

CHAPTER 5

CRITERIA FOR LAW REFORM ON COMPREHENSIVE SEXUALITY EDUCATION FOR CHILDREN WITH DISABILITIES IN SOUTH AFRICA

Thina Mthembu & Willene Holness***

Summary

The recent expanded understanding of Sexual Reproductive Health and Rights (SRHR), which includes Comprehensive Sexuality Education (CSE), seeks to highlight inter alia the needs of adolescents, (especially those with disabilities) a group previously excluded from the narrow scope of SRHR. This paper identifies relevant and context-specific criteria for law reform of CSE provision in legislation for South Africa. The paper considers the international law and interpretive guidelines for CSE but relevant indicators such as inclusivity, accessibility and reasonable accommodation specifically for children with disabilities is absent from UNESCO's Technical guidance on sexuality education: An evidence-informed approach for schools, teachers and health educators (2018). An analysis of the policy and South African legislation identifies that explicit provision for CSE and the accessibility of CSE and reasonable accommodation of children/adolescents with disabilities are largely absent. The implementation delay in the legislative framework currently contributes to the high number of out-of-school children with disabilities and also does not have a concrete provision for CSE. A review of the policy framework shows fragmentation, misalignment, and incoherence, which is unlikely to be remedied absent an enabling legislative provision that identifies the criteria for CSE, including for children/youth with disabilities, and a requirement for multi-sectoral alignment, budgeting and data disaggregation. The paper recommends an amendment to the Children's Act 38 of 2005 for explicit inclusion of CSE as this legislation is applicable to all children and extends beyond the context

* LLM Child Care and Protection (University of KwaZulu-Natal). Intern, Bidvest Tank Terminals.

** LLD (University of Pretoria), Senior Lecturer, School of Law, Howard College Campus, University of KwaZulu-Natal; member of the Navi Pillay Research Group. The authors wish to thank Dr David Barraclough for his meticulous editing and the insightful comments of the anonymous reviewers. This paper is based on a chapter from the LLM dissertation of the first author.

of education-sector specific legislation. Such an amendment would obligate the state to provide CSE not only in schools, but also in juvenile correction centres, hospitals, clinics and in other relevant public service facilities that cater for children – as well as in community-based fora. It further recommends an explicit provision on CSE in relevant sectors and general principles of accessibility and reasonable accommodation in proposed disability-specific legislation.

1 Introduction

Sexual reproductive health rights (SRHR) include individual persons' ability to make choices about their reproduction; and entitle persons to access information and education about their sexuality and to freedom from gender-based violence.¹ This right originally derived from the highest attainable right to health² and is now encapsulated in many treaties, and its content explained in the interpretive guidelines of treaty monitoring bodies (TMBs).³ The recent expanded understanding on the ambit of SRHR, which includes Comprehensive Sexuality Education (CSE), services for safe termination of pregnancy, prevention and treatment of sexually transmitted infections, infertility, and reproductive organ cancers, seeks to highlight inter alia the needs of adolescents, one of the groups previously excluded from the traditional narrow notion of the scope of SRHR.⁴

- 1 L Murungi & E Durojaye 'The sexual and reproductive health rights of women with disabilities in Africa: Linkages between the CRPD and the African Women's Protocol' (2015) 3 *African Disability Rights Yearbook* 1 at 7.
- 2 Article 12 of the International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966; GA Res 2200 (XXI), UN Doc A/6316 (1966) 993 UNTS 3 is the most authoritative encapsulation. Cf UN Committee on Economic, Social and Cultural Rights (Committee on ESCR), General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12), 11 August 2000, UN Doc E/C/12/2000/4 (2000) para 21.
- 3 For example, arts 10 and 16 of the UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol 1249, p 13 (CEDAW); UN Committee on the Elimination of Discrimination Against Women, General Recommendation 24: Article 12 of the Convention (Women and Health), 1999, A/54/38/Rev.1, chap I; Committee on Economic, Social and Cultural Rights, General Comment 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights) (2016) E/C.12/GC/22; art 24 of the UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol 1577, p 3; Committee on the Rights of the Child (CRC Committee), General Comment 15: On the right of the child to the enjoyment of the highest attainable standard of health (art 24), (2013); CRC Committee, General Comment 4: Adolescent health and development in the context of the Convention on the Rights of the Child (2003). Cf art 14 of the African Women's Protocol to the African Charter on Human and Peoples' Rights adopted by the 2nd Ordinary Session of the African Union General Assembly in 2003 in Maputo CAB/LEG/66.6 (2003); African Commission on Human and Peoples' Rights General Comment 2 on the article 14(1)(a), (b), (c) and (f) and article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2014).
- 4 L Ferguson & S Desai 'Sexual and reproductive health and rights for all: Translating the Gutmacher-Lancet Commission's global report to local action' (2018) 26 *Reproductive Health Matters* 1 at 6-7.

The relative invisibility of SRHR in the United Nations Convention on the Rights of Persons with Disabilities (CRPD)⁵ and other international instruments may be why states and the disability rights movement in South Africa have not readily politicised the issue of disabled sexualities in their own legislation.⁶ The Committee on the Rights of Persons with Disabilities (CRPD Committee) prefers to mention CSE in the narrow context of concerns about health rather than address it in a manner that advances sexual desire, freedom and self-determination.⁷ Globally, numerous barriers faced by children and young persons with disabilities in accessing sexuality education and other health priorities, mean that CSE is not on top of the political agenda.⁸ UNESCO found that while some legislative and policy pronouncements of sexuality education exist, the commitment is rhetorical and without 'adequate resources and prioritisation of implementation'.⁹ Fortunately, on the African continent, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities (African Disability Protocol)¹⁰ provides more explicit recognition of sexuality education for adolescents with disabilities that should guide state parties in their measures to respect, protect, promote and fulfil the SRHR of persons with disabilities when it comes into force.

Although South Africa recognises CSE as an appropriate curriculum tool to help bridge the apparent knowledge gap between legislative rights and the sexuality education provided in its schools, children with disabilities continue to be disadvantaged, as recent developments in public schools' sexuality education curriculum are silent on their sexuality.¹¹ Educators cite challenges in providing sexuality education to children with disabilities, including in relation to barriers in communication and language, cultural values and incidence of sexual abuse,¹² and unadapted and inaccessible curriculum.¹³ Commendably, the state recognises

5 UN General Assembly, Convention on the Rights of Persons with Disabilities: Resolution/adopted by the General Assembly, 24 January 2007, A/RES/61/106 (2007).

6 P Chappell '(Re)thinking sexual access for adolescents with disabilities in South Africa: Balancing rights and protection' (2016) 7 *African Disability Rights Yearbook* 133.

7 F Jaramillo Ruiz 'The Committee on the Rights of Persons with Disabilities and its take on sexuality' (2017) 25 *Reproductive Health Matters* 96.

8 K Michielsen & L Brockschmidt 'Barriers to sexuality education for children and young people with disabilities in the WHO European region: A scoping review' (2021) *Sex Education* doi: 10.1080/14681811.2020.1851181.

9 UNESCO *The journey towards comprehensive sexuality education: Global status report* (2021) 7.

10 African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, 29 January 2018.

11 J Hanass-Hancock et al 'The impact of contextual factors on comprehensive sexuality education for learners with intellectual disabilities in South Africa' (2018) 36 *Sexuality Disability* 123.

12 L de Reus et al 'Challenges in providing HIV and sexuality education to learners with disabilities in South Africa: The voice of educators' (2015) 15 *Sex Education* 333.

13 P Chirawu et al 'Protect or enable? Teachers' beliefs and practices regarding provision of sexuality education to learners with disability in KwaZulu-Natal, South Africa' (2014) 32 *Sex Disability* 259.

children with disabilities as rights-bearing citizens. However, its efforts in promoting accessibility to SRHR in terms of equal access to information and SRHR services are insufficient.¹⁴ Yet, adapted resources on sexuality education for some, such as children with intellectual disabilities, have been developed.¹⁵

Sexual minorities and women and girls with disabilities continue to face multiple barriers to accessing SRHR information and services.¹⁶ During COVID-19 and the closures of schools during country lockdowns, access to CSE and SRHR was constrained as remote teaching methods did not reach all children and particularly excluded girl children for a myriad of reasons, including their limited access to computers, the internet and data; being subjected to a higher chore burden compared to boys; being at a higher risk of gender-based violence (GBV); and being at a higher risk of not returning to school post-lockdown.¹⁷

It will be illustrated that the international law and interpretive guidelines point to CSE for children with disabilities that should meet a number of criteria: it should be developmentally appropriate, scientifically accurate, incremental, and based on a human rights approach. Furthermore, it should promote gender equality, be culturally relevant and context-appropriate, transformative, and enable children to develop life skills needed to support healthy choices. These are all criteria that relate to all children. Most importantly, CSE for children with disabilities should be accessible and include reasonable accommodation measures in order to fully and meaningfully include them in the curriculum and so promote their SRHR.

This paper seeks to identify relevant and context-specific criteria for law reform of CSE provision in legislation for South Africa. First, the South African context of CSE is briefly identified. Second, the tentative guidance obtainable from the international treaties and treaty monitoring bodies (TMBs) on the criteria for CSE is analysed. Third, the paper interrogates the South African constitutional and jurisprudential approach to SRHR and CSE, and in particular related rights such as bodily integrity and the provision for accessibility and reasonable accommodation at legislative level. Fourth, the fragmented, incoherent and misaligned policy landscape is discussed to illustrate the gap in implementation of the few existing strands of CSE provision. This policy review illustrates a dire need

14 Chappell (n 6) 125.

15 R Johns & C Adnams 'My right to know: Developing sexuality education resources for learners with intellectual disability in the Western Cape, South Africa' (2016) 4 *African Disability Rights Yearbook* 100.

16 Cape Mental Health et al 'Submission to the CRPD Committee Working Group for South Africa' (2018).

17 M Makaroudis 'The value of comprehensive sexuality education: Considerations for East and Southern Africa during the pandemic' *Regional CSTL Technical Committee Meeting* 16 February 2021 UNFPA, ESARO <https://mietafrica.org/wp-content/uploads/2021/03/Value-of-CSE-MIET-16Feb.pdf> (accessed 30 April 2022).

for law reform in South Africa to close the existing gaps and provide the force of enabling legislation to mandate a more coherent and aligned legal duty to provide CSE to children/youth with disabilities. Fifth, the legislative vacuum for CSE provision for children (with disabilities) in South Africa, in terms of the domestic legislation is identified followed by recommendations for law reform. Last, follows the conclusion.

2 The South African context of CSE

Pedagogically, sex education in South Africa is characterised by a sense of discipline and regulation, with teachers often preferring a transmission mode of teaching to the exclusion of participation and experiential modes of learning.¹⁸ Although some teachers acknowledge the benefits of sexual education, others believe that discussing sexuality with children with disabilities only encourages them to hasten their sexual debut.¹⁹ Some schools that cater for children with disabilities impose corporal punishment to discourage sexual knowledge.²⁰ According to McKenzie, 'this approach to sexuality education denies children the right to a sexual identity and places them at risk of HIV infection'; other risks include unplanned pregnancy and a heightened probability of sexual abuse.²¹

As an alternative to such prohibitory or corrective approaches, Francis proposes that

what young people need from sexuality education is a sympathetic recognition of themselves as sexual beings, because such recognition would minimise assumptions about their sexual experience or lack thereof and would instead encourage open discussions on the sexuality spectrum as a whole, and 'not focus only on their concerns in relation to issues of disease and danger'.²²

18 T Shefer & C Macleod 'Life orientation sexuality education in South Africa: Gendered norms, justice and transformation' (2015) 33 *Perspectives in Education* 1; S Ngabaza & T Shefer 'Sexuality education in South African schools: Deconstructing the dominant response to young people's sexualities in contemporary schooling contexts' (2019) 19 *Sex Education* 422 at 423.

19 Chappell (n 6) 135. However, this belief is unfounded – European Expert Group on Sexuality Education 'Sexuality Education – What is it?' (2016) 16 *Sex Education* 429.

20 J McKenzie 'Disabled people in rural South Africa talk about sexuality' (2013) 15 *Culture, Health & Sexuality* 372.

21 McKenzie (n 20) 372.

22 D Francis 'Sexuality education in South Africa: Three essential questions' (2010) 30 *International Journal of Educational Development* 314 at 315.

Indeed, a human rights approach to SRHR and CSE is preferred, as emphasised by the CRPD.²³ Such an approach does not deny access to abortion or impose forced sterilisation or abortion on persons on the basis of their disability and without their informed consent – as South Africa currently does.²⁴

An important contextual factor is the high number of out-of-school children with disabilities. In 2015, some 597 753 children with disabilities were out of school.²⁵ While in 2018 the National Senior Certificate report indicated that of the 624 733 learners who wrote matric only 3 856 had special educational needs, that is 0.6 per cent, and yet the national disability prevalence rate is estimated at around 7.5 per cent.²⁶ Children in ‘special schools’ do not necessarily receive CSE.²⁷ These children do not have adequate access to education and therefore cannot access the limited sex education that may be offered at schools. Provision of CSE should therefore extend outside of scholastic environments.

While CSE has been implemented in school curricula since 2000, in 2015 some changes were made, including the development of scripted lesson plans, which were piloted in 1 572 schools in five provinces.²⁸ Its roll-out initially met with resistance from parents about the appropriateness of the content of the curriculum.²⁹

A recent study of educators from special schools in Cape Town and eThekweni³⁰ sought to understand the feasibility, barriers and facilitators of implementing a ‘Breaking the Silence’ (BtS) approach to CSE during the

23 T Rugoho et al ‘Sexual and reproductive experiences of youth with disabilities in Zimbabwe’ (2020) 8 *African Disability Rights Yearbook* 31 at 34.

24 Section 5(4)(a) and 5(5) of the Choice of Termination of Pregnancy Act 92 of 1996; sec 3 of the Sterilisation Act 44 of 1998. Cf A Budoo & R Parsad Gunputh ‘Termination of pregnancy of persons with mental disabilities on medical advice: A case study of South Africa’ (2014) 2 *African Disability Rights Yearbook* 101 at 104; 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’ (2012) 26 *Emory International Law Review* 69 at 78; W Holness ‘Informed consent for sterilisation of women and girls with disabilities in the light of the Convention on the Rights of Persons with Disabilities’ (2013) 27 *Agenda* 35 at 50.

25 J McKenzie et al ‘The education of children with disabilities risks falling by the wayside during the pandemic’ *Daily Maverick* 27 May 2020 <https://www.dailymaverick.co.za/article/2020-05-27-the-education-of-children-with-disabilities-risks-falling-by-the-wayside-during-the-pandemic/> (accessed 5 October 2021), citing DBE statistics. Cf Human Rights Watch ‘“Complicit in exclusion”: South Africa’s failure to guarantee an inclusive education for children with disabilities’ (2015) <https://www.hrw.org/report/2015/08/18/complicit-exclusion/south-africas-failure-guarantee-inclusive-education-children> (accessed 30 April 2022).

26 McKenzie et al (n 25).

27 UN Special Rapporteur on the Rights of Persons with Disabilities *Report on the Sexual and reproductive health and rights of girls and young women with disabilities* A72/133 (2017) para 23.

28 Y Sobuwa ‘Sex ed “sidelines people living with disabilities”’ *Sowetan Live* 23 November 2021 <https://www.sowetanlive.co.za/news/south-africa/2021-11-23-sex-ed-sidelines-people-living-with-disabilities/> (accessed 30 April 2022).

29 L Ubisi ‘Analysing the hegemonic discourses on comprehensive sexuality education in South African schools’ (2020) 81 *Journal of Education* 118.

COVID-19 pandemic. This approach seeks to positively impact on SRHR for young people in and outside of schools by making CSE accessible. The approach is adopted following the UNFPA's project, *Leaving No One Behind*, in collaboration with stakeholders such as the Department of Basic Education.³¹ The findings from that study reinforce outcomes from previous studies that advocate for the need to provide training and support to educators in their provision of CSE to children/youth with disabilities.³² A key finding from the study is that anti-CSE propaganda, particularly on social media, fans the educators' fears and misconceptions of CSE. However, with the intervention of the BtS approach, the study found attitudinal changes could be implemented to ensure educators' acceptance and understanding of the dire need for CSE for these children and tools to adapt and make it accessible to them. The study calls for a number of enablers to guarantee the appropriate provision of CSE, including fostering the educators' understanding of the children/youth's needs and vulnerability; increasing the educators' capability to adjust teaching material and interactive methods (alongside providing adapted teaching materials and resources); as well as utilising a 'whole school approach to facilitate an "integrated approach" to improving the children/youth's SRHR through CSE that is accessible'.³³

Educators should obtain their guidance for adapting curricula and ensuring that CSE is accessible to children/youth with disabilities from policy and legislation, informed by and aligned with international best practices and international law obligations resting on the state.

- 30 J Hanass-Hancock et al 'Leaving no one behind: Feasibility case study: Applying the "breaking the silence" approach in comprehensive sexuality education for adolescents and young people with disabilities during the COVID-19 epidemic' *SAMRC Research Report* (June 2021) <https://www.samrc.ac.za/sites/default/files/files/2021-11-22/BTS%20Study%20Report-%20Leaving%20No%20One%20Behind%20Report.pdf> (accessed 30 April 2022).
- 31 UNFPA *The right to access: Regional strategic guidance to increase access to sexual and reproductive health and rights for young persons with disabilities in East and Southern Africa* (2017) <https://esaro.unfpa.org/en/publications/right-access-regional-strategic-guidance-increase-access-sexual-and-reproductive-health> (accessed 30 April 2022).
- 32 De Reus et al (n 12); J Hanass-Hancock et al 'Breaking the silence through delivering comprehensive sexuality education to learners with disabilities in South Africa: Educators experiences' (2018) 31 *Sexuality and Disability* 1; P Chirawu et al 'Protect or enable? Teachers' beliefs and practices regarding provision of sexuality education to learners with disability in KwaZulu-Natal, South Africa' (2014) 32 *Sexuality and Disability* 259; P Rohleder & L Swartz 'Providing sex education to persons with learning disabilities in the era of HIV/AIDS: Tensions between discourses of human rights and restriction' (2009) 14 *Journal of Health Psychology* 601. P Chappell et al 'Educators' perceptions of learners with intellectual disabilities' sexual knowledge and behaviour in KwaZulu-Natal, South Africa' (2018) 18 *Sex Education* 125.
- 33 Hanass-Hancock et al (n 30) 8-9.

3 Tentative guidance on CSE at regional and international levels

Next, the guidance from the CRPD and the African Disability Protocol at international and regional law levels is discussed, as well as guidance from international actors such as UNESCO, the Special Rapporteur on Persons with Disabilities and TMBs on the content and delivery of CSE.

3.1 The CRPD

As a relatively new disability-specific instrument, the assumption is that the drafters of the CRPD would have anticipated the acute need for carefully crafted tools to address the stigma and exclusions faced by persons with disabilities, including children, from exercising their SRHR on an equal basis with others, by inserting a provision on CSE. Detractors of a human rights approach identify that a concrete and explicit right to CSE is not stated in international law.³⁴ However, such a right can be inferred from the broad provisions of other rights that appear in international and regional instruments, as the following analysis shows.

In relation to SRHR, the CRPD enumerates several rights, including the rights to health; liberty and security of person; freedom from exploitation, violence, and abuse; and respect for home and the family.³⁵ Yet, the CRPD does not mention sex access.³⁶ This means that while 'issues of gender and violence are recognised, broader issues related to sexuality and sexual rights' such as 'diversity of sexual identity, positive sexual expression, sexual health and sexuality education' (issues which are particularly contentious in Africa), are not.³⁷ According to the CRPD Committee, the denial of legal capacity to persons with disabilities leads to the deprivation of many of their fundamental rights, including the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment.³⁸ The CRPD obligates states to 'abolish denials of legal capacity that are discriminatory on the basis of disability in purpose or effect', and recognises that though at times support may be necessary, the ultimate goal is 'to build the confidence and skills of persons with disabilities so that

34 M Curvino & MG Fischer 'Claiming comprehensive sex education is a right does not make it so: A close reading of international law' (2014) 20 *New Bioethics* 72.

35 M Schaaf 'Negotiating sexuality in the Convention on the Rights of Persons with Disabilities' (2011) 8 *SUR International Journal on Human Rights* 113.

36 Chappell (n 6) 132.

37 D Higgins 'Sexuality, human rights and safety for people with disabilities: The challenge of intersecting identities' (2010) 25 *Sexual and Relationship Therapy* 245 at 248.

38 UN Committee on the Rights of Persons with Disabilities (CRPD), General Comment 1 (2014), Article 12: Equal recognition before the law, 19 May 2014, UN Doc CRPD/C/GC/1 (2014) para 8.

they can exercise their legal capacity with less support in the future if they so wish'.³⁹

The CRPD requires that state parties take steps to 'ensure that reasonable accommodation is provided' in terms of their measures to promote equality and eliminate discrimination.⁴⁰ Article 2 of the CRPD defines reasonable accommodation as:

[N]ecessary and appropriate modification and adjustments not imposing a disproportionate or undue burden 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.⁴¹

The concept of reasonable accommodation (which is what would necessitate adaptations) derives from the broader concept of substantive equality and complements the social model of disability.⁴² It requires allowing for individual differences and undertaking reasonable alterations to ensure equal opportunities.⁴³

The CRPD also includes accessibility as a general principle and a self-standing obligation.⁴⁴ The principle of accessibility requires a universal design of curriculum to be drafted and implemented to equalise participation for all persons with disabilities, and reasonable accommodation is required for specific needs that some persons with disabilities may have.

This means that the provision of reasonable accommodations is a duty. This is demonstrated by the fact that the CRPD regards the denial of reasonable accommodations as discrimination.⁴⁵ However, despite the provision of reasonable accommodations being a duty of states and a right of persons with disabilities, this duty is not without limits. State parties are only required to provide accommodations where doing so does not cause a 'disproportionate or undue burden'.⁴⁶ This means that in the context of a right to education, reasonable accommodation acts as both a sword and a shield because the claimant must prove that the needed accommodation is reasonable, while the onus is on the education provider (particularly the

39 General Comment 1 (n 38) para 20.

40 Articles 2 and 5(3) of the CRPD.

41 Article 2 of the CRPD.

42 C Ngwena 'Equality and disability in the workplace: A South African approach' A Seminar presentation in the School of Law, University of Leeds England (29 November 2004) 15.

43 As above.

44 Articles 3 and 8 of the CRPD.

45 Article 2 of the CRPD.

46 As above.

state) to prove the unreasonableness, disproportion or undue burden of the required measure.⁴⁷

3.2 The African Disability Protocol

African soft-law instruments direct states towards their duty to implement CSE including for children and youth with disabilities (not only in schools) and require children and youth's 'inclusive and effective' participation.⁴⁸ States' progress in meeting this obligation has been slow.⁴⁹ The Protocol to the African Charter on Human and Peoples' Rights (Maputo Protocol)⁵⁰ and the General Comments,⁵¹ despite providing insightful interpretive guidance on SRHR of women, and mentioning prohibition of discrimination on the basis of disability, fail to:

[D]edicately consider the challenges that women with disabilities face in the exercise of their sexual and reproductive health and rights, despite recognition of the unique vulnerability, diminishes its potential to address disability specific challenges.⁵²

The African Disability Protocol then offers more hope for a disability-specific context. This treaty, once in force, will require states to provide sexuality education to youth with disabilities.⁵³ The primary purpose of this instrument is to provide an Africanised perspective of disability rights that takes 'into account the lived realities of persons with disabilities while maintaining the core values and principles on disability as set out in the CRPD'.⁵⁴ A key difference is that the African Disability Protocol unlike the CRPD has different provisions for girls/women, children and youth

47 L. Murungi *The significance of article 24(2) of the UN Convention on the Rights of Persons with Disabilities for the right to primary education of children with disabilities: A comparative study of Kenya and South Africa* PhD thesis, University of the Western Cape, 2013, 169.

48 Clauses 34, 40 and 69 of the Addis Ababa Declaration on Population and Development in Africa Beyond 2014 ECA/ICPD/MIN/2013/4 (2013); clauses 3, 3.6 and 3.8 of the Ministerial Commitment on comprehensive sexuality education and sexual and reproductive health services for adolescents and young people in Eastern and Southern African (2013).

49 African Union *Five-Year Review of the Addis Ababa Declaration on Population and Development* (2018) 184.

50 African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003.

51 African Commission on Human and Peoples' Rights, General Comment 2 on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2014) paras 28, 43, and 61; and General Comment No 1 on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2012) para 12-13.

52 Murungi & Durojaye (n 1) 10.

53 Article 29(h) of African Union, Protocol to The African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2018).

54 Centre for Human Rights 'Press statement: Centre for Human Rights calls on African States to ratify newly adopted African Disability Rights Treaty' (2018) <https://www.chr.up.ac.za/dru-news/482-press-statement-centre-for-human-rights-calls-on-african-states-to-ratify-newly-adopted-african-disability-rights-treaty> (accessed 22 April 2022).

with disabilities, and so actively addresses the long-standing issue of intersectional discrimination that has been highlighted a number of times by TMBs.

Moreover, this instrument actively calls for the promotion of ‘sexual and reproductive health education for youth with disabilities’ through state measures, whether policy, legislative, administrative or otherwise, to promote the rights of youth with disabilities.⁵⁵ The provision is groundbreaking because for the first time a right to CSE is not being inferred from the broad reading of provisions nor is it alluded to by way of general comments and recommendations. Instead, CSE is explicitly listed in a regional instrument. Reception of the instrument has so far been positive, with the Special Rapporteur on the Rights of Persons with Disabilities welcoming this trailblazing instrument in the belief that it will

trigger a much greater inclusion of the concerns of people with disabilities in laws, policies and budgets because it ensures increased accountability and closer oversight of how states implement their human rights obligations.⁵⁶

However, Viljoen and Biegon caution that:

Although the articulation of more regionalised and localised understanding of these (disability) rights in the form of a distinct treaty may raise greater awareness and assist states in the process of crafting appropriate domestic laws and policies, autochthonous standard setting should not be fetishized. ‘Just as the adoption of the Maputo Protocol did not see immediate benefits accruing to women ... an African-specific treaty would in itself (not) guarantee an improvement in the plight of persons with disabilities’.⁵⁷

They argue that ‘without a clear rationale identifying substantive weaknesses or omissions (within the CRPD) the drafting and adopting of an African pendant would amount to an exercise in “reinventing the wheel”’.⁵⁸

The Protocol’s provisions in relation to accessibility and reasonable accommodation should be interpreted, once it comes into force, together with the provisions on sexuality education, education and the right to health including SRHR,⁵⁹ to create enforceable duties on states to adapt the CSE curriculum and modes of communication where relevant for diverse persons with disabilities – going further than the CRPD. This is to make the information and education received under CSE accessible and

55 Article 29(h) of the African Disability Protocol.

56 OHCHR ‘African States affirm the rights of persons with disabilities in a new landmark Protocol’ (15 February 2018) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22661&LangID=E> (accessed 22 April 2022).

57 F Viljoen & J Biegon ‘The feasibility and desirability of an African Disability Rights Treaty: Further norm-elaboration or firmer norm-implementation?’ (2014) 30 *South African Journal on Human Rights* 345 at 364.

58 Viljoen & Biegon (n 57) 352.

59 Articles 3, 25, 26, 17(2), 24(2) and 28(4)(b).

accommodating to the diverse needs of children and youth with disabilities. The Protocol's clear statement supporting sexuality education should chart the way forward for CSE on the continent in addressing some of the attendant harms that face children and youth with disabilities such as GBV and inaccessible SRHR services, realigning 'the wheel', as it were. However, Viljoen & Biegon's warning should be heeded, and immediate evidence-based measures should be formulated to meet state obligations.

3.3 UNESCO

UNESCO's comprehensive and updated Technical Guidance⁶⁰ is the most up-to-date articulation of the scope and content of CSE. It specifies that CSE should be age and developmentally appropriate, scientifically accurate, incremental, and based on a human rights approach.⁶¹ Scientific accuracy refers to curriculum content based on 'facts and evidence related to sexual reproductive health, sexuality and behaviours'.⁶² CSE's incremental nature identifies that it is not a once-off process but a continuing process commencing at an early age, 'where new information builds upon previous learning, using a spiral-curriculum approach'.⁶³ The evolving capacity of children is recognised in the recommended age and developmentally appropriate nature of CSE. Furthermore, such appropriateness refers to the fitting time (age-related) and development. The technical guidance further states that CSE should be comprehensive and curriculum based; it should also encourage gender equality whilst also being culturally relevant and context-appropriate, transformative and finally capable of developing the life skills needed to support healthy choices.

'Comprehensive' refers to the 'breadth and depth of content' according to the guidance CSE should

encourage discussions on sexual and reproductive health issues, including, but not limited to: sexual and reproductive anatomy and physiology; puberty and menstruation; reproduction, modern contraception, pregnancy and childbirth; and STIs, including HIV and AIDS.

Additionally, drafters and educators of CSE are encouraged not to shy away from content that may be 'challenging in some social and cultural contexts'.⁶⁴ 'Curriculum based' speaks to

60 UNESCO *Technical guidance on sexuality education: An evidence-informed approach for schools, teachers and health educators* (2018) 16-17 https://www.unaids.org/sites/default/files/media_asset/ITGSE_en.pdf (accessed 30 April 2022).

61 UNESCO (n 60) 17.

62 As above.

63 As above.

64 As above.

the presentation of concepts, and the delivery of clear key messages that guide educators' efforts to support students learning in a structured way both in school or out-of-school settings.⁶⁵

CSE, according to UNESCO, contributes to gender equality by 'building awareness of the centrality and diversity of gender in people's lives; examining gender norms shaped by cultural, social and biological differences and similarities'.⁶⁶ Cultural and context appropriateness would examine the ways in which cultural structures, norms and behaviours affect people's choices and relationships within a specific setting.⁶⁷ The transformative aspect, UNESCO puts forward, would ensure that CSE 'empowers young people to take responsibility for their own decisions and behaviours, and the ways in which they may affect others' moreover building 'the skills and attitudes that enable young people to treat others with respect, acceptance, tolerance and empathy, regardless of their disability status'.⁶⁸ Collectively, the criteria would thus enable all recipients of CSE to 'develop the life skills needed to support the making of healthy choices'.⁶⁹

The UNESCO Guidance curiously refers to adaptations necessary 'when cognitive and emotional development is delayed'.⁷⁰ The provision of necessary 'adaptations' for persons with intellectual and/or developmental and psycho-social disabilities, as the Guidance prescribes, unduly limits this anti-discrimination measure to only some persons with specific disabilities. For Kallehauge, the question of whether a burden is undue or disproportionate in the proposed provision of reasonable accommodation turns upon the identity of the duty holder. He asserts that if it is the government or public authority who bears the duty to accommodate, then 'the burden will have to be extremely heavy before it can be considered disproportionate or undue'.⁷¹ As such the traditional parameters of reasonable accommodation in the UNESCO Guidance need to be adapted.

CSE should be included in a 'written curriculum'.⁷² Adaptations to content should therefore explicitly include principles such as universal instructional design, accessibility and reasonable accommodation. Therefore, a broader definition of disability such as that of the CRPD is preferred to ensure no discrimination or exclusions of some disabilities

65 UNESCO (n 60) 16-17.

66 UNESCO (n 60) 17.

67 As above.

68 As above.

69 As above.

70 As above.

71 Kallehauge cited in R White & D Masipa 'Implementing article 13 of the Convention on the Rights of Persons with Disabilities in South Africa: Reasonable accommodations for persons with communication disabilities' (2018) 9 *African Disability Rights Yearbook* 99 at 105.

72 UNESCO (n 60).

from an overly strict interpretation of these categories and these principles should be explicitly mentioned and explained.

UNESCO recognises that children and young people with disabilities

are all sexual beings and have the same right to enjoy their sexuality within the highest attainable standard of health, including pleasurable and safe sexual experiences that are free of coercion and violence; and to access quality sexuality education and SRH services.⁷³

Recognition of the vital role of sustainable development goals (SDG)⁷⁴ in strengthening the links between education, health, gender equality and human rights is encapsulated in the Guidance.⁷⁵ However, tracking states' progress in providing CSE remains 'aspirational'.⁷⁶

The Guidance, and similar initiatives to promote CSE in Global South countries, have been criticised for focusing on a CSE approach rather than a holistic sexuality education approach which focuses on positive sexuality and is offered in some parts of Western Europe.⁷⁷ The lack of emphasis on the decolonial intersection with disabled sexuality in CSE which seeks to dismantle institutional oppression of the disabled is another relevant criticism.⁷⁸ Some of those shortcomings, however, could be remedied with due consideration and adaptations to relevant contexts.

3.4 The UN Special Rapporteur on the Rights of Persons with Disabilities

The Special Rapporteur on the Rights of Persons with Disabilities articulates the steps that states need to take to ensure their legislative and policy frameworks align with the CRPD to ensure CSE is 'inclusive and accessible'.⁷⁹ CSE should be offered in accessible formats and alternative languages, including sign language, Braille, alternative script, easy-to-read formats, and alternative and augmentative modes of communication.⁸⁰

73 UNESCO (n 60) 25.

74 UN GA, Resolution 70/1: Transforming our world: The 2030 Agenda for Sustainable Development, 21 October 2015, UN Doc A/RES/70/1 (2015); World Education Forum 'Education 2030: Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4. Towards inclusive and equitable quality education and lifelong learning for all' (2015).

75 J Herat et al 'The revised international technical guidance on sexuality education - A powerful tool at an important crossroads for sexuality education' (2018) 15 *Reproductive Health* 185.

76 AJ Galati 'Onward to 2030: Sexual and reproductive health and rights in the context of the Sustainable Development Goals' (2015) 18 *Guttmacher Policy Review* 81.

77 JJ Ponzetti *Evidence-based approaches to sexuality education: A global perspective* (2015) cited in E Miedema et al 'But is it comprehensive? Unpacking the 'comprehensive' in comprehensive sexuality education' (2020) 79 *Health Education Journal* 747 at 756.

78 L Ubisi 'De/coloniality, disabled sexualities, and anti-oppressive education: A review of Southern African literature' (2021) 51 *South African Journal of Psychology* 175.

79 UN Special Rapporteur (n 27) para 62(e).

80 UN Special Rapporteur (n 27) para 51.

Information and awareness of parents and caregivers of children and youth with disabilities are identified as a means of combating stigma, stereotypes and exclusions that these children face in exercising their SRHR.⁸¹

3.5 CSE indicators inclusive of children with disabilities?

An interpretation of the mutually interdependent nature of rights recognises that the rights to respect for the home and family, health and freedom from exploitation, violence and abuse, read together, underscore the need for information that persons (including those with disabilities) require in order to make decisions about their sexual reproductive health and relationships – in other words, CSE.⁸² CSE is therefore the tool that gives effect to the respect, fulfilment, protection and promotion of attendant rights. The lack of explicit mention of CSE in treaties, therefore, is not fatal.

TMBs persistently call for states to provide CSE in a non-discriminatory manner and stress the need for accessibility to children and youth with disabilities.⁸³ However, a lack of an express obligatory provision in international law militates against explicit state provision for CSE and, accordingly, negatively affects monitoring the extent to which children with disabilities access relevant SRHR information and services. Sufficient guidelines, however, are provided by international actors such as the UNESCO and the Special Rapporteur, together with TMB's interpretive guidance in general comments, to identify to states the necessary indicators – including the requirement of provision of CSE that is inclusive, accessible and that provides reasonable accommodation. That being said, the main guiding document, UNESCO's Technical Guidance, is silent on accessibility and reasonable accommodation of children with disabilities and this should be remedied in future revisions.

81 UN Special Rapporteur (n 27) para 62(j).

82 International Disability Alliance & Center for Reproductive Rights *Inclusive comprehensive sexuality education and the CRPD: Submission to the CRPD Committee's Half Day of General Discussion on the Right to Education* (undated).

83 The Committee on the Rights of the Child, General Comment 20 on the implementation of the rights of the child during adolescence, 6 December 2016, UN Doc CRC/C/GC/20 (2016) para 61; The Committee on Economic, Social and Cultural Rights, General Comment 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, UN Doc E/C.12/GC/22 (2016) para 49(f).

4 Bodily integrity, SRHR, accessibility and reasonable accommodation in relation to children with disabilities in South African jurisprudence

Next, the meaning and interpretation of respect for bodily integrity and the jurisprudence on SRHR at the domestic level is discussed to articulate the constitutional rights basis of CSE in South Africa. The courts' engagement on accessibility and reasonable accommodation is also outlined.

4.1 The recognition of SRHR and bodily integrity

SRHR of all persons are protected under section 12(2) of the Constitution of the Republic of South Africa, 1996 which recognises at a minimum that 'each physical body is of equal worth and is entitled to equal respect'.⁸⁴ This section imposes 'a duty on the state to ensure that everyone is able to participate fully in society'.⁸⁵ The Constitution explicitly mentions the right to 'make decisions concerning reproduction'. Woolman and Bishop assert that this is probably because the drafters 'recognised that some of the most devastating and socially entrenched forms of physical (and psychological) oppression and exploitation relate to reproduction and sexuality'.⁸⁶

Bodily integrity has the potential to apply to a wide range of human rights violations, which also affect children's rights.⁸⁷ This is because the right to bodily integrity ensures that all persons including children have the right to autonomy and self-determination over their own body and considers any unconsented physical intrusion a human rights violation. Persons with disabilities (particularly woman and girls) are vulnerable to sexual abuse due to a number of myths, including asexuality, and consequently are vulnerable to HIV/Aids, among other risks.⁸⁸ CSE could be introduced as a preventative intervention that not only helps children identify signs of sexual abuse early on, but also encourages them to report the abuse before it escalates. This is necessary because most of the current legislative interventions are helpful only after the fact of sexual abuse which often goes unreported for a long period of time.

84 S Woolman & M Bishop 'Freedom and security of the person' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* 2 ed (2013) 40-76.

85 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 38.

86 *Hoffmann* (n 85) paras 40-80.

87 Child Rights International Network 'Bodily integrity' (2018) <https://archive.crin.org/en/home/what-we-do/policy/bodily-integrity.html> (accessed 18 October 2021).

88 J Hanass-Hancock 'Interweaving conceptualizations of gender and disability in the context of vulnerability to HIV/AIDS in KwaZulu-Natal, South Africa' (2009) 27 *Sex Disability* 35. TN Phasha & LD Myaka 'Sexuality and sexual abuse involving teenagers with intellectual disability: Community conceptions in a rural village of KwaZulu-Natal, South Africa' (2014) 32 *Sex Disability* 153. Cf Schaaf (n 35) 115; Jaramillo Ruiz (n 7) 96; Higgins (n 37) 24.

The educational realities of persons with disabilities distinctly demonstrate that disability ‘remains a concept linked to exclusion, inequality and dependency due to lack of or impaired access to essential resources and services’, as revealed in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*.⁸⁹ The High Court found that the educational policy in question implied that children with severe and profound intellectual disabilities were ineducable.⁹⁰ This case demonstrates that arbitrary differentiation between children with and without disabilities cannot be countenanced. In the same vein, the CSE curriculum must not only be accessible but also reflective of the experiences of children with disabilities – even if it incurs additional budgetary planning and costs.

SRHR of children were relevant in *Teddy Bear Clinic for Abused Children and Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) v Minister of Justice and Constitutional Development (Teddy Bear Clinic)*.⁹¹ The applicants challenged certain provisions of the Sexual Offences & Related Matters Amendment Act,⁹² which criminalised consensual sexual activity between two consenting minors. The court of the first instance described the provisions as ‘irrational, overbroad and harmful’, noting that they violated a number of constitutionally enshrined rights.⁹³ The provisions were subsequently declared unconstitutional. The matter was referred to the Constitutional Court for confirmation, where the Court addressed all but one of the violated constitutional provisions identified by the court a quo – namely the constitutional right to bodily integrity. The Court’s silence on the matter was a missed opportunity to provide interpretive jurisprudence on the importance of adolescent SRHR and the role of educational interventions such as CSE in this regard, especially since the Court recognised that:

During adolescence children ordinarily engage in some form of sexual activity, ranging from kissing to masturbation to intercourse. Exploration of at least some of these activities is potentially healthy if conducted in ways for which the individual is emotionally and physically ready and willing.⁹⁴

This landmark judgment implies a right to CSE because it recognises that consensual sexual conduct between children can be considered normal developmental behaviour. CSE, therefore, presents itself as an appropriate

89 2011 (5) SA 87 (WCC); T Boezaart ‘General principles (ss 6-17)’ in C Davel & A Skelton (eds) *A commentary on the Children’s Act* (2018) 21-22.

90 Paragraphs 3 & 19.

91 *Teddy Bear Clinic for Abused Children and Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) v Minister of Justice and Constitutional Development*, North Gauteng High Court, Pretoria, Case No: 73300/10 [2013] ZAGPPHC 1 (4 January 2013) (unreported).

92 Act 32 of 2007.

93 *Teddy Bear Clinic* (n 91) paras 74-79.

94 *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) para 45.

educational tool to ensure that all children (including children with disabilities) are able to explore not only their sexuality but also exercise the SRHR associated therewith. The South African jurisprudence promotes the promotion, respect, protection and fulfilment of SRHR as encapsulated in the Constitution and existing legislation yet the courts have not yet grappled with legal issues around disabled sexuality.

4.2 Accessibility and reasonable accommodation of the needs of children

The concepts of accessibility and reasonable accommodation as it pertains to children, as well as children with disabilities have been accepted into our jurisprudence, both in the Equality and Constitutional Courts.⁹⁵ The Promotion of Equality and Prohibition of Unfair Discrimination Act 4 of 2000 (the Equality Act) prohibits discrimination on the basis of disability⁹⁶ and requires a reasonable accommodation in the form of sector-specific codes.⁹⁷ The South African legal landscape is therefore no stranger to the notion of reasonable accommodation and accessibility, but it lacks disability-specific legislation that entrenches these two concepts as general principles or legal duties across sectors. The current provision in the Equality Act has not brought about the systemic change for persons with disabilities that is necessary.

Before analysing the legislative provision for CSE (or absence thereof), the provision for CSE in policy is discussed to illustrate the widespread invisibility of the needs of persons with disabilities to accessibility, universal design and reasonable accommodation.

5 Fragmented, misaligned and incoherent policies on CSE

One of the strongest levers for successful implementation of CSE is a strong policy and legislative pronouncement.⁹⁸ South Africa boasts a significant quantity of SRHR policies on diverse issues and for different sectors. Scholars reviewing diverse SRHR policies (including on health, adolescent health and education), found that they are generally not

95 *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC); *Oortman v St Thomas Aquinas Private School & Bernard Langton* (EqC) unreported case number 1/2010 (Witbank); *Haskin v Khan* (EqC) unreported case number 03/19 (Mitchell's Plain).

96 Sections 6 and 9 of the Equality Act. Cf W Holness & S Rule 'Barriers to advocacy and litigation in the equality courts for persons with disabilities' (2014) 17 *Potchefstroom Electronic Law Journal* 1907.

97 Section 25(1)(c)(iii) of the Equality Act.

98 C Panchaud et al 'Towards comprehensive sexuality education: a comparative analysis of the policy environment surrounding school-based sexuality education in Ghana, Peru, Kenya and Guatemala' (2019) 19 *Sex Education* 277.

inclusive of persons with disabilities.⁹⁹ CSE, where mentioned, is generally found under the rubric of SRHR policies. Relatively recent policy documents such as the Department of Health's *Policy on sexual and reproductive health and rights: Fulfilling our commitments 2011-2021 and beyond* (the Commitments Policy), the *National Adolescent Sexual and Reproductive Health and Rights Framework Strategy 2014-2019* (the Strategy), and the *National Strategic Plan on HIV, STIs and TB 2017-2022* (the NSP)¹⁰⁰ and the *National Strategic Plan on Gender-Based Violence and Femicide 2020* (the GBVF SP) include some measures towards inclusion of persons with disabilities.¹⁰¹ Of these, however, most are misaligned with existing international law obligations and the framework policy and the White Paper on the Rights of Persons with Disabilities (the WPRPWD),¹⁰² except for the Strategy, the NSP, and the GBVF SP.¹⁰³

The NSP explicitly identifies the barriers that persons with disabilities face in accessing SRHR and lists the 'core' services that they require access to, including CSE.¹⁰⁴ The provision of adapted curriculum for CSE to persons with disabilities, nor other relevant criteria is mentioned in the NSP. It specifically requires accessibility, principles of universal design to be employed and reasonable accommodation of persons with disabilities to access these services.¹⁰⁵ Of concern, however, is the reference to 'reasonable access' in the NSP, which could be an attempt to temper accessibility requirements. This of course is contrary to the state obligations under the CRPD which does not limit accessibility in this way. The Department of Health's *National Adolescent & Youth Health Policy* though acknowledging the fact that SRHR do not often meet the needs of persons with disabilities, and ostensibly included consultation with youth with disabilities,¹⁰⁶ does not identify how such needs could be better met with the implementation of this policy and crucially does not mention CSE.

In the school environment, not all of these policies apply. Three policies that do apply in this context, however, do not mention persons with disabilities as a category requiring specific measures: the *STI*

99 J Hanass-Hancock et al 'Sexual and reproductive health and rights and disability policy analysis: The South African case report' (2021) <https://www.samrc.ac.za/sites/default/files/files/2021-11-22/BtS%20Policy%20Report%20-%20Sexual%20and%20Reproductive%20Health%20Disability%20Policy%20Analysis.pdf> (accessed 30 April 2022) referring to the *Sexually Transmitted Infections: Management Guidelines* 2018, the *National HIV Testing Services: Policy* (2016), the *Adolescent & Youth Health Policy 2016-2020*, the *Integrated School Health Policy* (2012) and the *Policy Framework to address Gender Based Violence in the Post School Education and Training System* 2020.

100 Republic of South Africa *NSP* (2017) https://www.gov.za/sites/default/files/gcis_document/201705/nsp-hiv-tb-stia.pdf (accessed 1 December 2022).

101 Hanass-Hancock et al (n 99) 5.

102 Department of Social Development (DSD) *The White Paper on the Rights of Persons with Disabilities* (2016) published in GN 230 of Government Gazette 39792 of 9 March 2016 (WPRPD).

103 Hanass-Hancock et al (n 99) 5.

104 NSP (n 100) 82. Cf Hanass-Hancock et al (n 99) 7.

105 NSP (n 100) 56, 66 and 67.

106 National Adolescent and Youth Health Policy (2017) 2 and 7.

*Management Guidelines; the National HIV Testing Services: Policy, the Sexual Transmitted Infections: Management Guidelines 2018; and the Integrated School Health Policy.*¹⁰⁷ By and large, the NSP is the ‘most inclusive’ and it promotes both mainstreaming as well as specialised programmes for persons with disabilities, offering a rights based approach to key issues such as discrimination on the basis of HIV and disability.¹⁰⁸

The Department of Basic Education’s *National Policy on HIV, STIs and TB for Learners, Educators, School Support Staff and Officials in all Primary and Secondary Schools in the Basic Education Sector* (the National Policy),¹⁰⁹ the Departments of Health and Basic Education’s *Integrated School Health Policy*¹¹⁰ and the Department of Social Developments’ *National Adolescent Sexual and Reproductive Health and Rights Framework Strategy* (the Strategy),¹¹¹ however, address the provision of CSE and sexual reproductive health services. However, none of these policies put in place concrete steps for making these services (including CSE) accessible and do not put in place measures for the reasonable accommodation of children/youth with disabilities.¹¹²

Another relatively new policy instrument, the *National Strategic Framework on Reasonable Accommodation for Persons with Disabilities* (Reasonable Accommodation SF)¹¹³ seeks to guide the provision of reasonable accommodation in legislation and policy in different sectors and in order to align with the WPRPWD.¹¹⁴ It specifically requires appropriate budgeting towards this goal and monitoring of such measures.¹¹⁵ The instrument, however, does not clearly indicate the alignment with existing legislative pronouncements in relation to accessibility and reasonable accommodation, perhaps because most legislation does not explicitly create duties on the state to do so, bar the Equality Act and in the workplace context, the Employment Equity Act 55 of 1999.

107 Hanass-Hancock et al (n 99) 5.

108 Hanass-Hancock et al (n 99) 7.

109 DBE *The National Policy on HIV, STIs and TB for Learners, Educators, School Support Staff and Officials in all Primary and Secondary Schools in the Basic Education Sector* (2017) published in GN 777 of *Government Gazette* 41024 of 4 August 2017.

110 *Integrated School Health Policy* (2017) <https://serve.mg.co.za/content/documents/2017/06/14/integratedschoolhealthpolicydbeanndoh.pdf> (accessed 30 April 2022).

111 DSD *The National Adolescent Sexual and Reproductive Health and Rights Framework Strategy 2014-2019* (2015) 6.

112 Hanass-Hancock et al (n 99) 7.

113 Department of Women, Children and Persons with Disabilities (DWCPD) *Reasonable Accommodation SF* (2020) N 605 of 2021 in *Government Gazette* No 45328 of 15 October 2021 https://www.gov.za/sites/default/files/gcis_document/202110/45328gen605.pdf (accessed 30 April 2022).

114 DWCPD (n 113) 144.

115 Chapters 4 and 5 of the *Reasonable Accommodation SF* (n 113) 137-141.

None of the policies provide specific budgeting for the provision of SRHR services to ensure inclusion of persons with disabilities, nor do they set out mechanisms to ensure accountability in this regard.¹¹⁶

Of these documents, five policy documents relevant to the education and social development sectors are discussed in turn. The latter sector is important because of its historical status as the key implementing department. These are:

- White Paper 6: Special Needs Education: Building an Inclusive Education and Training System (White Paper 6);¹¹⁷
- The WPRPD;¹¹⁸
- The Strategy;¹¹⁹
- The National Policy;¹²⁰ and
- The *National Curriculum Statement* (NCS) for grades R-12.¹²¹

5.1 White Paper 6

White Paper 6, though not speaking directly to SRHR, acknowledges that 'inclusive education entails accepting that all children have learning needs ... and can learn if given support'.¹²² The policy also concedes that the curriculum could potentially be a learning barrier.¹²³ However, the policy's overly-broad strategies and lack of specificity regarding implementation suggests that this policy was enacted for political symbolism rather than practicality.¹²⁴

5.2 WPRPD

The WPRPD, aims to reflect the already established fundamental values of the CRPD in policy. To do this it proposes a collaborative, multi-

116 Hanass-Hancock et al (n 99) 8. Cf AF Rhwehumbiza *Unrecognised, unfulfilled: Comprehensive sexuality education and information for adolescent girls with intellectual disabilities in Tanzania* LLM Sexual and Reproductive Rights in Africa thesis, University of Pretoria, 2016 at 46

117 Department of Education 'White Paper 6: Special Needs Education: Building an inclusive education and training system' (2001).

118 DSD (n 102).

119 DSD *The Strategy* (n 111) 6.

120 DBE *The National Policy* (n 109).

121 DBE 'National Curriculum Statements (NCS) Grades R-12' <https://www.education.gov.za/Curriculum/NationalCurriculumStatementsGradesR-12.aspx> (accessed 30 April 2022).

122 C Ngwenya & L Pretorius 'Substantive equality for disabled learners in state provision of basic education: A commentary on *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*' (2012) 28 *South African Journal on Human Rights* 81 at 90.

123 White Paper 6 (n 117) 32.

124 D Donohue & J Bornhau 'The challenges of realising inclusive education in South Africa' (2014) 34 *South African Journal of Education* 1 at 8.

sectoral approach involving all relevant stakeholders to effect the necessary changes needed to transform the life experiences of persons with disabilities.¹²⁵ The policy calls for the provision of ‘family planning, sexuality/sex education programmes’. Regrettably, this intervention is only mentioned in the context of HIV/AIDS prevention.¹²⁶ The WPRPD further suggests using the school curriculum to address negative attitudes and stereotypes relating to disability while simultaneously promoting a disability rights awareness discourse.¹²⁷ Beyond encapsulating the rights of persons with disabilities, this policy emphasises important issues such as supported decision-making and self-representation.¹²⁸

Although the WPRPD is yet to reach authoritative legislative status, its contribution to the disability rights movement cannot be denied; to avoid following the steps of White Paper 6, more needs to be done to expedite the process of concretising this policy into enforceable legislation. The South African Law Reform Commission (SALRC) is currently embarking on law reform to domesticate the CRPD, and this process is an apt vehicle for the incorporation of CSE into enforceable domestic obligations.¹²⁹ The policy mentions the possibility of sexual and intimacy assistance,¹³⁰ but this is simply a throwaway line as there is no interpretive guidance as to what it means.

The absence of a provision explicitly mandating the provision of CSE (outside of the HIV/AIDS context) to children with disabilities in the WPRPD is a correctable flaw because of the importance placed on the state’s obligations to fulfil SRHR domestically and internationally.¹³¹ An explicit provision would have been preferred however to mitigate ameliorating social norms against SRHR and CSE.¹³² This policy could have been clearer as a coordinating framework to ensure a better alignment of existing and future policies on SRHR and specifically CSE, in line with South Africa’s international law obligations.

Three DBE specific policies are discussed next.

125 DSD (n 102) 55.

126 DSD (n 102) 101.

127 DSD (n 102) 64.

128 DSD (n 102) 114.

129 SALRC ‘Domestication of the United Nations Convention on the Rights of Persons with Disabilities *Issue Paper 39: Project 148*’ (2020).

130 DSD (n 102) 23-24.

131 AM Miller et al ‘Sexual rights as human rights: A guide to authoritative sources and principles for applying human rights to sexuality and sexual health’ (2015) 23 *Reproductive Health Matters* 16; A Strode & Z Essack ‘Facilitating access to adolescent sexual and reproductive health services through legislative reform: Lessons from the South African experience’ (2017) 107 *South African Medical Journal* 741.

132 For social norms on SRHR and policy gaps see D Cooper et al ‘Coming of age? Women’s sexual and reproductive health after twenty-one years of democracy in South Africa’ (2016) 24 *Reproductive Health Matters* 79; EL Davids et al ‘Adolescent girls and young women: Policy-to-implementation gaps for addressing sexual and reproductive health needs in South Africa’ (2020) 110 *South African Medical Journal* 855.

5.3 The Strategy

The *National Adolescent Sexual and Reproductive Health and Rights Framework Strategy 2014-2019* (the Strategy) recognises a need to ‘create and/or strengthen a responsive policy’ in order to meet the SRHR needs of all adolescents, especially those whom society has deemed most vulnerable, such as children with disabilities. It calls for:

The development of an inclusive agenda that intends to promote ... the right to exercise sexuality free of violence and coercion; the right to seek pleasure with respect for other people’s rights; the right to protect fertility; and the right to access modern techniques for the prevention, diagnosis and treatment of sexually transmitted infections.¹³³

Although the Strategy recognises a number of disabilities, it does not mention how it plans to make SRHR available and accessible to such children.¹³⁴ The Strategy seems to use disability as a device to claim inclusivity. As part of the implementation of this policy, the DBE is currently piloting the roll-out of a revised CSE curriculum in selected schools.¹³⁵ This Strategy is a good start but does not meet the call by UNESCO that states develop national policies on CSE, which are explicitly linked to education-sector plans and the country’s national policy.

5.4 The National Policy

The National Policy expressly recognises CSE as a game-changing ‘preventative gambit’ by stating that:

Every person in the Basic Education Sector has the right to access relevant and factual comprehensive sexuality education ... appropriate to their age, gender, culture, language and context, in order that they can make informed decisions about their personal health and safety.¹³⁶

This policy inadequately addresses the needs of vulnerable groups such as children with disabilities by providing very little guidance on how they will be represented in the CSE curriculum. It thus risks becoming an idealised theoretical document.

133 DSD *The Strategy* (n 111) 6.

134 Cf Hanass-Hancock et al (n 99) 6.

135 J Glover & C Macleod ‘Policy brief: Rolling out comprehensive sexuality education in South Africa: An overview of research conducted on life orientation sexuality education’ Critical Studies in Sexualities and Reproduction Research Programme (2016) 1 https://www.ru.ac.za/media/rhodesuniversity/content/criticalstudiesinsexualitiesandreproduction/documents/Life_Orientation_Policy_Brief_Final.pdf (accessed 30 April 2022).

136 DBE *National Policy* (n 105) 2 & 4.

5.5 NCS

The NCS specifies policy on curriculum and assessment and undertakes to provide knowledge, skills and values in learning at South African schools.¹³⁷ Its principal purpose is to equip learners,

irrespective of their socioeconomic background, race, gender, physical ability or intellectual ability with the knowledge, skills and values necessary for self-fulfilment and meaningful participation in society as citizens of a free country.¹³⁸

While the NCS claims to be sensitive to issues such as disability, there is no mention of children with disabilities (or their sexuality) in the curriculum. Instead, disability is addressed from an anti-discrimination perspective – but there is no mention of the exercise of sexuality by children with disabilities who are affected in comparison to their non-disabled peers.¹³⁹

5.6 CSE indicators in the policies

The CSE indicators are generally not provided in South African policy. While many of these policies assert a rights-based approach to SRHR, including gender equality, few link this approach with the provision of CSE to persons with disabilities which may require accessibility, universal design and reasonable accommodation (aside from the NSP). Of great concern is the absence of the following indicators in the policies: CSE that is developmentally appropriate, scientifically accurate, incremental, culturally relevant and context-appropriate, transformative, and enables children to develop life skills needed to support healthy choices.

Policy reform is needed in all sectors, including education, justice, health and social services, to strengthen the provision of SRHR to children with disabilities, including CSE in and outside of schools. The existing policies and potentially policies drafted in the future may remain fragmented and incoherent, we submit, without enabling a legislative provision that identifies the criteria for CSE, including for children/youth with disabilities, and the requirement for multi-sectoral alignment, budgeting and data disaggregation to inform better future practice.

137 F Khan *A critical analysis of the laws and policies regulating the management of learner pregnancy in South Africa using the lived exigencies of various stakeholders at selected public secondary schools in KwaZulu-Natal and the Hospital School Pretoria* PhD thesis, University of KwaZulu-Natal, 2016 at 16.

138 Khan (n 137) 16.

139 Khan (n 137) 17.

6 The legislative vacuum for explicit recognition of CSE

The gaps in the policy statements on CSE, are also mirrored in the legislation for the education sector (the National Education Policy Act 27 of 1996 (NEPA), the South African Schools Act 84 of 1996 (SASA) and the Children's Act 38 of 2005). These are discussed in turn.

6.1 SASA

SASA requires that all public schools 'admit learners and serve their educational requirements in a non-discriminatory manner'.¹⁴⁰ Public schools are required to be 'accessible and able to provide relevant educational support services' to learners with disabilities, whenever it is 'reasonably practicable' to do so.¹⁴¹ The drafting of this provision is problematic as it does not refer to reasonable accommodation of children's needs, and introduces the defence of 'reasonably practicable'.¹⁴² Children with disabilities, however, are not afforded compulsory schooling outside of ordinary public schools as the age of commencement has not been promulgated.¹⁴³

6.2 NEPA

NEPA empowers the Minister of Basic Education to determine a national educational policy, which should be directed towards '[t]he advancement and protection of the fundamental rights of every person guaranteed in terms of the Constitution, and in terms of international conventions'.¹⁴⁴ Moreover it is stated that educational policy should contribute 'to the full personal development of each student ... including the advancement of democracy and human rights'.¹⁴⁵ The Act specifically precludes an education policy from denying children their right to education on account of their *physical* disabilities.¹⁴⁶ It is unclear why the Act specifically mentions physical disabilities to the exclusion of other disabilities.¹⁴⁷

140 Section 5(1).

141 Section 12(4) & (5).

142 Murungi (n 47) 334-5.

143 Section 3(2) of the Schools Act and Department of Education *Age Requirements for Admission to an Ordinary Public School* GN 2433 in Government Gazette 19377 of 19 October 1998 para 5.

144 Section 4(a)(i).

145 Section 4(b).

146 Section 4(d).

147 Murungi (n 47) 335.

6.3 The Children's Act

The constitutional dispensation and the ratification of prominent international instruments paved the way for acknowledging that children are also bearers of human rights and not merely vulnerable and voiceless.¹⁴⁸ The Children's Act is the primary legal framework for the realisation of every child's constitutional rights. In relation to children with disabilities, it was agreed from the outset of the South African Law Commission's endeavours to develop a children's code that mentioned had to be made of this category of children.¹⁴⁹ Section 11 of the Act does exactly that by extending opportunities to children with disabilities (and chronic illnesses) to 'participate in amongst other things "educational activities" in a manner that is cognisant of any needs they may have'.¹⁵⁰ The section further states that it is equally important to provide such children with 'conditions that ensure dignity, promote self-reliance and facilitate active participation in the community'.¹⁵¹ Section 13 of the Children's Act grants children the right to 'access information related to health promotion and the prevention and treatment of ill-health and disease, sexuality and reproduction'.¹⁵² The section also recognises the importance of accessibility of such information by emphasising cognisance of any special needs a child may have.¹⁵³

Other relevant sections of the Act include section 2 (objectives), section 6 (general obligations) and section 7 (best interests of the child.) These sections use similar terminology to that which is mentioned in the UNESCO Guidance. According to section 2, the Children's Act's objectives include: 'make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children',¹⁵⁴ to 'strengthen and develop community structures which can assist in providing care and protection for children';¹⁵⁵ to 'protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards';¹⁵⁶ and to 'promote the protection, development and well-being of children'.¹⁵⁷ It is submitted that all these provisions could be used to strengthen not only the argument for the provision of CSE but for provision beyond the school environment.

148 Boezaart (n 89) 1-43.

149 Boezaart (n 89) 21-22.

150 Section 11(1)(b).

151 Section 11(1)(l).

152 Section 13(1)(a).

153 Section 13(2).

154 Section 2(d).

155 Section 2(e).

156 Section 2(f).

157 Section 2(i).

Section 6, in line with child legislation in many other jurisdictions, provides central principles underpinning how decisions should be made in regard to children in domestic legislation and guides the implementation, proceedings, actions and decisions in relation to children.¹⁵⁸ It establishes a child-centred approach in respect of all legislation, proceedings and state actions regarding children.¹⁵⁹ According to section 6(e), all proceedings, actions or decisions in a matter concerning a child must: recognise a child's need for development ... appropriate to the child's age. Section 6(5) further states that

a child, having regard to his or her age, maturity and stage of development ... where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.

This subsection acknowledges the fact that the child himself or herself (irrespective of their disability) must be informed of actions or decisions which significantly affect him or her. The age, maturity and stage of development of the particular child will be crucial in determining whether the child will benefit from this knowledge.¹⁶⁰

Before the Children's Act was enacted, South African legislation did not have a list of factors to be applied when a court has to deal with a child's best interests. This lacuna was often criticised because of the fact that subjective opinions could easily impede objective judgement in a specific case. The factors that follow (as stipulated in the Children's Act) may be used to argue for the provision of CSE especially in relation to the indicators set out in the UNESCO Guidance:

- 'the child's age, maturity and stage of development';¹⁶¹
- 'any other relevant characteristics of the child';¹⁶² and
- 'the child's physical and emotional security and his or her intellectual, emotional, social and cultural development'.¹⁶³

Furthermore, the Act extends the right not to be subjected to detrimental social, cultural and religious practices to all children, as well as the right to access information on health promotion and prevention and treatment of ill-health and disease, sexuality and reproduction.¹⁶⁴ The Act explicitly mandates that information on healthcare should be provided 'in a format accessible to children, giving due consideration to the needs of children

158 Boezaart (n 89) 1-4.

159 Boezaart (n 89) 4.

160 Boezaart (n 89) 5.

161 Section 7(1)(g)(i).

162 Section 7(1)(g)(iv).

163 Section 7(1)(h).

164 Sections 12(1) and 13(1)(a) of the Children's Act.

with disabilities'.¹⁶⁵ Therefore, health information should be both child-friendly and accessible to children with disabilities.

The question of precisely what a child's best interests are, is a factual question that has to be determined according to the circumstances of each individual case. It should be properly contextualised and as such the inherent flexibility of this principle should be seen as a strength.¹⁶⁶ Moreover law enforcement must always be 'child-sensitive; (meaning) that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children'.¹⁶⁷

Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents ... The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.¹⁶⁸

Strode and Essack explain South Africa's approach to separate legislation for different health interventions such as HIV testing and termination of pregnancy.¹⁶⁹ The legislative framework in place, however, only recognises the SRHR of children over the age of 12 (except for access to abortion), which while aligned with domestic criminal law, poses problems inter alia for medical research involving children.¹⁷⁰ That criticism notwithstanding, the nuanced and differing consent requirements for these health interventions are lauded.¹⁷¹ The authors, caution against South Africa's 'divergent' approach to the evolving capacity of children (and adolescents) and call for the drafting of specific guidance for service providers on how to assess that capacity.¹⁷² Unfortunately, the relevance of the CRPD's recognition of equal legal capacity and its implication for assessing children's capacity to consent including in accessing SRHR is not considered in the South African literature.

6.4 The gaps in the legislation and the way forward

Some of the UNESCO CSE indicators are evident in the legislation. For example, developmental appropriateness is contained in the Children's Act.¹⁷³ While a human rights approach is not directly listed, a children's

165 Section 13(2) of the Children's Act.

166 Boezaart (n 89) 8.

167 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 15.

168 *S v M* para 18.

169 Strode & Essack (n 131) 741.

170 Strode & Essack (n 131) 742.

171 Strode & Essack (n 131) 744.

172 As above.

173 Sections 5 and 6 of the Children's Act.

rights approach is encapsulated by all three laws – the South African Schools Act, the National Education Policy Act and, particularly section 6(2) of the Children’s Act. Accessibility or reasonable accommodation as principles or duties are generally not included, aside from the provision for health information in accessible formats for children with disabilities, as well as the general prohibition of discrimination on the basis of disability in the Children’s Act.¹⁷⁴ Cultural relevance and context appropriateness could be inferred from the mention of cultural development and traditions in the Children’s Act in relation to factors to determine the best interests of the child.¹⁷⁵ Notably absent is scientific accuracy.

Explicit provision of CSE to all children is absent in the current legislative provisions but would be congruent with the aims of these three statutes. Compliance with the CRPD’s requirement of measures to eliminate discrimination against persons with disabilities, including girls and women with disabilities, ‘requires more from a state party than inclusion in existing statutes by implication’.¹⁷⁶ Accordingly, it is submitted that an amendment to the Children’s Act would be the best option for explicit inclusion of CSE in the legislative offering because the Children’s Act is applicable to all children and extends beyond the context of education. Such an amendment would obligate the state to provide CSE not only in schools, but also in juvenile correction centres, hospitals, clinics and in other relevant public service facilities that cater for children – as well as in community-based fora.

The Children’s Act currently regulates numerous SRHR and associated aspects such as access to contraceptives, virginity testing and male circumcision. Explicitly recognising a right to CSE in the Act would give effect to the SRHR of children with disabilities. It is submitted that section 13 of the Children’s Act should be amended to include the relevant indicators developed at the international and regional levels, as follows:

Information on health care –

- (1) Every child has the right to –
 - (a) have access to information on health promotion and the prevention and treatment of ill-health and disease, sexuality and reproduction including through the provision of curriculum-based comprehensive sexuality education to all children, including children and youth with disabilities, that is:
 - (i) non-discriminatory and promotes gender equality,
 - (ii) inclusive,

174 Sections 6(2)(d) and (f); and 11 of the Children’s Act.

175 Sections 7(1)(f)(ii) and (h) of the Children’s Act.

176 Y Basson ‘Towards equality for women with disabilities in South Africa: The implementation of articles 5 and 6 of the Convention on the Rights of Persons with Disabilities’ (2021) 9 *African Disability Rights Yearbook* 3 at 17.

- (iii) accessible,
- (iv) age and developmentally appropriate,
- (v) scientifically accurate,
- (vi) incremental,
- (vii) culturally relevant and context-appropriate,
- (viii) transformative,
- (ix) geared towards developing the life skills children need to support healthy choices,
- (x) is based on a human rights approach, and
- (xi) includes reasonable accommodation where necessary.

All other relevant legislation such as NEPA should provide implementing provisions and regulations to guide stakeholders to provide CSE in different sectors. South Africa's tentative approach toward recognising CSE for persons with disabilities should be replaced with a rigorous approach including an urgent programme that includes a disabled sexuality discourse in the life orientation (LO) curriculum in schools. Considering the high burden of sexual abuse in schools,¹⁷⁷ urgent action is imperative.

Recalling that many children and youth with disabilities are out of school, the provision of CSE should be incorporated in other sectors, particularly healthcare and social development where many children with disabilities access services and also should be accessible within community structures. Importantly, since many parents and caregivers act as gatekeepers to exercise the SRHR of children and youth with disabilities, they also require information about CSE in inaccessible spaces.

It is further submitted that explicit provision of CSE in proposed disability-specific legislation should ensure inclusive and accessible CSE in all relevant sectors. Such a provision should incorporate the criteria suggested for the amendment to the Children's Act. An explicit provision that identifies the need to ensure that CSE material and instruction includes the provision of a modified curriculum in alternative formats, including Braille, Easy Read, alternative and augmentative communication and auxiliary aids, where necessary, should be drafted. Such legislation should establish a standard against which other legislation ought to be measured in terms of advocating for the recognition of SRHR of persons with disabilities, including CSE and pertinently their sexuality, in order to dispel harmful myths. General principles entrenched in such legislation, such as non-discrimination, recognition of legal capacity, accessibility and reasonable accommodation, would be a framework for

177 AA Mdikana, NT Phasha & S Ntshangase 'Teacher reported types of sexual abuse of learners with intellectual disability in a South African school setting' (2018) 28 *Journal of Psychology in Africa* 510.

other enabling legislation and policy. Although disability-specific legislation is not a cure-all solution, such legislation would be profoundly significant because it would ensure legal certainty and would safeguard persons with disabilities against unnecessary policy restructurings. The SALRC's current domestication of the CRPD provides a vehicle for explicit recognition of CSE in the draft legislation.

7 Conclusion

CSE in relation to SRHR of children and youth with disabilities in South Africa appears to be an (inadequate) tick-box approach and as a whole is fragmented and incoherent at a policy level, and at a legislative level lacks concrete guidance despite the existence of other health and SRHR related provisions in legislation such as the Children's Act. The policies are by and large not aligned with international law obligations. A recent study on educators' ability to adapt and make accessible the CSE curriculum to children/adolescents with disabilities in special schools identifies many persistent barriers, though these are not insurmountable.¹⁷⁸ Children with disabilities in 'mainstream' schools are often invisible, and their needs for inclusive, accessible CSE that includes reasonable accommodation where needed is less likely to be met considering the general lack of training that educators in those schools have compared to special schools environments. Future research should consider the roll-out of CSE for children with disabilities in mainstream schools as well. The negative impact of the COVID-19 pandemic on the provision of CSE for children with disabilities during the hard lockdowns was articulated.

An analysis of the policy and legislation identified that explicit provision for CSE and the accessibility of CSE and reasonable accommodation of children/adolescents with disabilities are largely absent. The implementation delay in the legislative framework, including in relation to school going-ages not only currently contributes to the high number of out-of-school children with disabilities but also does not have a concrete provision for CSE.

We propose that the main legislation pertaining to children in South Africa should contain explicit reference to CSE and should identify principles or criteria that would meet existing international consensus on the nature of CSE, particularly for children/youth with disabilities. We emphasise the need for accessibility, universal design and reasonable accommodation to be included as principles or criteria and for the inclusion of these concepts in the definitional section of the Children's Act. The SALRC's current law reform on the domestication of the CRPD, we further propose, should also include a similar framework provision on

178 Hanass-Hancock et al (n 99).

CSE for children/youth with disabilities in its formulation of disability-specific legislation. This would ensure greater coherence, less fragmentation and alignment with the CRPD and other international law obligations. These steps would also be one of the first towards meeting the African Disability Protocol's specific requirement for the inclusion of CSE.

The ongoing impact of the COVID-19 pandemic on and the lack of political will to prioritise the education of children with disabilities, particularly girls with disabilities, requires renewed efforts to develop innovative measures to provide CSE in and *outside of* school contexts to reach all children and youth with disabilities, in all the sectors where they access services. One of these measures is the setting of clear legal standards for compliance with legislation.