]

The Electoral Act further provides that any South African citizen in possession of an identity document may apply for registration as a voter. In cases where the citizen is an ordinary resident outside the Republic, he or she must in addition to his or her identity document also produce a valid South African passport. A person applying for registration as a voter must do so in person and also in the prescribed manner. A person is regarded to be an ordinary resident at the home or place where that person normally lives and to which that person regularly returns after any period or temporary absence. For the purpose of registration on the voters roll, a person is not regarded to be an ordinary resident at the place where that person is lawfully imprisoned or detained, but at the last home or place where that person normally lived, when not imprisoned or detained. The chief electoral officer, if satisfied that a person's application for registration complies with the Act, and that the person is a South African citizen and is at least 18 years of age, must register that person as a voter by making the requisite inscription in the voters roll. The chief electoral officer may not register a person as a voter if that person, *inter alia*, has been declared by the High Court to be of unsound mind or mentally disordered or is detained under the Mental Health Care Act.[705] A person's name must be entered in the voters roll only for the voting district in which that person is an ordinary resident and for no other voting district.[706]

According to section 24 B of the Act, in an election for the National Assembly or a provincial legislature, a person who, on

[704] See Sec 2 and 3 of the Electoral Act read with the LG: Municipal Electoral Act 27 of 2000.
[705] See Act 17 of 2002.
[706] Read ss 7 and 8 of the Electoral Act.

election day is in prison and whose name appears on the voters roll for another voting district, is deemed for that election day to have registered by his or her name having been entered into the voters roll for the voting district in which he or she is in prison. This provision could have important consequences and should be taken into account in circumstances where a person who is in prison is also disabled in one form or another.

It is of importance to note that part 5 of the Act specifically provides for special votes and the declaration of votes. In this regard the Act states that in an election for the National Assembly, the Electoral Commission must allow a person to apply for and cast a special vote, prior to the election day, if, on election day, that person cannot vote at a voting station in a voting district in which he or she is a registered as a voter, due to his or her:[707]

> (a) physical infirmity or disability, or pregnancy;
>
> (b) absence from that voting district while serving as an officer in the election; or
>
> (c) being on duty as a member of the security services in connection with the election.

The Electoral Act further provides for specific requirements regulating voting procedure, the assistance to certain voters as well as the establishment of mobile voting stations. The Act determines that a voter may only vote once in an election, and may vote only at the voting station in the voting district for which that voter is registered. A voter is further entitled to vote at the voting station on production of that voter's identity document to the presiding officer or a voting officer at the voting station and

[707] Refer to s 33 (1)(a)-(c) of the Electoral Act. A similar provision for special votes in the election for provincial legislatures is also provided for in s 33 (a) of the Act.

if that voter's name is recorded in the certified segment of the voters roll for the voting district concerned. It is further provided that the presiding officer or voting officer may require that a voter's fingerprints be taken and if the presiding officer or voting officer is satisfied in respect of all the matters mentioned above, that the officer must also mark the hand of the voter in the prescribed manner. Once the voter has received a ballot paper marked according to the Act, the voter must then enter an empty voting compartment and continue with the voting process. A further provision, and specifically relevant for purposes of this report, is the provision of assistance that can be provided to certain voters. In this respect the Act provides that the presiding officer or a voting officer, at the request of a voter who is unable to read, must assist that voter in the voting process. Such assistance must be provided in the presence of a person appointed in terms of section 85 of the Act by an accredited observer, if available, and two agents from different parties, if available.[708] Furthermore, a person may assist a voter in voting if: (a) the voter requires assistance due to physical disability, including blindness or other visual impairment; (b) the voter has requested to be assisted by that person; and (c) the presiding officer is satisfied that the person rendering the requested assistance has attained the age of 18 years and is not an agent or candidate in the election.[709] A further important aspect to note here is that the principle of secrecy of voting contemplated during the voting procedure, including the assistance of certain voters, must be preserved as far as possible. Also, if the Electoral Commission decides to use mobile voting stations in an election, the Commission must prescribe voting procedures, sustainably

[708] Read s 39 (1)(a) and (b) of the Electoral Act.
[709] See ss 39 (2)(a)-(c) of the Electoral Act.

in accordance with the aforementioned requirements as set out in sections 35 to 43 of the Act.[710]

The Electoral Act also determines various requirements relating to voting stations. In this regard the following provisions are important: The Commission is required to establish for an election one voting station or one voting station and a mobile voting station, or only a mobile voting station, in each voting district in which the election will be held. The Commission may establish a mobile voting station only if the voting district is a large and specially populated area and it is necessary to assist voters who would otherwise have to travel long distances to reach the voting station. When the location of a voting station is being determined, the Commission may take into account any factor that could affect the free, fair and orderly, conduct of elections, and such factors could include the availability of suitable venues for a voting station; the distance to be travelled to reach such venues; parking facilities; general facilities; the safety and convenience of voters; the geographical or physical features that may impede access to or at those venues and the ease with which those venues could be secured.[711]

In relation to voting materials, the Electoral Act determines that the Commission must design the ballot paper or ballot papers to be used in an election; must determine the language to be used on a ballot paper, taking into account the election in which the ballot paper is to be used and must also determine the manner in which ballot papers issued are to be accounted for.[712] The Commission must further determine the design and material of

[710] Note s 44 (1) of the Electoral Act.
[711] Refer to s 64 of the Electoral Act. It is important to note that the factors mentioned in s 64 (2) of the Act could also be of significant importance in relation to the full realisation of the rights of citizens with disabilities to exercise their democratically entrenched civil and political rights. Note also that according to s 65 of the Act, the commission may relocate a voting station if the commission is of the view that it is necessary to do so for the conduct of free and fair elections.
[712] See s 68 (a)-(c) of the Electoral Act.

voting compartments to be used in an election. In this regard it is important that the Commission also takes into account, whilst determining the design and material of voting compartments, the challenges and needs of voters with disabilities. It is also important to point out that the presiding officer of a voting station is legally obligated to coordinate and supervise the voting process at that voting station, so as to ensure that the election at the voting station is free and fair. Such statutory obligation could also significantly ensure the free and fairness of elections involving disabled voters. Apart from the role and duties of presiding officers, the Electoral Act provides for other role players such as accredited observers who should observe that an election is being conducted impartially and independently of any registered party or candidate and is also free and fair, especially in relation to the voting process involving disabled voters.[713]

Under the general provisions of the Electoral Act, no person may unduly influence any person in relation to a variety of aspects in relation to voting and no person may prevent anyone from exercising a right conferred in terms of the Act.[714] It is also specifically provided that no person may interfere with a voter's right to secrecy while casting a vote. This, again, is an important provision also in relation to the rights of voters with disabilities.[715] The Electoral Act further creates specific mechanisms for the enforcement of the provisions of the Act. The Act provides that the chief electoral officer may institute civil proceedings before a court, including the Electoral Court, to enforce a provision of the Act or the code of conduct provided under the Act. It is further provided that the Electoral Act has final jurisdiction in respect of all electoral disputes and complaints about infringements of the code, and no decision or

[713] See s 84 of the Electoral Act.
[714] Read ss 87 (1) and (2) of the Electoral Act.
[715] Note s 90 of the Electoral Act.

order of the Electoral Court is subject to appeal or review.[716] It is therefore clear that both the Electoral Act and the Constitution provide for important enforcement mechanisms regarding voting issues which could include issues relating to the voting rights of persons with disabilities. The Electoral Commission is also aided by additional powers which include the authority of the Commission to compile and issue any other code or to change or replace an existing code. The Electoral Commission is further obligated to make regulations regarding any matter that must be prescribed in terms of the Act.[717] In support of the provisions of the Act, the Act provides in schedule 2 for a specific electoral code of conduct. The purpose of this code is to promote conditions that are conducive to free and fair elections and every registered party and every candidate is bound by this code. It is further interesting that, according to item 6 of the electoral code, specific provision is made for the role of women during election proceedings. In this regard the code provides that every registered party and every candidate must: respect the rights of women to communicate freely with parties and candidates; facilitate the full and equal protection of women in political activities; ensure the free access of women to all public political meetings, marches, demonstrations, rallies and other public political events; and to take all reasonable steps to ensure that women are free to engage in any political activities.[718] Although the specific recognition of the role of women in elections is to be commended, it is unfortunate that persons with disabilities have

[716] Refer to ss 95 and 96 of the Electoral Act. In relation to the jurisdiction and powers of the electoral court it is constitutionally speaking doubtful whether the electoral court has final jurisdiction in respect of all electoral disputes. According to the Constitution 17th Amendment Act of 2012, the Constitutional Court may decide, not only constitutional matters, but also any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of the general public importance which ought to be considered by that Court. See s 167 (3) (b)(ii) of the Constitution of the RSA, 1996.

[717] See ss 99 and 100 of the Electoral Act.

[718] See item 6 of schedule 2 of the Electoral Act.

not been accorded with similar protection. In this respect it is recommended that such special protection of disabled persons within the electoral process should also be specifically provided for.

The electoral code further protects voters, including the disabled voter, against certain prohibited conduct. It is specifically provided for that no registered party or candidate may use language, or act in a way that may provoke the intimidation of candidates, members of parties, representatives or supporters of parties or candidates. No party or candidate may further discriminate on the grounds of race, ethnicity, sex, gender, class or religion in connection with an election or political activity. Similar to the issue of women mentioned above, this protection against prohibited conduct is supported, but it is again unfortunate that the ground of disability has not been included specifically as one of the prohibited grounds of discrimination. Future legislative amendments in this regard should be seriously considered.[719] Finally, as authorized by the Act, the following regulations have been prescribed:[720]

3.2.1.1 Voter registration regulations, 1998[721]

During 1998, the Electoral Commission prescribed particular voter registration regulations. According to the voter registration regulations, a person who applies for registration as a voter must complete an application form in a specific format. The applicant must then in person submit such completed application form, together with his or her identity document, to a registration officer at a place identified by the chief electoral officer in a

[719] Refer to item 9 (1) (a)-(d) of schedule 2 of the Electoral Act.
[720] See s 100 of the Electoral Act.
[721] It should be noted that the Electoral Commission has, in terms of s 100 of the Electoral Act, made certain regulations regarding voter registration. These regulations are titled: Voter Registration Regulations, 1998 and have been published under GN R1340 in GG 19388 of 16 October 1998, and are referred to hereafter as the Voter Registration Regulations, 1998.

particular voting district. It is specifically provided for in the regulations that a person in the Republic who applies for registration as a voter, and who is by reason of physical disability unable to travel to a place to submit his or her application form, may by means of an application made on a specific form, apply to the municipal electoral officer to be visited by a registration officer to whom he or she may then in person submit the application form for registration as a voter.[722] These provisions are also applicable in instances when a registered voter or a person who has applied for registration as a voter and whose name or ordinary place of residence has changed and who must apply to have that change recorded in the voters roll.[723] The voter registration regulations further provide for specific mechanisms whenever the chief electoral officer is required to notify a person of an event, referred to in section 12 of the Act, or when a person wishes to object to the commission in terms of aspects mentioned in section 15 of the Act. In this regard it should be noted, however, that no special arrangement for communication by the chief electoral officer to a person with disabilities, or when a person with disabilities wants to object to the commission regarding an issue of the election, have been provided for, and should be addressed. Finally, the voter registration regulations also provide that certain particulars, when registering as a voter, of a person are to be entered into voters the role. Such aspects include the identity number and the name of the voter.[724] Perhaps it could be considered, in an effort to enhance the rights of persons with disabilities that such particulars should indicate if a particular person suffers from a certain form of disability. This inclusion could then further inform the electoral officer to be extra vigilant in protecting and enhancing the rights of such disabled voters. On this point specific reference should be made

[722] See item 2 of the Voter Registration Regulations, 1998.
[723] Refer to item 3 and 4 of the Voter Registration Regulations, 1998.
[724] See item 10 of the Voter Registration Regulations, 1998.

to appendix 1 of the voter registration regulations which, in the application for registration as a voter, provides for details of any disability of an applicant. There seems to be no specific reason why such details of the disability of a voter should not be included on the voters roll after such application has been processed and allowed.[725]

3.2.1.2 Regulations on the Accreditation of Voter Education Providers, 1998[726]

In 1998, certain regulations relating to the accreditation of voter education providers were also prescribed. Under these regulations, a person applying for accreditation to provide voter education for an election must complete a specific application form,[727] and must adhere to a specific code of conduct.[728] According to the Regulations and the Code for accredited Voter Education Providers, every accredited voter education provider is obligated to inform and make voters aware of their protected rights to freedom of conscience and belief, freedom of speech and expression, freedom of association, and peaceful assembly, freedom of movement and of the right to participate freely in peaceful political activities. Voter education providers must also respect the right of voters to elect a party of their choice by using an impartial training method. An accredited voter education provider must further act in a strictly neutral and unbiased manner in any matter concerning a political party, candidate or voter. It is specifically emphasised that the role of an accredited voter education provider can and should be of significance in the

[725] Refer to the personal details column of appendix 1 of the Voter Registration Regulations, 1998.
[726] See the Regulations on the Accreditation of Voter Education Providers, hereafter referred to as the Regulations on the Accreditation of Voter Education Providers, as published under GN R1488 in GG19527 of 24 November 1998.
[727] Refer to appendix 1 of the Regulations on the Accreditation of Voter Education Providers, 1998.
[728] Note schedule B of the Regulations on the Accreditation of Voter Education Providers, 1998.

promotion and realisation of the rights of voters with disabilities in relation to electoral matters. Perhaps specific training for every voter education provider in relation to assisting and facilitating the needs and rights of voters with disabilities should be considered.[729]

3.2.1.3 Regulations on the Accreditation of Observers, 1999[730]

Similar to the code of conduct for accredited voter education providers, regulations and a code of conduct on the accreditation of observers have been provided for. In this regard every accredited observer must: observe an election impartially and independently of any registered party or candidate contesting the election, remain non-partisan and neutral, provide the commission with a comprehensive review of the elections taking into account all relevant circumstances such as the proper conduct of polling and the counting of votes and any other issue that concerns the essential freedom and fairness of the election. Since these obligations could include also the rights and assistance to people with disabilities, accredited observers can therefore also play an important role.

3.2.1.4 Regulations concerning the submission of lists of candidates, 2004[731]

The regulations concerning the submission of lists of candidates in essence regulate the lists of candidates, the deposits to be paid as well as aspects relating to the objection to the nomination of a candidate. In essence the regulations do not refer or impact the rights of people with disabilities to vote or to participate in voting procedures.

[729] Read again items 1 to 4 of schedule B of the Regulations on the Accreditation of Voter Education Providers, 1998.
[730] See the Regulations on the Accreditation of Observers, 1999 as published in GN R362 in GG 19857 of 17 March 1999.
[731] See the Regulations Concerning the Submission of Lists of Candidates, 2004 as published in GN R14 IN GG25894 of 7 January 2004.

3.2.1.5 Election Regulations, 2004[732]

Further important regulations were prescribed in 2004. Under the Election Regulations of 2004, special provision is made for the application for and casting of special votes. According to regulation 6, read with section 33(6) of the Electoral Act, provision is made in respect of persons who cannot vote at a voting station in the voting district in which they are registered as voters due to their physical infirmity or disability or pregnancy, for applying for special votes and for casting such votes in an election. These regulations specifically provide that the Electoral Commission must allow a person to apply for and cast a special vote, prior to Election Day, in the voting district in which that person is registered, if he or she cannot vote on the day of the election. Furthermore, a person referred to in sub-regulation 6(1)(a), who wants to vote in the voting district where he or she is registered, may apply for a special vote by delivering or causing to be delivered to the municipal electoral officer of the voting district within whose area he or she is registered as a voter, by not later than the relevant date or dates stated in the election timetable, a written application as indicated in appendix 1 of the regulations. The presiding officer, or a voting officer designated by him or her, must then consider every application received and if he or she is satisfied that the applicant is registered as a voter in that voting district and that the applicant cannot vote at that voting station due to physical infirmity or disability or pregnancy, approve the application. If an application is rejected, the applicant must be notified of such rejection in writing by the most convenient method available. If the application is approved, the applicant must be visited by at least two voting officers at the address within the voting district, as specified in the application, on the date or dates as stated in

[732] See the Election Regulations, 2004 as published in GN R12 IN GG 25894 of 7 January 2004.

the election timetable. On production of the applicant's identity document and if the voting officers are satisfied that the applicant is the person described in that identity document, the applicant's identity document and hand are marked in the prescribed manner and he or she is then handed a ballot paper, marked on the back for that election. The applicant is then allowed to mark the ballot paper in secret and to place and seal the ballot in an unmarked envelope which is in turn placed and sealed in another envelope and which is marked on the outside with the applicant's name, identity number and the voting district number. The applicant's name is then marked on the voters roll with the letters SV (special vote). According to Regulation eight, a similar procedure is provided for in instances where a voter cannot vote at a particular voting station due to physical infirmity or disability or pregnancy. The aforementioned procedures and requirements are basically similar for the casting of special votes in an election for the National Assembly or a provincial legislature. Under Regulation 18 it is required that a voter's hand be marked in terms of the requirements of section 38 of the Electoral Act, by drawing a short line on the voter's left thumb nail with visible indelible ink. If a voter does not have a left thumb or thumb nail or if it is impractical due to injury, disease or any other cause to mark the left thumb or left thumb nail, any of the left hand fingers and nails must be marked, or if the left hand cannot be marked, then a finger and nail of the right hand must so be marked. If, for any reason, no finger or nail of a voter can be marked, then the presiding officer must record the voter's name, address, identity number and the reasons why the voter's hand could not be marked, on a list that is kept for that purpose. It is therefore clear that the Regulations specifically provide for instances where people with disabilities want to participate in the voting process but are subject it to certain unusual difficulties.

3.2.2 The Local Government: Municipal Electoral Act (MEA)[733]

Apart from the Electoral Act of 1998, Parliament has also enacted the Local Government: Municipal Electoral Act of 2000. The Municipal Electoral Act (MEA) provides for similar provisions as mentioned in the Electoral Act of 1998, but only in relation to the electoral processes of municipal elections. The MEA applies to all municipal elections, including by-elections and is further also administered by the Electoral Commission.[734]

According to the MEA, the national common voters roll, as compiled and maintained in terms of the Electoral Act, must be used for municipal elections. Persons may only vote in an election if registered as voters on the certified segment of the voters roll for a voting district which falls within the municipal jurisdiction. Municipal elections must be free and fair and may be postponed in certain circumstances if it is not reasonably possible to conduct free and fair elections.[735] Municipal elections may further only be contested by registered parties or, in some instances, by ward candidates who belong either to a political party or are independent candidates. Members of political parties can include people with disabilities and such persons can also, in compliance with the general registration requirements, stand as independent ward candidates.[736]

Ander section 19 of the MEA, the Electoral Commission is then responsible to establish voting stations or even mobile voting stations for municipal elections. When determining the location of such voting stations, the MEA allows the Electoral Commission to take various factors into account. Such factors include: any aspect that could affect the free, fair and orderly conduct of elections, population density and the need to avoid

[733] Act 27 of 2000, hereafter referred to as the Municipal Electoral Act.
[734] See section 4 of the Municipal Electoral Act
[735] Note ss 5, 7 and 8 of the Municipal Electoral Act.
[736] See ss 13 to 18 of the Municipal Electoral Act.

congestion at voting stations.[737] Similar to the requirements at national and provincial levels, the free and fairness of elections could also be impacted by the manner in which people with disabilities are able to access and vote in municipal elections. Political parties must be consulted further on the location of voting stations and, therefore, have an important role to play to ensure that such locations are suitable also for people with disabilities in order to vote. If the location of voting stations is unsuitable, the MEA provides that such stations may be relocated by the Electoral Commission.[738]

On the issue of voting materials the MEA determines that the Electoral Commission is responsible to determine the design of the ballot paper to be used in an election as well as the design and material of voting compartments. The design of voting compartments must be in such a way as to adequately screen a voter from observation by other persons while marking a ballot paper. The general requirement of voting secrecy, therefore, is again provided for.[739] Under the MEA, a presiding officer or deputy presiding officers must be appointed for each voting station. Such offices have a variety of powers and duties which include assistance and help to people with disabilities.[740] Furthermore, all officers appointed under the MEA must be impartial and must exercise their powers and perform their duties independently and without fear, favour or prejudice. No officer may, whether directly or indirectly, in any manner, give support to any party or candidate contesting an election.[741] The MEA also provides for the appointment and powers of certain

[737] Read s 19 (3)(a)-(c) of the Municipal Electoral Act.
[738] Referred to ss 19 and 20 of the Municipal Electoral Act.
[739] Note ss 23 and 25 of the Municipal Electoral Act.
[740] Compare s 28 of the Municipal Electoral Act. This role should be specifically emphasised and such officers should be properly trained in order to cater for the need and assistance of voters with disabilities.
[741] See ss 37(5)-(6) of the Municipal Electoral Act. Such support should also include assistance to persons with disabilities who are candidates or voters in an election and where the Act or the law in general permits such support or assistance.

institutions, agents and observers in an election. Such institutions and persons could, in some instances, also play an important role in enhancing the rights of people with disabilities in such elections.[742]

According to the MEA a voter may only vote in an election and at the voting station in the voting district in which that voter is registered. Specific provision is then also provided for assistance to certain voters. The MEA determines that a person, other than the presiding officer or a voting officer, may assist a voter in voting, but only if: (a) the voter requires assistance due to physical disability, including blindness or other visual impairment; (b) the voter has requested to be assisted by that person; and (c) the presiding officer is satisfied that the person rendering assistance is at least 18 years old and is not an agent or a candidate.[743] Furthermore, the presiding officer or a voting officer, again at the request of a voter with physical disabilities, must assist that voter in voting and further provide such assistance in the presence of a person appointed by an accredited observer, if available, and two agents appointed by different parties or candidates, if available. In applying such assistance, the secrecy of voting as contemplated in section 47 of the MEA must again be preserved as far as possible.[744]

It should further be noted that it is a specific voting procedure, both under the Electoral Act and the MEA, that the left thumb or thumb nail of a voter must be marked with visible indelible ink. In order to provide for persons with certain disabilities, the MEA also provides that a voter without a left thumb or in instances when it is impractical due to injury, disease or any other cause, any of the left fingers or the right-hand fingers must be marked. However, voters without hands should also be able to vote and

[742] See ss 38-43 of the Municipal Electoral Act.
[743] Read s 48 (1)(a)-(c) of the Municipal Electoral Act.
[744] Note s 48 (2)-(3) of the Municipal Electoral Act.

the presiding officer must then record the voter's name, address, identity number and reasons for the irregularity, on a list kept for such purpose.[745] Provision is also made for special votes under the MEA. In this regard, any voter who is unable, on voting day, to cast his or her vote at the required voting station, may in the prescribed manner apply and be allowed, prior to the voting day, to cast a special vote within that voting district. This provision enhances the voting possibilities of people with disabilities.[746]

Under chapter 7 of the MEA, specific prohibited conduct is provided for. Conduct such as undue influence, impersonation, the making of intentional false statements, and the infringement of secrecy is specifically prohibited. Such provisions should also provide extra protection for vulnerable voters, such as persons with disabilities.[747] The MEA further again confirms the jurisdiction and powers of the Electoral Court, which should and is legally authorised to oversee, adjudicate upon and protect the rights of all voters and candidates including voters with disabilities. Finally, the MEA provides for an electoral code of conduct that must be complied with and which also authorises the Electoral Commission to make regulations regarding any matter that must be prescribed in terms of the Act.[748] As authorised by the MEA, the Act incorporates an electoral code of conduct with the general purpose to promote conditions conducive to free and fair elections.[749] Following on the authority provided for in sections 88 and 89 of the MEA read together with the provisions of sections 41 and 43, the Electoral Commission has made the Municipal Electoral Regulations (MER) of 2000.[750] In general, the MER do not directly refer or

[745] Referred to s 50 (1)-(3) of the Municipal Electoral Act.
[746] See s 55 of the Municipal Electoral Act.
[747] Read ss 66-72 of the Municipal Electoral Act.
[748] Note ss 78 and 87 of the Municipal Electoral Act respectively.
[749] See item 1 of schedule 1 of the Municipal Electoral Act.
[750] See the Municipal Electoral Regulations as published under GNR. 848 in GG 21498 on 22 August 2000.

assist voters or candidates with disabilities, however, on the issue of special votes it is provided that a voter who cannot travel to the voting station due to physical infirmity or disability must apply to be afforded the opportunity to cast a special vote at the place where he or she resides. On the day, as determined in the election timetable, at least two voting officers must visit such voters who had successfully applied to cast their special votes at their places of residence, and thus afford them the opportunity to exercise their right to franchise.[751] In conclusion, the MER further provide for a certain code of conduct and also for *pro forma* documents for use during the electoral process. All in all, strong emphasis is again put on the principle of secrecy throughout the electoral process.

3.2.3 The Electoral Commission Act, 1996 (ECA)[752]

As required under the Constitution and as referred to by both the Electoral Act and the MEA, national legislation - the Electoral Commission Act - has been enacted to manage the establishment and composition of an electoral commission in order to manage national, provincial and municipal elections and also to provide for the powers and functions of an electoral court.[753] The Electoral Commission is further an independent institution and is subject only to the Constitution and the law. The objects of the Commission are to strengthen constitutional democracy and to promote democratic electoral processes. The Electoral Commission further has a variety of powers, duties and functions which include, *inter alia*, to ensure free and fair elections; to provide conditions conducive for free and fair elections; and to continuously review electoral legislation and to propose changes

[751] Refer to regulations 28 b and 28 c of the Municipal Electoral Regulations of 2000.
[752] See Act 51 of 1996, hereafter referred to as the Electoral Commission Act, 1996.
[753] Note the long title of the Electoral Commission Act as well as s 2 of the Act.

and amendments that are necessary.[754] The Electoral Commission must further annually report to the National Assembly about its functions and activities. It must also furnish the President with information, if and when requested. Under section 18 of the Electoral Commission Act an Electoral Court for the RSA with the status of a High Court is established. This Electoral Court may review any decision of the Electoral Commission relating to an electoral matter.[755] Finally, the Electoral Commission is authorised to make regulations on a variety of matters, which can include regulations pertaining to the conduct of all persons, parties, and candidates in order to enhance free and fair elections. Such regulations could also include matters that are necessary or expedient to achieve the objects of the ECA and also to enhance the rights of people with disabilities during any electoral process.[756]

4 Recommendations and conclusion

As mentioned in the introduction of this report, the aim of the research project on people with disabilities is to evaluate the extent to which current South African law provides for the promotion, protection and fulfilment of the rights of persons with disabilities as required under the CRPD. The CRPD is an international legal instrument and the South African constitutional scheme demands that such an instrument be considered when rights protected in the Bill of Rights are interpreted.

On evaluation of the CRPD, and in particular article 29 of the Convention, it is confirmed that under international law, persons with disabilities are entitled to: the right and opportunity to

[754] See ss 4-5 of the Electoral Commission Act.
[755] Read ss 14, 18 and 20 of the Electoral Commission Act respectively.
[756] Note s 23 (1) (a)-(g) of the Electoral Commission Act.

effectively and fully participate in political and public life, on an equal basis with other people, directly or through freely chosen representatives; vote in person or to be elected to public office; to form or join a political party and to participate in the activities of such an organisation; to be subjected to and have access to voting procedures, materials and facilities that are appropriate and accessible; vote in all elections by secret ballot and to do so without intimidation or any discrimination; to stand for election as a possible candidate and to effectively hold office and perform all public functions at all levels of government if so elected or appointed; and finally to receive the recognition of complete inherent dignity, worth and equality as human beings and the full enjoyment of all human rights with the further guarantee to have assistance in exercising their rights, at their own choice and request.[757]

Upon evaluation of the South African legal system, it becomes clear that the right of persons with disabilities to participate fully in political and public life has been protected since the historic 1994 elections and with the commencement of the Interim Constitution and the Constitution of the RSA, 1996.[758] Apart from the various general fundamental rights provided for in the Constitution, section 19 of the Bill of Rights specifically guarantees the right of every citizen, including persons with disabilities, to exercise and enjoy a variety of political rights. Such recognition include the right, to form, participate and campaign for a political party of choice and to vote, in secret, in elections for any legislative body established in terms of the Constitution and also to stand for and hold public office, if elected.[759] The rights mentioned in the Constitution are not

[757] Read again article 29 of the CRPD.
[758] Refer again to the Draft SA Baseline Report on the CRPD para 327 at 65.
[759] See ss 19(1)-(3) of the Constitution of the RSA, 1996.

absolute and are subject to possible limitations.[760] It is clear from the wording of section 19 that internal limitations such as adulthood and citizenship are required for all people and that any other limitations, such as the disqualification for persons of unsound mind, must comply with the requirements of the general limitations clause.[761]

Apart from the core provisions as entrenched in the Constitution, the current South African legislative framework further expands on and enhances the political rights of persons with disabilities. It would seem that the various national laws that were investigated and are mentioned in this report not only build on the overall constitutional guarantees, but also ensure and support South Africa's responsibilities under the CRPD. As mentioned above, a statutory framework provides for and protects the rights of persons with disabilities in many ways, such as the provision of special voter materials, voting station configurations and the possible registration as special voters with the option to exercise the right to franchise with personal assistance of choice. It is also clear that the principle of voting secrecy is given significant prominence and people with disabilities are also protected in this respect. Finally, the legislative system provides for various mechanisms and institutions to adjudicate electoral disputes and to ensure an electoral system that is free and fair. The most prominent institutions in this regard are arguably the Electoral Commission and the special Electoral Court. Specific provision is made for continuous monitoring and investigation of issues concerning the management and enhancement of the political rights of all citizens.[762]

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[760] Note again s 7(3) of the Constitution which states that the rights in the Bill of Rights are subject to the limitations contained or referred to in s 36, or elsewhere in the Bill.

[761] See s 36 of the Constitution.

[762] See s 190(1)-(2) of the Constitution read with the provisions of the Electoral Commission Act.

It is finally concluded in this report that the current South African legislative framework, founded on a supreme constitution significantly provides protection and recognition of the political rights of persons with disabilities. There seems to be wide consensus that the rights and needs of vulnerable groups, such as persons with disabilities, are positively and extensively protected in the various electoral processes in relation to all three spheres of the South African government.[763] It is, however, recommended that continuous research and training be conducted and that Parliament should urgently develop and enact national legislation to formally incorporate the CRPD into South African law.

[763] Refer again to the SA Draft Baseline report paras 337-339 at 66-68.

8. REPORT ON DISABILITY DISCRIMINATION IN INSURANCE

Prof B Kuschke*

1 Introduction

Human rights are in essence a belief in the existence of a form of justice that is universally valid for all people. All sectors, public as well as private, are bound by the human rights to equality and non-discrimination.[764] The right not to be discriminated against due to a disability is addressed in the United Nations Convention on the Rights of Persons with Disabilities (hereinafter the 'Convention').[765] The discussion below deals with issues raised in the Convention specifically in the context of insurance discrimination.

Discrimination in a social or socio-economic context has been part of the daily narrative.[766] Discrimination in a purely economic sense such as in the financial sector has, however, not enjoyed as much attention. Discrimination is mostly regulated within the health, welfare and employment frameworks.

The one industry in which persons are discriminated the most on a daily basis is insurance. [767] In one of the first cases to be heard on insurance discrimination, the Supreme Court of Canada held in *Zurich Insurance Company v Ontario*, *Zurich Insurance Co v*

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[764] Fagan Internet Encyclopaedia of Philosophy www.iep.utm.edu (last accessed 29/8/2014).Recognised as a "privatisation of human rights", as described by Clapham "Human Rights in the private sphere" Oxford Monographs in International Law (1993) at 289.

[765] UN General Assembly 25 Aug 2006, signed and ratified by South Africa in 2007.

[766] For the national position see also the Integrated National Disability Strategy White Paper issued by the Office of the President [date unknown] www.independentliving.org (last accessed 9 August 2015).

[767] Information presented in this publication was gleaned from Kuschke International Report on Discrimination in Insurance presented at the AIDA XIVth World Congress (International Association for Insurance Law World Congress) in Rome, Italy on 4 October 2014 on the position in 28 participating countries.

Ontario Human Rights Commission[768] that '[a] fundamental tension between human rights law and insurance practice exists.' South African case law on insurance discrimination is rare, as cases often settle out of court. Reported cases on discrimination in insurance include *Robert and Others v Minister of Social Development*[769] (on age and gender discrimination); *Satchwell v President of the Republic of South Africa*[770] (on same-sex partner discrimination); and *Minister of Finance v Van Heerden*[771] (on pension fund discrimination based on employment level). To date no case law has been reported in our courts on disability discrimination in insurance.

Insurance companies are in fact in the business of discrimination when they segregate insureds into different risk groups or pools based on their risk profiles. Insurance companies are unable to price risks that they cannot analyse, assess or quantify which necessitates some form of arbitrary grouping or classification. Sometimes classification will coincide with a prohibited or unjustified ground of discrimination, such as race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[772] Such discriminating conduct has the potential to infringe on the right to dignity which is recognised as a foundational value in the Constitution.[773] Cover for persons diagnosed with HIV/AIDS is not included in this report as one cannot equate disability with disease.

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[768] 1992 (2) S.C.R. 321.
[769] Case nr 32838/05 High Court (TPD) September 2007.
[770] 2003 (4) SA 266 (CC).
[771] 2004 (6) SA 121 (CC).
[772] The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereinafter the 'Equality Act' which gives effect to s 9 and s 8(2) of the Constitution of the Republic of South Africa, 1996 (hereinafter the 'Constitution').
[773] Constitution s 10.

The degree of risk is inevitably determined on the basis of a specific group's common or general characteristics which are material to the risk. Some insureds placed in a group do not necessarily share the average characteristics of that group, with the result that the rate they pay or the extent of the insurance cover is discriminatory. The diversity of disabilities and varying degrees of disability complicate matters. The Convention recognises that this diversity causes complications and makes groupings difficult.[774]

Discrimination in insurance is most often based on age, gender and disability. Disabled or elderly persons seem to mutely accept a generalised grouping, often unaware that such a classification can be challenged and that standard-form or adhesion insurance contracts are not cast in stone and unalterable. Many persons are unaware that they may negotiate deviations from the printed contract form presented to them during contractual negotiations and accept that it is a "take it or leave it" scenario. Insurers classify persons with disabilities into broad groupings failing to differentiate on personal degrees and refined characteristics of a specific disability, and often failing to inform potential policyholders of exclusions from cover, or other alternatives available in the market. The Convention stresses the importance of accessibility to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms.[775]

Finally, to add insult to injury, disabled persons might be discriminated against in the context of insurance on more than one factor. The Convention also recognises the harsh reality of multiple or aggravated forms of discrimination.[776]

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[774] Art 2 (i).
[775] Art 2 (v).
[776] Art 2 (p).

Inequality could potentially affect the validity of a contractual clause, as it may be contrary to public policy to enforce an agreement that was entered into while labouring under the inequality.[777] The South African Supreme Court of Appeal has since the judgment in *Barkhuizen v Napier*[778] accepted that there can be "a constitutionally-inspired public policy challenge to the enforcement of a prima facie reasonable contractual term."[779] One should on the other hand always keep in mind that contractual autonomy to voluntarily consent to a specific categorisation and cover also remains part of the right to freedom and to dignity.[780]

It is a common understanding that insurers should be able to differentiate, but that not all types of discrimination by insurers should be tolerated. The issue is how to identify acceptable grounds for differentiation and what the limits are for legitimate economic discrimination.[781] The discussion below aims to comment on some of the issues pertaining specifically to the insurability of persons with mental or physical disabilities, yet in no way attempts to provide a comprehensive analysis.

2 Nature of insurance discrimination

Discrimination in the insurance industry clearly falls within the broad descriptions provided for in the Convention and in The

[777] Constitution s 172(1)(a) that a particular term or contract is unenforceable if incompatible with the Constitution.
[778] 2007 (5) SA 323 (CC).
[779] Ngcobo J in *Barkhuizen* found the public policy approach to be correct; dissenting judgments by Judges Sachs, Moseneke and Mokgoro also confirmed this principle
[780] Cameron JA in *Brisley v Drotsky* 2002 (4) SA 1 (HHA) par 94.
[781] It is thus not a "disability" in the true sense. In *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC) the court declined to comment on whether an HIV infection can be regarded as a "disability" and protected as such under the Constitution sec 9(3).

United Nations Human Rights Committee, which states that "The term *discrimination* should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground[s] and which has the purpose of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[782] Two important constitutional issues that arise in this context are the inequality of bargaining power and outright discrimination. This report attempts to address only the latter.

Insurance discrimination is mostly justified as a form of personalisation of the insurance product. It allows insurers to maintain financially sound underwriting policies, to bring competitive offers to the market and enables insurers to charge different premiums for the different risk profiles. Preventing poor market performance within an essential sector of the economy and to promote business efficiency and profitability, while on the other hand acting fairly towards all insurance consumers when underwriting, poses a challenge for the industry. Insurers should still take cognisance of the fact that its conduct may be unconstitutional and may affect the policies that it issues.

The Convention requires states to participate in awareness raising of the rights of persons with disabilities in society.[783] The mere absence of statistics is not enough to irrefutably prove that there is no alternative to the discriminatory practice.[784]

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[782] UN Human Rights Committee *General Comment 18: Non-discrimination* (1989).
[783] Convention Art 8.
[784] The Integrated National Disability Strategy recognises the following: "There is a serious lack of reliable information on the nature and prevalence of disability in South Africa. This is because, in the past, disability issues were viewed chiefly within a health and welfare framework. This led naturally to a failure to integrate disability into mainstream government statistical processes. Statistics are unreliable for the following reasons: (a) there are different definitions of disability; (b) different survey technologies are used

To maintain equity among insured persons, clearly each policyholder should be charged a premium rate proportional to the actual risk he or she transfers to the insurance fund.[785] If one person is allowed to pay less than his or her proportional share to prevent discrimination, it will by necessity lead to an overcharge against other persons, again creating inequality and a type of reverse discrimination.

In insurance, discrimination is usually based on universal generalizations, such as the physical and physiological health status of the individual, but not on individualistic traits. Broad classifications include temporary, permanent, partial or recurring disabilities. A cause for concern that has been raised in the case of the so-called 'marginal cases': where persons are merely temporarily lacking in the criteria required for proper risk differentiation. This applies especially to some mental disabilities. Examples would include individuals who in the past have been diagnosed as suffering from for example epilepsy, dementia, and schizophrenia, yet who upon full recuperation, fail to procure sufficient cover due to their past medical history.

Discrimination in insurance is seen primarily as a form of price discrimination where higher rates are charged for minorities, or deal discrimination where some minorities do not qualify for, or are not offered the same extent of services or goods. Price discrimination occurs when selling a product at different prices for different classes of buyers. In most cases the different premiums charged are not related to the differences in the cost

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to collect information; (c) there are negative traditional attitudes towards people with disabilities; (d) there is a poor service infrastructure for people with disabilities in underdeveloped areas, and (e)violence levels (in particular areas at particular times) have impeded the collection of data, affecting the overall picture. See also the Convention Article 21that recognises a disabled person's right of access to information.

[785] See Nienaber and Van der Nest "Actuarial science versus equity: Contingency deductions for future loss of earnings and the HIV/AIDS pandemic" 2005 *THRHR* 546.

of providing the underlying cover. The access offered to disabled persons to medical insurance cover serves as an example.

Discrimination in insurance is furthermore a form of statistical discrimination, based on the theory of stereotyping. Inequality and the preferential treatment of some persons can be classified as statistical discrimination because stereotyping may be based on the average behaviour of a specific risk group.[786] Statistical discrimination is often applied and tolerated, for example when older people are charged more for life insurance, when people with a medical history are charged more for health insurance, and when disabled drivers who are quite capable of driving a vehicle safely and competently with adapted controls, are charged more for car insurance.

Theoretically an insurer would be inclined to substitute group averages in the absence of direct information about a certain fact, characteristic or ability. This causes the unfair discrimination of atypical individuals from the disadvantaged group. The mere absence of statistics is not enough to irrefutably prove that there no alternative to the discriminatory practice exists. Difficulty alone in providing statistical or actuarial information is an unacceptable excuse for discriminatory conduct in a commercial relationship that infringes on a disabled person's fundamental rights.[787]

The Integrated National Disability Strategy recognises the following: "There is a serious lack of reliable information on the nature and prevalence of disability in South Africa. This is because, in the past, disability issues were viewed chiefly within

[786] This theory was pioneered by Arrow, KJ (1973) "The Theory of Discrimination", in Ashenfelter and Rees (eds.), *Discrimination in Labor Markets*; Phelps "The Statistical Theory of Racism and Sexism" *American Economic Review* 1972(62) 659.
[787] *Zurich Insurance Co v Ontario Human Rights Commission* par 23.

a health and welfare framework. This led naturally to a failure to integrate disability into mainstream government statistical processes. Statistics are unreliable for the following reasons: (a) there are different definitions of disability; (b) different survey technologies are used to collect information; (c) there are negative traditional attitudes towards people with disabilities; and (d) there is a poor service infrastructure for people with disabilities in underdeveloped areas, that have impeded the collection of data, affecting the overall picture.

One should caution that not all categorisations necessarily lead to bias or prejudice, which renders them incontestable.[788] One type of price discrimination for example, called "inertia pricing" is not necessarily prejudicial. This occurs where renewal prices are higher than prices for risk-equivalent new customers. Although this practice appears to intensify competition, leading to lower aggregate industry profits, policyholders in aggregate pay lower prices. On the other hand not all customers are better off and some end up paying a disproportionate amount. The high level of switching cover between insurers to avoid this problem is furthermore found to be inefficient for society as a whole.

The modern insurance consumer's intolerance of discrimination in insurance became clear in the *Test Achats* case[789] in the EU where gender distinction between men and women in the calculation of motor insurance premiums was held to be discriminatory. This truly put the car amongst the pigeons. Many countries used to allow insurance companies to charge men and

[788] Explained in Thomas "Non-Risk Price Discrimination in Insurance: Market Outcomes and Public Policy" (2012) *The Geneva Papers of The International Association for the Study of Insurance Economics* 1018-5895/12 27 at 37.

[789] *Association belge des Consommateurs Test-Achats ASBL, Vann van Vugt, Charles Basselier v Conseil des ministres* C 236/09 heard in the European Court of Justice hereinafter the '*Test Achats'* case on the effect of The European Union's Gender Directive, Article 5(2) of the Council Directive 2004/113/EC of 13 December 2004. See Kuschke "Gender Equality in insurance" *De Jure* 2012(3) 624.

women with identical driving records different rates or factor in gender when deciding whether to deny coverage. Although attempting to reach optimal equality, the judgment in this case violates the primary insurance principle that risk must be calculated by taking all relevant information into account, and that one cannot treat all persons and all risks equally.[790]

Rather than using general factors the insurer should assess the risk of the individual insured, applying appropriate and neutral rating variables suited to the particular circumstances and attributes as well as the behaviour of the individual seeking insurance. This would require a much more intensive risk evaluation and would literally require the insurer to create bespoke insurance cover for each applicant. It is submitted that such an approach would theoretically give effect to the right to equality, but is not necessarily practically feasible.

Although insurers must be allowed to complete realistic risk assessments, they should still respect principles of transparency, anti-discrimination, proportionality and good customer policy such as Treating Customers Fairly or 'TCF' Framework.[791] Its focus is on fairness in service or product delivery, and will apply for instance where a customer may not have been treated fairly for example if sold a product such as a policy on which they subsequently may be unable to claim.

Discrimination should clearly be avoided unless it is justified by a legitimate aim, and means of achieving it are appropriate and necessary, with a reasonable proportion between the differentiated treatment and the aim pursued. Rather than

[790] Albertyn and Goldblatt "Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality" (1998) 14 *SAJHR* 248 at 272-3.
[791] TCF principles are introduced in South Africa by the Financial Services Board Treating Customers Fairly Framework (Annex B).

outright exclusion, various techniques can be applied to personalise the insurance product and discriminate to a lesser degree. These include premium adjustments selection of benefits, deductibles or the provision of, or recommendation to procure alternative cover.

3 Equality in South African insurance practice and legislation

No separate statute exists that deals with the rights of disabled persons. National legislation is however enacted in accordance with the UN Convention as set out above.

As supreme law in our country the right to equality as set out in section 9 of the Constitution renders discrimination on one or more of the listed grounds unfair unless its fairness is established. To prove that the discrimination is fair, one must take into account whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria that are intrinsic to the activity concerned.[792] The following aspects need to be taken into consideration:[793] (a) whether the discrimination impairs or is likely to impair human dignity; (b) the impact or likely impact of the discrimination on the complainant; (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage; (d) the nature and extent of the discrimination; (e) whether the discrimination is systemic in nature; (f) whether the discrimination has a legitimate purpose; (g) whether and to what extent the discrimination achieves its purpose; (h) whether there are less restrictive and less disadvantageous means to achieve the purpose; (i) whether and to what extent the respondent has taken such steps as being

[792] Equality Act s14.
[793] Equality Act s14(2)(b).

reasonable in the circumstances to address the disadvantage which arises from or is related to one or more of the prohibited grounds; or (ii) to accommodate diversity.

Discriminating factors that apply specifically to insurance products and services provided to persons with disabilities are identified as: (a) unfairly refusing on one or more of the prohibited grounds to provide or to make available an insurance policy to any person; (b) unfair discrimination in the provision of benefits, facilities and services related to insurance; and (c) unfairly disadvantaging a person or persons.[794] These are generalised provisions that provide no clear guidelines to the industry and insurance applicants to attain legal certainty as to the extent to which categorisation is found acceptable.

Furthermore, factors and differentiation methods must be applied equally and consistently to all applicants. Give the wide application of the equality clause, it is clear that a possibility of a constitutional argument presents itself where a party to a contract can identify an area where he is treated differently from someone in an analogous position.

Already in the last decade Kok recognised that these statutory provisions are insufficient to address the problems facing discrimination in insurance, and urges that legislative reform in this regard is required.[795]

Internationally the drive to introduce more specific insurance legislation to address the problem of legal uncertainty as to the extent of differentiation found to be fair proves this point.[796] Industry specific laws will comply with Article 4 of the

[794] Part 5 to the Schedule of the Act.
[795] Kok A 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for Legislative Reform', 2008 (24) 3 *South African Journal of Human Rights*, 445].
[796] See par 4 below.

Convention in promoting the enactment non-discriminatory legislation.[797] To this end States Parties undertake in the Convention to (a) adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention; (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities; and (e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise. This will furthermore be in line with the Constitution section 9(2) that provides for the achievement of full and equal enjoyment of all rights and freedoms by authorising legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination.

The White Paper on the Integrated National Disability Strategy recognises that South Africa has a discriminatory and weak legislative framework which has sanctioned and reinforced exclusionary barriers. As a result, large sections of the legislative framework in South Africa still fail to meet international human rights standards and principles with regard to the rights of people with disabilities. The White Paper acknowledges that "[a]lthough there has since 1994 been some attempt to identify and eliminate discriminatory legislation from our statute books, many aspects of past discriminatory legislation still remain. In addition, some new laws and amendments contain sections which directly or indirectly lead to discrimination against people with disabilities."

On the other hand, due to the valuable social service insurance provides, the solvency and profitability of insurance companies

[797] Convention Art 4.

should be protected. In South Africa the Long-term Insurance Act[798] confirms that it is the statutory duty of insurance companies to keep their policies actuarially sound, which implies that insurers are not bound to issue life insurance cover to any insurance applicant, yet they are bound by the universal and constitutional principle of non-discrimination. As classification of risks and the setting of premiums are the essence of insurance business, insurance companies are more likely to prosper and the interests of all their policyholders more likely to be protected and promoted if insurers are permitted to differentiate. They should be entitled to classify risks and fix premiums in accordance with their own sound judgment, provided that it is founded upon actuarial data and prudent insurance practice. Insurers should also be sensitive to the fact that these practices might result in an unfair discrimination. On the other hand, insurance applicants and policyholders should also carry a duty to inform themselves of their position and of alternative coverage available when negotiating policy premiums and terms of cover. The Convention Article 21 expressly recognises a disabled person's right of access to information.

Even though industry supervision and regulation could curb improper practices, experience from the challenging attempt to regulate medical schemes in South Africa has shown that a comprehensive legislated solution is not easily attainable.[799] As an argument against restrictive legislation, McQueen's confirms that "[t]he law [i.e. contract law] is founded on ideas of transactional equality, private autonomy, and voluntary interaction, in which, within very broad limits, individuals strike

[798] Act 52 of 1998 s 46.

[799] The focus of the report is on insurance. As there is a distinction between medical insurance and medical aid, schemes or fund based memberships in for example medical aid schemes and road accident fund schemes are not included in this report.

their own balance of interests, rather than have it set for them by external, social or public standards." can be emphasised.[800] On the other hand, Woolman reiterates the following viewpoint in response to the judgment in *Barkhuizen*: "I work within a tradition of constitutional law – of which South Africa is most avowedly a part - that recognizes rules as a necessary feature of the legal landscape."[801]

In view of even the Constitutional Court failing to generate cognizable legal rules and meaningful legal precedent, statutory intervention might be the answer to provide greater certainty, accuracy and legitimacy in differentiated treatment. Furthermore, the Constitution section 8(3) sees legislation as its" first port of call" in giving effects to human rights, whereas common law development only where legislation is absent or deficient.[802] In the absence of South African statutory law, foreign law could provide guidance to our legislator and our courts in developing our anti-discrimination laws.[803]

In anticipation of new insurance laws, initially proposed in 2014 to replace current insurance legislation within the next few years,[804] this might be an attainable goal within the near future. The three way test as explained by the court in the *Van Heerden* case[805] to prevent the legislation from being contested as unconstitutional will have to be kept in mind when drafting the relevant sections. The first question would be whether any measure targets persons or a category of persons from a previously disadvantaged group. The second, whether it is

[800] MacQueen "Delict, Contracts and the Bill of Rights: A Perspective from the United Kingdom" 2004 *SALJ* 359 at 376.
[801] At 791.
[802] Reid and Visser 349.
[803] Reid and Visser 351.
[804] In accordance with the National Treasury Policy Document 23 February 2011. Acts that are in the firing line include the Long-Term Insurance Act and Short-term Insurance Acts.
[805] Par 37.

designed to protect and advance the interests of those persons previously disadvantaged, and in the third instance, whether the statutory measure in fact promotes the achievement of equality.

Whether one should include detailed provisions on what is deemed to be fair differentiation and not outrights discrimination in a separate disability act, or whether the inclusion of some provisions in specific insurance legislation will prove to be more effective, will require some thought.

4. Some comments on the position in other countries

This report does not intend to provide a comprehensive discussion of legislation in any of the foreign jurisdictions. The purpose of this brief exposition is purely to indicate that discrimination in insurance enjoys attention universally.

Most countries have introduced general anti-discrimination laws, yet few have laws that specifically target discrimination in insurance underwriting. Examples of the few countries that have legislation that applies exclusively to disability law and that includes specific sections on discrimination in insurance include Australia;[806] Hong Kong;[807] Israel;[808] Mexico[809] and Spain.[810]

Many countries have laws that apply to financial services in general (which mostly includes insurance),[811] or general consumer laws (which might include insurance) that address the issue of insurance discrimination. In South Africa insurance legislation is silent on the issue. Insurance has also been

[806] Disability Discrimination Act 1992.
[807] Disability Discrimination Ordinance (Cap 487).
[808] The Equal Rights for People with Disabilities,1998.
[809] General Law for the Inclusion of Persons with Disabilities 2013.
[810] General Act on the rights of persons with disability and their social inclusion (2013).
[811] For an example of a country with advanced laws, see the Danish Law on Equal Treatment between Men and Women in connection with Insurance, Pension and Financial Services.

excluded from the scope of the South African Consumer Protection Act, thus removing it from the protection created for disabled persons in our general statutory consumer law.[812]

Some countries also address the issue in separate insurance statutes or Codes of Conduct that apply within the insurance industry. The following are excellent examples that relate to disability insurance discrimination.

The Hong Kong the Motor Vehicles Insurance (Third Party Risks) Ordinance provides that policies are *ab initio* void if they restrict coverage due to discriminating factors such as age, and the physical or mental condition of the driver.[813] The Hong Kong Equal Opportunities Commission "Discussion Paper on Insurance Issues under Antidiscrimination Legislation"; and "Statement of Best Practice on Disability Discrimination" issued by the Hong Kong Federation of Insurers attempt to comprehensively regulate insurance discrimination, including disability discrimination.

Japan has enacted The Insurance Business Act[814] which provides that policy conditions and premiums may not be unfair or discriminatory; and The Law Concerning Non-Life Insurance Rating Organisation[815] that provides that all rates shall be reasonable, adequate and not unfairly discriminatory. The Spanish Insurance Act[816] expressly prohibits discrimination based on disability.[817]

[812] Act 68 of 2008; exempted by the promulgation of the Financial Services Laws General Amendment Act 45 of 2013.
[813] Chap 272 of 30/06/1997.
[814] Law No. 105 of June 7, 1995 art 4(1) and 4(2).
[815] Law No 193, updated by Law No 160 art 8.
[816] Act 50/1980.
[817] 4TH AP.

The Association of British Insurers Good Practice Guide[818] on the Equality Act 2010 provides that insurers must be aware of and meet equality obligations. The Equality and Human Rights Commission Codes of Practice[819] prescribes equality duties for financial service providers that specifically including the rights of persons with disabilities. A non-statutory agreement between government and the British Insurance Brokers Association promotes transparency and upon refusal/exclusion from cover brokers must refer the unsuccessful applicants to another service/product or supplier that can meet their risks. This meets the universal duty to inform prospective policyholders and raise awareness.

An interesting aspect on the onerous duties on insurers in Portugal can be found in the Portuguese Insurance Institute Regulation which established conditions for insurers obtaining and applying actuarial and statistical data to in fact *guarantee* that the risk categorisation is justified, proportionate and non-discriminatory.[820] Failure to comply where it does prove to be discriminatory is breach of statutory duty and also breach of warranty towards the insurance consumer.

These statutes and prescriptions tend to differ in many respects, in substance and in the nature and scale of regulatory enforcement, across most lines of insurance and policyholder characteristics. This becomes clear from the different positions that apply in the EU. In the USA there is no federal law specifically forbidding insurers from taking into account

[818] The Guide for Consumers, and Guide for the Insurance industry of Association of British Insurers (ABI).
[819] Of 6 April 2011.
[820] [Notice 8/2008-R].

discriminating factors when issuing insurance policies, although the different state laws might differ.[821]

When attempting to introduce new anti-discrimination laws, cognisance may be taken of the experience and lessons learned in foreign jurisdictions when addressing the issue.

5 Conclusion

- It would be more prudent to refer to differentiation rather than discrimination. Not all differentiation is necessarily discrimination. It is impossible not to take person-related factors into consideration when assessing insurance risks. Individual characteristics must be considered without being classified outright as discriminatory *per se*. The Convention recognises that disability remains an evolving concept and legislation must be adapted as medical and technological advances reduce levels and negative impact of disabilities.[822] Statutory descriptions and specified categories might provide more guidance.
- Discrimination is justified and should be allowed where based on reasonable grounds, independently assessed, and relying on true distinction or differentiation.
- One should keep in mind that the right to equality in fact does not prohibit discrimination but rather unfair discrimination. When determining whether discrimination is fair or not, one should evaluate the impact of the discriminatory treatment on the victim, and also weigh the importance of the limitation with the proportionality of the infringement. Discrimination is

[821] See with regards to the different positions in the various states of the USA Avraham, Logue,and Schwarcz "Understanding Insurance Anti-Discrimination Laws" (2013) *Law& Economics Working Papers P*aper.52.http://repository.law.umich.edu/ law econ (last accessed 2/3/2015).
[822] Article 2(e).

thus from the outset assumed or deemed to be unfair unless it is established to be fair in accordance with specific statutory criteria. This places some burden on insurers to prove fairness.

- The underwriting process is concerned primarily with significant risk exposures that are not common to all persons seeking insurance. What is important is that risks in each grouping or classification must be as homogenous as possible to ensure the necessary balance and equality among policyholders accepted into each classification. This could prove to be challenging where disabilities are concerned, as circumstances of individuals differ greatly. Yet this should not detract from the important statement by Sachs J in *Minister of Home Affairs v Fourie* that "[t]o penalize people for who and what they are is profoundly disrespectful."[823]
- One could support the position that the insurance business should not follow a blanket discriminatory practice, but rather approach insurance applications by evaluating persons with unique circumstances on a case by case basis. The nature of the disability should not on its own be the determining factor, but should, in conjunction with statistical and actuarial and other empirical data, be applied consciously for risk selection and classification in insurance underwriting.
- To provide support to insurers, a more specified framework or guidance notes on classifications and groupings might provide the answer. Even though industry supervision and regulation could curb improper practices, experience from the challenging attempt to regulate the medical schemes in South Africa has shown that a comprehensive legislated solution is not easily

[823] 2006 (3) BCLR 355 CC at par 60.

attainable. In view of this, the experiences in other countries regarding insurance discrimination regulation could provide some guidelines.

- Legislation must be easily adaptable to remain relevant and keep astride of medical and technological advances that can positively affect the risk profile of persons with disabilities. Therefore inclusion in subordinate legislation such as the insurance Policyholder Protection Rules that may be adopted without lengthy Parliamentary processes, can be recommended.

9. THE RIGHTS OF PERSONS WITH DISABILITIES TO BE PROTECTED AGAINST EXPLOITATION, VIOLENCE AND ABUSE – A SELECTION OF ISSUES

Philip Stevens*

1 Introduction

Persons with disabilities form part of a particularly vulnerable group of individuals facing numerous barriers restricting them from participating on an equal footing with others in society. The current discussion focuses on an analysis as to whether selected South African legislation is compatible with provisions contained in the United Nations Convention on the Rights of People with Disabilities (CRPD). Within the framework of the current discussion, an analysis will be made of a selection of provisions from the Criminal Law (Sexual Offences and Related Matters) Amendment Act[824], the Older Persons Act[825]; as well as the Domestic Violence Act.[826] Specific emphasis will fall on the protection afforded in terms of the latter legislation to persons with disabilities. The discussion will inevitably be canvassed against the backdrop of relevant provisions of the Constitution of the Republic of South Africa, 1996.

2 CRPD

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[824] Act 32 of 2007 (hereinafter referred to as "SORMA").
[825] Act 13 of 2006 (hereinafter referred to as "OPA").
[826] Act 116 of 1998 (hereinafter referred to as "DVA").

The CRPD was adopted on 13 December 2006 in conjunction with its optional protocol.[827] The CRPD and the Optional Protocol to the CRPD were signed by South Africa on 30 March 2007 and ratified on 30 November 2007. The CRPD is essentially human rights-centred, catering for a comprehensive human rights approach in respect of a particularly vulnerable group of society, namely, persons with disabilities.

The preamble to the CRPD specifically endorses the concern that despite various instruments currently in place, individuals with disabilities continue to face barriers to their participation as equal members of society. The preamble, in addition, recognises that women and girls are often at a greater risk of "violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.[828] Article 1 of the CRPD states that the purpose of the CRPD is essentially to promote, protect and ensure the full and equal enjoyment of all human rights and freedoms.[829] It is worth noting that the CRPD does not pertinently define the term "disability". Article 1, however, provides elucidation of the term disability by stating the following:[830]

> "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

Of particular relevance for the present discussion is Article 16 of the CRPD. Article 16(1) provides that state parties should take all appropriate legislative, administrative, social, educational,

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[827] See the preamble of the CRPD. Convention on the Rights of Persons with Disabilities, G.A. Res 61/106 (2007); see also the Optional Protocol to **the Convention on the Rights of Persons with Disabilities, G.A. Res** 61/106 (2007).
[828] *Ibid.*
[829] Article 1 of the CRPD.
[830] *Ibid.*

and any other measures necessary to protect persons with disabilities from all forms of exploitation, violence and abuse.[831] Article 16(2) states that states must take appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring that gender and age-sensitive assistance and support are provided to persons with disabilities, including educational incentives as to how to avoid, identify and report instances of exploitation, violence and abuse.[832] Article 16(3) places an obligation on state parties to ensure that all programmes and facilities implemented to serve persons with disabilities are effectively monitored by independent authorities.[833] Article 16(4) essentially provides that states parties must take all necessary steps in order to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who fall prey to any form of exploitation, violence or abuse.[834] Recovery and reintegration in these circumstances should, in addition, be conducted in an environment conducive to health, welfare, self-respect, dignity and autonomy and should further be sensitised to gender and age-specific needs.[835] Article 16(5) entails an obligation on states to ensure that legislation and policies are put in place to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and ultimately prosecuted.[836] It could be argued that Article 17 of the CRPD compliments Article 16 by providing that every individual with disabilities has the inherent right to respect of his or her physical and mental integrity on an equal footing with others.[837]

[831] Article 16(1) of the CRPD.
[832] Article 16(2) of the CRPD.
[833] Article 16(3) of the CRPD.
[834] Article 16(4) of the CRPD.
[835] *Ibid*.
[836] Article 16(5) of the CRPD.
[837] Article 17 of the CRPD.

In the discussion which follows, an assessment will be undertaken as to the manner in which South African legislation complies with Article 16 of the CRPD. Specific reference will be made to selected provisions contained in SORMA, OPA and the DVA.

3 Constitutional foundation

The current discussion has at its core the fundamental human rights of every person and, in this case, specifically persons with disabilities. As such it goes without saying that the underlying foundation to this discussion relates to the values and principles enshrined in the Constitution of the Republic of South Africa, 1996.[838] On 8 May 1996 the Constitutional Assembly adopted the current Constitution of the Republic of South Africa, which commenced on 4 February 1997.[839] The Constitution is the Supreme law of South Africa.[840]

In *S v Thebus*[841] the importance of the Constitution was underscored by Moseneke J who stated the following:

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[838] Hereinafter referred to as the "Constitution". For an in depth analysis of equality and non discrimination, see part 1 of the report *supra*. For purposes of the current discussion, emphasis will fall on the specific rights included in the Bill of Rights that are important with reference to Article 16 of the CRPD.

[839] See also J De Waal, I Currie, G Erasmus "The Bill of Rights Handbook" (2013) 1-10; MH Davis, DM Haysom NRL "South African Constitutional Law: The Bill of Rights" (2002) 20, GE Devenish "The South African Constitution" (2005) 1.

[840] See Section 1 and 2 of the Constitution. In *S v Makwanyane* 1995 (3) SA 391 (CC) at 487 Mohamed J observed:

*"*In some countries the Constitution only formalises, in a legal instrument, a historical consensus of valves and aspirations evolved incrementally from a stable and unbroken post to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution."

[841] *S v Thebus* 2003 (6) SA 505 (CC); 2003 (2) SACR 319 (CC), See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) par 56. See also *Pharmaceutical Manufacturers Association of SA and Another, In re Ex parte President of Republic of South Africa and Others* 2000 (2) SA 674 (CC).

> "Since the advent of the constitutional democracy, all law must conform to the command of the Supreme law, the Constitution, from which all law derives its legitimacy, force and validity. Thus, any law which precedes the coming into force of the Constitution remains binding and valid only to the extent of its Constitutional consistence. The Bill of Rights enshrines fundamental rights which are to be enjoyed by all people in our country. Subject to the limitations envisaged in s 36, the State must respect, protect, promote and fulfil the rights in the Bill of Rights. The protected rights therein apply to all law and bind all organs of State including the judiciary."

Section 7(1) of the Constitution enshrines the rights of all people to human dignity, equality and freedom. Of particular importance for the present discussion is Section 9(1) of the Constitution which states that everyone is equal before the law and has the right to equal protection and benefit of the law.[842] Section 9(3) provides that the state may not unfairly discriminate, either directly or indirectly, against anyone on one or more grounds, including specifically disability.[843] Section 10 provides that everyone has inherent dignity and the right to have their dignity respected and protected.[844] Section 12 of the Constitution pertains to the right to freedom and security of the person. Section 12(1)(c) specifically states that everyone has the right to be free from all forms of violence from either public or private sources. Subsections 12(1)(d) and (e) protects all persons from being either tortured in any manner, or being treated or

[842] Section 9(1) of the Constitution.
[843] Section 9(3) of the Constitution. The other grounds include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, religion, conscience, belief, culture, language and birth.
[844] See Section 10 of the Constitution.

punished in cruel, inhuman or degrading way.[845] It is important to bear in mind that no right in the Constitution is absolute and can accordingly be limited. Section 36 of the Constitution sets the criteria to determine when a particular right in the Bill of Rights can be restricted or limited.[846] In the context of disability rights the importance of the Constitution can never be overemphasised. It is accordingly against the backdrop of this constitutional framework that the other sections of the current discussion will be addressed.

4 Criminal Law (Sexual Offences and Related Matters) Amendment Act

SORMA came into effect on 16 December 2007;[847] the result of more than a decade of negotiations. Initially the aim behind SORMA was to create a new framework of sexual offences limited to sexual offences against children only. It was, however, later decided to extend the project, to cover all sexual offences covering adults as well as children.[848] SORMA repealed various common law crimes and, more specifically, the common law crime of rape with an expanded definition and scope, also providing for a gender-neutral definition.[849] In addition, the common law offence of indecent assault was repealed and replaced with the statutory crime of sexual assault.[850] A unique feature introduced by SORMA relates to the chapters dealing with comprehensive new offences relating to sexual acts against mentally-disabled persons. The latter advancement in terms of SORMA is to be welcomed as mentally-disabled persons constitute a particularly vulnerable group of society.[851] SORMA

[845] See Sections 12(1)(d) and (e) of the Constitution.
[846] See Section 36 of the Constitution. See also Cheadle, Davis and Hayson (n 16) 695.
[847] D Smythe and B Pithey "Sexual Offences Commentary – Act 32 of 2007" (2011) v.
[848] Smythe and Pithey (n 24) v.
[849] CR Snyman "Criminal Law" (2014) 341.
[850] See in general Smythe and Pithey (n 24) 3-4 – 3-7; Snyman (n 26) 360.
[851] See Smythe and Pithey (n 24) vi.

accordingly contains general sexual offences relating to adults and, in addition, contains chapters specifically focused on addressing sexual offences against children and mentally-disabled persons.[852] A comprehensive discussion of all the offences provided for in SORMA falls beyond the scope of this discussion; the current discussion will accordingly focus on the provisions in SORMA dealing with sexual offences against mentally disabled persons as a vulnerable group of society within the context of the theme of disability rights. It should be noted that the sexual offences in general provided for in SORMA obviously also apply to mentally-disabled persons. This section will accordingly emphasise those offences specifically aimed at protecting mentally disabled persons as contained in SORMA.

The preamble to SORMA distinctly enshrines the need to protect mentally-disabled persons as a vulnerable group by stating the following:[853]

> "Enacting comprehensive provisions dealing with the creation of certain new, expanded or amended sexual offences against children and persons who are mentally disabled, including offences relating to sexual exploitation or grooming, exposure to or display of pornography and the creation of child pornography, despite some of the offences being similar to offences created in respect of adults as the creation of these offences aims to address the particular vulnerability of children and persons who are mentally disabled in respect of sexual abuse or exploitation."

The Preamble to SORMA endorses the rights included in the Bill of Rights of the Constitution, including the rights of all persons

[852] Smythe and Pithey (n 24) 14-1.
[853] See the Preamble to SORMA.

to equality, privacy, dignity, freedom and security of the person, which incorporates the right to be free from all forms of violence and the rights of vulnerable persons whose best interests should be regarded as being of paramount importance.[854]

4.1 Definition of "Mental disability" in SORMA

The term "mental disability" refers to both "intellectual disability" as well as "psychiatric disability".[855] In psychiatric disability it could be as a result of a mental illness as provided for in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V).[856] Mental disability as provided for in SORMA is defined as follows:[857]

> "'Person who is mentally disabled' means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was –
>
> (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
>
> (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
>
> (c) unable to resist the commission of any such act; or
>
> (d) unable to communicate his or her unwillingness to participate in any such act."

[854] See Smythe and Pithey (n 24) 14-1.
[855] Smythe and Pithey (n 24) 14-2.
[856] American Psychiatric Association "Diagnostic and Statistical Manual of Mental Disorders" (2013) (DSM-V).
[857] See the definitions contained in SORMA. See also Smythe and Pithey (n 24) 14-4.

It could be argued that the use of the word "including" in the definition renders the definition broad enough to also, for example, cover neurological disorders. Each case will accordingly have to be assessed based on its own unique circumstances in order to assess whether the complainant is mentally-disabled. In the recent judgment of *S v Mnguni*,[858] Louw J stated the following in respect of the onus of the prosecution in proving mental disability:

> "The onus was therefore on the state to prove that the victim was mentally disabled as contemplated in one of the four categories mentioned in the definition. The nature of the mental disability required to be proved is therefore specific. It is not sufficient for the state to merely prove that the victim is mentally disabled or retarded or challenged."

It is worth noting that the wording in terms of the definition of "mental disability" as contained in SORMA is in accordance with the requirements for criminal capacity as provided for in terms of section 78(1) of the Criminal Procedure Act 51 of 1977.[859]

4.2 Consent and the capacity to consent of persons with mental disabilities

SORMA contains a definition of consent which reads as follows:[860]

> "(2) For the purposes of sections 3, 4, 5 (1), 6, 7, 8 (1), 8 (2), 8 (3), 9, 10, 12, 17 (1), 17 (2), 17 (3) (a), 19, 20 (1),

[858] *S v Mnguni* 2014 (2) SACR 595 (GP) par 4.
[859] See Section 78(1) of the Criminal Procedure Act 51 of 1977. See also Snyman (n 26) 391 as well as 164-172; J Burchell "Principles of Criminal Law" (2014) 271-302.
[860] See the definitions to SORMA; Smythe and Pithey (n 24) 14-6.

21 (1), 21 (2), 21 (3) and 22, **'consent'** means voluntary or uncoerced agreement;

(3) Circumstances in subsection (2) in respect of which a person ('B') (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in sections 3 and 4, or an act of sexual violation as contemplated in sections 5 (1), 6 and 7 or any other act as contemplated in sections 8 (1), 8 (2), 9 (3), 9, 10, 12, 17 (1), 17 (2), 17 (3) (a), 19, 20 (1), 21 (1), 21 (2), 21 (3) and 22 include, but are not limited to the following:

(d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act –

(v) a person who is mentally disabled."

Section 57(2) of SORMA, in addition, provides that a person who is mentally-disabled is incapable of consenting to a sexual act.[861] Chapter 4 of SORMA contains a cluster of offences against mentally disabled persons without referring to the question of consent by, for example, requiring the absence of consent as an element of the offence.[862] The reason for the latter is that when the definition of a "person who is mentally disabled" is read in conjunction with section 57(2), consent will invariably always be absent.[863] Once it has accordingly been established that a complainant falls within the scope of the definition of a person who was "mentally disabled", it will accordingly be accepted that the complainant was unable to consent to the sexual act in question.[864]

[861] Section 57(2) of SORMA.
[862] Smythe and Pithey (n 24) 14-7.
[863] *Ibid.*
[864] See also Smythe and Pithey (n 24) 14-8.

Sexual offences against persons who are mentally disabled as provided for in SORMA are contained in Chapter 4 of SORMA. These offences are summarised below.

4.3 Sexual exploitation of persons who are mentally-disabled – Section 23

Section 23(1) provides that a person who engages the services of a complainant who is mentally-disabled for financial or other reward to the mentally-disabled person or a third person, in order to engage in a sexual act with the mentally-disabled person or by committing such act with the mentally-disabled person, will be guilty of an offence.[865] This section accordingly punishes the "customer" for purchasing sexual services from a mentally-disabled person.[866] The "reward" can be either to the mentally-disabled person or a third person. Section 23(2) punishes those persons who act as "facilitators" in the sexual exploitation of mentally-disabled persons such as pimps.[867] Section 23(3) punishes those persons who knowingly permits or allows the commission of a sexual act by a third person with a mentally-disabled person. Whilst being a care-giver, parent, guardian or teacher of such mentally-disabled person or the situation where such person owns, leases, rents, occupies or has control over moveable or immovable property which is to be used for purposes of the commission of a sexual act with the mentally-disabled person, is also punishable.[868] Section 23(4) provides that a person who receives financial or other reward from the commission of a sexual act by a third person with a mentally-disabled person, is guilty of the offence of benefiting from the sexual exploitation of a person who is mentally-disabled.[869] On face value it might appear as though sections 23(2) and 23(4) are

[865] Section 23(1) of SORMA.
[866] Smythe and Pithey (n 24) 14-14.
[867] See Section 23(2) of SORMA; Smythe and Pithey (n 24) 14-15.
[868] Section 23(3) of SORMA.
[869] Section 23(4) of SORMA.

similar. It is, however, important to note that the essential difference between these two sections lies in the fact that section 23(2) deals with the *offering of services*, whereas section 23(4) deals with the *receiving of reward*.[870] Section 23(5) punishes those persons, male or female, who live on the earnings of prostitution.[871]

Subsections 23(6)(a) and (b) provide that any person, including juristic persons, who facilitates travel arrangements for or on behalf of a third person with the intention of facilitating the commission of any sexual act with a person who is mentally-disabled; or prints or publishes any information intended to promote conduct which would constitute a sexual act with the mentally-disabled person, will be guilty of the offence of promoting sex tours with persons who are mentally-disabled.[872]

4.4 Sexual grooming of persons who are mentally disabled – Section 24

Section 24 of SORMA comprehensively deals with the offence of sexually grooming mentally-disabled persons. Section 24 resembles section 18 of SORMA which criminalises the sexual grooming of children. The offence of sexual grooming essentially consists of two parts – firstly it comprises of the *promoting* of sexual grooming, and secondly it consists of the *actual* grooming.[873] According to Burchell, the *actus reus* and the *mens rea* for *promoting* sexual grooming and *actual* sexual grooming may be tabulated as follows:[874]

Table 1: Promoting sexual grooming: *actus reus* and *mens rea*

[870] See Smythe and Pithey (n 24) 14-15 and 14-17.
[871] See Section 23(5) of SORMA; Smythe and Pithey (n 24) 14-18.
[872] See Section 23(6) of SORMA.
[873] Burchell (n 36) 622-623.
[874] Tables extracted from Burchell (n 36) 622-623.

Actus reus	*Mens rea*
Manufacturing or distributing an article or a publication to be used in the commission of a sexual act with or by the child or mentally-disabled person.	The manufacture or distribution of an article or publication must 'promote or intended to be used in the commission of a sexual act' with or by the complainant.
Supplying, exposing or displaying to a third person an article to be used in the performance of a sexual act, a publication or pornography.	The supply, exposure or display of the article or publication must be intended to encourage, enable, instruct or persuade the third person to perform a sexual act with the complainant.
Arranging or facilitating a meeting or communication between the child or mentally-disabled person and a third person by any means from, to or in any part of the world.	The arrangement or facilitation of the meeting or communication with the complainant must be with the 'intention … [to] commit a sexual act' with the complainant.

Table 2: Actual sexual grooming: *actus reus* and *mens rea*

Actus reus	*Mens rea*
Supplying, exposing or displaying to a child or mentally-disabled person an article, publication or pornography.	The intention to encourage, enable, instruct or persuade the complainant to perform a sexual act.
Committing any act with or in the presence of the complainant or describing the commission of any act	The intention to encourage or persuade the complainant or to diminish or reduce any

with or in the presence of the complainant.	resistance or unwillingness on the part of the complainant to (a) perform a sexual act with him-/herself or a third party; (b) perform an act of self-masturbation in his or her or another's presence or while they are watching; (c) be in the presence of or watch him- or herself perform a sexual act with another or self-masturbation; (d) be exposed to pornography; (e) expose the body or body parts of the complainant in a manner which violates or offends the sexual integrity or dignity of the complainant.
Arranging or facilitating a meeting or communication with the complainant by any means from, to or in any part of the world.	The intention that he or she will commit a sexual act with the complainant.
Having met or communicated with the complainant by any means from, to or in the world, inviting, persuading, seducing, inducing, enticing	The conduct of 'inviting, persuading, seducing, inducing, enticing or coercing' implies intentional conduct.

or coercing the complainant to travel to any part of the world to meet him- or herself; or during the meeting or communication, committing a sexual act with him- or herself, discussing, explaining or describing the commission of a sexual act; or being provided by any form of communication (including electronic) with any image, publication, depiction, description or sequence of child pornography.	
Having met or communicated with the complainant, by any means travelling to meet with the complainant.	Intentionally travelling to meet the complainant with the intention of committing a sexual act with the complainant.

The above tables by Burchell eloquently summarise the offence of sexual grooming. Section 24, as stated above, is very similar to the offence of sexual grooming of children in respect of children provided for in section 18 of SORMA.

4.5 Additional offences against mentally-disabled persons – Sections 25 and 26

Section 25 of SORMA provides that any person who unlawfully and intentionally exposes or displays or causes such display of any image, publication, depiction, description of child pornography or ordinary pornography to a mentally-disabled

person, will be guilty of the offence of exposing or displaying of child pornography or pornography to a person who is mentally-disabled.[875] Section 26(1) criminalises the act of using mentally-disabled persons, whether for financial reward, favour or compensation for purposes of creating or producing any publication of pornography or child pornography. Section 26(2), in addition, renders it a criminal offence for any person to in any manner gain financially from, or receive any favour, benefit, reward or compensation as a result of the production of any pornography as contemplated in section 26(1).[876]

4.6 Services for victims of sexual offences

A particularly important feature of SORMA which invariably also applies to mentally disabled persons, relates to the provision of Post Exposure Prophylaxis (PEP) treatment to victims of sexual offences, more specifically rape victims at the state's expense. PEP essentially consists of a 28 day program of antiretroviral drugs provided to an individual who has been exposed to HIV in order to minimise the risk of contracting HIV.[877] Section 28(1) provides that if a victim had been exposed to the risk of being infected with HIV as a result of a sexual offence having been committed against him or her, he or she may:[878]

- receive PEP for HIV at a public health facility at state's expense;
- be given free medical advice pertaining to the administration of PEP;

[875] Section 25 of SORMA.
[876] Section 26(1) and (2) of SORMA.
[877] Smythe and Pithey (n 24) 15-1.
[878] Section 28(1)(a) and (b) of SORMA.

- be provided with a list containing names, addresses and contact details of accessible public health facilities;
- apply for an order that the alleged offender be tested for HIV, at state's expense.

In terms of section 28(2) only a victim who formally lays a charge with the South African Police in respect of the alleged sexual offence or reports an incident in respect of an alleged sexual offence in the prescribed manner at a designated public health facility within 72 hours after the occurrence of the sexual offence may receive these services.[879] Section 28(3) provides that a victim must immediately after laying a charge, be informed by the police official to whom the charge is made, or by a medical practitioner, of the:[880]

- importance of obtaining PEP for HIV infection within 72 hours at the alleged offence took place;
- need to obtain medical advice and assistance regarding the possibility of other sexually transmitted infections;
- that the victim may apply to a magistrate for an order that the alleged offender be tested for HIV.

4.7 Concluding remarks on SORMA

SORMA constitutes a radical advancement of sexual offences law within South Africa. The provisions aimed at protecting specifically mentally-disabled persons as a vulnerable group are to be welcomed. Not only does SORMA underscore the need to protect one of the most vulnerable groups of society, but it also effectively regulates the protection of mentally-disabled persons by creating a specific chapter, apart from the general offences

[879] Section 28(2) of SORMA.
[880] Section 28(3) of SORMA. See also Smythe and Pithey (n 24) 15-5.

provided for in SORMA, aimed at addressing the protection of mentally-disabled persons from particular sexual conduct towards them. The services available to victims of sexual offences, which inevitably also include mentally-disabled persons, are a further welcoming feature of SORMA. To date there has been no cases reported where sexual offences against mentally disabled persons have featured, so it remains to be seen how effective these offences will apply in practice. It can, however, be concluded that SORMA does indeed promote the values enshrined in Article 16 of the CRPD.

5. Protection of older persons from abuse, violence and exploitation - OPA

It was noted earlier in this discussion that the CRPD refrains from defining the concept or term "*disability*". From Article 1 of the CRPD it could, however, be submitted that older persons by virtue of their age, physical or mental retardation, inevitably forms part of the cluster of persons with disabilities. It is accordingly essential to assess the manner in which they are currently protected against exploitation, abuse and violence by virtue of the provisions of the OPA. The essential objects of OPA relate specifically to maintain and promote the status, well-being, safety and security of older persons; to maintain and protect the rights of older persons; and to combat the abuse of older persons.[881] Section 4(1) notes that the rights afforded to older persons in terms of OPA supplement those rights that an older person enjoys in terms of the Bill of Rights.[882]

Section 7 of the OPA lists the rights of older persons to include the right to:[883]

[881] See the objects of the OPA as provided for in section 2 and more specifically section 2(a), (b) and (c). The OPA officially commenced on 1 April 2010.
[882] Section 4(1) of OPA.
[883] Section 7 of OPA.

- participate in community life in any position appropriate to his or her interests and capabilities;
- participate in inter-generational programmes;
- establish and participate in structures and associations for older persons;
- live in an environment catering for his or her changing capacities;
- access opportunities which promote his or her optimal level of social, physical, mental and emotional well-being.

Some of the guiding principles for the provision of services as provided for in Section 9 entail that these services must be provided in an environment that promotes the prevention of exploitation of older persons and promotes the respect and dignity of older persons.[884] Section 24 of the OPA further states that the provisions of the OPA in no way limit, amend, repeal or alter any provisions of the DVA.[885] Section 25(1) of the OPA provides that any person who is involved with an older person in a professional capacity and who is of the opinion that the older person is in need of care and protection, must report such fact to the Director-General.[886] Any person other than the person referred to in section 25(1) who is of the opinion that an older person is in need of care and protection may report such fact to a social worker.[887] The Director-General or social worker must subsequently investigate the matter.[888] Section 26, in addition,

[884] See Section 9(f) and (g) of OPA.
[885] See the discussion of the DVA below.
[886] Section 25(1) of OPA.
[887] Section 25(2).
[888] Section 25(3) of OPA. In terms of section 25(5), an older person who is in need of care and protection is one who:

"(a) has his or her income, assets or old age grant taken against his or her wishes or who suffers any other economic abuse;

(b) has been removed from his or her property against his or her wishes or who has been unlawfully evicted from any property occupied by him or her;

states that any person who suspects that an older person has been abused or suffers from an abuse-related injury, must immediately notify the Director-General or a police official of such fact.[889]

Section 26(5) further states that failure to comply with section 26(1) will constitute an offence.[890] Probably the most important section of the OPA for purposes of the current discussion is section 30 which deals pertinently with the prohibition of abuse of older persons and measures to combat abuse of older persons. Section 30(1) provides that any person who abuses an older person is guilty of an offence.[891] Section 30(2), in addition, provides as follows:[892]

(c) has been neglected or abandoned without any visible means of support;
(d) lives or works on the streets or begs for a living;
(e) abuses or is addicted to a substance and without any support or treatment for such substance abuse or addiction;
(f) lives in circumstances likely to cause or to be conducive to seduction, abduction or sexual exploitation;
(g) lives in or is exposed to circumstances which may harm that older person physically or mentally, or
(h) is in a state of physical, mental or social neglect."

[889] Section 26(1) of the OPA.

[890] Section 26(3) of OPA. The penalty prescribed for this offence in terms of section 33(b) is a fine or imprisonment for a period not exceeding five years or both a fine and imprisonment.

[891] Section 30(1) of OPA. The penalty prescribed for this offence in terms of section 33(b) is a fine or imprisonment for a period not exceeding five years or both a fine and imprisonment.

[892] Section 30(2). Section 30(3) provides that *abuse* includes physical, sexual, psychological and economic abuse. In terms of section 30(3)(a)-(d), "physical abuse" means any act or threat of physical violence towards an older person; "sexual abuse" means any conduct that violates the sexual integrity of an older person; "psychological abuse" refers to any pattern of degrading or humiliating conduct towards an older person, including –

(i) repeated insults, ridicule or name calling;
(ii) repeated threats to cause emotional pain; and
(iii) repeated invasion of an older person's privacy, liberty, integrity or security and "economic abuse" refers to
  (i) the deprivation of economic and financial resources to which an older person is entitled under any law;
  (ii) the unreasonable deprivation of economic and financial resources which the older person requires out of necessity;
  (iii) the disposal of household effects or other property that belongs to the older person without the older person's consent.

> "Any conduct or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress or is likely to cause harm or distress to an older person constitutes abuse of an older person."

Section 30(4) provides that if a court finds, after having convicted a person of any particular offence, that such person abused an older person in the commission of such offence, such finding will be regarded as an aggravating circumstance for purposes of sentencing.[893] Section 31(1) requires that a register be maintained of persons convicted of the abuse of an older person. Section 31(2) provides that a person whose name appears in such register may not in any way operate or be employed at any residential facility or provide any community-based care and support to older persons.[894]

5.1 Concluding remarks on OPA

The OPA currently addresses the need of older persons to be protected from violence, abuse and exploitation. It caters for the specific needs of older persons as a specific vulnerable group of persons in society. The lack of case law in respect of the OPA renders a finding on the efficacy thereof difficult. It remains to be seen how effectively the provisions thereof will be implemented in future. Public awareness programmes, specifically within residential facilities, of the existence of the OPA could assist in raising awareness of this piece of legislation in the ultimate strive to combat abuse against older persons.

6 DVA

[893] Section 30(4) of OPA.
[894] Section 31(1) and (2).

The essential purpose of the DVA is to provide for the issuing of protection orders in cases where domestic violence occurs.[895] The preamble acknowledges the vulnerability of victims of domestic violence by stating "that victims of domestic violence are among the most vulnerable members of society……",[896] and further:

> "HAVING REGARD to the Constitution of South Africa, and in particular the right to equality and to freedom and security of the person; and the international commitments and obligations of the State towards ending violence against women and children……."

The DVA essentially provides that a complainant in a domestic violence matter may apply to the court for a protection order.[897]

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[895] The DVA commenced on 15 December 1999.

[896] See the Preamble to the DVA.

[897] Section 4 of the DVA. In terms of the DVA, a "domestic relationship" is defined as follows:

"'domestic relationship' means a relationship between a complainant and a respondent in any of the following ways:

(a) they are or were married to each other, including marriage according to any law, custom or religion;

(b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;

(c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);

(d) they are family members related by consanguinity, affinity or adoption;

(e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or

(f) they share or recently shared the same residence."

"Domestic violence" is defined as:

"(a) physical abuse;

(b) sexual abuse;

(c) emotional, verbal and psychological abuse;

(d) economic abuse;

(e) intimidation;

(f) harassment;

(g) stalking;

(h) damage to property;

(i) entry into the complainant's residence without consent, where the parties do not share the same residence; or

(j) any other controlling or abusive behaviour towards a complainant,

In certain prescribed circumstances the application may also be brought on behalf of a complainant, provided that the application is accompanied by the written consent of the complainant, except where the complainant is a minor, a mentally-retarded, unconscious, or a person whom the court is satisfied is unable to provide the requisite consent.[898] Such application together with the requisite affidavits is then subsequently submitted to the clerk of the court.[899] A court subsequently considers the application and may consider any additional evidence it deems necessary, including oral evidence or evidence by means of an affidavit.[900] If the court is satisfied that there is *prima facie* evidence that the respondent is committing, or has committed an act of domestic violence and undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued, the court must issue an interim protection order.[901] The interim protection order is then served on the respondent, requesting that the respondent shows cause

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Where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant."

"Emotional, verbal and psychological abuse" are defined as:

"a pattern of degrading or humiliating conduct towards a complainant, including –

(a) repeated insults, ridicule or name calling;
(b) repeated threats to cause emotional pain; or
(c) the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invading of the complainant's privacy, liberty, integrity or security."

"Harassment" and "intimidation" are defined as follows:

"'harassment' means engaging in a pattern of conduct that induces the fear of harm to a complainant including –

(a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, words, carries on business, studies or happens to be;
(b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant whether or not conversation ensues;
(c) repeatedly sending, delivering of causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant;

'intimidation' means uttering of conveying a threat, or causing a complainant to receive a threat, which induces fear."

[898] Section 4(3) of the DVA.
[899] Section 4(7) of the DVA.
[900] Section 5(1) of the DVA.
[901] Section 5(2)(a) and (b) of the DVA.

on a return date specified in the order as to why a protection order should not be issued.[902] The interim protection order is of no force and effect until it has been served on the respondent.[903] Should a respondent not appear on a return date and proper service was effected on the respondent and the court is satisfied that the application contains *prima facie* evidence that the respondent has committed or is committing an act of domestic violence, the court must issue a protection order.[904]

If the respondent appears on the return date in order to oppose the issuing of a protection order, the court will hear the matter and may consider any evidence previously received and consider any additional evidence whether oral or by means of affidavits.[905] After such evidence was presented, the court must issue a protection order if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence.[906] Whenever a court issues a protection order, the court must make an order authorising the issue of a warrant of arrest of the respondent, and at the same token suspend the execution of such warrant subject to compliance with any prohibition, condition, obligation or order imposed.[907]

7 Conclusion

The discussion focused on the South African response to the protection of persons with disabilities with specific reference to the obligations imposed in terms of the CRPD. Selected provisions from SORMA, the OPA and the DVA were

[902] Section 5(3)(a) of the DVA. In terms of section 5(5) the return dates may not be less than ten days after service has been effected upon the respondent.
[903] Section 5(6) of the DVA.
[904] Section 6(1) of the DVA.
[905] Section 6(2) of the DVA.
[906] Section 6(4) of the DVA.
[907] Section 8(1)(a) and (b) of the DVA. See also section 7 of the DVA which section sets out in detail the powers of the court in respect of protection orders.

discussed. From this discussion, the following conclusions may be drawn:

- the Constitution of South Africa as supreme law underscores and enshrines the rights of persons with disabilities;
- SORMA addresses the rights of persons with disabilities, and more specifically, mentally-disabled persons, in specifically catering for a cluster of sexual offences, in addition for the general sexual offences, against mentally-disabled persons;
- The provisions of SORMA undoubtedly underscores the aims of Article 16 of the CRPD;
- Lack of case law to date in terms of which the provisions of SORMA were applied in practice, renders it difficult to assess the practical implications and possible obstacles in terms of the application of the provisions of SORMA in practice;
- The OPA caters for a unique group of vulnerable persons, namely, older persons, and the aims and objectives of the OPA compliment the provisions of Article 16 of the CRPD;
- The DVA, within the context of domestic relationships, could act as a safeguard in terms of which persons with disabilities could apply for a protection order in the event of domestic violence occurring.

In conclusion it could be remarked that South Africa has made great strides in promoting the aims of Article 16 of the CRPD. From a practical perspective, however, it remains to be seen how effective the actual application of these provisions will be in practice in ultimately protecting persons with disabilities from exploitation, violence and abuse.

10. PROTECTING CHILDREN WITH DISABILITIES FROM VIOLENCE AND ABUSE AND ENSURING THEIR ACCESS TO THE JUSTICE SYSTEM

*Zita Hansungule**

1 Introduction

The discussion below deals, first, with legislation and services that aim to protect children with disabilities from violence. These include responses by the child protection system to children with disabilities who are victims of violence and abuse. Thereafter the discussion moves to legislation and services that aim to assist children with disabilities as victims or witnesses in the criminal justice system.

A contextual discussion of the context of violence and abuse against children with disabilities in South Africa is an important precursor to a more detailed examination of laws and service provision. Research has found that children with disabilities are three to four times more likely to be victims of violence and abuse and are often repeat victims.[908] A 2010 study undertaken at the Teddy Bear Clinic for Abused Children[909] found that children with disabilities had a 10% prevalence rate for physical abuse, compared to 6% of other children and the rate for neglect

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[908] Department of Social Development and Department of Women, Children and people with disabilities 'Violence against children in South Africa' (2012) 26

[909] J Bornman 'Accessing Justice via key role players: A view from South Africa' in D Nelson Bryen and J Bornman*Stop violence against people with disabilities: An international resource* (2014) 46.

was at 23% for children with disabilities and 13% for other children.[910]

Children with disabilities are particularly vulnerable to various types of abuse due to societal stigma, discrimination, or lack of social support from primary care givers. The type of disability may increase vulnerability (for example if there is a communication difficulty), and the need for increased care may also intensify vulnerability.[911] There are a number of reasons why children with disabilities are more vulnerable to violence and abuse than their peers without disabilities. Below are some reasons taken from studies in two townships in the South Africa (Orange Farm and Tembisa) that are probably commonly experienced by children with disabilities in similar circumstances in other parts of the country:[912]

- Children with disabilities are often discriminated against by their communities and sometimes their families, due to their 'low status' in these contexts;
- Children with disabilities are isolated and invisible to communities due to the fact that a number of them do not attend school and are always at home. This reduces opportunities for them to come in contact with people that they can confide in about abuse;
- Stigmatisation due to disability increases vulnerability;
- Children with disabilities are sometimes victims of humiliating and degrading behaviour by others, resulting in shame and fear;

[910]Department of Social Development (n8 above) 26.
[911]J Bornman (n9 above) 46.
[912] C Chames and D Lemofsky 'Towards effective child protection: Adopting a systems approach' in Children's Institute*Child Gauge: End the Cycle of Violence* (2014) 48.

- Due to a lack of knowledge about their rights, children with disabilities are often disempowered and unsure about whether they are being abused or not;
- Children with disabilities may be dependant for care on the very people who are the perpetrators of the violence and abuse;
- The nature and severity of the disability may have an impact on children's increased vulnerability as it impacts on their independence and participation in daily activities; and
- Poor access to resources such as education, health, child protection and legal services increases vulnerability and reduces opportunities to report violence and abuse they experience.

Research shows that children with disabilities are often victims of emotional abuse, sexual abuse and violence in the form of physical abuse. They are also often victims of neglect.[913]

2 Protections against violence and abuse: social services to children with disabilities

Article 16 places the obligation on state parties to ensure that persons with disabilities, including children, are protected from exploitation, violence and abuse inside and outside the home. The article requires state parties to make available to persons with disabilities, their families and caregivers information and education on how to avoid, recognise and report instances of exploitation, violence and abuse. State parties must also ensure that victims of such abuse receive physical, cognitive and psychological recovery, rehabilitation and reintegration services.

In light of the above, the Constitution states in section 28(1)(b) that every child has the right to family care or parental care, or

[913]J Bornman (n 9 above) 49; AE Hesselink-Louw et al (n5 above) 170.

to appropriate alternative care when removed from the family environment. Section 28(1)(c)provides children with the right to social services and section 28(1)(d)states that children have the right to be protected from maltreatment, neglect, abuse or degradation.

The above obligations should be achieved through the development and implementation of effective legislation and policies that ensure that children with disabilities live in environments free of violence and abuse and that, if and when they arise, cases of exploitation, violence, abuse or neglect are identified, investigated and, where appropriate, prosecuted.

The Children's Act 38 of 2005 is the primary law giving effect to the above international and constitutional obligations regarding children. The Children's Act recognises, on the one hand, that children are to be encouraged to maximise their potential and, on the other hand, that they are vulnerable and need to be protected.[914]It ensures that the needs of vulnerable children are taken into account by decision-makers who are guided on the appropriate allocation of social resources and services to children.[915]The Act also provides guidance on the application of the constitutional imperative to consider the best interests of the child paramount in every matter concerning the child; it sets out factors to be taken into account when this standard is applied.[916]

The Children's Act aims to strengthen families and communities in their role of protecting children as a means of primary prevention. The Act initiates the child protection system in circumstances where signs of problems are observed in order to

[914] T Boezaart 'The Children's Act: A valuable tool in realising the rights of children with disabilities' *TydskrifvirHedendaagseRomeins-HollandseReg* (74) 2011 271.
[915]S Philpott (n4 above) 182.
[916]See above; Section 7 of the Children's Act 38 of 2005.

stop them from occurring or escalating.[917] There is a system for mandatory and voluntary reporting of abuse and neglect. The Act provides alternative care services for children whose families or communities are unwilling or unable to care for them.[918]

One of the main objectives of the Act is to 'recognise the special needs that children with disabilities may have'.[919] The general principles of the Act go on to state that actions or decisions relating to children must 'recognise a child's disability and create an enabling environment to respond to the special needs that the child has'.[920] Section 11 of the Act contains explicit provisions on children with disabilities:

11 Children with disability or chronic illness

(1) In any matter concerning a child with a disability due consideration must be given to-

(a) providing the child with parental care, family care or special care as and when appropriate;

(b) making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have;

(c) providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community; and

(d) providing the child and the child's care-giver with the necessary support services.

(2) In any matter concerning a child with chronic illness due consideration must be given to-

(a) providing the child with parental care, family care or special care as and when appropriate;

(b) providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community; and

(c) providing the child with the necessary support services.

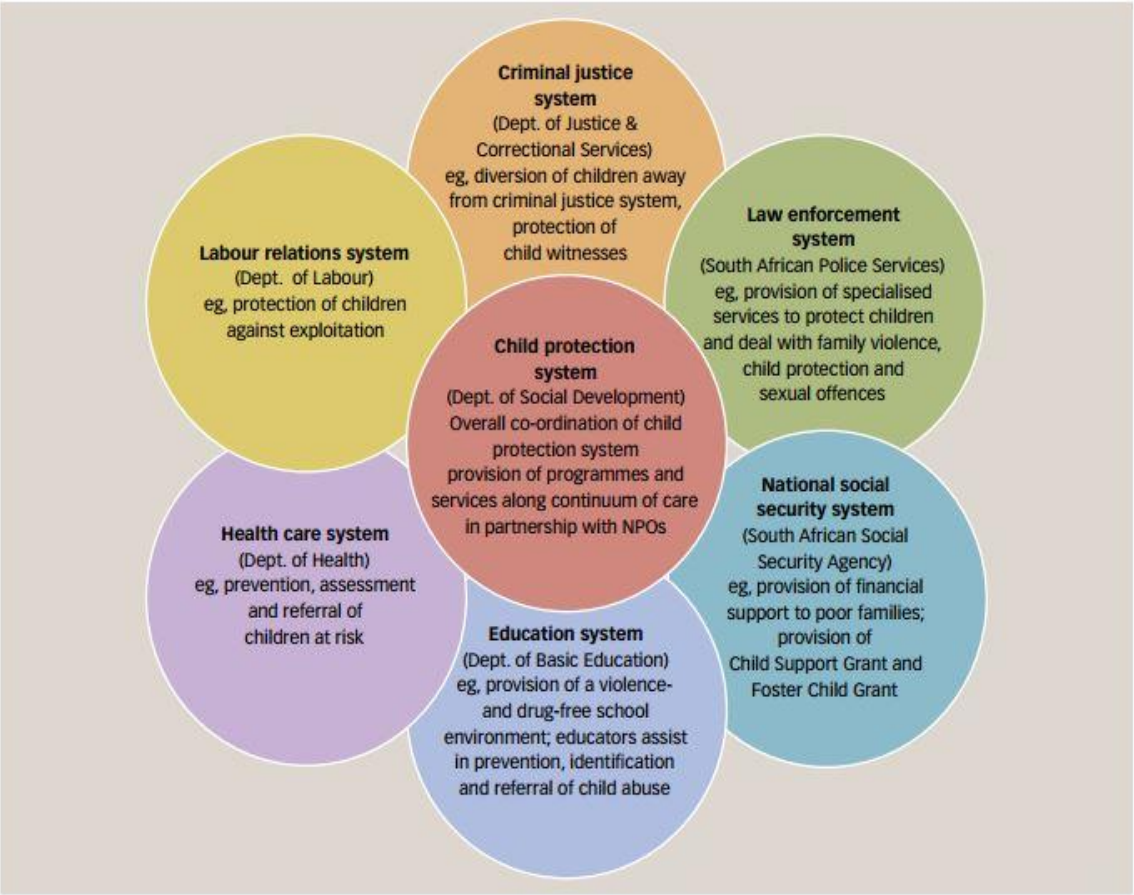
(3) A child with a disability or chronic illness has the right not to be subjected to medical, social, cultural or religious practices that are detrimental to his or her health, well-being or dignity.

Section 11 affirms the Constitutional obligation of society and government to treat children with disabilities with dignity and to ensure that they have the support necessary for their participation in community life and provide their care givers with the necessary support. It should be noted that the reach of this

[917] S Philpott (n 4 above) 183.
[918] S Philpott (n 4 above) 183.
[919] Section 2(h) of the Children's Act 38 of 2005.
[920] Section 6 (2)(f) of the Children's Act 38 of 2005.

section goes beyond the ambit of the Children's Act – it refers to any matter concerning a child with a disability.[921]

The main focus of this section will be on the obligations placed on the Department of Social Development as the lead implementer of the Children's Act. It is important to note, however, that child protection is an inter-sectoral function and, therefore, the Department of Social Development has the responsibility to co-operate with other departments.[922]



Source: South African Child Gauge: Preventing violence against children (2014)

There are three levels of obligation to ensure that children are protected from violence and abuse. These include:

- Prevention of violence and abuse;

[921]T Boezaart 'General principles' in CJ Davel and AM Skelton *Commentary on the Children's Act* [Revision service 5, 2012].2-21.
[922]C Chames (n12 above) 43.

- Protection of children from further harm if they are victims of violence and abuse;
- Provision of support and treatment to children who have experienced violence and abuse. This is done to restore them to physical and psychological health.[923]

The Children's Act requires provincial departments of social development to provide and fund child protection services that may be provided by the Department, provincial departments of social development or designated child protection organisations (these are non-government organisations that deliver services through service level agreements with government).[924]

These child protection services include services that relate to prevention and early intervention,[925] which include partial care facilities.[926]The care and protection system initiates investigations[927] and make assessments in cases of suspected abuse, neglect or abandonment of children.[928] There are provisions for intervention and for the removal of children for their own protection.[929] Social workers support proceedings in Children's Courts through the filing and presentation of reports and through the implementation of court orders.[930] Following the placement of children in alternative care, the system offers reunification with their families where that is in their best interests.[931]

a. Partial care

Chapter 5 of the Children's Act makes provision for partial care which is described as 'when a person, whether for or without

[923]C Chames (n12 above) 43.
[924]Section 105(1), (3) and (4) of the Children's Act 38 of 2005.
[925]Chapter 8 of the Children's Act.
[926]Chapter 5 of the Children's Act.
[927]Section 110 of the Children's Act.
[928]Section 155 of the Children's Act.
[929] Sections 151 or 152 of the Children's act 38 of 2005.
[930] The possible court orders a children's court can make are set out in section 46 of the Children's Act.
[931]Section 157 and 187 of the Children's Act.

reward, takes care of more than six children on behalf of their parents or caregivers'.[932] This is particularly useful for parents or care-givers who need additional support to care for children with disabilities who may need constant care or supervision.[933]

The Minister of Social Development must (in consultation with interested persons and other government departments) develop a national strategy for partial care that aims to ensure an appropriate spread of partial care facilities paying due consideration to children with disabilities or chronic illnesses.[934]

Section 78 provides that the provincial departments of social development *may* provide and fund partial care facilities from money appropriated by the province from the national Treasury. The use of the word '*may*' is concerning as it places discretion on the province to allocate funding for partial care; it does not place a direct duty to provide partial care if there is a need.[935]This needs to be corrected as it is necessary to ensure that the state is placed under an obligation to provide partial care facilities, particularly in poor communities and possibly at no cost.[936] This will ensure that families with children with disabilities in poor and vulnerable communities receive the support necessary to appropriately care for the children.[937]

The Act contains norms and standards that partial care facilities must comply with and it sets out additional standards that facilities caring for children with disabilities or chronic illnesses must meet. These facilities must be accessible to children with

[932] Section 76 (1) of the Children's Act 38 of 2005; This excludes the care of a child by a school, a school hostel or hospital or other medical facility.
[933]T Boezaart (n 14 above) 274.
[934]Section 77 (1) of the Children's Act.
[935]S Philpott (n4 above) 192.
[936]S Philpott (n4 above) 192.
[937] P Mahery 'Partial care facilities' in CJ Davel and AM Skelton *Commentary on the Children's Act* [Revision service 2, 2010] 5-7: Mahery indicates that there is insufficient funding in this sector, and that the bulk of services are provided by the NGO sector, but that many of these are 'desperately underfunded'.

disabilities; meet the needs of children with disabilities and employ people that are trained in the needs, health and safety, appropriate learning activities, communication strategies and basic therapeutic interventions of children with disabilities.[938]Mahery indicates that this is to be welcomed as few laws have made express provision for children with disabilities, and she notes that section 78(4) requires funding to be prioritized 'to make facilities accessible to children with disabilities'. However, she stresses that a lack of funding will mean that the practical implementation of the law is likely to frustrate the intention.[939]Furthermore, Mahery questions why the funding of these social services is discretionary (as indicated by the word 'may') when section 28(1)(c) of the Constitution guaranteeing social services for children does not contain any internal qualifiers – thus placing a direct obligation on the state.[940]

Philpott observes that that the Act could be interpreted to mean that partial care facilities for children with disabilities are separate from facilities of other children.In response to this she calls for "a continuum of services which cater for children requiring a range of levels of support – from low and moderate to high – within an inclusive system".[941] This will require staff to be trained and educated also on the rights of children with disabilities; the implementation of inclusive programmes and the identification of barriers to learning.[942]

b. Early childhood development and prevention and early intervention

The Committee on the Rights of the Child stressed the importance of early childhood development in a General

[938]Section 79 of the Children's Act.
[939] P Mahery (n37 above) 5-8.
[940]Op cit 5-9.
[941] S Philpott (n4 above) 193
[942] See above

Comment.[943]Early childhood development (ECD) is described in the Children's Act as "the process of emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of children from birth to school-going age".[944] Early childhood is the period from birth to four years old. It is during this time that children's brain development may be optimally promoted and toxic stress averted.[945]The Committee on the Rights of the Child has also indicated that non-discrimination may take place so that children with disabilities can all enjoy these benefits. Du Toit has observed, accordingly, that the development of ECD programmes 'must therefore strive to provide equal access to these services for all children'.[946]In its Interim strategy for early childhood development, the Government of National Unity conceded that only 9 to 11 % of children in South Africa were accessing ECD, and that most of them were black. This clearly meant that much more needed to be done for black children, including black children with disabilities.[947]

Early childhood development is a tool that may be used to promote social inclusion amongst children with disabilities and children without disabilities and create in children with disabilities a sense of dignity, self-worth and equality.[948]ECD requires collaboration and the provision of services between and by the Departments of Social Development, Health and Education.[949]

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[943]UN Committee on the Rights of the Child General Comment no 7 *Implementing child rights in early childhood* (2005) CRC/C/GC/7.
[944]Section 91 (1) of the Children's Act.
[945] S Philpott (n4 above) 225
[946]C Du Toit 'Early childhood development' in CJ Davel and AM Skelton *Commentary on the Children's Act* [Revision service 2, 2010] 6-3.
[947]Department of Basic Education 'Interim policy for early childhood development' (1996) 7.
[948]S Philpott (n4 above) 194 and 225.
[949] See above; The Government recently issued an 'Integrated Programme of Action for Early Childhood Development – Moving Forward,' this programme sets out in detail the different objectives and activities that need

The argument has been raised that the section 91 description of ECD overlooks the importance of ECD in the context of the home and community, and focuses only services provided in centres.[950] This is seen in section 91(2) which states that ECD services are services that are provided by persons, other than parents or care-givers, on a regular basis and an ECD programme is one structured in an ECD service. This makes no mention of support provided to parents or communities.

The Minister of Social Development is tasked with developing a national strategy that aims to secure a properly resourced, co-ordinated and managed early childhood development system.[951] This strategy must give due consideration to the needs of children with disabilities and children with chronic illnesses.[952]The MEC for Social Development must provide for a provincial strategy within the national one.[953]

The Act also requires records and provincial profiles to be compiled; this information may be used to monitor the fulfilment of the responsibilities and obligations in the Act and Constitution.[954] This monitoring task may, however, be difficult to carry out in relation to children with disabilities, due to the fact that data currently does not consistently analyse and disaggregate by disability status.[955] Sufficiently disaggregated data is necessary for the determination of whether children are benefiting from or are being excluded from social services in general, and ECD services in particular.[956]

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to carried out to further the provision of ECD services. It also includes information of which Departments must collaborate to carry out different activities, it includes time frames, budget allocations and the current situation.

[950] S Philpott (n4 above) 194

[951]Section 92 (1) of the Children's Act.

[952]Section 92 (1) of the Children's Act.

[953]Section 92(2) of the Children's Act.

[954]S Philpott (n4 above) 195.

[955]Department of Social Development (n7 above) 64.

[956] See above.

ECD programmes must be registered and must be in accordance with prescribed conditions as well as with ECD norms and standards.[957] Assistance is given to enable service providers to comply with registration requirements. Assistance includes technical expertise, the promotion of inclusive ECD programmes and financial assistance.[958]

In regard to the funding of ECD services, the Act states that funding of ECD programmes must be prioritised in poor communities and that ECD services must be made available to children with disabilities.[959]Du Toitpoints out that the Child Care Act previously provided funding in the form of a 'place of care grant', and writing in 2010 she predicted that the fact that prioritisation of funding is legislated for in this way is a positive move in the right direction.[960]However, in practice the system of funding through minimal transfers for each child in residential care continues to be the main mode of funding. The fact that the funding requirement, like partial care is discretionary rather than mandatory is a disappointment and has been a point of considerable lobbying by the Early Childhood Development sector. This has in turn borne fruit, with substantial funding flowing to early childhood development in the past few years. ECD has been singled out for prioritisation in the National Development Plan, and this has filtered through to budgeting. According to Budlender and Francis, this prioritisation has been supported through 'several rounds of additions to the equitable share'.[961]

[957]Section 95 (1) of the Children's Act 38 of 2005.
[958]S Philpott (n4 above) 195.
[959]Section 93 (4) of the Children's Act 38 of 2005.
[960] C du Toit (n46 above) 6-8.
[961] D Budlender and D Francis 'Budgeting for Social Welfare in South Africa's nine provinces'2010/11-2016/17 available at http://www.ci.org.za/depts/ci/pubs/pdf/researchreports/2014/WelfareSpending2014v4.pdf

The next level of services provided by the Act are prevention and early intervention in Chapter 8. Prevention and early intervention programmes aim to strengthen families with children and to build their capacity and self-reliance in a manner that will enable them to address problems that may result in statutory intervention.[962] This is done to protect the wellbeing of vulnerable children or children identified as being at risk of harm or removal.[963]

Through prevention and early intervention, the Act envisages a system in which social services practitioners are vigilant regarding risk and will have the foresight and forethought to deal with 'small problems' before they become 'bigger problems'. This aims to reduce the likelihood of statutory intervention in a child's life.[964]Prevention and early intervention services focus on, amongst other things, preserving children's family structures; developing parenting skills and the capacity of parents to preserve the well-being of children; promoting appropriate interpersonal relationships in families; preventing neglect, abuse, exploitation or abuse of children; and avoiding the removal of children from the home.[965]

The above focus area of prevention and early intervention services makes no mention of addressing risk factors that may be found in communities where families are located.[966] This places a limit on addressing and dealing with risk factors.[967]It is also disappointing that no mention is made of the need to raise

[962]Section 143 (1) and (2) of the Children's Act 38 of 2005.
[963]See above
[964]C Frank 'Prevention and early intervention' in CJ Davel and AM Skelton *Commentary on the Children's Act* [Revision service 2, 2010] 8–2 and 8-10.
[965]Section 144(1) of the Children's Act 38 of 2005.
[966] S Philpott (n4 above) 191
[967]See above

awareness on disability to remove stigma or the promotion of the inclusion and full participation of children with disabilities.[968]

c. Reporting of abuse or neglect and the children's court process

The Act further provides for the reporting of abused or neglected children. It provides that if any person, as listed in the Act, believes that a child is being abused or neglected they must report such suspicion to a designated child protection organisation, the Department or police.[969] Once a matter has been reported the designated organisation, the police or Department must ensure the safety and well-being of the child concerned.[970] The designated child protection organisation or Department will issue an initial report and initiate child protection proceedings in the Children's Court.[971] The correct procedure is for the social worker to undertake an investigation into the allegations without removing the child. However, the task of determining which circumstances require the removal of the child and placement into temporary safe care is a difficult one.[972] Although removal should not be resorted to easily, there are some circumstances where the safety and protection of a child requires removal.[973]The social worker has 90 days in which to conclude the investigation and compile a report for the court.[974]

[968]S Philpott (n4 above) 191; C Frank (n64 above) 8-11.
[969]Section 110 (1) and (2) of the Children's Act 38 of 2005.
[970]Section 110(4) and (5) of the Children's Act 38 of 2005.
[971]Section 110(5) of the Children's Act 38 of 2005.
[972] N Zaal and C Matthias 'The child in need of care and protection' in T Boezaart (ed) *Child Law in South Africa* (2009) 171.
[973] In *C and Others v MEC for Social Development and Others 2012 (2) SA 208 (CC)* the Constitutional Court found that the power for the emergency removal of children was not per se unconstitutional, but that such a decision must be subject to judicial review on the next court day, with the parents or caregivers of the child being given notice to attend.
[974]Section 155 of the Children's Act.

At the end of a children's court process a decision is made as to whether the child is in need of care and protection.[975]The Children's Court is able to make a child protection order that would require a child to remain in, be released from, or returned to the care of a person subject to certain conditions.[976] A child may be placed in alternative care, which is discussed further below.

The Act also makes provision for the establishment of a National Child Protection Register. This Register is made up of two parts; part A is the 'child register' and contains records of abuse and deliberate neglect of children.[977]The purpose of Part A is to assist the child protection system by ensuring, inter alia, that is better equipped to carry out risk assessments and a centralised monitoring of cases.[978] In addition Sloth-Nielsen notes that Part A of the register is also the foundation of a national monitoring system for victims of abuse and neglect.[979]Amongst other things, the Register must contain details of whether child victims have a disability and the nature of the disability.[980] Part B contains a record of persons found to be unsuitable to work with children by a Children's Court, any other court and any forum that carries out disciplinary hearings.[981]

The above legislative provisions are important, particularly for children with disabilities who have a higher prevalence of neglect, physical abuse and sexual abuse than other children.[982]

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[975] The grounds for such a determination are set out in section 150(1) of the Children's Act.
[976] Section 46 (1)(h) of the Children's Act 38 of 2005.
[977]Section 113 of the Children's Act 38 of 2005.
[978] J Sloth-Nielsen 'Protection of children' in CJ Davel and AM Skelton *Commentary on the Children's Act* [Revision service 2, 2010] 7-38.
[979] See above.
[980] T Boezaart and A Skelton 'From Pillar to Post: legal solutions for children with debilitating conduct disorder' in I Grobbelaar-du Plessis and T van Reenen*Aspects of Disability Law in Africa* (2012) 128.
[981]Section 118 and 120 (1) of the Children's Act 38 of 2005.
[982]Department of Social Development (n8 above) 26.

d. Alternative care

If a child needs to be removed from his or her home environment, the Act makes provision for alternative care, which includes foster care or care in a child and youth care centre.[983] The focus here is on child and youth care centres because there are specific provisions relating to the care of children with disabilities in such facilities. A child and youth care centre (CYCC) is a facility for the residential care of more than six children outside of their family environment.[984]

A CYCC must offer a therapeutic programme designed for the residential care of children. This may include programmes designed for the reception and care of children to protect them from abuse or neglect. Other programmes are for the purpose of observation and assessment, counselling and treatment and reintegration with families or communities. Some programmes are specifically designed for children with behavioural, psychological and emotional difficulties.[985]

Section 191(3) of the Act goes on to provide that a CYCC may, in addition to its residential care programme, offer a programmed for the provision of appropriate care and development of children with disabilities and chronic illnesses.

The Minister of Social Development is also in this instance tasked with developing a comprehensive national strategy to ensure an appropriate spread of CYCCs in South Africa. TheseCYCCs must provide a range of residential programmes in

[983] This new term includes what used to be called children's homes, places of safety and schools of industry. The term also covers facilities for children awaiting trial or serving sentences. This term ensures that facilities are not categorised to avoid the stigmatisation associated with placing children in facilities because of their 'problems' (see T Boezaart (n14 above) 276).
[984]Section 191 of the Children's Act 38 of 2005
[985]Section 191(2) of the Children's Act 38 of 2005.

the different provinces and regions, giving due consideration to children with disabilities and chronic illnesses.[986]

In order to ensure that the children in the CYCCs receive appropriate care a number of conditions and standards must be complied with as set out in the Act:

- All CYCCs must be registered with the Department of Social Development; non-registration is an offence. The Act sets out a registration process and requirements that must be complied with in order to achieve registration. The Centre for Child Law's research, however, has revealed that a number of CYCCs are unable or struggle to comply with these processes and requirements due to lack of funding and a lack of understanding of the Act and its regulations;[987]
- Staff that work in CYCCs and care for the children in them must be trained on developmental, therapeutic and recreation programmes;
- Social workers managing children's cases must abide by the social work code of conduct to keep their records confidential; the Act also provides that the details of children involved in care proceedings must not be revealed;
- Children should be assessed by multi-disciplinary teams and children must be afforded the opportunity to participated in these processes as well as those in which individual development, care and permanency plans are drafted and reunification considered;
- Children in CYCCs must have access to free education but this right is often infringed as schools try to charge fees or exclude children that cannot pay. In 2010 the vast

[986]Section 192(1) of the Children's Act 38 of 2005.
[987] Centre for Child Law 'Children at the Centre: A guide to the Registration of Child and Youth Care Centre' (2012) 4.

majority of children in registered facilities were attending school and attendance was between 85% to 95% in unregistered centres;

- All children without medical aid are eligible to receive free primary health care services.[988]

A 2010 study of CYCCs in South Africa revealed just over a quarter (28%) of children in registered CYCCs had one or more special needs or disabilities. However, the lack of provincial audits and profiles makes it difficult to determine whether the needs of children with disabilities are met and whether there are enough CYCCs to cater for children with disabilities.[989]

What the study does conclude, however, is that CYCCs are not equipped to meet the needs of children with disabilities.[990] This is seen when one looks at the situation of children with conduct disorders (a mental disability) in South Africa. Boezaart and Skelton report that these children are literally sent from 'pillar to post' as, on one the hand, mainstream CYCCs struggle to manage these children due to insufficient understanding and training of their needs and how to meet them, and on the other hand, institutions providing mental health care services cannot care for them and manage their behaviour.[991] These children are currently being failed by a system that does not have programmes designed and implemented by the relevant government institutions to meet their particular needs.[992] This

[988] L Jamieson 'Children rights to appropriate alternative care when removed from the family environment: A review of South Africa's child and youth care centres' in P Proudlock (ed) S*outh Africa's progress in realising children's rights: A law review* (2014) 229 to 231.
[989]L Jamieson (n88 above) 239.
[990]See above
[991]T Boezaart and A Skelton (n88 above) 110.
[992]See above; This failure to provide services is also confirmed in the Constitutional Court case of *De Vos NO and Others v Minister of Justice and Constitutional Development and Others [2015] ZACC 21*where it was stated in paragraph 43 that: "It should be noted that the Correctional Services Act behoves the Department of Correctional Services to provide psychological services to detainees with mental illnesses or intellectual disabilities. However, the uncontested evidence presented by Cape Mental Health is that prisons do not have the facilities to provide appropriate treatment and care.

results in the children coming into conflict with the law and having to go through the criminal justice system, an unfortunate consequence that could be avoided if policy is developed and implemented on their care needs.

Implementation challenges

The above description shows that the Children's Act is structured in a manner that makes use of a developmental approach; it requires a greater focus on prevention services.[993] If prevention is not successful and signs of problems appear, then early intervention services and programmes should be employed.[994] Only when problems arise should statutory services be utilised.

However, there are indications that current practice and emphasis are not as the Children's Act envisioned. It seems that in the context of limited resources, limited skills and management capacity, prevention and early intervention are not seen to be as critical as statutory protection and alternative care services.[995] The consequence is that more time is spent by child protection practitioners, for example social workers, on statutory protection and alternative care services and less on prevention and early intervention services such as parenting skills development, therapeutic programmes and the management of family disputes.[996]This is concerning for children with disabilities who are vulnerable to violence and abuse as a result of families and communities not knowing how to care for these children, and provide for their wellbeing and protection. A gradual shift of balance is required: the Act's developmental

This evidence appears to have been accepted by the Minister of Health before the High Court."

[993]C Chames (n12 above) 43.

[994] See above.

[995]C Chames (n12 above) 45; C Frank (n64 above) 8-18.

[996] See above.

approach needs to find preference in financial and human resources planning in order for children, particularly children with disabilities, to receive well-rounded social services.[997]

The below are further challenges that need to be addressed in order to better protect children with disabilities from violence and abuse. A number of these are challenges facing children generally that in turn affect children with disabilities:

- Non-governmental organisations deliver the majority of services to children but they receive insufficient financial assistance. The government only partially funds these organisations, and donor funds are quickly diminishing due to global recession and donor hesitance to fund government services. One of the consequences of this insufficient funding is that no provisioning is made for 'weighting' of children that may need additional support such as children with disabilities.[998]
- Skilled social service practitioners, such as social workers, social auxiliary workers, child and youth care workers and community development practitioners are a scarce resource. It was estimated that by its 3rd year of implementation, the Children's Act would need 66 329 social workers and 48 660 social auxiliary workers for its effective implementation. However, by March 2012 only 16 740 social workers were registered and of those only 9 289 were in public practice meeting the needs of children and families.[999] This is particularly frustrating for children with disabilities as there is already a lack of capacity in the social development sector of skilled personnel that can work with children with

[997] See above. For more information see C Chames (n12 above) 45 to 57.
[998] S Philpott (n 4 above) 236; P Mahery (n above) 5-7 – 5-8.
[999] P Proudlock, S Matthews and L Jamieson 'Children's rights to be protected from violence: A review of South Africa's laws and policies' in P Proudlock (ed) *South Africa's Progress in Realising Children's rights: A law review* (2014) 179 to 182.

disabilities.[1000] This shortage of human resources and the lack of skilled personnel are detrimental to the provisioning of services to children with disabilities.

- There is limited evidence available to determine whether programmes aimed at violence prevention are up to scale. In addition there is insufficient data available on children in the child protection system,[1001] as well as on the social services needs of children with disabilities necessary for the targeting of services.[1002]
- The National and provincial departments of social development have not successfully finalised their strategies on prevention and early intervention that are require in terms of the Children's Act.[1003]
- It is submitted that because to high caseloads, social workers and children's courts are struggling to keep up with matters that are reported to them. This is due to the fact that social workers and Children's Courts have the additional burden of extending foster care orders and administrative tasks that are mandated by the Children's Act. This, in turn, affects the level of child protection services being provided to children with disabilities.

Recommendations

Set out below are some recommendations to ensure the adequate and full implementation of protection services:

[1000] Situation analysis 80 Department of Social Development, Department of Women Children and People with Disabilities and UNICEF South Africa 'Children with Disabilities in South Africa: A Situation Aanalysis 2001 – 2011'(2012) 80 and 96.
[1001] P Proudlock (n99 above) 179 to 182; Department of Social Development 'Integrated national strategy: The right to belong and participate, support services for children with disabilities' (2009) 38
[1002]Department of Social Development (n100 above) 85.
[1003]P Proudlock (n99 above) 179 to 182.

- The Department of Social Development develop funding norms and standards for the provision of funding to NGOs and provision should be made for meeting the different and complex needs of children with disabilities;
- Due to the shortage of skills in the children's disability sector, strategies need to be developed to ensure that human resources are utilised in areas of greatest need. This would include providing scare skills incentives and staff retention strategies. There should also be a drive to improve human resources and ensure the training of skilled persons working with children with disabilities.
- Data collection and disaggregating methods need to be enhanced to ensure that the needs of children with disabilities are determined and service delivery improved. The data must unveil inequities in access to and provision of services by and to children with different and complex disabilities;
- The Department of Social Development must finalise and publish the National Strategy on Prevention and Early Intervention. The strategy must deal with the issues raised in respect of children with disabilities;
- Programmes that are shown to have made a difference should be implemented and taken to scale so that they have maximum impact in preventing violence and abuse, particularly in respect of children with disabilities;
- Administrative tasks that social workers and courts should not be carrying out, should be given to administrative bodies such as the South Africa Social Security Agency to extend foster care orders. This would free up social workers and court to carry out child protection services.[1004]

[1004]P Proudlock (n 16 above) 202 to 204; S Philpott (n 4 above) 232 to 235; Department of Social Development (n100 above) 80 and 96.

3 ACCESS TO JUSTICE

Article 13 requires states parties to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations.

It also requires state parties to promote appropriate training for those working in the field of administration of justice, including police and prison staff in order to help ensure effective access to justice for persons with disabilities.

Access to justice has been defined as "the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards".[1005] For children with disabilities who are victims of violence and abuse in South Africa, this protection is found in the Sexual Offences Act 32 of 2007 and the Criminal Procedure Act 51 of 1977.

The Sexual Offences Act regulates the law on sexual offences such as rape, sexual assault and child pornography. The Act provides guidance to police and the Department of Justice and Correctional Services on the arrest and prosecution of offenders of sexual offences against children.

The Sexual Offences Act goes a step further in its protection of children in that it establishes the National Sex Offender's Register. The Register contains the details of persons who have been convicted of committing sexual offences against children,

[1005] See http://www.fhr.org.za/programmes/access-justice/ (accessed 19 June 2015).

including children with disabilities, and persons with mental disabilities.[1006]

Persons convicted of sexual offences against children and whose names are on the Register cannot be employed to work with children; hold any positions which in any manner place them in a position of authority, supervision or care of children; be granted a licence to manage any entity or business in relation to the supervision and care of children; or become foster parents, kinship care givers, temporary safe care givers or adoptive parents.[1007]

The Criminal Procedure Act affords special protective measures to child victims and witnesses in court, in order to prevent secondary trauma.[1008] The Act makes it possible for children to testify in private and through the use of intermediaries in separate testifying rooms connected to the courts through closed circuit televisions (CCTV).[1009]The Criminal Procedure Act also allows for court proceedings involving children victims and witness to be heard in camera (only in the presence of those necessary, such as the presiding officer, legal representatives, intermediaries, but not the general public).[1010]

Despite the existence of the above legislation, which on the face of it adequately protects children with disabilities who are exposed to the criminal justice system as victims and witnesses, there exist a number of implementation challenges. For instance, although the Criminal Procedure Act contains progressive provisions regarding court services to child victims and witnesses of crime, including children with disabilities, it is very

[1006]Section 42 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[1007]Section 41 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[1008] P Proudlock (n99 above) 192
[1009] Section 170A and section 158 of the Criminal Procedure Act 51 of 1977.
[1010]Section 15 of the Criminal Procedure Act 51 of 1977.

difficult to determine the availability of these services on the ground. It is difficult to track and monitor the provision of intermediaries, CCTV cameras and separate testifying rooms, to determine their availability as the Department of Justice is inconsistent in its reporting of the relevant data.[1011] Furthermore, certain information is not in the public domain. Thus, it has proved impossible to get the latest provincial figures on the provision of separate child witness testifying rooms, CCTV systems and one-way mirrors as well as figures on how many intermediaries are appointed on an *ad hoc* or permanent basis and how many are appointed by NGOs.[1012]

A 2012 Centre for Child Law survey shows a lack of accommodation resulting in some courts not having separating waiting rooms for children; lack of toys to keep children busy; and a lack of refreshments for children. Another concern is the lack of job security for intermediaries who are often appointed on a contract basis and not a permanent basis.[1013] This is in effect detrimental to children with disabilities who need these services and assistance in order to prevent secondary traumatisation.

[1011] See Centre for Child Law 'Making Room: Facilitating the testimony of child witnesses and victims' (2014).
[1012] See above.
[1013] See above.

Case Study: Giving the defenceless a voice in court

Giving testimony in court can be a stressful and terrifying time for any person, the more so for children with disabilities. This is particularly the case if they have little or no functional speech. The Centre for Augmentative and Alternative Communication (CAAC), based at the University, aim to provide assistance to children with disabilities through the development of specific augmentative and alternative communication strategies. This will empower children with disabilities to report crimes and testify in court. Such strategies include the development of communication boards and vocabulary lists.

Communication boards are devices that make language visible and accessible to individuals with little or no functional speech. The boards typically employ picture communication symbols, words or phrases, or a combination, which are displayed on a cardboard background or high-tech device. The person using the board can point to a symbol or word that represents what they need to communicate. This allows them to express themselves in a manner is easy to understand.

As part of the study professionals that work in the legal system are assisting the researchers to determine the core vocabulary that persons with little or no functional speech need to testify in court. This will allow children with disabilities to testify sufficiently in court and report crimes and contribute to development of the criminal justice system to better protect and serve them.

Note: This is a summary of an article that appeared on the University of Pretoria website: http://www.up.ac.za/en/news/post_1975379-nuwe-navorsing-gee-weerloses-n-stem-in-die-hof

Although services for children with disabilities in the criminal justice have focused predominantly on child victims and witnesses, mental health disabilities are a significant problem in the child justice system relating to child offenders. Children with emotional and behavioural problems often end up in the criminal justice system charged with crimes such as assault or damage to property, largely because of failures to meet their care and

protection needs.[1014] Furthermore, children with mental health disorders which impair their criminal capacity or their ability to follow criminal proceedings have recently come to the attention of the Constitutional Court. In *De Vos NO and Others v Minister of Justice and Constitutional Development and Others [2015] ZACC 21*the Constitutional Court found a law to be unconstitutional that caused child offenders with mental or intellectual disabilities to be institutionalised, imprisoned or placed in a psychiatric hospital.[1015] The Criminal Procedure Act 51 of 1977 provides that if an accused person has been found to not be capable of understanding criminal proceedings and, therefore, not able to make a proper defence, then they can be dealt with in terms of section 77(6) of the Act. Section 77(6)(a)(i) provides that if such an accused person has on a balance of probabilities been found to have committed a serious offence the court trying the matter shall direct that they be detained in a psychiatric hospital or prison, pending the decision of a judge in chambers. Section 77(6)(a)(ii) provides that if it has been determined on a balance of probabilities that the accused person committed a minor offence or has not been found to have committed any offence, then the court shall direct that they be admitted to and detained in an institution.

The Western Cape High Court found that these provisions were unconstitutional as they did not allow the presiding officer to determine whether the accused continues to be a danger to society; evaluate the individual needs or circumstances of the accused; or consider whether other options are more appropriate.[1016] It also found that these provisions are particularly harsh on child offenders, as the presiding officer has

[1014]T Boezaart (n14 above) 107 to 110.
[1015]*De Vos NO and Others v Minister of Justice and Constitutional Development and Others [2015] ZACC 21*at para 1.
[1016]De Vos at para 7.

no discretion to consider alternative options set out in the Child Justice Act.[1017]

The case went to the Constitutional Court which found that the Child Justice Act is silent on how child offenders must be dealt with if found not to understand the court proceedings.[1018] It pointed out that in order for children to benefit from diversion options (which take them out of the court system and avoid a criminal record) they must acknowledge responsibility for the alleged offence. This cannot be done in the case of a child who does not understand the proceedings.[1019]Thus,section 77(6)(a)(i) provisions apply in respect of such children.[1020]

The Court found that the provisions infringe on children's right to freedom and security of the person as set out in section 12 of the Constitution, as the detention or institutionalisation does not flow from the determination of their guilt by a court of law.[1021] The section 12 right aims to prevent detention and deprivation of a person's physical liberty without appropriate procedure and for reasons that are not acceptable.[1022]

As the law stands, if a child is found to have committed no criminal act or only a minor offence, then they must be dealt with in terms of section 77(6)(a)(ii). This means that they must be institutionalised as involuntary mental health care users.[1023] The Court pointed out the objective of the treatment alone cannot justify institutionalisation, as this does not take into account the complexities of mental illness or intellectual disability.[1024]

[1017]De Vos at para 9.
[1018]De Vos at para 49 to 52.
[1019]De Vos at par 49 to 52.
[1020] See above.
[1021]De Vos at para 20 to 22.
[1022]De Vos at para 25.
[1023]De Vos at para 53.
[1024]De Vos at para 55.

The Court, therefore, found section 77(6) to be inconsistent with the Constitution and invalid. This declaration of invalidity was suspended to allow Parliament to correct the defects through amendments to the law.

Implementation challenges

In addition to the above mentioned challenges in relation to the Criminal Procedure Act, below are some challenges that need to be dealt with in order for children, including children with disabilities, to have better access to justice:[1025]

- There are low rates of reporting of crimes against children with disabilities, despite the fact that there are high rates of crime against them. This has been linked to the social isolation that children with disabilities experience, discrimination against them and dependence on the caregivers who are sometimes the perpetrators.
- When crimes are reported children with disabilities experience poor responses from professionals who are supposed to assist them. It has been reported that police respond poorly as a result of incorrect assumptions about disability or failure to recognise the need for additional assistance for the child. For example, it is often assumed that children with disabilities (particularly children with intellectual disabilities) will not provide adequate statements.
- There are low conviction rates for crimes that have been reported and crimes that have been prosecuted. This appears to be the result of difficulties experienced in investigating the cases; lack of special skills and training amongst police, lawyers and even judges; communication difficulties of victims that are

[1025] J Bornman (n 9 above) 54 to 61; AE Hesselink-Louw (n 5 above) 172 to 175.

sometimes exasperated by negative stereotypes; and prejudices against children with disabilities.

- The low conviction rate is reported also to be as a result of a lack of therapeutic support for child victims and witnesses, including children with disabilities, during and after the trial to prevent secondary trauma. If a child is traumatised, fearful or very young, or if they have communication disabilities, they their testimony is impeded.
- Court officials, including presiding officers, may make incorrect assumptions about victims and witnesses with disabilities, and this may skew the outcomes of cases.
- National data on crimes against children with disabilities is virtually non-existent, making it difficult to determine the extent of the problem is in relation to crime against children with disabilities.
- Crimes are sometimes perpetrated by children with intellectual disabilities or emotional and behavioural difficulties. The system often does not know how to treat these children.

Recommendations

Set out below are some recommendations to ensure adequate and full access to justice for children with disabilities:[1026]

- Training to legal and law enforcement practitioners should be intensified to empower them to work with children with disabilities. Training should be given on, amongst other things, appropriate questioning or information gleaning strategies; responding to the

[1026] J Bornman (n 9 above) 64 to 75; AE Hesselink-Louw (n 5 above) 178 to 179.

individual needs of the child and the situation; and awareness on Constitutional, legislative and International obligations to protect the children with disabilities.

- Data should be collected on the crimes committed against children with disabilities, its prevalence, and the types of crime, the perpetrators, conviction rates and other information. This will ensure that the extent of problem is known for the development of appropriate national strategies and policies on implementation of legislation.
- Training intermediaries and making use of them to ensure that they are a strong support structure for children with disabilities when they have to testify. Ensuring the consistent collection and collation of data on the availability of intermediaries and other court services to determine the gaps in provision and ways in which these gaps will be dealt with.
- Parliament should with urgency make amendments to section 77(6) of the Criminal Procedure Act 51 of 1977 to ensure that the section is in line with the Constitution and the Child Justice Act 75 of 2008.

12. ASPECTS OF THE IMPACT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES ON SOUTH AFRICAN HEALTH LAW

Magdaleen Swanepoel*

1 Introduction

The article addresses the question whether South African health legislation complies with the United Nations Convention on the Rights of People with Disabilities (CRPD). Health legislation applicable to the situation of persons with disability is examined, for example the Choice on Termination of Pregnancy Act 92 of 1996 and the Sterilisation Act 44 of 1998 as amended by the Sterilisation Act 3 of 2005.

Healthcare practitioners face dilemmas when providing sexual healthcare to disabled patients. Although the HIV/AIDS epidemic has forced critical thinking about some issues, obstacles remain to a completely emancipatory approach. A balance must be sought, given that disabled people have a right to a healthy sexuality. Disabled people should be advised of the risk of sexual abuse and HIV infection.[1027] The CRPD recognises the equal legal capacity and the right to free and informed consent of people with disabilities and their equal right to respect for physical and mental integrity. Taking this into consideration relevant aspects of the Constitution of the Republic of South

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1027 Mall & Swartz "Sexuality, disability and human rights: Strengthening healthcare for disabled people" (2012) 10 *South African Medical Journal* available at http://www.samj.org.za/index.php/samj/article/view/6052/4795 (accessed 06 July 2015).

Africa, 1996 the Mental Health Care Act 17 of 2002 and the National Health Act 61 of 2003 are discussed below.

2 CRPD

The CRPD was passed by the General Assembly of the United Nations in December 2006. It sets out key rights that citizens with a disability should enjoy in a fair society. Its key purpose is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms byr all persons with disabilities and to promote respect for their inherent dignity. The elimination of discrimination by ensuring that rights are enjoyed on an equal basis with others is a fundamental aim.[1028] Being the first human rights treaty of the 21st century, the CRPD is a ground-breaking treaty, promoting and protecting the rights and dignity of persons with disabilities. South Africa signed and ratified the CRPD and its Optional Protocol in 2007, and is obligated under this convention to fulfil its commitments in terms of implementation and reporting.[1029]

Disability is not formally defined in the CRPD, allowing individual state parties considerable latitude in how they define disability in their domestic law. Countries are placed under a variety of obligations to take measures to modify or abolish existing discriminatory laws, regulations and practices, as well as to provide programmes to support the rights of persons with disabilities.[1030]

Article 25 of the CRPD

Article 25 of the CRPD determines that persons with disabilities have the right to the highest attainable standard of health without

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1028 A 1 CRPD.

1029 Ubuntu Centre South Africa *Convention on the Rights of persons with disabilities* available at: https://ubuntucentre.wordpress.com/crpd/ (accessed 28 June 2015).

1030 A 4 CRPD.

discrimination on the basis of disability. They are to receive the same range, quality and standard of free or affordable health services as provided other persons, receive those health services needed because of their disabilities, and not to be discriminated against in the provision of health insurance.

According to Article 25, states parties recognise that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties must take all appropriate measures to ensure the access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties must:

a. Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;
b. Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;
c. Provide these health services as close as possible to people's own communities, including in rural areas;
d. Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;

e. Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;
f. Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.

3 Constitution of the Republic of South Africa, 1996

The Constitution meets the following conditions necessary to ensure consistency with the CRPD:

- Everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection. National legislation must be enacted to prevent or prohibit unfair discrimination. Discrimination on one or more of the grounds listed in subsection is unfair unless it is established that the discrimination is fair.[1031]

[1031] S 9 of the Constitution, 1996.

- Everyone has inherent dignity and the right to have their dignity respected and protected.[1032]
- Everyone has the right to bodily and psychological integrity, which includes the right not to be subjected to medical or scientific experiments without their informed consent.[1033]

Fundamental rights and freedoms, as protected in the Bill of Rights, may be limited or restricted, and are therefore not absolute. Section 36, the general limitation clause, sets out specific criteria for the restriction of the fundamental rights in the Bill of Rights. However, given the importance of the rights and the total and irremediable negation caused by an infringement, the justification for a limitation would have to be exceptionally compelling.[1034] Therefore, where an infringement can be justified in an open and democratic society based on human dignity, equality and freedom, it will be constitutionally valid.[1035]

3.1 Human Dignity

1032 S 10 of the Constitution.

1033 S 12(2)(c) of the Constitution.

1034 "Limitation" is a synonym for "infringement" or, perhaps, "justifiable infringement". A law that limits a right infringes that right; see Currie & De Waal *The Bill of Rights Handbook* (2013) 151.

1035 A consequence of the inclusion of a general limitation clause in the Bill of Rights is that the process of considering the limitation of fundamental rights must be distinguished from that of the interpretation of rights. If it is argued that a provision of the law infringes a right in the Bill of Rights, it will first have to be determined whether that right has in fact been infringed. Limitations on rights are established by means of interpretation of the right by a court. Even if a respondent makes no attempt at justification, the court must nevertheless consider the issue of limitation. In *National Coalition for Gay and Lesbian Equality v Minister of Justice,* the court *mero motu* considered whether a limitation argument could be made in favour of the laws, despite the fact that the Minister indicated that he would abide by the decision of the court and did not attempt to defend the laws in question. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) and *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

In *Carmichele v Minister of Safety and Security* human dignity was found to be a central value of an objective, normative value system.[1036] Chaskalson[1037] wrote in this regard: "The affirmation of human dignity as a foundational value of the constitutional order places our legal order firmly in line with the development of constitutionalism in the aftermath of the Second World War."

He continues to say that as an abstract value common to the core values of our Constitution, dignity informs the content of all concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony. However, it, too, must find place in the constitutional order. O'Regan J remarked in *Makwanyane*[1038] that recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: Human beings are entitled to be treated as worthy of respect and concern. This right is therefore the foundation of many of the other rights that are specifically entrenched in the Bill of Rights. This right is also in line with the CRDP.

3. 2 Section 12(2) of the Constitution

Subsection 12(2)(a) and subsection 12(2)(b) read:

> Everyone has the right to bodily and psychological integrity, which includes the right –
>
> (a) to make decisions concerning reproduction;
>
> (b) to security in and control over their body …

Section 12 combines a right to freedom and security of the person with a right to bodily and psychological integrity. The right, therefore, protects the right to physical liberty and to physical security.[1039]

1036 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

1037 Chaskalson 'Human dignity as a foundational value of our constitutional order' (2000) 16 *SAJHR* 196 as quoted in Currie & De Waal 250.

1038 *S v Makwanyane*.

1039 *Ferreira v Levin* NO 1996 (1) SA 984 (CC).

3.3 Section 12(2)(a): Decisions concerning reproduction

The inclusion of the right to make decisions concerning reproduction signals recognition that the power to make decisions about reproduction is a crucial aspect of control over one's body.[1040] The converse to the positive aspect of reproductive health care is contraception, sterilisation and, ultimately, abortion. The right to be sterilised - like the right to be artificially inseminated - is based rather upon the right to freedom and security of the person than on the section 27(1) right to reproductive care, since if one accepts that a person has a right to security in and control over their own body as stated in section 12(2)(b), then the question of whether or not they have a right to medical procedures for the purpose of sterilisation, in principle, is resolved and it becomes merely a question of the available resources of the state as to whether or not a person can undergo a sterilisation procedure.[1041] The section 10 right to human dignity can also have a bearing on the issue of sterilisation, especially in the case of mentally-ill patients.

Systemic prejudice and discrimination against women and girls with disabilities continue to result in the widespread denial of their right to experience their sexuality, to have sexual relationships, and to found and maintain families. The CRPD provides a basis for upholding the rights of persons with disabilities and contains specific articles of relevance to the issue of involuntary sterilisation. Article 23 reinforces the right of people with disabilities to found and maintain a family and to retain their fertility on an equal basis with others. Article 12 reaffirms the right of persons with disabilities to recognition everywhere as persons before the law and to enjoy legal capacity

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1040 Currie & De Waal 286.

1041 Carstens & Pearmain *Foundational principles of South African medical law* (2007) 185.

on an equal basis with others, including access to the support they may require to exercise their legal capacity. Article 25 clearly articulates that free and informed consent should be the basis for providing health care to persons with disabilities. The Committee on the Rights of Persons with Disabilities recommended "the abolition of surgery and treatment without the full and informed consent of the patient" in one of its first recommendations to a state party.

Pearmain[1042] explains that the sterilisation of persons under the age of eighteen years is an emotionally-loaded topic and the issue of the sterilisation of the mentally-ill even more so. When a mentally ill person under the age of eighteen years presents with a problem that can be resolved through sterilisation, health professionals feel uncomfortable. The Sterilisation Act[1043] (amended by the Sterilisation Amendment Act 3 of 2005) makes it clear that while the reproductive rights of mentally ill persons under the age of eighteen years must be respected and protected, their other constitutional rights, such as their rights to human dignity and psychological integrity, must also be taken into consideration when the question of their sterilisation arises.

The age issue is one that often arises as a threshold in law. It is relevant as such in the health care context, *inter alia* in terms of the Sterilisation Act. Section 2 of the current Act provides that:

(1) No person is prohibited from having sterilisation performed on him or her if he or she is-
    (a) capable of consenting; and
    (b) 18 years or above.
(2) A person capable of consenting may not be sterilised without his or her consent.

1042 *Idem* 185.
1043 Sterilisation Act 44 of 1998.

(3) (a) Sterilisation may not be performed on a person who is under the age of 18 years except where failure to do so would jeopardize the person's life or seriously impair his or her physical health.

According to Pearmain,[1044] subsection (2) of the Sterilisation Act is not entirely in keeping with subsection (1)(b) which, although it separates the capacity to consent from age, still imposes the age of eighteen as a threshold. The peculiar phrasing of subsection (1) suggests that where a person is capable of consenting but is under the age of eighteen years, the sterilisation of that person is prohibited. However, such prohibition must be inferred from section 2(1) of the Act itself, since there is no other legal prohibition or provision with regard to sterilisation either in or outside the Act. Pearmain submits that this subsection on its own could be in conflict with the constitutional right of a minor to bodily and psychological integrity, given the arguments raised by the court in the second *Christian Lawyers*[1045] case.

According to the decision of the court in this case, where a person is capable of informed consent, this should be sufficient

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1044 Carstens & Pearmain 101.

1045 In this case the plaintiff instituted an action in which it sought an order declaring ss 5(2) and 5(3) read with the definition of "woman" in ss 1 and 5(1) of the Choice On Termination of Pregnancy Act to be unconstitutional and an order striking down ss 5(2) and 5(3) and the definition of "woman" in s 1 of the Act. The provisions of the Act against which the plaintiff's claim was directed are those that allow women under the age of 18 years to choose to have their pregnancies terminated without: (a) The consent of the parents or guardians; (b) consulting the parents or guardians; (c) first undergoing counselling; and (d) reflecting on their decision or decisions for a prescribed period. The measures in (a) to (d) are collectively referred to as parental consent or control. In principle, the plaintiff's case was that young women or girls below that age are not capable on their own (without parental consent or control) to take an informed decision as to whether or not to have a termination of pregnancy which serves their best interests. In order to succeed, the plaintiffs had to establish that the relevant provisions of the Act were in conflict with those of the Constitution. See *Christian Lawyers Association of South Africa v Minister of Health* case no 7728/2000 (TPD).

grounding for a right to be sterilised, irrespective of the age of the person being sterilised. Sterilisation, like termination of pregnancy, is an exercise of a reproductive right and the right to security in and control over one's body in terms of section 12(2) of the Constitution.

Pearmain[1046] further submits that it is also not in keeping with the concept of administrative justice that rigid criteria such as age limits should be imposed where a large number of factual permutations can occur and not every one of them can be anticipated by legislation. It is a well-established principle of administrative law that each case must be decided on its merits and there is no reason why this principle should not be incorporated into legislation involving minors and the giving of informed consent by them – especially where the right to bodily and psychological integrity is involved.

Indeed one of the primary concerns of the Sterilisation Act when it was first passed was to ensure that the unnecessary sterilisation of mentally-ill persons was prohibited since mentally-ill persons have reproductive rights. People, particularly women with mental illness, have been subjected to forced sterilisations, rape, and other forms of sexual violence, and this is inherently inconsistent with their sexual and reproductive health rights and freedoms. Moreover, rape and other forms of sexual violence are psychologically, as well as physically, traumatic; and they impact negatively on the right to proper mental health care.[1047] It was much easier in the past for parents and caregivers of such persons to have them sterilised than to worry about sexual activity leading to the birth of an unwanted child. However, on one possible

1046 Carstens & Pearmain 103.

1047 Hunt & Mesquita "Mental disabilities and the human right to the highest attainable standard of health" (2006) 28 *Human Rights Quarterly* 2: 332 at 343.

interpretation of section 3, the Act went perhaps too far in the direction of preventing sterilisation of mentally-ill persons under the age of eighteen years insofar as the provisions of this section can be interpreted to mean that disordered persons younger than eighteen years may not be sterilised at all.[1048]

3.4 Section 12(2)(b) of the Constitution

According to Currie and De Waal, the essence of the right to freedom and security of the person is the right to be left alone. And, at least in relation to one's body, the right creates a sphere of individual inviolability.[1049] Section 12(2)(b) has two components: "security in" and "control over" one's body. These components are not synonymous. "Security in" denotes the protection of bodily integrity against intrusion by the state and others. "Control over" denotes the protection of what could be called bodily autonomy or self-determination[1050] against interference. The former is a component of the right to be left alone in the sense of being left unmolested by others. The latter is a component of the right to be left alone in the sense of being allowed to live the life one chooses.[1051]

Decisions made about the health care of mentally ill patients is permeated by the need to strike an appropriate balance between two dimensions of the obligation to show respect for persons, and respect for the wishes of the person. As Harris[1052] states:

1048 Carstens & Pearmain 104.

1049 Currie & De Waal 287.

1050 In *Phillips v De Klerk*, the right of an individual to dispose over one's own body, in so far as that right is not in conflict with the overriding social interest, was recognised. In the absence of an overriding social interest, the mentally competent individual's right to control his own destiny in accordance with his own value system, his "selfbeskikkingsreg", must be rated even higher than his health and life. Strauss respectfully submitted that the decision must be welcomed. See *Phillips v De Klerk* 1983 TPD (unreported). See also Strauss *Doctor, patient and the law* (1991) 30, 31.

1051 Currie & De Waal 287.

1052 Harris 'Profession responsibility and consent to treatment' in *Consent and the incompetent patient: Ethics, law and medicine*

> The problem for all who care about others is how to reconcile respect for the free choices of others with real concern for their welfare when their choices appear to be self-destructive or self-harming. One sort of comprehensive self-harming preference…is that exhibited by a refusal to consent to treatment which would be beneficial, or by an inability to consent.

Nowhere is the tension between autonomy and paternalism more evident than in relation to the treatment of mentally-ill patients. On the one hand is the need to limit the power of mental health professionals, and on the other is the rights of patients and their autonomously expressed wishes. Also important is the concept of "medicalism" which stresses the need to ensure that the safeguards for patients' individual rights are not so cumbersome that they impede medical interventions aimed at serving those same patients' best interests. In the last decade, the debates have become more refined, especially on the side of the legalists, who are increasingly emphasising the entitlement of patients to be free from discrimination, and to have adequate treatment and support services.[1053]

Over time, a mentally ill individuals' right to make personal health care decisions has been recognised, enhanced and accepted with much deference. Personal autonomy, however, is not without limits and should a state have an interest, and narrowly defines such interest(s), it may be able to demonstrate a compelling interest that will supersede an individual's right to autonomy. The state may act under its *parens patriae* powers to protect the innocent and vulnerable, including from medically-

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Hirsch & Harris (eds) (1988) 37-47 at 39-42 as published in Fennell "Inscribing paternalism in the law: Consent to treatment and mental disorder" (1990) 17 J *L & Soc* 29.

1053 Fennell 1990 J *L & Soc* 29-30.

acknowledged and *bona fide* health risks and treatments, but it cannot exclude due process.[1054]

Consulting psychiatrists are frequently asked to assess a patient's competency, but the definition of competency varies widely depending on the circumstances. From a legal perspective, adults are presumed competent until proven otherwise, and the determination of incompetency requires a court's decision. Although the term "competency" is widely used in a clinical setting, physicians cannot technically "declare" an individual "incompetent". What a clinician can determine is lack of decisional capacity. Competency is situation-specific, but its elements include awareness and understanding of the illness and proposed intervention, appreciation of available alternatives, the ability to communicate a choice regarding intervention, and a rational process for deciding. Cognitive disorders can reduce all these elements, while other psychiatric disorders primarily affect rational decision-making. Mental illness, whether in mentally-impaired psychiatric patients or psychiatrically impaired medically ill patients, does not automatically render a person incompetent to all decisions. Instead, the patient must be examined to determine whether he or she is capable of making a particular decision. However, in many countries, proxy consent in the patient lacking decision-making capacity is prohibited when the patient actively refuses treatment or for specific types of treatment (for example, psychiatric treatment, electroconvulsive therapy and psychosurgery).[1055]

4 Mental Health Law

1054 Selected works of Mike Jorgensen: Jorgensen 'Is today the day we free electroconvulsive therapy?" (2008) *ExpressO* Electronic publishing http://works.bepress.com/mike_jorgensen/1 (accessed: 26 June 2015).

1055 Appelbaum & Grisso "Capacities of hospitalised medically ill patients to consent to treatment" (1997) 38 *Psychosomatics* 119-125.

4.1 Introductory remarks

People with mental illnesses may be subject to the CRPD, depending on the definitions of terms such as 'impairment', 'long-term' and the capaciousness of the word 'includes' in the Convention's characterisation of persons with disabilities. Particularly challenging with reference to the CRPD is the scope, if any, for involuntary treatment. Such law is aimed at eliminating discrimination against persons with a mental illness. It covers all persons regardless of whether they have a 'mental' or a 'physical' illness, and only allows involuntary treatment when a person's decision-making capability for a specific treatment decision is impaired - whatever the health setting or cause of the impairment - and where supported decision making has failed. In addition to impaired decision making capacity, involuntary treatment would require an assessment that such treatment gives the person's values and perspective paramount importance.[1056]

The CRPD states clearly that states parties must ensure that persons with disabilities, on an equal basis with others, enjoy the right to liberty and security of person; are not deprived of their liberty unlawfully or arbitrarily; and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty. States parties must ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and are treated in compliance

[1056] Szmukler, Daw & Callard "Mental health law and the UN Convention on the rights of Persons with Disabilities" (2014) 37 *International Journal of Law and Psychiatry* 245.

with the objectives and principles of the Convention, including by provision of reasonable accommodation.[1057]

According to Szmukler, mental illness – even if it comprises only a number of necessary criteria for involuntary detention - makes that set of criteria incompatible with Article 14 that a disability shall in no case justify a deprivation of liberty.[1058] It is clear that these interpretations place current involuntary treatment regimes under increasing scrutiny. Minkowitz argues that involuntary treatment is ruled out entirely.[1059] She argues that Article 12 rejects involuntary treatment by stating that persons shall enjoy legal capacity on an equal basis with others in all aspects of life and by making no explicit reference to substitute decision-making in any of its subsections.[1060] Direct reference to the possibility of decision-making by another person on behalf of a disabled person, even as a last resort, is not made.

1057 A 14 CRPD.

1058 Szmukler 248.

1059 Minkowitz "The United Nations Convention on the rights of persons with disabilities and the right to be free from nonconsensual psychiatric interventions" (2006) 34 *Syracuse Journal of International Law and Commerce* 405.

1060 According to A 12 - Equal recognition before the law: 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests. 5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

One of the most important aims of the CRPD is the elimination of discrimination against people with disabilities. Decisions are made for mentally-ill patients according to judgements and preferences that are not theirs. Undoubtedly, in relation to long-term disabilities, such as those resulting from sensory or intellectual impairments or chronic health conditions, the proposed measures to counter discrimination are highly appropriate. However, according to Szmukler, what is not clear is how far this thinking applies to persons who experience sudden or potentially short-term impairments – often reversible with treatment, social support or lapsing of time – that significantly affect their decision-making capabilities.

The overall aim of the South African Mental Health Care Act is the regulation of the mental health environment so as to provide mental health services in the best interest of the patient. The provision of care at all levels becomes the responsibility of the state. The Act promotes treatment in the least restrictive environment possible, and requires active integration into general healthcare.

Furthermore, respect for individual autonomy and decreased coercion procedures have been introduced in the management of the acute stages of illness. The Act also addresses the potential for and alleged malpractices in institutions and provides for prevention and detection. This is related to reports of human rights abuses of those with mental illnesses which required attention. Psychiatric hospitals' stigmatisation of patients used to occur. This is an important aspect in terms of the Constitution and the CRPD, which require that there be no discrimination

against persons with disabilities.[1061] Mentally-ill people have the right to be treated under the same professional and ethical standards as any other ill person. Zabow[1062] states that this must include efforts to promote the greatest degree of self-determination and personal responsibility on the part of patients. He further states that admission and treatment should always be carried out in the patient's best interest.

4.2 Electroconvulsive therapy

When electroconvulsive therapy is mentioned in conversation it evokes strong reactions from scientists and laypeople alike. A swirl of controversy has always surrounded the use of shock treatment. Electroconvulsive therapy has undergone many changes since its creation in the early 1930s in Europe.[1063] However, despite scientific innovations and legislative actions, South Africa and many other countries do not sufficiently protect the mentally-ill patient's constitutional right to refuse such an invasive and controversial treatment. It is of vital importance that electroconvulsive therapy be administered only with the free and informed consent of the person concerned, including on the basis of information on the secondary effects and related risks such as heart complications, confusion, loss of memory and even death. The CRPD lays the foundation for this argument to be developed, starting from its recognition of equal legal capacity and free and informed consent of persons with disabilities and equal right to respect for physical and mental integrity as well as freedom from torture and cruel, inhuman and degrading

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1061 Zabow "The Mental Health Care Act" in Baumann (ed) *Primary health care psychiatry: A practical guide for South Africa* (2007) 570-571.

1062 Zabow "The Mental Health Care Act (Act 17 of 2002)" in Kaliski (ed) *Psycholegal assessment in South Africa* (2006) 61.

1063 Newell "Competency, consent, and electroconvulsive therapy: A mentally ill prisoner's right to refuse invasive medical treatment in Oregon's criminal justice system" (2005) 9 *Lewis & Clark L R* 1022.

treatment or punishment. Articles 12, 15, 17 and 25 require immediate cessation of forced psychiatric interventions.[1064]

The use of electroconvulsive therapy is not highly regulated and legislated in South Africa. Up until the introduction of the Mental Health Care Act, legislation and monitoring of the use of electroconvulsive therapy in South Africa were conspicuous in their absence. Fortunately, the Mental Health Care Act potentially impacts on the practice of electroconvulsive therapy in a variety of ways. A major limitation of electroconvulsive therapy is the neurocognitive side-effects that accompany its administration. However, with recent research on the effects of changes in electrode placement and dosing strategies, it is possible to minimise these side effects in the majority of patients. Despite these recent advances in the practice of electroconvulsive therapy, it should remain a highly regulated and legislated treatment modality in South Africa. According to Segal and Thom,[1065] it has been shown that the more legislated the procedure becomes the less frequently it is used. Their argument is that paternalistic psychiatrists are conducting electroconvulsive therapy on patients whose rights they are violating, by utilising inadequate procedures for obtaining informed consent, thus undermining autonomy. Undermining autonomy and consent procedures is also not in line with the CRPD and the Constitution.

As this treatment is potentially harmful it thus does not adhere to the tenets of non-maleficence. Further, the increasing risk of litigation in the field of medicine played a role in the aforementioned phenomenon both as cause and effect. On the

1064 Minkowitz 405.

1065 Segal & Thom "'Consent procedures and electroconvulsive therapy in South Africa: Impact of the Mental Health Care Act" (2006) 9 *South African Psychiatry Review* 207.

contrary, Jorgensen[1066] argues that the stigma that electroconvulsive therapy suffered due to prior barbaric-type applications is largely historical, and most medical professionals should agree that electroconvulsive therapy today is safe, has very minimal side-effects, is not inherently abusive, and has no long-term detriments. Yet, with the increase in popularity and safe applications, electroconvulsive therapy is still treated archaically under certain laws and legislative restraints will cause an indigent, elderly population to be deprived of this useful and sometimes solely effective treatment.

Individuals requiring electroconvulsive therapy fall within groups or categories. The group that is least controversial is those who have mental capacity and may either refuse or request electroconvulsive therapy. Such individuals have statutory, common law and constitutional protections of autonomy and self-determination. The more controversial group are those patients who are mentally incapacitated and either refuse electroconvulsive therapy, requeste electroconvulsive therapy or who have not expressed a decision either way.

In *Rompel v Botha*,[1067] Neser J made the following statement:

There is no doubt that a surgeon who intends operating on a patient must obtain the consent of the patient … I have no doubt that a patient should be informed of the serious risks he does run. If such dangers are not pointed out to him then, in my opinion, the consent to the treatment is not in reality consent – it is consent without knowledge of the possible injuries. On the evidence defendant did not notify plaintiff of the possible dangers, and even if plaintiff did consent to shock treatment he consented

1066 Jorgensen http://works.bepress.com/mike_jorgensen/1.

1067 *Rompel v Botha* 1953 (T) unreported. It is important to note that this case is rather old and shock therapy is now much safer than in 1953.

without knowledge of injuries which might be caused to him. I find accordingly that plaintiff did not consent to the shock treatment.

It is clear from the above that lawful medical interventions require the informed consent of the patient apart from the specific exceptions mentioned above. Therefore, a medical intervention without the required informed consent amounts to a violation of a person's physical integrity, and may amount to criminal assault, civil or criminal *injuria*, or result in an action for damages based on negligence. Article 25(d) of the CRPD also specifically refers to informed consent by requiring health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, *inter alia*, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care.

Whether they have or lack capacity, each group's autonomy interests should be afforded differently. A group of concern are those patients who previously were competent, but who are now incapacitated. When these individuals previously enjoyed capacity, they may either have created medical advance directives that did not provide for mental health care decisions or they failed to provide directives at all. The category includes those who may have consented to electroconvulsive therapy before or who may have refused the treatments prior to losing capacity. Procedures are needed which will protect these vulnerable individuals from the misuse of electroconvulsive therapy and at the same time continue to protect incapacitated individuals' rights and self-determination.[1068]

[1068] Jorgensen http://works.bepress.com/mike_jorgensen/1.

4.3 Regulation of mentally-ill prisoners in terms of the Mental Health Care Act

Chapter 7 of the Mental Health Care Act regulates the position with regard to mentally-ill prisoners. In terms of section 49, the head of the national department must, with the concurrence of the heads of the provincial departments, designate health establishments which may admit, care for, treat and provide rehabilitation services to mentally-ill prisoners to avoid discriminatory practices. If it appears to the head of a prison through personal observation or from information provided that a prisoner may be mentally-ill, the head of the prison must cause the mental health status of the prisoner to be enquired into by a psychiatrist[1069] or, where a psychiatrist is not readily available, by a medical practitioner,[1070] and a mental health care practitioner.[1071] The person conducting the enquiry must submit a written report to the head of the prison, and must specify in the report the mental health status of the prisoner;[1072] and a plan for the care, treatment and rehabilitation of that prisoner.[1073]

If the person conducting the enquiry referred to in section 50 finds that the mental illness of the convicted prisoner is of such a nature that the prisoner concerned could appropriately be cared for, treated and rehabilitated in the prison, the head of the prison must take the necessary steps to ensure that the required levels of care, treatment and rehabilitation services are provided to that prisoner.[1074] This is in line with Article 25(f) of the CRPD requiring the prevention of discriminatory denial of health care or health services or food and fluids on the basis of disability.

1069 S 50(1)(a).
1070 S 50(1)(b)(i).
1071 S 50(1)(b(ii).
1072 S 50(2)(a).
1073 S 50(2)(b).
1074 S 51. See also ss 52-58.

The implementation of supported decision-making processes is challenging in prisons, although adequate safeguards to protect prisoners with mental illness against treatment without free and informed consent are vital as stipulated in the CRPD.

4.4 Institutionalisation of the mentally-ill

Far from providing a supportive environment, institutional care settings for the mentally-ill are often where human rights abuses occur. This is particularly true in segregated services, including residential psychiatric institutions and psychiatric wings of prisons. Persons with mental illnesses are often inappropriately institutionalised on a long-term basis in psychiatric hospitals and other institutions. While institutionalised, they may be vulnerable to being chained to soiled beds for long periods of time, experience violence and torture, the administration of treatment without their informed consent, unmodified use of electro-convulsive therapy, grossly inadequate sanitation, and inadequate nutrition. Women are particularly vulnerable to sexual abuse and forced sterilisations. Persons from ethnic and racial minorities often are victims of discrimination in institutions and care systems. A lack of monitoring of psychiatric institutions and weak or non-existent accountability structures allow these human rights abuses to flourish away from the public eye.[1075]

In terms of the Mental Health Care Act, a health care provider or a health establishment may provide care, treatment and rehabilitation services to or admit a mental health care user only if:

(a) the user has consented to the care, treatment and rehabilitation services or to admission;[1076]

1075 Hunt & Mesquita 333.

1076 S 9(1)(a).

(b) it was authorised by a court order or a review board;[1077]

(c) due to mental illness, any delay in providing care, treatment and rehabilitation services or admission may result in the death or irreversible harm to the health of the user; or

(d) the user can inflict serious harm to himself or herself or others; or cause serious damage to or loss of property belonging to him or her or others.[1078]

Any person or health establishment that provides care, treatment and rehabilitation services to a mental health care user or admits the user in circumstances referred to in subsection (1)(c) of the Mental Health Care Act must report this fact in writing in the prescribed manner to the relevant review board;[1079] and may not continue to provide care, treatment and rehabilitation services to the user concerned for longer than 24 hours, unless an application in terms of Chapter V[1080] is made within the 24-hour period.[1081]

Chapter V of the Mental Health Care Act regulates voluntary, assisted and involuntary mental health care. Subject to section 9(l)(c), a mental health care user may not be provided with assisted care, treatment and rehabilitation services at a health

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1077 Mental health review boards are quasi-judicial structures that have been established in terms of the Mental Health Care Act. The establishment of mental health review boards by members of the Executive Council in provinces commenced in 2005. By April 2013, twenty mental health review boards were established in all provinces. These boards serve as "watch-dogs" when it comes to mental health related issues and have to see that mental institutions comply with the provisions of the Mental Health Care Act and therefore ensure that the rights of individuals with mental illness are protected. As quasi-judicial authorities review boards must within their legal powers administer their functions with clear knowledge and understanding of the intentions of the Mental Health Care Act. It is therefore important that proper and continuous systems be put in place to ensure effective functioning of the mental health review boards. S 9(1)(b).

1078 S 9(1)(c)(i)-(iii).

1079 S 9(2)(a).

1080 Chapter V consists of ss 25-40 of the Mental Health Care Act.

1081 S 9(2)(b).

establishment as an outpatient or inpatient without his or her consent, unless a written application for care, treatment and rehabilitation services is made to the head of the health establishment concerned and he approves it;[1082] and at the time of making the application there is a reasonable belief that the mental health care user is suffering from a mental illness or severe or profound mental disability, and requires care, treatment and rehabilitation services for his or her health or safety, or for the health and safety of other people;[1083] and the mental health care user is incapable of making an informed decision on the need for the care, treatment and rehabilitation services.[1084]

An application referred to in section 26 may only be made by the spouse, next of kin, partner, associate, parent or guardian of a mental health care user,[1085] but where the user is under the age of 18 years on the date of the application, the application must be made by the parent or guardian of the user.[1086] If the spouse, next of kin, partner, associate, parent or guardian of the user is unwilling, incapable or not available to make such an application, the application may be made by a health care provider.[1087] The applicants referred to in paragraph (a) must have seen the mental health care user within seven days before making the application.

Such application must be made in the prescribed manner, and must set out the relationship of the applicant to the mental health

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1082 S 26(1)(a).

1083 S 26(1)(b)(i).

1084 S 26(1)(b)(ii). See also s 25 of the Act, which states that: "A mental health care user who submits voluntarily to a health establishment for care, treatment and rehabilitation services, is entitled to appropriate care, treatment and rehabilitation services or to be referred to an appropriate health establishment."

1085 S 27(1)(a).

1086 S 27(1)(a)(i).

1087 S 27(1)(a)(ii).

care user;[1088] if the applicant is a health care provider, the reasons why he is making the application must be stated;[1089] and what steps were taken to locate the relatives of the user in order to determine their capability or availability to make the application;[1090] the grounds on which the applicant believes that care, treatment and rehabilitation services are required must be set out;[1091] and the date, time and place where the user was last seen by the applicant within seven days before the application is made must be indicated.[1092]

On receipt of the application, the head of a health establishment concerned must cause the mental health care user to be examined by two mental health care practitioners.[1093] Such mental health care practitioners must not be the persons making the application and at least one of them must be qualified to conduct physical examinations.[1094] On completion of the examination, the mental health care practitioners must submit their written findings to the head of the health establishment concerned on whether the circumstances referred to in section 26(b) are applicable;[1095] and

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1088 S 27(2)(a).

1089 S 27(2)(b)(i).

1090 S 27(2)(b)(ii).

1091 S 27(2)(c).

1092 S 27(2)(d).

1093 The procedure differs with regard to assisted and involuntary mental health care users. Assisted care, treatment and rehabilitation services means a user is not capable of making an informed decision but is not refusing treatment. Involuntary care, treatment and rehabilitation services means a user is not capable of making an informed decision and is also refusing treatment, but needs such treatment for their own safety and the safety of others. If following stabilization at a health establishment the user is diagnosed as having a mental illness and the conditions for either emergency admission and treatment without consent, involuntary treatment or assisted treatment exist – then only can the procedures of the Mental Health Care Act be applied. Of importance is the specified Mental Health Care Act Forms (MHCAF) that have to be completed by the health establishments. Institutions do not always comply with the provisions of the Act, which creates a range of serious practical problems. If the relevant procedures are not followed it would mean that the patient is illegally admitted and can lead to liability issues. S 27(4)(a).

1094 S 27(4)(b).

1095 With regard to assisted users an application for admission is made on a MHCAF 04. This document must be commissioned by a

the mental health care user should receive assisted care, treatment and rehabilitation services as an outpatient or inpatient.[1096]

A mental health care user must be provided with care, treatment and rehabilitation services without his or her consent at a health establishment on an outpatient or inpatient basis if:

(a) An application is made in writing to the head of the health establishment concerned to obtain the necessary care, treatment and rehabilitation services and the application is granted;[1097]

(b) at the time of making the application, there is reasonable belief that the mental health care user has a mental illness

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commissioner of oath and the date of application and date of commissioning must be the same. Then the user has to be assessed by two mental health care practitioners for which MHCAF's 05 are used. One of the two mental health care practitioners must be qualified to conduct a physical examination. The practitioners who complete the MHCAF 05's cannot complete the MHCAF 04 as well. When these assessments had been done the Head of the Health Establishment has to complete a MHCAF 07 in which the Mental Health Review Board is informed of the decision of the health establishment with regard to future care, treatment and rehabilitation. The Mental Health Review Board then completes a MHCAF 14 with a recommendation for future care, treatment and rehabilitation. The board has to ensure that all documentation is in order and that the user is indeed legally admitted. With regard to involuntary users the same procedure is followed as above but there is additional documentation that has to be completed. Two MHCA06's have to be completed after assessment by two mental health care practitioners. This assessment has to be done over a period of 72 hours. One of the two mental health care practitioners has to be a medical practitioner and the other any one of the other categories of mental health care practitioners. Those practitioners completing the MHCAF 05's are allowed to also complete the MHCAF 06's provided that one is a medical practitioner and that new individual assessments are done. If the decision is made for further care, treatment and rehabilitation services, the head of the health establishment has to complete a MHCAF 08. A mental health care user cannot be admitted as an involuntary user if there is not a completed MHCAF 08.

S 27(5)(a).

1096 S 27(5)(b). See also ss 27(6)-27(10).

1097 S 32(1)(a).

of such a nature that the user is likely to inflict serious harm to himself or herself or others; or

(c) care, treatment and rehabilitation of the user are necessary for the protection of the financial interests or reputation of the user;[1098] and at the time of the application the mental health care user is incapable of making an informed decision on the need for the care, treatment and rehabilitation services; and is unwilling to receive the care, treatment and rehabilitation required.[1099]

According to Levenson,[1100] physical restraints and seclusion may be required for confused, mentally unstable patients, especially when chemical restraint is ineffective or contraindicated. Confused mentally-ill patients often climb over bed rails, risking falls which may result in fractures and head trauma. The stringent legal regulation of physical restraints has increased during the past decade, yet courts have generally held that restraints are appropriate when a patient presents a risk of harm to themselves or others and a less restrictive alternative is not available. While it should be acknowledged that physical restraints have been overused in the past, some argue that there are times when these restraints are the safest and most humane option. A full range of alternatives for preventing harm in confused mentally-ill patients, and for respecting their dignity, should be considered, keeping in mind that there are clinical and legal risks both in inappropriately using and foregoing restraints.

1098 S 32(1)(b)(i) and (ii).

1099 S 32(1)(c).

1100 Levenson "Legal issues in the interface of medicine and psychiatry" (2007) *Primary Psychiatry* http://www.primarypsychiatry.com/aspx/articledetail.aspx?articleid=117 (accessed 28 June 2015).

With regard to the seclusion of mentally ill patients, according to Saks[1101] there are at least two theories of how seclusion is directly therapeutic: First, the patient is separated from stressful interpersonal relations and so is permitted to reconstitute and to feel more settled. Second, seclusion is therapeutic because of the destimulation it provides. The idea is that patients, especially psychotic ones, have a real problem with overstimulation. They have, as it were, lost their ability to filter out unnecessary detail. Therefore, placing a patient in a bare room with no stimuli to distract, impinge on and overwhelm him or her, can be most therapeutic. It is submitted that should less restrictive means be available to achieve the same putative therapeutic ends, seclusion should not be justified as a means of therapy.

The rights and duties of persons, bodies or institutions are set out in Chapter 3 of the Mental Health Care Act and are in addition to any rights and duties that they may have in terms of any other law.[1102] According to section 8 of the Mental Health Care Act, the person, human dignity and privacy of every mental health

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1101 Saks *Refusing care: Forced treatment and the rights of the mentally ill* (2002) 125-126.

1102 See s 7. "(1) The rights and duties of persons, bodies or institutions set out in this Chapter are in addition to any rights and duties that they may have in terms of any other law. (2) In exercising the rights and in performing the duties set out in this Chapter, regard must be had for what is in the best interests of the mental health care user." Further legislation pertaining to mental health in South Africa include: The Criminal Procedure Act 51 of 1977 and amendment 1998; The Prevention and Treatment of Drug Dependency Act 20 of 1992; The Prevention of Family Violence Act 116 of 1998; The Choice on Termination of Pregnancy Act 92 of 1996; The Promotion of Access to Information Act 2 of 2000 and the Children's Act 38 of 2005.

care user[1103] must be respected.[1104] Every mental health care user must be provided with care, treatment and rehabilitation services that improve the mental capacity of the user to develop to their full potential and to facilitate his or her integration into community life.[1105] A mental health care user must receive care, treatment and rehabilitation services to the degree appropriate to his or her mental health status.[1106]

People suffering from mental illness are among the most disadvantaged groups in society. They suffer severe personal distress and they are stigmatised, discriminated against, marginalised and often left vulnerable.[1107] Stigma[1108] has become an important concept in health law. It is widely accepted that certain diseases are scorned in society, leading to discrimination against people diagnosed with these diseases. Burris[1109] explains that this leads to a tendency to drive an epidemic underground, for example, to make it more difficult for

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1103 "Mental health care user" means a person receiving care, treatment and rehabilitation services or using a health service at a health establishment aimed at enhancing the mental health status of a user, state patient and mentally disordered prisoner and where the person concerned is below the age of 18 years or is incapable of taking decisions, and in certain circumstances may include: (i) prospective user; (ii) the person's next of kin; (iii) a person authorised by any other law or court order to act on that persons' behalf; (iv) an administrator appointed in terms of this Act; and (v) an executor of that deceased person's estate and "user" has a corresponding meaning. See s 1 of the Mental Health Care Act.

1104 S 8(1).

1105 S 8(2).

1106 S 8(3).

1107 Orovwuje & Taylor "Mental health consumers, social justice and the historical antecedents of oppression" 95-111 in Taylor (ed) *Justice as a basic human need* (2006) 95.

1108 Stigmatisation is entirely contingent on access to social, economic and political power that allows the identification of indifference, the construction of stereotypes, the separation of labelled persons into distinct categories and the full execution of disapproval, rejection, exclusion and discrimination. The term stigma is applied when elements of labelling, stereotyping, separation, status loss and discrimination co-occur in a power situation that allows them to unfold. See Link & Phelan "Stigma and its public health implications" 2006 367 *Lancet* 528.

1109 Burris "Disease stigma in US public health law" (2002) 30 *J L Med & Ethics* 179.

voluntary public health programs to reach and succeed among populations bent on concealing their diseases or risk status. The need to reduce stigma and its effects has been used to justify the passage of privacy and anti-discrimination laws to protect people with disabilities. Stigma also insinuates itself into policy decisions, access to care, health insurance, employment discrimination, and in research allocations and priorities.[1110]

The personalised nature of mental illness obscures from general view the intolerable burden of private and public distress that people with serious mental illness carry. Invariably the mentally-ill person encounters rejection and humiliation that are in some way tantamount to a "second illness". This combination either disrupts or puts beyond reach the usual personal and social life stages of marriage, family life, raising children, sexual relationships, choice of treatment, affordable housing, transportation, education and gainful employment. By lacking financial and social support, if not rejection from society, mentally-ill persons tend to neglect themselves and their diet, and frequently they delay seeking treatment.[1111]

As Burris explains,[1112] there are three broad areas where law affects the operation of stigma in society. Law can be a means of preventing or remedying the enactment of stigma as violence, discrimination, or other harm. It can be a medium through which stigma is created, enforced, or disputed; and it can play a role in structuring individual resistance to stigma. For the individual with a stigmatised health condition, acceptance of society's views and self-stigmatisation may lead to concealment to avoid discrimination. But anti-stigma activism is also possible. For

1110 Jamison "The many stigmas of mental illness" (2006) 367 *Lancet* 533.
1111 Orovwuje & Taylor 95-96.
1112 Burris "Stigma and the law" (2006) 367 *Lancet* 529.

many stigmatised diseases, for example, epilepsy and schizophrenia, the consequences of concealment may often be more severe than those of resistance. In both cases the individual faces status loss and discrimination, but, depending on the nature and incidence of enacted stigma, people who adopt resistance strategies may actually face less stigma, experience less social harm, and be better able to cope with any discrimination. At the same time they avoid the life-long hidden distress and unhappiness experienced by people who conceal.

According to Jamison,[1113] the inability to discuss mental illness in an informed and straightforward way, to deal with it as the major public health concern that it is, is unjustifiable. There is a very large group which she refers to as "the silent successful". These are people who recover from mental illness, but who are afraid to speak out. This reluctance is very understandable, very human, but it is unfortunate because it perpetuates the misperception that mental illness cannot be treated and cured. What remains visible in the public eye are the newspaper accounts of violence, the homeless mentally-ill and the untreated illness in friends, family, and colleagues. What is not seen are all the truck drivers, secretaries, teachers, lawyers, physicians and government officials who have been successfully treated, who work, compete and succeed.

Equality (non-discrimination) has a special place in the Bill of Rights, and sets its face against laws and practices that reinforce the subordination of disadvantaged and disabled groups.[1114] Equality is also a dominant theme running through the Constitution and the CRPD. It is mentioned expressly in the following sections in the Constitution:

1113 Jamison (fn 84) 533.

1114 *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC).

- Section 9: "Everyone is equal before the law";
- section 36: "In an open and democratic society based on freedom, and equality;
- section 39: "When interpreting the Bill of Rights, a court, tribunal, or forum … must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom".[1115]

In *Harksen v Lane*,[1116] the criteria for determining whether the equality clause may in fact be invoked, require an inquiry into the fact whether there is differentiation between people or categories of people. If such differentiation exists, it must be determined if there is a rational connection to a legitimate government purpose. The court went on to say that even if there is such a rational connection, it might nevertheless still amount to discrimination.

The second step is to distinguish if the differentiation amounts to unfair discrimination which requires a three-stage analysis: Firstly, it must be established whether the differentiation amounts to discrimination. The court was of the opinion that, if the allegation of unfair discrimination is not based on a listed ground, it must be resolved objectively whether the ground is based on "attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably adverse manner". Secondly, it must be found that if it amounts to discrimination, such discrimination is unfair. If it is found to be

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1115 See s 7(1) of the Constitution: "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom."

1116 *Harksen v Lane* 1998 (1) SA 300 (CC).

on a listed ground (in this case disability), then the court will presume unfairness.[1117] However, if on an unspecified ground the test of unfairness primarily focuses on the impact of the discrimination on the complainant and other people in the same situation.[1118] Thirdly, if the discrimination is found to be unfair, it must be determined whether it can be justified under the limitation clause.[1119]

According to Link and Phelan,[1120] an insidious form of discrimination occurs when stigmatised individuals realise that a negative label has been applied to them and that other people are likely to view them as less trustworthy and intelligent, and more dangerous and incompetent. According to this modified labelling theory, people who have been hospitalised for mental

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1117 S 9(3).

1118 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 also contains a general prohibition provision, and states that "neither the state nor any person may unfairly discriminate against any person". See s 6. The strong link between human dignity and equality is also conceptualised in the value of *ubuntu*. Although not expressly mentioned in the Constitution, it was nevertheless recognised as a constitutional value in *S v Makwanyane*. *Makwanyane*. This culture emphasises the fact that, in treating human beings with dignity, the state is required to act in a reasonable manner to eradicate poverty and is obliged to take steps to ensure the equal treatment of those who are vulnerable in society and have been historically deprived.

1119 *Republic of South Africa v Hugo*, Kriegler J suggested that the factors that would or could justify interference with the right to equality under the limitation clause should be distinguished from those relevant to the enquiry as to whether there has been unfair discrimination under the equality clause. The former are concerned with justification, possibly notwithstanding unfairness, and the latter are concerned with fairness and with nothing else. See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC). In *Harksen v Lane*, the Constitutional Court stated that the limitation analysis involves "a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality". Currie & De Waal 216-217.

1120 Link & Phelan ”Stigma and its public health implications” (2006) 367 *Lancet* 528. See also Link ”Mental patient status, work and income: An examination of the effects of a psychiatric label” (1982) 47 *Am Sociological Rev* 212-215; Link “Understanding labelling effects in the area of mental disorders: An assessment of the effects of expectations of rejection” 1987 52 *Am Sociological Review* 1: 96-112.

illnesses may act less confidently and more defensively with others, or may simply avoid a threatening contact altogether. The result may be strained and uncomfortable social interactions, more constricted social networks, a compromised quality of life, low self-esteem, depressive symptoms, unemployment and loss of income.

According to Jamison,[1121] we need to better understand why stigma exists. He makes the following recommendations:

- We have to acknowledge upfront that untreated mental illness can be frightening and that it can be associated with violent acts. It should further be acknowledged that mental illness can have a powerful effect on those people close to it.
- Research is the greatest destigmatiser: We need to get people interested in the brain, and in the fact that these are very interesting illnesses. We need to capture the imaginations of the young and explain that understanding the brain is the last great frontier. To make a disability interesting is to some extent to help destigmatise it.
- Third, we need to start within our own clinical communities and have more honest and open discussions about impaired doctors, psychologists, nurses and other professionals. Unless we are willing to talk about how to deal with mental illness among professionals the problem is going to remain, creating more fear and more stigmatisation. We also need to standardise the teaching of the clinical science underlying these illnesses. Some of the stigma associated with mental illness exists because there has been so much bad teaching and inadequate treatment over the years. The stigma that

[1121] Jamison 534.

those with mental illness face is only truly understood by those who have been on the receiving end of it.[1122]

It is stated in section 10 of the Mental Health Care Act that a mental health care user may not be unfairly discriminated against on the grounds of his or her mental health status. All mental health care users must receive the same standard of care, treatment and rehabilitation services. This is in line with the CRPD. The problem is the practical implementation of it.

[1122] Jamison (Department of Psychiatry and Behavioural Sciences, Johns Hopkins University School of Medicine) explains that this stigmatisation became more painfully clear to her when she wrote her book *An unquiet mind* that recounted her own experience with bipolar disorder. She wrote: "I received thousands of letters from people. Most of them were supportive but many were exceedingly hostile. A striking number said that I deserved my illness because I was insufficiently Christian and that the devil had gotten hold of me. More prayer, not medication, was the only answer. Others were irate that I had continued my professional work, even though my illness was well-controlled. The most upsetting letters, however, were from doctors, psychologists, and nurses who wrote about their own mood disorders, suicide attempts, and substance misuse problems. All made the irrefutable point that it was disingenuous for hospitals and medical schools to expect health-care professionals to be straightforward about mental illness when their hospital privileges, referral sources, and licences to practice were on the line. This is undeniably true. The chairmen of my academic departments have been compassionate and supportive of my career. I am fortunate in this regard; most others in my situation are not. *Mental illness is as least as common in our colleagues as it is in the general public, which is to say it is common.* Suicide occurs far too often. We need to reach out to our colleagues. As mentors and educators we need to be proactive, we need to educate medical students, house staff, and graduate students about depression and other mental illnesses. We need to make it easy for them to get treatment. We need as well to educate them more effectively about how best to diagnose and treat mental illness in their patients. We as a profession also need to reach out to society to say that we will not tolerate the kind of pain and discrimination that has gone on for far too long. When I wrote my book I had no idea what the long term consequences of being public about my manic depressive illness would be. I assumed that they were bound to be better than continuing to be silent. I was tired of hiding and tired of the hypocrisy. I was tired of being held hostage to stigma and tired of perpetuating it. Now there is indeed no turning back and I find myself continuing to take solace in Robert Lowell's question, the one which had been at the heart of my decision to be public about my illness: 'Yet why not say what happened?'" (Own emphasis). See Jamison 534. See also Jamison *An unquiet mind* (1995).

The right against exploitation and abuse is protected in section 11 of the Mental Health Care Act and states that every person, body, organisation or health establishment providing care, treatment and rehabilitation services to a mental health care user must take steps to ensure that users are protected from exploitation, abuse and any degrading treatment. Users should not be subjected to any forced labour either. Care, treatment and rehabilitation services should not be used as punishment or for the convenience of other people. According to section 12 of the Act, any determination concerning the mental health status of any person must be based on factors exclusively relevant to that person's mental health status, or to give effect to the Criminal Procedure Act, and not on socio-political or economic status, cultural or religious background or affinity.

4.5 Consent provisions as stipulated in the Mental Health Care Act

Section 9 of this Act states that a health care provider[1123] or a health establishment[1124] may provide care, treatment and rehabilitation services to, or admit, a mental health care user only if the user has consented[1125] to the care, treatment and rehabilitation services or to admission; the provision of these services has been authorised by a court order or a Review Board; or if any delay in providing care, treatment and rehabilitation services or admission could result in the death or irreversible harm to the health of the user, where the delay may cause the

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1123 "Health care provider" means a person providing health care services. See s 1 of the Mental Health Care Act.

1124 "Health establishment" means institutions, facilities, buildings or places where persons receive care, treatment, rehabilitative assistance, diagnostic or therapeutic interventions or other health services and includes facilities such as community health and rehabilitation centres, clinics, hospitals and psychiatric hospitals. See s 1 of the Mental Health Care Act.

1125 "Informed consent" is defined in s 7(3) of the National Health Act as consent for the provision of a specified health service given by a person with legal capacity to do so and who has been informed as contemplated in s 6.

user to inflict serious harm on himself or herself or others and where the delay may result in the user causing serious damage to or loss of property belonging to him, or her, or others.

5 The National Health Act

The National Health Act[1126] further provides a legal framework, based on consent, for the regulation of disabilities with regard to adults and children. This is compatible with article 25 of the CRPD, which ensures that health care be provided to persons with disabilities on the basis of free and informed consent, on an equal basis with others.

5.1 Consent provisions as stipulated in the National Health Act

The National Health Act contains general provisions pertaining to consent to medical treatment, as well as consent to research. Section 6 of the National Health Act requires a user, as defined in the Act, to have full knowledge of the proposed treatment. Every health care provider must inform a user of –

(a) the user's health status, except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user;
(b) the range of diagnostic procedures and treatment options generally available to the user;
(c) the benefits, risks, costs and consequences generally associated with each option; and
(d) the user's right to refuse health services and the implications, risks and obligations of such refusal.[1127]

1126 National Health Act 61 of 2003.
1127 S 6(1)(a)-(d).

The health care provider concerned must, where possible, inform the user, as contemplated in subsection (1), in a language that the user understands and in a manner that takes into account the user's level of literacy.[1128]

Section 7 of the National Health Act regulates the consent of the user and provides for the following:

> Subject to section 8,[1129] a health service[1130] may not be provided to a user without the user's informed consent,[1131] unless –
>
> (a) the user is unable to give informed consent and such consent is given by a person mandated by the user, in writing, to grant consent on his or her behalf; or authorised to give such consent in terms of any law or court order;
>
> (b) the user is unable to give informed consent and no person is mandated or authorised to give such consent, and the consent is given by the spouse or partner of the user or,

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1128 S 6(2).

1129 S 8 reads as follows: "Participation in decisions: (1) A user has the right to participate in any decision affecting his or her personal health and treatment. (2)(a) If the informed consent required by s 7 is given by a person other than the user, such person must, if possible, consult the user before giving the required consent. (b) A user who is capable of understanding must be informed as contemplated in s 6 even if he or she lacks the legal capacity to give the informed consent required by s 7. (3) If a user is unable to participate in a decision affecting his or her personal health and treatment, he or she must be informed as contemplated in s 6 after the provision of the health service in question unless the disclosure of such information would be contrary to the user's best interest."

1130 "Health service" means: (a) Health care services, including reproductive health care and emergency medical treatment, contemplated in s 27 of the Constitution; (b) Basic nutrition and basic health care services contemplated in s 28(1)(c) of the Constitution; (c) Medical treatment contemplated in s 35(2)(e) of the Constitution; and (d) Municipal health services. See s 1.

1131 For the purposes of s 7, "informed consent" means consent for the provision of a specified health service given by a person with legal capacity to do so and who has been informed as contemplated in s 6. See s 7(3).

in the absence of such spouse or partner, a parent, grandparent, an adult child or a brother or a sister of the user, in the specific order as listed;

(c) the provision of a health service without informed consent is authorised in terms of any law or a court order;

(d) failure to treat the user, or group of people which includes the user, will result in a serious risk to public health; or

(e) any delay in the provision of the health service to the user might result in his or her death or irreversible damage to his or her health and the user has not expressly, implied or by conduct, refused that service.[1132]

A health care provider must take all reasonable steps to obtain the user's informed consent.[1133]

Section 9 of the National Health Act regulates health services without consent. Subject to any applicable law, where a user is admitted to a health establishment without his or her consent, the health establishment must notify the head of the provincial department of the province in which that health establishment is situated within 48 hours after the user was admitted of the admission and submit any other information as may be prescribed.[1134] If the 48-hour-period contemplated in subsection (1) expires on a Saturday, Sunday or public holiday, the health establishment must notify the head of the provincial department of the user's admission and must submit the other information contemplated in subsection (1) at any time before noon of the next day that is not a Saturday, Sunday or public holiday.[1135] Subsection (1) does not apply if the user consents to the provision of any health service in that health establishment within 24 hours of admission.[1136]

1132 S 7(1).
1133 S 7(2).
1134 S 9(1).
1135 S 9(2).
1136 S 9(3).

5.2 Choice on Termination of Pregnancy Act

Introductory remarks

The Act definitely shows a change in society's attitude towards abortion, and abortion can no longer be regarded as being against public policy. Society had to face the reality that despite anti-abortion laws, many South Africans were having illegal and dangerous abortions performed because they could not afford raising a child. By condoning abortion to prevent the birth of, for example, a defective child, society had made it clear that it was sympathetic to parents who were anxious not to have a baby if it suffered from a serious disability.[1137] The termination of pregnancy which in the past was regarded as the product of a cruel fate is nowadays accepted as an event that might partly be controlled and legally dealt with by society.

The preamble of the Act recognises the values of human dignity, the achievement of equality, security of the person, non-racialism and non-sexism, and the advancement of human rights and freedoms that underlie a democratic South Africa. It also recognises that the Constitution protects the right of persons to make decisions concerning reproduction, and to security in and control over their bodies. It further states that both women and men have the right to be informed about and have access to safe, effective, affordable and acceptable methods of fertility regulation of their choice; and that women have the right of access to appropriate health care services to ensure safe pregnancies and childbirth. In addition, the Act recognises that the decision to have children is fundamental to a woman's physical, psychological and social health, and that universal access to reproductive health care services includes family planning and contraception, termination of pregnancy, as well as

[1137] Meintjies-Van der Walt "The right to be born?" (1991) *DR* 286:745.

sexual education and counselling programmes and services. The state has the responsibility to provide reproductive health to all, and also to provide safe conditions under which the right of choice can be exercised without fear or harm. Also, the termination of pregnancy is not regarded as a form of contraception or population control,[1138] and the Act promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early,[1139] safe and legal termination of pregnancy according to her individual beliefs.[1140]

With reference to the above, Van Oosten submits that the foetus, as a non-human or non-person for legal purposes, is evidently not entitled to any protection afforded to humans by the criminal law. It is simply a "member" of the pregnant woman's body and, in that capacity, is subject to her right "to security in and control over her body", which includes the right to have her embryo killed.

1138 Van Oosten submits that the belief that "termination of pregnancy is not a form of contraception" not only states the obvious but also confuses and identifies fact with belief. He states that "contraception" and "pregnancy" are mutually exclusive. Pregnancy means that there was no contraception, and contraception means that there is no pregnancy. The fact that contraceptive measures were taken but were unsuccessful makes no difference. Failed contraception is equivalent to no contraception. He further mentions that the belief that "termination of pregnancy is not a form of population control" needs clarification. It presumably means that the motive for the legalisation of terminations of pregnancy was not to curb population growth. It can hardly mean that the legalisation of termination of pregnancy will not actually curb, at least to some extent, population growth. Killing embryos and fetuses effectively terminates their potential to become human beings and to procreate in that capacity. Van Oosten "The Choice on Termination of Pregnancy Act: Some comments" (1999) 116 *SALJ* 63.

1139 Van Oosten points out that, in effect, the pregnant women not only has the right to choose an early termination of pregnancy, which is during the first 12 weeks of pregnancy, but also an opportunity, in certain circumstances, to choose a late termination between weeks 13 to birth. See Van Oosten 62.

1140 The pregnant woman's right to choose a termination of pregnancy according to her individual beliefs includes her right to have her pregnancy terminated in accordance with her belief that the only good fetus is a dead one. See in general the preamble of the Choice on Termination of Pregnancy Act 92 of 1996.

With regard to abortion, the Choice on Termination of Pregnancy Act[1141] also deals with situations where a woman is severely mentally-ill to such an extent that she is completely incapable of understanding and appreciating the nature or consequences of a termination of her pregnancy, or is in a state of continuous unconsciousness and there is no reasonable prospect that she will regain consciousness in time to request and consent to the termination of her pregnancy in terms of section 2. Under these circumstances, her pregnancy may be terminated during the first twelve weeks of the gestation period, or from the thirteenth up to and including the twentieth week of the gestation period on the grounds set out in section 2(1)(b), upon request of and with the consent of her natural guardian, spouse or legal guardian, as the case may be, or, if such persons cannot be found, upon the request and with the consent of her *curator personae*. However, such pregnancy may not be terminated unless two

1141 The preamble of the Act recognises the values of human dignity, the achievement of equality, security of the person, non-racialism and non-sexism, and the advancement of human rights and freedoms that underlie a democratic South Africa. It also recognises that the Constitution protects the right of persons to make decisions concerning reproduction, and to security in and control over their bodies. It further states that both women and men have the right to be informed about and have access to safe, effective, affordable and acceptable methods of fertility regulation of their choice; and that women have the right of access to appropriate health care services to ensure safe pregnancies and childbirth. In addition, the Act recognises that the decision to have children is fundamental to a woman's physical, psychological and social health, and that universal access to reproductive health care services includes family planning and contraception, termination of pregnancy, as well as sexual education and counselling programmes and services. The state has the responsibility to provide reproductive health to all, and also to provide safe conditions under which the right of choice can be exercised without fear or harm. Also, the termination of pregnancy is not regarded as a form of contraception or population control, and the Act promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs. For a discussion of whether the embryo is a bearer of constitutional rights (which falls outside the scope of this article), see *Christian Lawyers Association of South Africa and Others v Minister of Health and Others* 1998 (4) SA 1113 (T); (1998) 11 BCLR 1434 (T).

medical practitioners or a medical practitioner and a registered midwife who has completed the prescribed training course consent thereto.[1142]

Two medical practitioners or a medical practitioner and a registered midwife or registered nurse who has completed the prescribed training course may consent to the termination of the pregnancy of such a woman in the following circumstances: During the period up to and including the twentieth week of the gestation period if the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality; or after the twentieth week of the gestation period if the continued pregnancy would endanger the woman's life; would result in a severe malformation of the foetus; or would pose a risk of injury to the foetus. This may only be done after consulting her natural guardian, spouse, legal guardian or *curator personae*, as the case may be; provided that the termination of the pregnancy shall not be denied if the natural guardian, spouse, legal guardian, or *curator personae*, as the case may be, refuses to consent thereto.[1143]

In the second *Christian Lawyers*[1144] case, the Court stated that with regard to the question of the capacity to consent in this context, valid consent can only be given by someone with the intellectual and emotional capacity for the required knowledge, appreciation and consent. Because consent is a manifestation of will, Mojapelo J said that: "Capacity to consent depends on the ability to form an intelligent will on the basis of an appreciation

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1142 S 5(4).

1143 S 5(5). See also Van Oosten "The Choice on Termination of Pregnancy Act: Some comments" (1999) 116 *SALJ* 60-71 for an evaluation and criticism of this particular section of the Choice on Termination of Pregnancy Act.

1144 *Christian Lawyers*.

of the nature and consequences of the act consented to." The court further stated that a girl or any woman has the capacity to consent to the termination of her pregnancy and its concomitant invasion of her privacy and personal integrity only if she is "in fact mature enough to form an intelligent will". This might not be possible in the case of a severely mentally-ill woman.

Section 3 of the Act deals with the place where surgical termination of pregnancy may take place. Termination of pregnancies may only take place at a facility that gives access to medical and nursing staff; gives access to an operating theatre; has appropriate surgical equipment; supplies drugs for intravenous and intramuscular injection; has emergency resuscitation equipment and access to an emergency referral centre or facility; gives access to appropriate transport should the need arise for emergency transfer; has facilities and equipment for clinical observation and access to in-patient facilities; has appropriate infection control measures; gives access to safe waste disposal infrastructure; has telephonic means of communication; and has been approved by the Member of the Executive Council by notice in the *Gazette*.[1145] In addition, section 4(3)(c) of the National Health Act[1146] compels the state, clinics and community health centres funded by the state, but subject to any condition prescribed by the Minister, to provide women, subject to the Choice on Termination of Pregnancy Act, with free termination of pregnancy services.[1147]

Section 4 of the Choice on Termination of Pregnancy Act deals with counselling and provide for non-mandatory and non-

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1145 Ss 3(1)(a)-(k).

1146 S 4 deals with the eligibility for free health services in public health establishments.

1147 S 5 of the National Health Act provides that a health care provider, health worker, or health establishment may not refuse a person emergency medical treatment. See also s 27 of the Constitution and the case of *Soobramoney v Minister of Health, KwaZulu-Natal* .

directive counselling before and after the termination of the pregnancy.

According to section 10 of the Choice on Termination of Pregnancy Act, it is an offence for any person who is not a medical practitioner to procure the termination of a pregnancy.[1148] The elements of this offence are "unlawfulness",[1149] "termination", "performed by someone other than a medical practitioner", and "fault".[1150]

Provisions pertaining to consent: Section 5

Section 5(1) states that the termination of a pregnancy may only take place after the informed consent of the woman was obtained. It further states in section 5(2) that no consent other than that of the pregnant woman shall be required for the termination of a pregnancy.

1148 According to s 10: "Offences and penalties – (1) Any person who (a) is not a medical practitioner, or a registered midwife or registered nurse who has completed the prescribed training course, and who performs the termination of a pregnancy referred to in section 2(1)(a); (b) is not a medical practitioner and who performs the termination of a pregnancy referred to in section 2(1)(b) or (c); (c) prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of a pregnancy; or (d) terminates a pregnancy or allows the termination of a pregnancy at a facility not approved in terms of section 3(1) or not contemplated in section 3(3)(a), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years. (2) Any person who contravenes or fails to comply with any provision of section 7 shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months."

1149 A common law abortion was lawful when procured to preserve the life of the mother. The basis of this exception to the general prohibition of abortion was the defence of necessity.

1150 On general principles, the fault element of the crime consists in the intention to procure an abortion unlawfully. Therefore, the abortionist must know or foresee that the termination is unlawful. Where the abortionist *bona fide* believes that the woman is not pregnant or the fetus is already dead, or that the abortion is lawful in terms of the Act, he lacks the necessary fault. For a discussion of section 10 of the Choice on Termination of Pregnancy Act see Van Oosten 74.

Section 5(3) deals with the situation where a pregnant minor[1151] needs to consent to a termination of pregnancy and reads as follows:

> In the case of a pregnant minor, a medical practitioner or a registered midwife, as the case may be, shall advise such minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated: Provided that the termination of the pregnancy shall not be denied because such minor chooses not to consult them.

It is thus evident that every pregnant woman, irrespective of how young she is and even if she is an infant, not only has the statutory right to a termination of pregnancy, but also the statutory capacity to consent to it. The exceptions to these provisions are discussed in the paragraphs below. Van Oosten submits that although the Act's approach represents a radical departure from the common law and statutory provisions relating to children's capacity to consent, its justification clearly lies in the fact that pregnancy and childbirth could hardly be in the best interest of very young girls and/or their potential offspring.[1152] If a pregnant minor is under the age of 18 years, the consent of her parents or guardians is required for medical operations and concomitant procedures. In contradiction to this, the Choice on Termination of Pregnancy Act makes provision for "any female of any age" to consent to a termination of pregnancy. The Choice on Termination of Pregnancy Act can hardly be effective without a corresponding right and capacity to consent to concomitant

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1151 "Minor" is defined in section 1 as "any female person under the age of 18 years." The Children's Bill (B-2003) (hereafter referred to as the Children's Bill) provides in section 13(a) that: "Every child has the right to: have access to information on health promotion, sexuality, reproduction and the prevention of ill-health and disease".

1152 Very young pregnant girls also have the right and capacity to express an "informed refusal" to have their pregnancies terminated. "Informed refusal" is the reverse side of informed consent. See Van Oosten 67.

medical procedures. Van Oosten submits that it would be better if a pregnant woman under the age of 18 years is legally capable of consenting to an anaesthetic and, for that matter, any other concomitant intervention that is medically indicated.[1153] Human, again, argues that it is arbitrary to allow a minor to decide to terminate a pregnancy in terms of the Choice on Termination of Pregnancy Act, but to require parental consent for any other operation in terms of the Child Care Act.[1154]

Bekink submits that the benefits of obtaining parental or guardian consent in the case of a termination of pregnancy of a minor are of much more value than any negative consequences for the child. She further submits that a requirement of co-consent would indeed be a more appropriate requirement, as it would not only be in the child's best interests, which is a constitutional imperative,[1155] but it would also ensure that a child who is the victim of sexual abuse and maltreatment is afforded the necessary support and assistance to overcome the trauma of the criminal offence committed against her. Finally, it would also ensure that the criminal justice system is not legally

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1153 Van Oosten 67.

1154 Human (1998) *Die invloed van die begrip kinderregte op die privaatregtelike ouer-kind verhouding in die Suid-Afrikaanse reg* (unpublished LLD thesis) University of Stellenbosch 78. In *Christian Lawyers Association of South Africa and Others v Minister of Health and Others* (fn 115), section 5 of the Choice on Termination of Pregnancy Act was challenged on the grounds that it infringed section 28(1)(b) and (d) of the Constitution by allowing a child to make a decision about termination without the assistance and guidance of her parents or guardian. Mojapelo J held that this argument neglected to take account of the Act's requirement that consent to an abortion had to take place with the "informed consent" of the pregnant woman. In many cases a child under the age of 18 could give adequately informed consent, and in cases where the child is not sufficiently mature to make an informed decision without parental assistance, a child's decision to terminate her pregnancy would not meet the Act's threshold requirement for valid consent.

1155 S 28(2) of the Constitution.

sidestepped through misinformation and the non-prosecution of possible sexual offenders.[1156]

Concluding remarks on the Choice on Termination of Pregnancy Act

The Choice on Termination of Pregnancy Act only regulates abortion, which is the termination of an embryo in utero, but the destruction of embryos outside a woman's body (the embryo *extra uterum*) – for example, embryos in test tubes, cryopreserved embryos and embryos in transit from the donor to the recipient in embryo transfers – fall outside the scope of the Act.

The right to health as it pertains to children with disabilities

Section 28(1)(c) of the Constitution states that every child has the right to basic health care services. Section 28(1)(c) of the Constitution contains no qualifying phrases that make provision of the services subject to 'reasonable legislative measures', to be 'progressively realised' or within 'available resources'. This suggests that children should enjoy immediate and effective access to a basic level of these social services and resources.[1157]

The National Health Act 61 of 2003 regulates national health and provides uniformity in relation to health services in South Africa.[1158] It does this by establishing a national health care system encompassing public and private health care providers.[1159] Section 2(c)(iv) provides that people with

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[1156] An aspect of concern is that in allowing and performing an abortion on a woman under the age of 16, the medical practitioner or registered midwife is in fact destroying critical evidence in a possible case of rape or statutory rape. Bekink & Bekink "Aspects of rape, statutory rape and the Choice on Termination of Pregnancy Act 92 of 1996: Do we protect our women?" 69 *THRHR* 24, 27, 28.

[1157] S Liebenberg *Socio-Economic Rights - Adjudication Under a Transformative Constitution*(2010) 234.

[1158] Department of Social Development (n100 above) 49

[1159] See above

disabilities have the constitutional right to access health care services, including reproductive health care, and this right must be protected, respected and fulfilled.

Section 70(1) provides that in identifying research priorities, the National Health Research Committee must have regard to the health needs of persons with disabilities and ensure that research contributes to the prevention of disability.[1160]

All health care services, including rehabilitation at the home-based or community based levelsshould be offered at no cost.[1161] In order for persons with disabilities to access free health care and rehabilitation at public hospitals, they have to comply with nationally determined criteria based on household income.[1162]

The Department of Health also has guidelines and policies that aim to improve children with disabilities' access to health care services.[1163] These include the National Rehabilitation Policy, the Assistive Devices Policy and the policy guidelines on Free Health Care for Disabled People at Hospital Level.[1164] These policies, however, do not place an obligation on government to allocate funding and a budget for or ensure the provision of services to children with disabilities, resulting in the services being discretionary and subject to competing priorities.[1165]

[1160] Section 73(2)(a) of the National Health Act 61 of 2003.
[1161] Department of Social Development (n100 above) 49
[1162] See above.
[1163]S Philpott 'Vulnerability of children with disability: the impact of current policy and legislation' 272
[1164]Department of Health. Rehabilitation for all: National Rehabilitation Policy. Pretoria: Department of Health 2000; Department of Health. Standardisation of provision of assistive devices in South Africa: A guide for the use in the public sector. Pretoria: Department of Health 2003; Department of Health. Free Health Care for Disabled People at Hospital Level. Pretoria: Department of Health 2003.
[1165]S Philpott (n 148 above) 275.

In addition, financial constraints in accessing health care services remain a challenge for persons with disabilities, due to the following reasons:

- The health sector tends to focus on the medical needs of children with disabilities instead of following a holistic approach that looks at their life as a whole;
- Translating policy into practice, development of specific programmes and budgeting, remains a challenge;
- Lack of monitoring mechanism to determine the extent of accessibility to services;
- Lack of access to physical environments. When there are facilities they are often far away, with some being further than 10 km away, and lack of transport;
- Lack of access to information in accessible formats;
- Discriminatory and negative by health and support personnel towards persons with disabilities;
- Lack of skilled and trained health personnel on disability;
- Lack of effective appeal and reporting mechanismswhen rights have been infringed; and
- Lack of development of community level services.

A number of these challenges can be resolved through the strengthening of policy in relation to children with disabilities. The health care needs of children with disabilities should be included in all aspects of service provision and should not just be an 'add on'.[1166] The needs of children with disabilities need to form part of the planning of services.[1167]

Clear strategies also need to be formulated for the development, planning and resource allocation of community level services.[1168] Health care personnel need to be sufficiently trained

[1166]Philpott (n162 above) 279.
[1167]See above.
[1168]See above.

on causes of impairment and disability; early identification and prevention; available resources and mechanisms for referral; and communication skills.[1169] Often health care personnel, such as nurses and clinic staff, are the first people that parents see and get information from, it is important that the information being communicated is accurate and helpful.[1170]

It is also hoped that with the introduction of the National Health Amendment Act 12 of 2013, progress will be made in protecting the rights and well-being of persons with disabilities, including children. The Amendment Act introduces the Office of Standards Compliance that will advise the Minister of Health on the development of standards, norms and quality management systems for the national health system. The Office will also inspect and certify health establishment as being compliant with norms and standards.

Lastly, it is important for the report to point out two issues that will not be fully dealt with here, but which are important to be flagged for further research and/or legislative or policy development. The Department of Health currently does not have a general policy on the prevention of disability as it is moving away from generic policy and towards impairment-specific policy.[1171]For example, relevant guidelines on the prevention of birth asphyxia are lacking, yet asphyxia is the most common reported cause of cerebral palsy in African countries.[1172]

Another issue for further legislative development is South Africa's current policy on the non-consensual sterilisation of children, including children with disabilities. At the moment all that is required for the sterilisation of children is parental

[1169]See above.
[1170]See above.
[1171]S Philpott (n162 above) 276.
[1172] K Donald et al 'Pediatric cerebral palsy in Africa: Where are we?' 2014 *Journal of Child Neurology* 1-9 at 6.

consent, a panel decision and a written opinion by an independent medical practitioner.[1173] Children's right to participate, to the extent of their capacity, in decisions that affect them is not taken into account as well as their status as rights bearers.[1174]

7 Conclusion

Human rights have a long heritage. The principal philosophical foundation of human rights is a belief in the existence of a form of justice valid for all persons (including people with disabilities), everywhere. In this form, the contemporary doctrine of human rights has come to occupy centre stage in geo-political affairs. The language of human rights is understood and utilised by many people in very diverse circumstances. Human rights have become indispensable to the contemporary understanding of how human beings should be treated, by one another and by national and international political bodies. Human rights are best thought of as potential moral guarantees for each human being to lead a minimally good life. The extent to which this aspiration has not been realised represents a gross failure by the contemporary world to institute a morally-compelling order based upon human rights.[1175]

It is clear from the above discussion that, since 1994, many far-reaching improvements have been made to the South African health system. The legal and policy frameworks described in this article are still relatively new and are a major achievement.

[1173]T Boezaart 'Protecting the reproductive rights of children and young adults with disabilities: the roles and responsibilities of the family, the state and judicial decision-making' 78.

[1174]See above.

[1175] The Internet Encyclopedia of Philosophy: "Human rights" http://www.iep.utm.edu/h/hum-rts.htm (accessed: 7 July 2015). See also Freeman *Human rights: An interdisciplinary approach* (2002) 1.

However, much remains to be done to implement policies and to ensure that the vision of the protection of the patient becomes a reality for people, regardless of factors like disability.[1176] The Constitution and the Mental Health Care Act introduced changes relating to the administration of mental healthcare in South Africa. The Review Boards[1177] have been created to ensure more supervision and accountability of care provision within health establishments and to ensure that those suffering from mental illness are protected during periods of vulnerability and not discriminated against.[1178]

It is concluded that the CRPD poses major challenges for a justification of, for example, treatment of disabled people without their informed consent, or involuntary treatment for mentally-ill patients. Some have stated that the CRPD may effectively rule out involuntary treatment in any circumstance. It is, however suggested that very few would support the idea that the state never, even as a last resort, has a duty to protect those who are clearly unable to make crucial treatment decisions for themselves. There is still clearly much conceptual and practical work to be done in developing measures to solve these problems. It remains to be seen whether and how the CRPD will work to inspire reforms in global health governance.

1176 Hassim *et al* (eds) *Health & democracy: A guide to human rights, health law and policy in post-apartheid South Africa* (2007) 25.

1177 See chapter 4 of the Mental Health Care Act.

1178 Zabow 61.

13. THE RIGHT TO SOCIAL PROTECTION OF PERSONS WITH DISABILITIES IN SOUTH AFRICA

Innocentia Mgijima*

Conceptual Framework of the right social protection: History, Negotiations and Interpretations

Historical development of the right social protection in international human rights law

The historical formulation of the right to social security under the international human rights law and the interpretation of the right by diverse treaty monitoring bodies provide us with illuminating guidance on how the right developed its formulation under Article 28 of the CRPD. The right to social security has been strongly affirmed in international law. The right has been recognised in the Universal Declaration of Human Rights and guaranteed in many other international and regional human rights treaties and instruments. Historically the right to social protection and the right to an adequate standard of living have been treated as two separate rights; the CRPD is the first international convention that merges them into one.

The Universal Declaration of Human Rights (UDHR) 1948 was the first international human rights instrument to make reference to the right to social protection which has been historically enumerated as the right to social security.[1179] This right is articulated in article 22 which protects the right of everyone to social protection. The right to social security is reiterated in article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which obliges state parties to

[1179] Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/RES/217(III)

recognise the right of everyone to social security including social protection.[1180]

Both the United Nations Convention for the Elimination of All Forms of Discrimination against Women (CEDAW)[1181] and the Convention for the Elimination of Racial Discrimination (CERD)[1182] recognizes a right to social security without discrimination. CEDAW calls for the elimination of discrimination against women in as far as access to social protection is concerned.[1183] CEDAW identifies in article 14 (2) (c) women living in rural areas as particularly vulnerable to discrimination in accessing social protection and calls on state parties to ensure that women in rural areas benefit directly from social security programs on an equal basis with others. CERD prohibits in strong terms racial discrimination in all its forms in the enjoyment of all rights including the right to social security and services.[1184] The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRMWMF) contains the right to social security in Articles 27 and 61 which afford migrant workers and their families the same right to social protection as nationals if they are eligible for social protection under the applicable legislation in operation in the country.[1185]

[1180] International Covenant on Economic, Social and Cultural Rights (ICCPR), 16 Dec. 1966
[1181] Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979)
[1182] International Convention on the Elimination of All Forms of Racial Discrimination, G art. 5(a) (Dec. 21, 1965)
[1183] Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979), art 11(1)(e)
[1184] International Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965), art 5(e)(iv)
[1185] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRMWMF), 18 December 1990

The Convention on the Rights of the Child (CRC) also contains a specific provision on social protection. [1186] Article 26(1) affords every child the 'right to benefit from social security, including social insurance'. The state has the responsibility to 'take the necessary measures to achieve the full realisation of the right in accordance with national law'. The UN Standard rules on the equalisation of opportunities for persons with disabilities (rule 8) which preceded the CRPD affirms that persons with disabilities have the right to social protection.

South Africa is party to the CRPD and its Optional Protocol and has signed and ratified all the discussed treaties with the exception of the ICPRMWMF. [1187] South Africa in ratifying the CRPD and the other treaties discussed assumed the obligation to take all appropriate legislative, administrative and other measures to implement the right of persons with disabilities to social protection, and to modify or abolish existing laws, regulations, customs and practices which deprive persons with disabilities' their right to social protection.

The Right to an adequate standard of living and social protection: Article 28 of the CRPD

Article 28 of the CRPD the right to adequate standard of living and social protection restates the right to social protection from a disability perspective. Article 28(2) obliges states to ensure that persons with disabilities enjoy the right to social protection without discrimination. The article directs state parties to undertake a variety of measures to give effect to the right of persons with the disabilities to social protection including ensuring that persons with disabilities and their families living in

[1186] Covenant on the Right of the Child (CRC),1989

[1187] See http://www1.umn.edu/humanrts/research/ratification-southafrica.html (accessed 15 June 2015) for a list of all the international treaties South Africa has ratified.

situations of poverty have access to assistance from the state with disability expenses. State parties are required to take effective measures to safeguard and promote the full realisation of this right.[1188]

Concluding Observations of the CRPD Committee on Article 28

The State parties to the CRPD are required in terms of article 35 of the CRPD to submit to the CRPD Committee, the UN treaty monitoring body with the mandate to monitor the convention comprehensive periodical reports on the progress made in implementing their treaty obligations. The CRPD Committee constituted under article 34 of the convention assess the reports submitted periodically by state parties and generate concluding observations which consist of the Committees' collective assessment of the state's report and recommendations for the enhanced implementation of the rights under the convention.[1189]

[1188] **Article 28 Adequate standard of living and social protection**
1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.
2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:
(*a*) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;
(*b*) To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;
(*c*) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability related expenses, including adequate training, counselling, and financial assistance and respite care;
(*d*) To ensure access by persons with disabilities to public housing programmes;
(*e*) To ensure equal access by persons with disabilities to retirement benefits and programmes.

[1189] M O'Flaherty 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 27 *Human Rights Law Review* 1

Though the concluding observations of the Committee are not legally binding they have great interpretative import and assist in clarifying the legal obligations of state parties. They also constitute important guidelines in the practical implementation of rights in order to ensure the conscientious implementation of the convention. The CRPD Committee to date has considered the initial state reports and issued concluding observations for Argentina, Australia, Austria, Azerbaijan, Belgium, China, Costa Rica, Denmark, Ecuador, EL Salvador, Hungary, Korea, Mexico, New Zealand, Paraguay, Peru, Spain, Sweden and Tunisia.[1190]

Guidelines for State Parties

Examining the concluding observations adopted by the Committee on the right to an adequate standard of living and social protection to date reveals that the Committee has engaged; though not substantively in expounding state parties' obligation to ensuring the right of persons with disabilities to social protection.

In summary the following key **guidelines and clarifications** were provided by the Committee to assist states in implement Article 28.

- The right to social protection extends to migrant workers with disabilities and children of migrant workers with disabilities. In its concluding observations to Argentina the Committee expressed concern at unequal treatment of migrant workers with disabilities and children of migrant workers with disabilities in relation to access to social protection measures and advised Argentina to review the provisions of its social security legislation that

[1190] United Nations Committee on the Rights of Persons with Disabilities, Concluding observations of the Committee on the Rights of Persons with Disabilities of Tunisia, (2011), CRPD/C/TUN/CO/1 par

inhibit migrant workers with disabilities and the disabled children of migrant workers from having equal access to social protection in accordance with article 28 of the Convention.[1191]

- The Committee has emphasised the important role social security plays in preventing social exclusion and realising the right of persons with disabilities to independent living and inclusion in the community (Article 19). To this end the Committee has highlighted in its concluding observations to Azerbaijan and Korea the need for state parties to ensure that social protection programs provide sufficient and fair financial assistance to facilitate independent living in the community.[1192]
- The Committee in its' concluding observations to China and El Salvador identified huge discrepancies in access to social security between persons with disabilities living in urban and those living in rural areas.[1193] These observations infer the need for states to take measures as a matter of priority to remedy any such discrepancies and combat structural barriers that hinder persons with disabilities living in rural and remote areas from accessing social security benefits on an equal basis with others. The Committee recommends that states raise awareness in rural communities on the right of persons with disabilities to social protection.

[1191] United Nations Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Argentina, (2012), CRPD/C/ARG/CO/1 par 45-46.

[1192] United Nations Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Azerbaijan, (2014), CRPD/C/AZE/CO/1 par 32-33; United Nations Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Korea,(2014) ,CRPD/C/KOR/CO/1 par 40

[1193] United Nations Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of China, (2012), CRPD/C/CHN/CO/1 par 24-25; United Nations Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of El Salvador, (2013), CRPD/C/SLV/Q/1 par 57-58.

- Another key issue the Committee raised is that of assessment for social security grants. The Committee in its concluding observations to both Hong Kong and Korea strongly condemned the use of family based assessments in determining eligibility to receive social protection grants.[1194] The Committee recommended that the family based assessments be replaced with individual based assessments which focus on the income of the person concerned rather than the income of their family.[1195] The Commission also emphasised the need of such assessments to be uniform.[1196]

The legal and policy framework relating to the right to access to social protection of persons with disabilities in South Africa

The Right to Social Security in the Constitution of the Republic of South Africa

The right to social security is one of several socio-economic rights guaranteed in the South African Constitution of 1996.[1197] Section 27 of the Constitution provides that everyone has the right to access social security, including appropriate social assistance if they are unable to support themselves and their dependents. Section 27(2) further obliges the state to take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of the right to access to social security and social assistance.

[1194] United Nations Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Korea,(2014) ,CRPD/C/KOR/CO/1 par 9-10; United Nations Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of China, (2012), CRPD/C/CHN/CO/1 par 23,24

[1195]

[1196]

[1197] The Constitution of the Republic of South Africa, Act 108 of 1996, S 27(1)(c).

In the case of *Government of the Republic of South Africa and Others v Grootboom and Others* the South African Constitutional Court stated that progressive realisation entails that whilst the state might be unable to realise a right immediately due to limited resources it is nonetheless obliged to progressively improve accessibility both in terms of numbers of people accessing the right, as well as the range of people covered and also improve the quality of the right being realised.[1198] In addition the Constitutional Court also affirmed that 27 (1) imposes a negative duty on the state to "desist from preventing or impairing" access to the relevant rights.[1199]

The Constitution guarantees the right to social protection on an equal basis with others. The Constitution provides in section 9(1) that, "everyone" - is equal before the law and has the right to equal protection and equal benefit of the law. In section 9(2) the Constitution further elaborates that equality includes the full and equal enjoyment of *all rights* and *freedoms*. In providing social protection Section 9(3) of the Constitution provides that the state may not unfairly discriminate, either directly or indirectly, against anyone on one or more of the listed grounds. The grounds specifically mentioned in section 9(3) are "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth"

The Constitution therefore unambiguously guarantees the right to social security to all persons with disabilities and social assistance to persons with disabilities who cannot look after

[1198] Grootboom and Others v Government of the Republic of South Africa and Others 2000 ZACC 14. Irene Grootboom and others made the case that the government had violated their right to housing by evicting them from their informal settlement.
[1199]Sandra Liebenberg, 'The Judicial Enforcement of Social Security Rights' in Riedel, Eibe, (ed.) 76.

themselves or their dependents without discrimination on an equal basis with others and compels government to ensure the progressive realisation of this right consistent with South Africa's internal obligations.

Disability, Poverty and Social Assistance

The relationship between poverty and disability in South Africa has been strongly established.[1200] South Africa recognizes that the intersection of disability and poverty has had and continues to have serious impact on the lives of disabled persons. The existing relation between high incidences of disability and poverty are highlighted in the National Development Plan 2030 which acknowledges that disability and poverty operate in a vicious circle.[1201] Disability increases vulnerability to poverty, while poverty in turn often creates the conditions for increased risk of becoming disabled.[1202]. This has led to a higher proportion of disabled people amongst the very poor and an increase of families living at poverty level as a result of disability.

The South African government's legislative response to the right of persons with disabilities to social assistance must be understood within South Africa's current social context as well as historical context. South Africa's past characterised by systematic state enforced discrimination, exclusion and inequality marginalised persons with disabilities from social-economic activities. Social security in South Africa therefore functions as a primary safety net to help ease the hardship of poverty and ensures a basic standard of living. It also acts as a redistributive mechanism, transferring wealth to those

[1200] References to studies done on disability and poverty and how the next MDGs include persons with disabilities
[1201] NATIONAL DEVELOPMENT PLAN – 2030 42
[1202] Emmett 2006: 209

historically privileged by the apartheid system to those who were disadvantaged.

South Africa's National Development Plan 2030 (the NDP) recognises that social protection measures, including those that aim to support vulnerable members of society that are most in need, must bring about social cohesion and ensure an adequate standard of living.[1203]Therefore, action needs to be taken to ensure that vulnerable members of society, including children with disabilities who were historically denied the right to an adequate standard of living, are empowered to access rights and services available to them and live with dignity.

Social Assistance Act of 2004 and Social Assistant Act Regulations 2008

The Social Assistance Act of 2004 which repealed the Social Assistance Act of 1992 is the key legislative intervention that gives effect to the right to social assistance guaranteed in Sec 27(1) (b) of the South African Constitution[1204]. The act provides for the rendering of social assistance and the mechanism for rendering such assistance.The aim behind the social assistance act was to consolidate legislation on social assistance and specifically provide for the;

a) administration of social assistance and payment of social grants
b) provision for social assistance and to determine the qualification requirement
c) ensure that minimum norms and standards are prescribed for the delivery of social assistance and

[1203] National Planning Commission "National Development Plan 2030: Our future – make it work" (2011) 53 and 355.
[1204] The Social Assistance Act 13 of 2004

d) provide for the establishment of an inspectorate for social assistance.[1205]

The Minister of Social Development in 2008 in accordance with Sec 32 of the Social Assistance Act promulgated regulations relating to the application for and the payment of social assistance and the requirements or conditions in respect eligibility for social assistance.[1206]

The right to an adequate standard of living for children with disabilities[1207]

The Convention, through article 28, places an obligation on ratifying states to ensure that children with disabilities enjoy full and decent lives; have full and equal enjoyment of their rights through the protection of the right to an adequate standard of living.[1208]

The fulfilment of this obligation includes the provision of the necessary support to children with disabilities and parents or care-givers of children with disabilities, particularly those living in poverty.[1209]

This obligation, with regards to children, is affirmed by the Constitution in section 28 (1) (c) which provides that every child in South Africa has the right to social services. Section 28(1)(c) of the Constitution contains no qualifying phrases that make provision of the services subject to 'reasonable legislative measures', to be 'progressively realised' or within 'available resources'. This suggests that children should enjoy immediate

[1205] Sec 3 Social Assistance Act
[1206]Regulations relating to the application for and payment of social assistance and the requirements and conditions in respect of eligibility for social assistance, Government Gazette 31356, 22 August 2008 (regulations).
[1207] The discussion on the right to an adequate standard of living and social protection was written by *Zita Hasungule*.
[1208]P Martin et al (n1 above) 85.
[1209] P Martin et al (n 1 above) 86.

and effective access to a basic level of these social services and resources.[1210]

The discussion below will deal specifically with access to the CDG, South Africa's social security option directed at children with disabilities, in light of the Convention, as well as the Constitution and relevant national legislation.

THE CARE DEPENDENCY GRANT

Children with disabilities often require extra care, support or supervision to perform ordinary day-to-day activities.[1211] In some instances, these children may also require additional support such as medication, therapy and assistive devices.[1212] Parents and or care givers of children with disabilities may need to care for these children on a full-time basis or employ someone to provide the care.[1213]If a parent or care-giver decides to care for their child on a full-time basis this may affect their employment and if they employ someone to provide the care they may incur extra expenses.[1214]This places financial strain on care-givers and their families, particularly on families living in poverty or surviving on a low income.[1215]

The Social Assistance Act 13 of 2004 makes the care dependency grant (CDG) available to parents or care givers of children with disabilities to assist them as they care for the children. In order for the grant to be awarded,parents or care givers as well as the children have to go through an application and screening process as set out in the Act.[1216]Research indicates that the CDG has had commendable impact on the lives of the children and the households they are part of. It has been reported

[1210]S Liebenberg (n156 above) 234.
[1211]P Martin et al (n1 above) 87.
[1212]P Martin et al (n1 above) 87.
[1213]P Martin et al (n1 above) 87.
[1214]P Martin et al (n1 above) 87.
[1215]P Martin et al (n1 above) 87.
[1216]Department of Social Development (n100 above) 55.

that as a result of access to the grant,the majority of these households have:

- experienced an improvement in their general well-being;
- been able to purchase better quality food;
- been able to cover the cost of going to medical facilities and purchasing medication; and
- been able to improve housing.[1217]

The above is an indication of the role that the CDG plays in reducing income poverty among low income and vulnerable families in South Africa, as well in improving the lives of children with disabilities.

Accessing the grant

The Social Assistance Act and its regulations[1218] set out the eligibility requirements and application procedures required for access to the CDG.

The CDG grant is a cash transfer sum of R 1 410 per month that is paid to the parent or care-giver of a child with a disability.[1219] In terms of the Social Assistance Act, a parent, primary care-giver or foster parent ('parent or care giver') of a child with a disability is eligible to receive the grant (they must be a South African citizen, a permanent resident or a refugee).[1220]The parent or care-giver's monthly income must be less than 10 times the value of the CDG.[1221]

[1217]Department of Social Development et al (n100 above) 55.
[1218] Regulations relating to the application for and payment of social assistance and the requirements r conditions in respect of eligibility for social assistance, Government Gazette 31356, 22 August 2008 (regulations).
[1219] This is the amount as of April 2015. The value of the CDG is increased annually to keep up with inflation.
[1220]Section 8 of the Social Assistance Act 13 of 2004.
[1221] Section 8 (b) and Annexure D of the Social Assistance Act 13 of 2004 and P Martin et al (n 1 above) 879. Must not earn more than R169 200 a year

In addition, an assessment must conducted to confirm that the child concerned requires and receives permanent care or support services as a result of his or her physical or mental disability. The Act ensures that emphasis of eligibility criteria of the child is not on the medical severity of the impairment and permanence of the child's disability, but on the level of care or support services that are needed.[1222] It should be noted that the grant is not made available to children who receive care in state-fund institutions on a 24-hour basis.[1223]

In order for a parent or care-giver to apply for the grant, they must go to the South Africa Social Security Agency (SASSA) office closest to them to fill in an application form.[1224] They must produce the following documents to be attached to the application form:

- An identity document (or other documentation, as set out in regulation 11, proving citizenship or permanent residence of the applicant;
- An identity document or valid birth certificate of the child;
- A medical assessment report (a child is referred by SASSA to a medical practitioner to determine the nature of the disability as well as if the child's care needs are permanent and if the child needs support services);
- Proof of marital status; and
- Proof of income (this does not apply to refugees or foster parents);

It may take up to three months to process the application.[1225] If an application has been denied, the parent or care-giver has

(R14 100 per month) if single. Combined income should not be above R338 400 a year (R28 200 per month) ifmarried (see www.services.gov.za)
[1222]P Martin et al (n1 above) 90.
[1223]P Martin (n1 above) 89.
[1224]Reg 10 of the Regulations.
[1225] See above.

recourse in the form of lodging an appeal with the Minister of Social Development within 90 days of being notified that the application has been denied.

Once an application is successful and the grant provided, the Act and regulations provide for circumstances in which the grant will lapse:

- when the child passes away;
- when the child is admitted to a state institution;
- when the beneficiary who is the caregiver does not claim the grant for three consecutive months;
- when the child is absent from the country; and
- when the child turns 18.[1226]

Legislative and implementation challenges and gaps

Despite the achievements that have been accomplished through the CDG, there are concerns that the grant does not reach a substantial number of children that are eligible to receive it in terms of the Social Assistance Act.[1227]

Due to the fact that there are no accurate statistics on the total number of children with disabilities in South Africa, it is difficult to assess whether the percentage of children that are targeted by the grant are actually being reached. What available information does tell us is that the grant's coverage is low.[1228] The number of children receiving the grant in March 2015 was 126 777.[1229]This is much lower than the estimation in the Census 2011 of 474 000 children with severe disabilities. This 2011Census figure does not even take into account children with moderate to mild

[1226] See above.
[1227]P Martin et al (n1 above) 88; Department of Social Development et al (n55 above) 57.
[1228]P Martin et al (n1 above) 88.
[1229] South African Social Security Agency "Fact sheet: Issue no 3 of 2015 – 31 March 2015" http://www.sassa.gov.za/index.php/statistical-reports (accessed 18 June 2015).

disabilities. Projections further indicate that by 2016/17 the number of children accessing the grant will have risen to approximately 150 377,[1230] still much lower than the 2011 census data.

A number of challenges limit the positive impact that the CDG has been shown to have, to a small fraction of children.[1231] Below is a description of some of the challenges as well as recommendations proposed by Martin, Proudlock and Berry:

a. Inconsistencies between the Social Assistance Act and the Regulations

The Social Assistance Act makes it very clear that all children with disabilities who require either **permanent care or support services** are eligible to receive the grant. The regulations, on the other hand, provide that only **care-dependent** children can receive the grant. This creates an inconsistency between the Act (the enabling legislation) and the regulations (the subordinate legislation) because when one looks at the definition of a care dependent child in the Act,the definition is a child 'who requires and receives permanent care due to his or her severe mental or physical disability.The regulations, therefore, only make it possible for children with severe disabilities to receive the grant,whereasthe Social Assistance Act makes it possible for children (who have mental or physical disabilities) with severe, moderate to mild disabilities to receive the grant as long as they receive permanent care or support services.

b. Anew assessment form has not been promulgated

As a result of the amendments to the Act and the regulations, the Department of Social Development recognised the need to develop a new assessment form to be used by medical

[1230] South African Institute of Race Relations "Please sir, I want some more" (May 2015) 5 Fast facts 20.
[1231] P Martin et al (n1 above) 89.

practitioners. This is the form to be used when children with disabilities are being assessed during the application process.[1232]Despite this, a new assessment form is yet to be promulgated.

This has resulted in medical practitioners using the old assessment form or a form developed by SASSA for assessing adults' eligibility for the Disability Grant. The old form only considers criteria such as children havinga 'severe' disability to determine eligibility and the SASSA form is in no way child-focused. This has resulted in the interpretation of eligibility criteria not being consistent with the Act.

c. Medical practitioners are not given guidance and training

As a result of a lack of child-focused assessment forms, medical practitioners are left to form opinions and interpretations on children's needs without policy guidelines. This has had two implications: inexperienced medical practitioners and practitioners not making use of the Social Assistance Act exclude children with mild to moderate disabilities from accessing the CDG while experienced medical practitioners, who are aware of the Social Assistance Act and its requirements, ensure that children with mild to moderate disabilities are recommended for the CDG. These practitioners recognise that "[t]he continuum from mild to severe disability is fluid, as are the care needs, which means that a child with a mild or moderate disability may well need permanent care or support services. Accordingly, a number of medical [practitioners] recognise that a child with a moderate, or even mild disability may require a degree of supervision that translates into a need for permanent care".

[1232]Department of Social Development "Strategic Plan 2010 – 2015" (2010) 38; P Martin et al (n1 above) 92.

Medical practitioners who take into the account the Social Assistance Act are an exception; the assessments are most often done by junior medical staff that have little experience and therefore make decisions based on the medical diagnosis of children only. The junior staff does not receive sufficient guidance and training on the Social Assistance Act and its concepts and how to apply them.

d. Children with chronic illnesses are excluded

Section 11(2) of the Children's Act 38 of 2005 requires that children with chronic illnesses receive the same level of care as children with disabilities. This is due to the fact that they may also experience some form of impairment and require additional care.However, thereexist no guidelines or policies on the eligibility criteria of children with chronic illnesses to receive the CDG.

Case Study: Mom denied much needed grant for disabled child

On 04 June 2015 it was reported, by Media24, that a mother of a 1 year old child had been denied the care dependency grant. When the child was four-weeks-old he had a tracheostomy pipe inserted in his throat to help him breath due to complications at birth. This has left him unable to speak. His mother has to keep a constant vigil in order to determine if something is wrong or if he needs something. She has to physically clear mucus from the pipe that was inserted to prevent him from suffocating. If something goes wrong with the pipe he could die as he cannot breath on his own.

In order to care for the child, his mother had to stop working. This affected the family's financial situation drastically. She applied for the care dependency grant twice and the application was denied and an appeal application turned down. She was informed that the application was denied because a tracheostomy was not considered to be a permanent devise and it could not be proved that the child would need it until he was 18. A SASSA spokesperson further indicated that "*[d]espite the impairment, the child does not require nor does he receive permanent home care*".

<http://www.news24.com/SouthAfrica/News/Mom-denied-much-needed-grant-for-her-child-20150604>

*it was later reported that after the media reported on the matter SASSA contacted the mother, helped her through a new application process and approved the application for the grant (http://www.news24.com/SouthAfrica/News/Mom-gets-much-needed-grant-for-ill-child-20150616)

Recommendations

The following recommendations are made in light of the above challenges and gaps:

- The Act and regulations must be amended to deal with the inconsistencies and gaps that have been identified;
- A standardised assessment form, in compliance with the Act, must be developed for use by medical practitioners during the application process;
- All medical practitioners should receive standardised training on the Act and its application and relevance to children with disabilities.

Disability Grants

In terms of Sec 3 of the Social Assistance Act persons with disabilities between the ages of 15 and 59 are eligible for a disability grant if because of their physical or mental disability they are unable to enter the open labour market or find any other means of providing for themselves. The Social Assistance Act and its regulations set out the eligibility requirements and application procedure required to access the grant.

Eligibility criteria for disability grant

To qualify for a disability grant the applicant must personally make an application for the grant at the South African Social Security Agency [SASSA] office nearest to them.[1233] If the person applying is unable to make the application in person because doing so would cause undue hardship on them, the person may nominate by means of a power of attorney, a third party to apply and receive the social assistance grant on their behalf in accordance with Sec 15 of the Social Assistance Act.[1234] Where the applicant is unable to neither apply for the grant themselves nor appoint someone to apply for them, the

[1233] Sec 14
[1234] Sec 24 Regulations (Appointment of procurator)

Agency has the power to nominate a person to apply and receive social assistance on behalf of the person unable to do so.[1235]

To qualify for the grant the applicant must be a South African citizen, permanent resident or refugee and must reside in the country during the application and intent to continue doing so during the subsistence of the grant.[1236] The applicant is required to undergo a medical assessment by a medical practitioner recognised by SASSA and submit a medical record issued by the practitioner which should not be older than three months at the date of the application. The disability grant will be granted on the condition that the medical assessment confirms that the application has a disability which affects his/her ability to enter the job market. A long term disability grant will be granted in cases in which the medical assessments confirm that the disability is permanent in that it is expected to continue for more than 12 months.[1237] Where the disability is not permanent and will only persist for a continuous period of between 6 to 12 months a temporary disability grant will be granted.

The grant is awarded subject to a means test. Sec 18 of the regulations sets out the criteria used to determine the means of the applicant. The current thresholds are as follows

Income Thresholds

Single: R64 680

Married: R129 360

Asset Thresholds

Single: R930 600

Married: R1 861 200

[1235] 24(1)(b) of the Regulations
[1236] Sec 5(c); Sec 16 Act, Regulations 3
[1237] Regulations 3(b)

In terms of Annexure A of the Social Assistance Act, the formula for the determination of the amount of a disability grant to be paid to the beneficiary is the following:

D = 1,6A – 0,4B

Where A corresponds to the maximum social grant payable per annum as approved by the Minister, B to the annual income of the applicant and D to the annual social grant amount payable, which must not exceed the amount equal to A.

The applicant must not be a recipient of another grant and must not at the time be maintained in a state institution. It may take up to three months to process the application.[1238] If an application has been denied, in terms of Section 18 of the Social Assistance Act an applicant can, within 90 days, appeal the decision made by the South African Social Security Agency regarding the provision of a grant.

Applicants can use the Internal Review Mechanism in SASSA, and Appeal Mechanism in DSD if they are dissatisfied with the outcome of their application, as provided in the Social Assistance Act, 2004, and Social Assistance Regulations of 2008. Should there still be dissatisfaction applicants are free to approach a court of law. If the reconsidered decision is still unfavourable the applicant has the right to appeal to the Minister of Social development. Once the recipient of a disability grant turns 60 the grant is converted into an old age grant.[1239]

[1238] See above.
[1239] Regulations Sec 23

LIST OF LEGILSATION AND POLICIES REVIEWED

EQUALITY AND NON-DISCRIMINATION

List of documents to be reviewed include but are not limited to:

Constitution
Broad based Black Economic Empowerment Act 53 of 2003
Preferential Procurement Policy Framework Act 5 of 200
Promotion of Equality and Unfair Discrimination Act

WORK, EMPLOYMENT AND BUSSINESS

List of documents to be reviewed include but are not limited to:

Employment Equity Act 55 of 1998
Labour Relations Act 66 of 1995
The Basic Conditions of Employment Act 1997
Codes of Good Practice on Employing Persons with Disabilities
Technical Assistance Guidelines on the Employment of People with Disabilities (TAG)
Skills Development Act 97 of 1998 and Skills Development Levies Act 9 of 1999
The Compensation for Occupational Injuries and Diseases Act 130 of 1993
The Draft Policy on Reasonable Accommodation and Assistive Devices in the Public Service
Article 27 of the UNCRPD

ACCESSIBILITY AND TRANSPORT

List of documents to be reviewed include but are not limited to:

National Building Regulations and Building Standard Act 103 of 1977
South African Bureau of Standards (SABS) 0400 Code of Practice
Electronic Communications Act 36 of 2005
Electronic Communications and Transactions Act 25 of 2002
National Land and Transport Act 5 of 2009
South Africa Library for the Blind Act 84 of 1996
A Transport Strategy for 2020 by the National Department of Transport
Article 9 of the UNCRPD

PROTECTION AGAINST EXPLOITATION, VIOLENCE AND ABUSE

List of documents to be reviewed include but are not limited to:

Criminal Law (Sexual Offenses and Related Matters)
Domestic Violence Act 116 of 1998
Older Persons Act, 2006
National Crime Prevention Strategy
The National Policy Guidelines for Victim Empowerment of 2009
Article 16 of the UNCRPD

THE RIGHT TO MARRY AND FOUND A FAMILY

Civil unions (Civil Union Act 17 of 2006)
Marriage Act
Intestate Succession Act
Divorce Act 1979
Article 23 of the UNCRPD

HEALTH

List of documents to be reviewed include but are not limited to:

National Health Act 61 of 2003
Sterilisation Act 44 of 1998
Termination of Pregnancy Act 1996
Medical Schemes Act. (Act 131 of 1998)
Mental Health Care Act 17 of 2002
Proposed Bill on Supported Decision-making (unpublished) SA Law Reform Commission. 2008
Article 12 of the UNCRPD

EDUCATION

List of documents to be reviewed include but are not limited to:

South African Schools Act 84 of 1996
National Education Policy Act 27 of 1996
The National Development Plan of 2012
The National Policy Framework for Teacher Education (2007*)*
White Paper 6 on Special Needs Education (2001)
Draft Policy on the Minimum Requirements for Teacher Education Qualifications (2010)
The National Strategy for Continued Professional Teacher Development (CPTD)
White Paper on Inclusive Education
White Paper on Early Childhood Education
Article 24 of the CRPD

RIGHTS OF CHILDREN WITH DISABILITIES

List of documents to be reviewed include but are not limited to:

Childrens Act 53 of 2003
Child Justice Act 75 of 2008

ADEQUATE STANDARD OF LIVING AND SOCIAL PROTECTION

List of documents to be reviewed include but are not limited to:

Social Assistance Act 13 of 2004
Social Assistance Amendment Act (Act 6 of 2008)
Housing Act (Act 107 of 1997)
The National Development Plan, (2012),
White Paper on Social Welfare and Population Development (1997)
Article 28 of the UNCRPD

ACCESS TO JUSTICE

List of documents to be reviewed include but are not limited to:

Criminal Procedure Act 51 of 1977
Magistrate's Court Act, (Act 32 of 1944
Criminal Procedure Second Amendment Act (Act 75 of 1995)
South African Police Service Act (Act 68 of 1995
Article 13 of the UNCRPD

PARTICIPATION IN POLITICAL AND PUBLIC LIFE

List of documents to be reviewed include but are not limited to:

Electoral Act 73 of 1998
Local Government Municipal Electoral Act, 2000
Article 29 of the UNCRPD

Rights set out in the CRPD

Article	Rights	Article	Rights
10	The right to life	22	Respect for privacy
11	Situations of risk and humanitarian emergencies	23	Respect for home and the family
12	Equal recognition before the law	24	Education
13	Access to justice	25	Health
14	Liberty and security of the person	26	Habilitation and rehabilitation
15	Freedom from torture or cruel, inhuman or degrading treatment or punishment	27	Work and employment
16	Freedom from exploitation, violence and abuse	28	Adequate standard of living and social protection
17	Protecting the integrity of the person	29	Participation in political and public life
18	Liberty of movement and nationality	30	Participation in cultural life, recreation, leisure and sport
19	Living independently and being included in the community		
20	Personal mobility		
21	Freedom of expression and opinion, and access to information		

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