

# THE RIGHT TO PRIMARY EDUCATION OF CHILDREN WITH DISABILITIES IN MALAWI: A DIAGNOSIS OF THE CONCEPTUAL APPROACH AND IMPLEMENTATION

*Enoch MacDonnell Chilemba\**

---

## Summary

*The Convention on the Rights of Persons with Disabilities, which Malawi ratified in August 2009, affirms the recognition that disabled children are entitled to enjoy human rights such as primary education, including compulsory and free primary education, on an equal basis with others. However, almost 98 per cent of Malawi's disabled children do not have access to education. This article observes that the situation could be attributed to the failure by the government of Malawi to conceptualise and implement the right to primary education for disabled children as envisaged by the international conceptual approaches and legal standards of inclusive education. The standards, as provided for in article 24 of the Disability Convention, emphasise the right of disabled children to attain compulsory and free primary education in mainstream schools together with all other children. Accordingly, this article explores the measures that Malawi could take to ensure a domestic implementation framework and conceptual approach that complies with international standards and approaches. This article first highlights the challenges that Malawi faces in the provision of primary education to disabled children before analysing the pertinent concepts such as inclusive education. It further discusses the applicable international legal standards before examining Malawi's approach to the provision of primary education of disabled children. Ultimately, it evaluates Malawi's constitutional, legislative and policy framework for the implementation of the right and suggests a number of measures that Malawi can implement in order to ensure compliance with international standards and conceptual approaches.*

\* LLB (Hons) (Mal), LLM (UP, RSA), LLD Candidate & Doctoral researcher at the Community Law Centre & the Centre for Disability Law and Policy at the University of the Western Cape; Lecturer in Law at the Faculty of Law, University of Malawi; advocate of the High Court and Supreme Court of Malawi; enochilemba@yahoo.com. This work builds on the author's LLM thesis, 'A critical appraisal of the right to education of children with disabilities in Malawi', submitted in partial fulfilment of the requirements of the LLM (Human Rights and Democratisation) Degree, (University of Pretoria) and also on the author's current doctoral research.

## 1 Introduction and background

Education is a fundamental right for all children, including children with disabilities (disabled children), to the extent that it is regarded as having double dimensions as a human right in itself and an indispensable means of realising other rights.<sup>1</sup> Primary education, on which this article focuses, is one of the components that make up the umbrella right to education.<sup>2</sup> The right is guaranteed in a number of human rights treaties, which include the United Nations (UN) Convention on the Rights of the Child (the CRC);<sup>3</sup> the African Charter on the Rights and Welfare of the Child (the ACRWC);<sup>4</sup> and the Convention on the Rights of Persons with Disabilities (the CRPD).<sup>5</sup> Malawi is one of the state parties to these treaties.<sup>6</sup> Despite this, most disabled children in Malawi do not have access to primary education.<sup>7</sup> The Malawi Government has acknowledged that almost 98 per cent of the disabled children do not obtain an education.<sup>8</sup> Accordingly, this article seeks to explore the measures that Malawi could take, which comply with international standards and accepted conceptual approaches, to realise the right to primary education of children with disabilities.<sup>9</sup>

This article first gives a general introduction and background, which includes a synopsis of the challenges that Malawi faces in the provision of primary education to disabled children. It also analyses applicable concepts such as compulsory and free primary education (compulsory and FPE) and inclusive education. Thereafter, it discusses international legal standards relating to the right before examining Malawi's approach to the provision of primary education of disabled children. Lastly, this article

- 1 See generally, Committee on Economic, Social and Cultural Rights, General Comment 13, The right to education, (Twenty-first session, 1999), UN DocE/C12/1999/10 (1999), para 1; M Verheyde 'Article 28: The right to education' in A Alen *et al* (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2006) 7; M Jones 'Inclusion, social inclusion and participation' in MH Rioux *et al* (eds) *Critical perspectives on human rights and disability law* (2011) 77.
- 2 The components are generally referred to as levels of education, namely: primary, secondary and tertiary levels. See KD Beiter *The protection of the right to education by international law* (2006) 19; International Standard Classification of Education (ISCED) (1997) para 37.
- 3 Adopted on 20 November 1989, entered into force on 2 September 1990, see arts 28 & 29.
- 4 Adopted on 11 July 1990, entered into force on 29 November 1999, see art 11.
- 5 Adopted on 13 December 2006, entered into force on 3 May 2008, see art 24.
- 6 Malawi signed the CRPD on 27 September 2007 and ratified it on 27 August 2009; ratified the CRC on 2 January 1991; and signed the ACRWC on 13 July 1999 and ratified it on 16 September 1999.
- 7 A Chavuta *et al* *Inclusive education project: Shire Highlands education division – Malawi baseline study report* (August 2008) 7-9.
- 8 See Malawi Government, National Policy on the Equalisation of Opportunities for Persons with Disabilities (2005) 5 (the EOPD policy).
- 9 Indeed, states parties have an obligation to ensure the enjoyment all human rights that are guaranteed by the instruments they ratify. See generally F Viljoen *International human rights law in Africa* (2012) 5-6 & 8-9; *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 44-48.

evaluates Malawi's constitutional, legislative and policy framework for the implementation of the right and suggests a number of recommendations.<sup>10</sup>

### 1.1 A synopsis of Malawi's challenges

The provision of primary education for disabled children in Malawi is beset by impediments which include a lack of adequate schools that provide inclusive education, discussed below, or special needs education (SNE). This explains the glaring situation whereby 98 per cent of the country's disabled children do not attain an education. This implies that Malawi is not adhering to the 'four-As (4As)' international standard relating to education in general as elaborated by the Committee on Economic, Social and Cultural Rights (Committee on ESCR) in General Comment 13.<sup>11</sup> The 4As standard requires education to satisfy the elements of availability, accessibility, acceptability and adaptability.<sup>12</sup> Availability of education implies that functioning educational institutions and programmes must be available in sufficient quantity within the state to cater for all children.<sup>13</sup> The accessibility standard requires the state to ensure that educational institutions and programmes, including the environment, services, and all necessary facilities are accessible to all children.<sup>14</sup> Accessibility has three overlapping dimensions which require

10 The article has consulted a number of sources pertaining to education and other rights of disabled children, which include: LE Bassier 'Justice for all? The challenges for realising the right to education for children with disabilities' 2005 (8) *Journal of Race, Gender & Justice* 531; B Bekink & M Bekink 'Children with disabilities and the right to education: A call for action' (2005) 16 *Stellenbosch Law Review* 125; D Filmer 'Disability, poverty, and schooling in developing countries: Results from 14 household surveys' (2008) 22 *World Bank World Economic Review* 141; L Wakefield & N Murungi 'Domesticating international standards of education for children with intellectual disabilities: A case study of Kenya and South Africa' in I Grobbelaar-du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2011) 133; SA Djoyou Kamga 'Realising the right to primary education in Cameroon' (2011) 11 *African Human Rights Law Journal* 171; African Child Policy Forum *The lives of children with disabilities in Africa – A glimpse into a hidden world* (2011). Although the existing literature has addressed the rights of disabled children such as education, this work contextualises the discourse with reference to Malawi. For example, Combrinck's work gives a general picture of the right to formal education of disabled children in the African context and any specific references to countries were by way of illustration and do not include Malawi. See H Combrinck 'The hidden ones: Children with disabilities in Africa and the right to education' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 299. Similarly, Akinbola's study specifically looks at inclusive education in Nigeria and does not focus on primary education alone. See BR Akinbola 'The right to inclusive education in Nigeria: Meeting the needs and challenges of children with disabilities' (2010) 10 *African Human Rights Law Journal* 457.

11 General Comment 13 (n 1 above). The Committee has also explained the social and economic rights of disabled persons in General Comment 5. See Committee on ESCR, General Comment 5 'Persons with disabilities' (1994).

12 General Comment 13 (n 1 above) para 6. The 4As standard applies to the right to education in general. See 3 below for a further discussion on the international legal standards relating to the right to primary education for disabled children.

13 General Comment 13 (n 1 above) para 6(a).

14 General Comment 13 (n 1 above) para 6(b).

that there must be physical accessibility;<sup>15</sup> economic accessibility;<sup>16</sup> and accessibility without discrimination.<sup>17</sup> The attribute of acceptability entails that the form and substance of education, curricula and teaching methods are relevant, culturally appropriate and of good quality and are regarded as such by parents and learners, including disabled children.<sup>18</sup> Lastly, the standard of adaptability requires education to be flexible to adapt to the needs of changing societies and to be responsive to the needs of learners within their diverse social and cultural settings.<sup>19</sup>

Malawi experiences a number of obstacles that make compliance with this 4As standard a pipedream. The situation is apparently exacerbated by Malawi's failure to implement inclusive education, discussed below.<sup>20</sup> Indeed, a study commissioned by the Cheshire International and Montfort College (Cheshire and Montfort study) found that Malawi faces difficulties to implement inclusive education due to, amongst others, limited resources; insufficient funding; and environmental barriers.<sup>21</sup> The study found that challenges facing teachers and learners include a lack of knowledge and skills in teaching disabled children; inadequate teaching and learning resources; negative attitudes by teachers and the community towards disabled children; inaccessible school infrastructure; and a lack of assistive devices.<sup>22</sup>

On its part, the Malawi Government acknowledges that by 2008, the country was short of 34 203 and 60 203 primary school teachers to achieve a teacher-pupil ratio of 1-60 and 1-40 respectively by 2015.<sup>23</sup> In respect of teachers trained in SNE, Malawi had 500 teachers against 50 586 students in primary schools by 2006.<sup>24</sup> Montfort College, which is owned by the Catholic Church, is the only school that has been training SNE teachers in Malawi. It is operated jointly by the Church and the Malawi Government's SNE Department.<sup>25</sup> The SNE Department has since proposed the setting up of a state institution to train teachers in SNE.<sup>26</sup> By 2006, Malawi had two special schools for the blind and four special schools

15 General Comment 13 (n 1 above) para 6(b)(ii).

16 General Comment 13 (n 1 above) para 6(b)(iii).

17 See General Comment 13 (n 1 above) para 6(b)(i); General Comment 5 (n 11 above) para 15.

18 See General Comment 13 (n 1 above) para 6(c); General Comment 5 (n 11 above) para 35.

19 General Comment 13 (n 1 above) para 6(d).

20 See 2.2 below for a discussion on inclusive education, SNE and other conceptual approaches to education of disabled children.

21 Chavuta *et al* (n 7 above) 7.

22 Chavuta *et al* (n 7 above) 8 & 9.

23 See Malawi Ministry of Education, Science and Technology & Malawi National Commission for UNESCO *The development of education: National report of Malawi* (October 2008) 13.

24 A. Salmonsson *Disability is not inability: Baseline study of steps taken towards inclusive education in Blantyre, Balaka and Machinga districts in Malawi – Final report* (2006) 9.

25 Salmonsson (n 24 above) 10.

26 Salmonsson (n 24 above) 11.

for the deaf.<sup>27</sup> Three of the four schools were not using sign language but the oral teaching methods, which require the disabled children to read the lip movements of teachers and interpret them. This is not effective as the students have to guess what the teacher is saying.<sup>28</sup>

In view of the challenges highlighted above, it would be relevant to evaluate the extent to which Malawi complies with the international legal standards and internationally accepted conceptual approaches for the implementation of the right to primary education of children with disabilities.<sup>29</sup>

## **2 Conceptualisations pertaining to primary education for children with disabilities**

### **2.1 Compulsory and free education**

Education does not have a single agreed definition. It can be understood broadly as an act, process or experience that systematically promotes learning, knowledge and development.<sup>30</sup> In the narrow sense, education is understood as a formal instruction of knowledge within a recognised and well-structured system of institutions and programmes.<sup>31</sup> This article is concerned with formal education at a primary level as it applies to disabled children within the context of disability. Formal education refers to education that is systematically provided in educational institutions such as schools and it comprises primary, secondary and higher education levels as elaborated by ISCED.<sup>32</sup> Primary education consists of at least six years of full time schooling and its entry age for children is expected to be between five and seven years.<sup>33</sup>

The right to education is one of the social and economic rights (SERs) guaranteed in the International Covenant on Economic, Social and Cultural Rights (the CESCR).<sup>34</sup> The CESCR, amongst others, provides for the right to primary education and the concept of compulsory and free

27 Salmonsson (n 24 above) 9.

28 Salmonsson (n 24 above) 17.

29 The evaluation of Malawi's compliance with international standards and internationally accepted approaches is contained in 4 below.

30 P Mittler 'Special needs education: An international perspective' (1995) 22 *British Journal of Special Education* 105.

31 G Mialaret (ed) *The child's right to education* (1979) 11.

32 See ISCED (n 2 above); Beiter (n 2 above) 19. Although other forms of education, including technical or vocational training, are important to all persons, it is not within the scope of this article to discuss such forms of education.

33 ISCED (n 2 above) para 46. Primary education forms the first level of formal education. See ISCED, para 37.

34 See art 13(1). The CESCR was adopted on 16 December 1966, and entered into force on 3 January 1976. Malawi acceded to the Covenant on 22 December 1993.

primary education (FPE).<sup>35</sup> The Committee on ESCR, which monitors the implementation of the CESCR, has explained the concept in General Comment 11.<sup>36</sup> The notion of compulsory education has at least two elements. Firstly, it entails that the decision regarding access of a child to education must not be optional.<sup>37</sup> Secondly, it implies access to education without discrimination.<sup>38</sup>

On its part, FPE entails primary education that is available without charges to the child, the parent or the guardian.<sup>39</sup> This requires the elimination of any fees and direct costs of education, including compulsory levies and other indirect costs such as the obligation to wear relatively expensive school uniforms; costs related to stationery, transport and learning materials; and other obstacles to education, including 'opportunity costs'.<sup>40</sup> The requirement of compulsory and FPE in respect of disabled children entails state's obligations to provide special facilities such as Braille for some children with visual impairments to ensure the accommodation of disabled children in education.<sup>41</sup> The CRC and the CRPD, amongst other treaties, also recognise the concept of compulsory and FPE.<sup>42</sup> For example, the CRC requires compulsory and FPE for all children on the basis of equal opportunity.<sup>43</sup> It is noteworthy that compulsory education is considered to further or serve the best interests of the child.<sup>44</sup>

## 2.2 Inclusive education and conceptual approaches to education of children with disabilities

Disability is said to be a dynamic and contested concept.<sup>45</sup> In addition, there are at least three models of disability, which include the medical, social, and human rights models. The conceptualisation of education of disabled children reflects the model of disability on which the education is based. The concepts of SNE and inclusive education are used in relation to the education of children with disabilities.<sup>46</sup> These concepts do not have

35 See art 13(2)(a).

36 Committee on ESCR, General Comment 11 'Plans of action for primary education' (1999) para 6.

37 As above.

38 As above.

39 General Comment 11 (n 36 above) para 7.

40 As above. See also CRC Committee, Concluding observations on Mozambique (2002) para 306; Beiter (n 2 above) 513 & 514; J Sloth-Nielsen & BD Mezmur *Free education is a right for me: A report on free and compulsory primary education* (2007) 10.

41 See General Comment 5 (n 11 above) para 35.

42 See the CRC, art 28(1)(a); and the CRPD, art 24(2)(a). See 3.1 below for further discussion on the CRPD and its applicable education provisions.

43 Art 28(1)(a).

44 See G Van Bueren *The international law on the rights of the child* (1995) 237.

45 R Traustadóttir 'Disability studies, the social model and legal developments' in OM Arnardóttir & G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (2009) 8.

46 Mittler (n 30 above) 105.

agreed meanings.<sup>47</sup> SNE is understood as the educational delivery system that puts the primary focus on enabling learners with special educational needs (SEN) to learn in a modified environment or with individualised accommodations for the disability that has been diagnosed.<sup>48</sup> On its part, inclusive education is broadly conceptualised as a process of responding to the diversity of needs of learners through increasing participation in learning, cultures and communities, and reducing exclusion in education.<sup>49</sup> It aims at addressing the learning needs of all persons, especially those who are vulnerable to marginalisation and exclusion, by ensuring that schools accommodate all children in spite of their differences and impairments.<sup>50</sup> Nonetheless, the concept of inclusive education is currently favoured over SNE and is the one that is used in conceptualising the education of disabled children.<sup>51</sup> Furthermore, there are three conceptual approaches to the provision of education of disabled children, namely, special schools, integrated schools and inclusive schools approaches.<sup>52</sup>

### **2.2.1 Special schools approach**

The special schools approach or special education refers to the provision of education to disabled children in a different environment where they learn separately from other children.<sup>53</sup> It is based on the perception that disabled children's impairments are challenges to their learning in mainstream schools.<sup>54</sup> It perceives disabled children as different from other children in that they do not respond to learning and have special needs which require their segregation from mainstream schools.<sup>55</sup> Consequently, the approach emphasises the placement of disabled children in their own 'segregated' schools.<sup>56</sup>

The approach puts the focus on the disabled children and their impairments and not on the school system. Accordingly, it is based on the medical model of disability which locates the 'problem' of disability within the individual persons with disabilities (disabled persons) and views their

47 World Health Organization (WHO) & World Bank *World report on disability* (2011) 209.

48 AN Itimu & PB Kopetz 'Malawi's special needs education (SNE): Perspectives and comparisons of practice and progress' (2008) 8 *Journal of Research in Special Educational Needs* 153.

49 R Rieser *Implementing inclusive education: A Commonwealth guide to implementing article 24 of the UN Convention on the Rights of Persons with Disabilities* (2008) 21.

50 As above.

51 See UN Human Rights Council *The right to education of persons with disabilities: Report of the UN Special Rapporteur on the right to education, V Muñoz* UN Doc A/HRC/4/29 (19 February 2007) para 9.

52 WHO & World Bank (n 47 above) 210.

53 S Nock 'Implementing inclusive education: A Commonwealth guide to implementing article 24 on the UN Convention on the Rights of People with Disabilities' (2011) 21 *Development in Practice* 447.

54 UN Human Rights Council (n 51 above) para 11.

55 Rieser (n 49 above) 27.

56 UN Human Rights Council (n 51 above).

physiological conditions as the problem associated with disability.<sup>57</sup> Consequently, the model perpetuates the segregation of disabled persons from the mainstream society and would emphasise segregated education.<sup>58</sup>

### 2.2.2 *Integrated schools approach*

The integrated schools approach or integrated education also puts the focus on the disabled children themselves and views their impairments as the 'problem' that hinders their learning in mainstream schools. This entails that the approach embodies elements of the medical model of disability. Hence, it is similar to the conception behind special education in terms of its thinking and techniques.<sup>59</sup> However, instead of putting the disabled children in segregated environments, the approach requires measures to be taken to 'fix' the disabled children to fit in at mainstream schools.<sup>60</sup> For example, disabled children can be provided with special teachers and taught with special techniques but are expected to fit in at mainstream schools without making adjustments to the education system and environment.<sup>61</sup> Hence, the idea is that disabled children must be 'fixed' to fit the mainstream school system (and not vice-versa), failing which, they must be sent to special schools.<sup>62</sup>

### 2.2.3 *Inclusive schools approach*

The inclusive schools approach refers to the education of disabled children in the mainstream schools where all children, including disabled children, learn together.<sup>63</sup> Accordingly, it is the inclusive schools approach that portrays the ideal conception behind inclusive education. The approach focuses on the school environment and its barriers.<sup>64</sup> It attributes the challenges that disabled children face in education to the impediments in the mainstream education system and environment.<sup>65</sup> Accordingly, it aims at identifying and eradicating such hindrances to enable all children to

57 See M Oliver *Understanding disability: From theory to practice* (1996) 32; G Quinn & T Degener *Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 10.

58 M Schulze *Understanding the UN Convention on the Rights of Persons with Disabilities: A handbook on the human rights of persons with disabilities* (2010) 16.

59 Rieser (n 49 above) 28.

60 Rieser (n 49 above) 22.

61 Rieser (n 49 above) 28. See also CRC Committee 'Day of general discussion on the rights of children with disabilities' UN Doc CRC/C/69 (6 October 1997).

62 In other instances of integration, the disabled children learn in separate classrooms but within the mainstream school.

63 S Peters *et al* 'A disability rights in education model for evaluating inclusive education' (2005) 9 *International Journal of Inclusive Education* 139 142.

64 Rieser (n 49 above) 28.

65 UNESCO *Open file on inclusive education: Support materials for managers and administrators* (2001) 22.

attain an education.<sup>66</sup> Hence, the idea is that the mainstream school system must be 'fixed' to accommodate the disabled children (and not vice-versa).

The inclusive schools approach or inclusive education is consistent with the social and human rights models of disability. The premise of the social and human rights models is that disability and the 'problem' associated with it are the outcome of the interaction between disabled persons and the environment where environmental, attitudinal and other barriers in society impose restrictions upon disabled persons.<sup>67</sup> Consequently, they advocate for the eradication of the barriers to equal participation and inclusion of disabled persons. For example, the human rights model holds that the state has the responsibility to 'tackle socially created obstacles in order to ensure full respect for the dignity and equal rights of all persons'.<sup>68</sup> In view of this, the two models would inevitably promote the inclusive schools approach as the mainstream schools would be adjusted to accommodate the education of all children. Therefore, they would ensure inclusive education in keeping with the modern and internationally accepted conceptualisation of the education of disabled children. Indeed, the medical model has fallen out of favour and there has been a shift in the disability approach from the medical to the social and human rights models culminating in the adoption of the CRPD.<sup>69</sup>

Due to its consistency with the social and human rights models, the inclusive schools approach is widely recommended in the provision of education to children with disabilities for respecting the equality of all children.<sup>70</sup> However, it is considered that it might be difficult to ensure full inclusion of disabled children in education with the effect that no state has a fully inclusive education system.<sup>71</sup> Nonetheless, although flexibility in conceptualising the education to disabled children is often suggested, the internationally accepted approaches require the education of all disabled children to be conceptualised in terms of inclusive education that is based on the inclusive schools approach.<sup>72</sup>

66 WHO & World Bank (n 47 above) 210.

67 Oliver (n 57 above) 33; H Combrinck 'The hidden ones: Children with disabilities in Africa and the right to education' in Sloth-Nielsen (n 10 above) 31. See also H Hahn 'Public support for rehabilitation programs: The analysis of US Disability Policy' (1986) 1 *Disability, Handicap & Society* 128.

68 Quinn & Degener (n 57 above) 10.

69 Schulze (n 58 above) 16.

70 WHO & World Bank (n 47 above) 210.

71 See generally WHO & World Bank (n 47 above) 210 & 211; Mittler (n 30 above) 105.

72 For further discussion on the conceptualisation of inclusive education in international law, see generally B Byrne 'Hidden contradictions and conditionality: Conceptualisations of inclusive education in international human rights law' (2013) 28 *Disability & Society* 232.

### 3 International legal standards on the right to primary education of children with disabilities

The CESC, the CRC and the CRPD are amongst the human rights treaties that provide the international legal standards relating to primary education of children with disabilities. The CRC is the first global human rights treaty to expressly prohibit discrimination on the basis of disability.<sup>73</sup> It also unequivocally protects the rights of disabled children by obliging state parties to ensure the provision of free special care and assistance to disabled children in accordance with their needs to enable them, amongst others, to access education.<sup>74</sup> It further provides for the right to primary education, including compulsory and FPE.<sup>75</sup> In addition, the CRC Committee has elaborated on education and other rights of disabled children in General Comment 9.<sup>76</sup> Amongst others, the Committee requires states to ensure inclusive primary education, which 'should be the goal of educating children with disabilities' that is flexible enough to accommodate the learning of disabled children.<sup>77</sup>

There are also a number of African regional human rights treaties, such as the ACRWC, which provide for the right to education in addition to other rights of children.<sup>78</sup> Indeed, the ACRWC guarantees the right to education and recognises compulsory and free basic education, which includes primary education.<sup>79</sup> It further sets out the rights of disabled children in article 23. Amongst others, it requires state parties to ensure

73 CRC Committee, General Comment 9 'The rights of children with disabilities' (2006) para 2.

74 Art 23. For further discussion on the CRC, the CRPD and disabled children, see generally B Byrne 'Minding the gap? Children with disabilities and the United Nations Convention on the Rights of Persons with Disabilities' in Freeman M (ed) *Law and childhood studies: Current legal issues* vol 1 (2012) 423.

75 See art 28 (1)(a), which provides that:  
'States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all'.

76 See eg General Comment 9 (n 73 above) paras 62-68.

77 General Comment 9 (n 73 above) paras 65 & 66. For aims of education under the CRC, see art 29 & General Comment 1 'The aims of education' (2001). There is also the Universal Declaration of Human Rights, adopted as a non-binding instrument on 10 December 1948, which recognises the right to education in art 26.

78 See eg the ACRWC, art 11. For further discussion on the ACRWC see generally M Gose *The African Charter on the Rights and Welfare of the Child* (2002); Viljoen (n 9 above) 391-409.

79 See art 11(1) & (3)(a), which provides as follows:  
'1. Every child shall have the right to an education ...  
3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular:  
(a) provide free and compulsory basic education'.

that disabled children have special assistance and effective access to training and preparation for employment.<sup>80</sup>

### 3.1 Convention on the Rights of Persons with Disabilities

The CRPD provides for the (general) rights of disabled children in article 7 and the right to education in article 24.<sup>81</sup> Its preamble also recognises the entitlement of disabled children to enjoy all human rights on an equal basis with other children.<sup>82</sup>

#### 3.1.1 International standards under the CRPD's article 24: Inclusive education

The CRPD expressly guarantees all disabled children the right to compulsory and FPE in article 24.<sup>83</sup> There are at least eight core standards or obligations or elements pertaining to the right under article 24.<sup>84</sup> First, the CRPD under article 24(2)(a) requires states to ensure the non-exclusion of children with disabilities from the general education system and from compulsory and FPE. Secondly, under article 24(2)(b), the CRPD imposes the duty to ensure that disabled persons can access inclusive, quality and FPE on an equal basis with others. Thirdly, the CRPD imposes the obligation to ensure the provision of reasonable accommodation of the individual requirements of the learners under article 24(2)(c).<sup>85</sup> It is

80 Art 13(2). African Youth Charter (AYC), adopted on 2 July 2006 and entered into force on 8 August 2009; African Charter on Human and Peoples' Rights (ACHPR), adopted on 26 June 1981 and entered into force on 21 October 1986; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted on 11 July 2003 and entered into force on 25 November 2005, also contain provisions on education and disability. See ACHPR, arts 17(1) & 18(4); AYC, arts 13 & 24; Women's Protocol, arts 12 & 23. It is not within the scope of this article to give a detailed discussion of these regional treaties.

81 See eg art 7(1), which provides that: 'States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children'.

82 See the CRPD preamble, para (r).

83 See art 24(2)(a), which provides in part that 'States Parties shall ensure that ... children with disabilities are not excluded from free and compulsory primary education ...'.

84 Out of the eight, five key elements are contained in art 24(2), which provides that: 'In realising this right, States Parties shall ensure that:  
(a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;  
(b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;  
(c) Reasonable accommodation of the individual's requirements is provided;  
(d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;  
(e) Effective individualised support measures are provided in environments that maximise academic and social development, consistent with the goal of full inclusion'.

85 See also the CRPD Committee 'Concluding Observations on Spain' (2011) paras 43 & 44(a).

noteworthy that the provision of reasonable accommodation is also a crucial element of the right to equality and non-discrimination under the CRPD. Indeed, the Convention guarantees the right to equality and non-discrimination in article 5 and recognises that disability based discrimination includes the denial of reasonable accommodation.<sup>86</sup> It 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.<sup>87</sup>

It can be observed that reasonable accommodation is individualistic as it aims at accommodating disabled persons according to their individual needs. This explains the basis for the obligation under the CRPD's article 24(2)(c) that expects states to provide reasonable accommodation which takes into account the 'individual requirements' of the learners. Hence, the concept of reasonable accommodation entails the right of individual disabled persons to benefit from adjustments and modifications of any nature which enable the disabled persons to attain education, or other rights, on an equal basis with others. The modifications must not impose an undue burden on the responsible party or the state.

Fourthly, the CRPD requires states to ensure that disabled persons receive the support required to facilitate their effective education within the general education system in article 24(2)(d). In addition, it recognises the duty to ensure the provision of individualised support to learners with disabilities in 'specialised environments' under article 24(2)(e). This provision is complementary to the extent that it seeks to address the responsibility of the state with respect to cases of persons who, due to the extent of impairment, are not able to 'effectively' learn in 'regular settings'.<sup>88</sup> Therefore, article 24(2)(e) provides for education of disabled persons in 'environments that maximise academic and social

86 See CRPD, art 2, which defines disability discrimination 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. It includes all forms of discrimination, including denial of reasonable accommodation'.

Non-discrimination is both a general principle under art 3(b) and a substantive right under art 5. See the CRPD Committee, Communication 3/2011, *HM v Sweden* (2011).

87 Art 2. For further discussion on the concept of reasonable accommodation, see LV Martel 'Reasonable accommodation: The new concept from an inclusive constitutional perspective' (2011) 8 *SUR International Journal on Human Rights* 85. See also UN *From exclusion to equality: Realising the rights of persons with disabilities – Handbook for parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (2007) 60.

88 There is controversy as to whether this provision could give leeway to states parties to retain special schools. See generally Byrne (n 72 above) 239-241. For further discussion on the rationale for this provision, see Schulze (n 58 above) 135.

development'.<sup>89</sup> The provision is supported by article 24(3)(c) which reiterates the duty of the state to enable persons who are deaf, blind, or deaf-blind to learn life and social development skills in environments that maximise their academic and social development.

Furthermore, the CRPD requires that the education of disabled children must be delivered in the most appropriate language, and modes and means of communication, and that the learning of these modes must be facilitated.<sup>90</sup> It further expects the employment of qualified teachers, including teachers with disabilities, who are qualified in sign language and, or Braille.<sup>91</sup> Similarly, it requires training of professionals and staff who work at all levels of education. The training must incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support disabled persons.<sup>92</sup> Lastly, the CRPD obliges states parties to facilitate the learning of sign language; Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring.<sup>93</sup>

Above all, the CRPD under article 24(1) emphasises the obligation to ensure an inclusive education system at all levels and lifelong learning.<sup>94</sup> In view of this, article 24(2), which requires the inclusive schools approach, is regarded as the cornerstone of article 24 since it 'enshrines inclusive education by ensuring that persons with disabilities are not excluded from mainstream education'.<sup>95</sup> Therefore, the CRPD requires

89 It is unlikely that such environments could include special schools since the CRPD expressly recognises the right of disabled children to non-exclusion from the mainstream education system and it does not make reference to special schools or integrated education. Indeed, the Convention requires the education provided in such settings to be consistent with the concept of inclusion. See eg CRPD, art 24(2)(e). It is also noteworthy that the 1993 'Standards Rules', which are non-binding as they are not in treaty form, expect special schools to eventually fall away by being transformed into inclusive schools. See Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, UN General Assembly resolution 48/96 (adopted on 18 December 1992), rule 6, para 8. Accordingly, it can be observed that international legal standards require states to work towards providing the education of all disabled children in inclusive mainstream schools.

90 Art 24(3).

91 Art 24(4).

92 As above.

93 Art 24(3).

94 Art 24(1) provides in part that:  
'States Parties recognise the right of persons with disabilities to education. With a view to realising 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'.

95 Schulze (n 58 above) 135.

the inclusive schools approach in providing primary education to disabled children.<sup>96</sup>

It is noteworthy that there are at least two international conferences that preceded the adoption of the CRPD which could provide further guidelines on the realisation of inclusive education. For example, the Salamanca Conference adopted the Salamanca Statement on SNE, its principle purpose being to advocate for inclusive education, emphasises that disabled persons must be educated within the regular or mainstream school system.<sup>97</sup> Amongst others, the Statement requires states to enact laws or policies that implement inclusive education and to enrol disabled children in regular schools.<sup>98</sup> Therefore, inclusive education that is based on the inclusive schools approach is the prevailing international legal standard for the implementation of the right to primary education of children with disabilities.

### 3.2 Domestic implementation measures

It is noteworthy that SERs are subject to progressive realisation in that the state is not obliged to fulfil them immediately.<sup>99</sup> Since primary education is one of the SERs, it implies that states are not obliged to implement it immediately.<sup>100</sup> However, the CESCR requires states to work out and develop a detailed plan within a period of two years from the time they become state parties that indicates a specific period, which must be within a reasonable number of years, within which they will provide compulsory and FPE.<sup>101</sup> Hence, the obligation to realise compulsory and FPE is accelerated as it requires that immediate action must be taken.<sup>102</sup> On its part, the CRPD impliedly acknowledges that the obligation to provide compulsory and FPE requires immediate action to be taken.<sup>103</sup> The CRPD

96 Art 24(2)(a) & (b); Schulze (n 58 above) 133. See also the CRPD Committee 'Concluding Observations on Tunisia' (2011) paras 30 & 32(b) & (d), where the CRPD Committee emphasises this approach. In addition, the CRPD requires the education of disabled persons to be capable of achieving particular purposes, which include the full development of the disabled persons' human potential and sense of dignity; the development of disabled persons to their fullest potential of their personality, mental and physical abilities; and the enabling of disabled persons to participate effectively in a free society. See art 24(1). The 4As standard of education (discussed in section 1 above) also applies in respect of inclusive education under the CRPD. See eg M Jones 'Inclusion, social inclusion and participation' in Rioux *et al* (n 1 above) 74.

97 See Salamanca Declaration, adopted by acclamation in Salamanca, Spain on 10 June 1994.

98 Art 3. It is not within the scope of this article to provide a detailed discussion of these non-binding instruments.

99 Committee on ESCR, General Comment 3 'Nature of states parties obligations' (1990) para 9.

100 S Kalantry *et al* 'Enhancing enforcement of economic, social, and cultural rights using indicators: A focus on the right to education in the ICESCR' (2010) 32 *Human Rights Quarterly* 253 269. See also General Comment 13 (n 1 above) paras 43-45.

101 Art 14.

102 Beiter (n 2 above) 516; Kalantry *et al* (n 100 above) 270.

103 Art 4(2).

Committee has indicated that in implementing the right to education of disabled children, the obligation 'to provide reasonable accommodation is immediately applicable and not subject to progressive realisation'.<sup>104</sup> In respect of national implementation measures, the applicable treaties such as the CESCR, the CRC, the ACRWC and the CRPD expect states to take legislative, policy and administrative measures, amongst others, to realise the right to education at national level.<sup>105</sup>

## 4 A diagnosis of Malawi's conceptual approach to implementation

### 4.1 Conceptual approach to education of children with disabilities

Malawi commonly uses the concept of SNE as opposed to inclusive education in the provision of education to all persons who face learning challenges and are said to have special educational needs (SEN).<sup>106</sup> Malawi's learners with SEN include disabled children who require access to academic accommodation to ensure their schooling.<sup>107</sup> The responsibility of providing SNE in Malawi has historically been undertaken by church mission schools by following the special schools approach.<sup>108</sup> The state eventually started to participate.<sup>109</sup> The Cheshire and Montfort study found that the provision of SNE in Malawi started with two mission schools for learners with visual impairments in 1950.<sup>110</sup> The Roman Catholic Church also commenced the provision of SNE to learners with hearing impairments at Montfort campus in Chiradzulu in 1968.<sup>111</sup> Malawi's Ministry of Education introduced another SNE programme in 1996.<sup>112</sup>

SNE at primary education level in Malawi is provided through resource rooms, itinerant programmes, and special schools.<sup>113</sup> The special schools are usually residential. On their part, the resource rooms entail

104 See Concluding Observations on Spain (n 85 above) para 44.

105 See generally the CESCR, art 2(1); the CRC, Art 4(1); the ACRWC, art 1(1); the CRPD, art 4(1), paras (a), (b) & (c). See also General Comment 3 (n 99 above); General Comment 13 (n 1 above); CRC Committee, General Comment 5 (n 11 above); General Comment No 9 (n 73 above) paras 17 & 18.

106 See eg Malawi's Special Needs Education Policy (SNE Policy), which uses SNE as opposed to inclusive education in most of its provisions. See 5.3 below for a discussion on the SNE Policy.

107 Itimu & Kopetz (n 48 above) 153.

108 Salmonsson (n 24 above) 10.

109 As above.

110 Chavuta *et al* (n 7 above) 11.

111 As above.

112 As above.

113 Itimu & Kopetz (n 48 above) 156.

special classes within the regular schools.<sup>114</sup> This depicts elements of the integrated schools approach. The itinerant programme further entails SNE teachers travelling to schools within a particular school zone to provide SNE.<sup>115</sup> It sometimes results in one SNE teacher catering for 15 different schools thereby posing a challenge relating to disabled children's access to SNE.<sup>116</sup> Accordingly, it can be observed that Malawi mostly uses the integrated and special schools approaches in conceptualising the education of disabled children since there are few special schools and SNE is mostly provided in integrated schools.<sup>117</sup> The approach does not emphasise inclusive schools. Therefore, the approach that Malawi follows is at variance with the prevailing and internationally accepted conception of inclusive education.

It can be observed that the failure by Malawi to emphasise the inclusive schools approach coupled with the few schools that provide integrated and special education makes the country fall below the 4As international requirement (discussed above).<sup>118</sup> Ultimately, Malawi is not in compliance with the internationally accepted approach and consequently, in contravention of the international standards relating to primary education of children with disabilities.<sup>119</sup>

#### 4.2 Compulsory and free primary education

The 1995 democratic Constitution of Malawi (the Constitution) and the Education Act,<sup>120</sup> amongst others, comprise Malawi's pertinent legal measures for implementing primary education, including compulsory and FPE. The Constitution recognises primary education of at least five years.<sup>121</sup> This is at variance with the international standards set by ISCED. On its part, the Education Act defines primary education as the first eight years of formal education.<sup>122</sup> Hence, there is disharmony between the Constitution and the legislation. Consequently, any school that could provide primary education of five years would not be contravening the law since the Constitution is Malawi's supreme law. Nevertheless, Malawi's public schools follow the prescriptions of the Education Act while private schools often provide primary education of at least six years. Hence, the discrepancy does not have negative implications in practice. Nonetheless,

114 Itimu & Kopetz (n 48 above) 157.

115 As above.

116 Salmonsson (n 24 above) 9.

117 See, the findings in Salmonsson (n 24 above) 18-19. See also Chavuta *et al* (n 7 above) 12; EM Chilemba 'A critical appraisal of the right to primary education of children with disabilities in Malawi' unpublished LLM thesis, University of Pretoria, 2011 42 & 43.

118 See 1 above for the discussion on the 4As standard.

119 See 3.1 above for a discussion on the international legal standards.

120 Chapter 30:01 of the Laws of Malawi. The other applicable laws such as the Disability Act are discussed in 5(2) below

121 See sec 25(2).

122 Sec 2.

the Constitution being the supreme law is expected to prescribe primary education that complies with the international standard of six years.

In terms of the implementation of compulsory and FPE in Malawi, the Constitution and applicable statutes such as the Education Act again come into the picture. The Constitution contains Principles of National Policy that include education related principles in section 13. The principles on education expect the state to 'devise programmes in order to make primary education compulsory and free'.<sup>123</sup> However, the principles are directory but not justiciable.<sup>124</sup> Furthermore, the provision on education in the justiciable Bill of Rights does not make any reference to the concept of compulsory and FPE.<sup>125</sup> Similarly, the Education Act and other applicable laws do not recognise compulsory and FPE.<sup>126</sup> Nevertheless, the Education Act is in the process of being amended following a review by the Law Commission of Malawi, which has proposed to introduce compulsory and FPE in state schools for all children under the age of 18 years.<sup>127</sup> Ironically, learners in state primary schools have not been paying fees since 1994 as a matter of practice and the general governmental position or policy approach. Accordingly, Malawi's Constitution and applicable legislation do not recognise compulsory and FPE as a (justiciable) human right contrary to international standards.

## **5 A diagnosis of Malawi's legal and policy implementation framework**

The Constitution of Malawi, applicable laws such as the Disability Act and the Education Act, and applicable policies, which include the SNE Policy, make up Malawi's legal and policy implementation framework relating to the right to primary education of children with disabilities. It is relevant to evaluate the implementation framework for its compliance with the standards, established above, in order to determine the measures that Malawi must take to realise the right to primary education of disabled children.

<sup>123</sup> Sec 13(f).

<sup>124</sup> Sec 14. The Principles of National Policy are contained in Chapter 4 of the Constitution.

<sup>125</sup> Sec 25 which provides for education. The Bill of Rights is contained in Chapter 4 of the Constitution and is justiciable. See sec 15.

<sup>126</sup> See sec 64(1), which provides for the payment of fees.

<sup>127</sup> See Malawi Law Commission 'Report on the review of the Education Act' (2009) 22. See also Education Bill, sec 9. The Commission has also proposed that primary education should consist of at least seven years.

## 5.1 Constitutional framework

The Constitution provides for equality and non-discrimination as justiciable rights and recognises disability as a prohibited ground of discrimination.<sup>128</sup> Moreover, it provides for the justiciable right to education.<sup>129</sup> Hence, disabled children are entitled to enjoy the right to education. The Constitution also contains disability related principles in section 13 which are in the form of state directives but are not justiciable.<sup>130</sup> Although the provisions expect the government to support disabled persons by ensuring their fullest possible participation in all spheres of society, amongst others, they do not expressly recognise the obligation to equalise the opportunities of disabled persons in education.<sup>131</sup> In view of the foregoing observations, Malawi should consider revising the constitutional provisions on education to recognise the right to compulsory and FPE which should consist of at least six years. In addition, the provisions on persons with disabilities should be further revised to extend the need to ensure the equalisation of opportunities for disabled persons to education.

## 5.2 Legislative framework

### 5.2.1 *The Disability Act*

The Disability Act is Malawi's new disability legislation that was passed in 2012 to replace the 1971 Handicapped Persons Act. The Disability Act is based on the social model of disability as evidenced by the definition of disability, amongst others, which is contained in section 2 and is consistent with the social model and the CRPD.<sup>132</sup> The Act recognises the right to education under section 10 in three separate paragraphs. Amongst others, it provides for the right to education on the basis of equal opportunity; the obligation to ensure an inclusive education system and lifelong learning;

128 Sec 20(1).

129 Sec 25, which does not recognise compulsory and FPE as discussed in 4.2 above.

130 See sec 13(g), which expects the state to support disabled persons to have greater access to public places; fair opportunities in employment; and the fullest possible participation in all spheres of society.

131 The constitutional provisions on disability are in the process of being amended – mainly to refer to the disabled as 'persons with disabilities' without necessarily changing the substance. See Constitution (Amendment) Bill 13 of 2009.

132 See E Chilemba 'Promoting disability rights in Malawi' 23 July 2012: [www.osisa.org/law/blog/promoting-disability-rights-malawi](http://www.osisa.org/law/blog/promoting-disability-rights-malawi) (accessed 29 May 2013). Sec 2 of the Disability Act defines disability as:

'[A] long-term physical, mental, intellectual or sensory impairment, which, in interaction with various barriers, may hinder the full and effective participation in society of a person on equal basis with other persons'.

The definition attributes the disability 'problem' to the environment and not to the disabled persons' impairments and it is also the same as the 'definition' or understanding of disabled persons under CRPD's art 1.

and the obligation to ensure access to quality primary education.<sup>133</sup> The section further emphasises the inclusive schools approach as it guarantees the right not to be excluded from the general education system.<sup>134</sup> This is consistent with the CRPD's article 24(2).<sup>135</sup> However, the provision does not provide for non-exclusion of disabled children from compulsory and FPE thereby contradicting the Convention. In fact, the Act does not make reference to compulsory and FPE at all with the effect that it does not provide any indications regarding whether in implementing the right to inclusive education, the obligation to ensure the speedy realisation of compulsory and FPE for disabled children will be respected. In addition, the Act does not mention how or whether the other seven elements or standards that are contained in article 24 should be achieved.<sup>136</sup>

Nevertheless, section 10(b) of the Disability Act requires the Government to take 'into consideration the special requirements of persons with disabilities in the formulation of educational policies and programmes, including the provision of assistive devices, teaching aids and learning support assistants'. This could entail the obligation to ensure provision of individualised support to disabled children as required by the CRPD. However, the list of the support to be provided as contained in the Act could be restrictive and exhaustive; and hence, the Act might not capture or reflect the essence of the CRPD's provision. Consequently, the substantive provision on education in the Act leaves out the majority of the core state obligations for the realisation of the right.

Furthermore, section 11 of the Act prohibits discrimination against disabled persons in education.<sup>137</sup> However, the two sections on education do not mention the concept of reasonable accommodation. In fact, despite defining reasonable accommodation in section 2, the Act does not require the government to ensure the provision of reasonable accommodation in the enjoyment of any rights of disabled persons, including education and

<sup>133</sup> See sec 10.

<sup>134</sup> See sec 10(a), which provides that:

'The Government shall recognise the rights of persons with disabilities to education on the basis of equal opportunity, and ensure an inclusive education system and lifelong learning by:

(a) ensuring that persons with disabilities are not excluded from the general education system at all levels and have access to quality primary education'.

Sec 2 also defines inclusive education as:

'a process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities and reducing exclusion from and within education'.

<sup>135</sup> The text of the legislative provision (sec 10(a)) is also similar to the CRPD's provision.

<sup>136</sup> See 3.1 above for a discussion on the eight core standards prescribed by the CRPD's art 24.

<sup>137</sup> Sec 11(1) provides as follows:

'(1) No education or training institution shall –

(a) deny any person admission into or expel the person from the institution;

(b) discipline, segregate or deny the person participation in any event or activity; or

(c) deny any benefits or services to the person, on the basis of disability.'

non-discrimination.<sup>138</sup> It is surprising that the Act merely defines reasonable accommodation without the concept having any implication on the rights of disabled persons. Consequently, there is no legal basis to claim entitlement to the provision of reasonable accommodation as an element of the right to inclusive education or the right to disability non-discrimination under the Act. This is inconsistent with the CRPD which requires the provision of reasonable accommodation in education, especially in ensuring FPE.<sup>139</sup> Therefore, although the Disability Act could go a long way in meeting the international standards to a certain extent by recognising inclusive education, it falls a bit short.

In view of this, it would be crucial for Malawi to review the Disability Act to expressly recognise that the failure to provide reasonable accommodation constitutes discrimination. In addition, the sections on education should be amended to expressly require or recognise the provision of reasonable accommodation in education. The education provisions should be further revised to include the seven core obligations for implementing the right to education of CWDs that are contained in CRPD's article 24.<sup>140</sup> Currently, the Act only recognises the duty to ensure the non-exclusion of disabled children from the general education system as a means of implementing inclusive education.

### **5.2.2 The Child Care, Protection and Justice Act**

The Child Care, Protection and Justice Act (the CCPJA), which is Malawi's child specific legislation, 'domesticates' the CRC and the ACRWC.<sup>141</sup> This is commendable as it entails that it is possible to invoke the rights of disabled children contained in these treaties before the courts of Malawi. The Act does not have provisions on education and it contains only two provisions relating to disabled children that expect local government authorities to register all disabled children and provide them with assistance to enable them to grow with dignity, on the one hand; and requires the proceedings in a child justice court to ensure that disabled children 'are accorded assistance to meet their special needs where necessary' on the other hand.<sup>142</sup> Therefore, it cannot act as enabling legislation in implementing the right to education apart from facilitating judicial enforcement of the right by virtue of the CRC and ACRWC

138 Indeed, the Disability Act's definition of discrimination does not include the denial of reasonable accommodation unlike the CRPD's definition. See sec 2 of the Act, which defines discrimination as:

'a distinction, exclusion or restriction on the basis of disability, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, of any human rights or fundamental freedoms, in the political, economic, social, cultural, civil or other field'.

139 See eg art 24(2)(c); Concluding Observations on Spain (n 85 above) para 44(c).

140 See 3.1 above for the discussion on the obligations.

141 Act 22 of 2010, sec 4(c) of the Third Schedule.

142 Secs 72 & 145(d).

domestication. Nevertheless, since the Constitution recognises education as a justiciable right and Malawi has an education specific law, any drawbacks in the CCPJA might not have negative implications on the right to education of children with disabilities.

### **5.2.3 The Education Act**

Malawi's Education Act does not make any reference to education of disabled children or inclusive education and it does not recognise compulsory and FPE (as discussed above). This is at variance with the applicable international standards. Nevertheless, the proposed Education Bill that seeks to enact new education legislation recognises the concept of compulsory and FPE.<sup>143</sup> However, the new Bill has not made proposals in respect of the education of disabled persons or inclusive education apart from containing a non-discrimination clause that recognises disability as a protected ground.<sup>144</sup> Moreover, the non-discrimination provision in the Bill, and the Bill in its entirety, does not make reference to reasonable accommodation. However, the omission to make provision for inclusive education under the Education Act or the new Bill could be regarded as having been 'cured' by the Disability Act which guarantees the right to education of disabled children, including inclusive education. Hence, the omission to recognise the concept of reasonable accommodation is the one that is regrettable. Nonetheless, since the Education Act is the principal education legislation, it should have made provision for inclusive education. Accordingly, in the light of its shortcomings, the Education Bill would still require further revision aimed at making provision for inclusive education at all levels, including primary education, and recognising the concept of reasonable accommodation.

## **5.3 Policy framework**

Malawi's National Policy on the Equalisation of Opportunities for Persons with Disabilities (Disability or EOPD Policy) notes that 98 per cent of disabled children in Malawi do not receive formal education.<sup>145</sup> Hence, it has a number of policy statements that seek, amongst others, to promote easy access to schools' physical environments; to provide information and education materials in accessible formats to disabled persons; and to establish a national sign language.<sup>146</sup> Above all, the policy statement on education aims to promote equal access and inclusion of disabled persons in education by, amongst others, designing and developing appropriate technologies, assistive devices and learning materials; providing free appropriate resources to assist disabled persons with their learning needs;

143 Education Bill, sec 13.

144 See sec 4(1)(a).

145 The EOPD policy (n 8 above).

146 The EOPD policy (n 8 above) 12 & 14.

reviewing and reforming the delivery of the national curriculum to cater for disabled children; adapting and adopting communication systems appropriate for learners with SEN; training specialist educators; incorporating SNE in the teacher-training curriculum; and supporting and encouraging inclusive education.<sup>147</sup> However, although the Disability Policy recognises inclusive education, it does not, expressly, prioritise the inclusive schools approach. Instead, it requires the provision of SNE while putting emphasis on special and integrated schools contrary to the international standards.

In addition, there are at least three relevant education policies. First, the National Education Sector Plan (the NESP) sets out the government's goals and objectives of the general education sector to be realised over the 2008-2017 period.<sup>148</sup> The NESP intends to strengthen primary education through three sets of strategies and priorities.<sup>149</sup> Amongst others, the strategies that relate to disabled children aim at moving towards the 'recommended' ratio of 1 teacher to 10 pupils in special schools and 1 teacher to 5 pupils in resource centres by the end of 2017; fostering the development of tools for special needs such as sign language and Braille; and mobilising community participation in 'whole-school development' and management for 'ordinary' learners and learners with SEN.<sup>150</sup> The NESP further intends to introduce additional programmes in teacher training institutions to increase capacity in SNE and to expand the intake in teacher training colleges for mainstream education and SNE.<sup>151</sup> Secondly, there is also the 2009 Education Sector Implementation Plan which serves as a guide for the articulation of the broad development objectives of the NESP.

Thirdly, the Special Needs Education Policy (the SNE Policy) identifies eight major components of SNE that include early identification assessment and intervention; advocacy; care and support; management, planning, and financing; access; quality; equity; and relevance.<sup>152</sup> For example, the policy area relating to access is informed by the understanding that 'the education system should encourage all individuals who have special needs to enrol in school and to facilitate the effective participation in all learning activities'.<sup>153</sup> Amongst others, it expects the government to develop and utilise national sign language; to provide enough and well qualified specialist teachers; to build more resource

147 The EOPD policy (n 8 above) 14 & 15.

148 The National Education Sector Plan 2008-2017, A statement, Ministry of Education, Science and Technology, Malawi (June 2008) (the NESP) v.

149 The NESP (n 148 above) 11. The priorities relate to education quality and relevance; access and equity; and governance and management.

150 As above.

151 The NESP (n 148 above) 19.

152 Malawi Government, National Policy on Special Needs Education (Revised) (2007) (the SNE Policy) 9.

153 The SNE Policy (n 152 above) 21.

centres and special schools; and to establish a bursary scheme for learners with SEN.<sup>154</sup>

The SNE policy further aims at overcoming SNE implementation challenges that include financial constraints, physical environmental considerations, attitudinal barriers, and limited capacity in training specialist personnel.<sup>155</sup> Its objectives include: providing education and training to learners with SEN; ensuring equitable access for all learners with SEN; providing educational facilities with needed supportive provisions; ensuring accommodating learning environments for all learners with SEN; and increasing SNE services provisions.<sup>156</sup> The Policy also contains relevant concepts and definitions.<sup>157</sup> However, it does not mainly use the concept of inclusive education despite the fact that the Policy was adopted in 2007 after the CRPD was already in force although Malawi had not ratified it.<sup>158</sup>

It can be observed that although the applicable policies have a number of positive aspects such as recognising the concept of inclusive education and the need to increase the capacity and provision of SNE, they put emphasis on integrated and special education as opposed to the inclusive schools approach. For example, although the Disability Policy indicates that it will encourage inclusive education, it does not mention the need to ensure that disabled children learn in mainstream schools. Instead, it seeks to establish 'accessible specialist education resource centres throughout the country', which embodies the integrated schools approach.<sup>159</sup> Similarly, the education policies put their emphasis on special schools and integrated education that relies on resource centres.<sup>160</sup> In addition, they do not make reference to the concept of reasonable accommodation. Consequently, they ultimately and generally do not comply with the international standards. Accordingly, it is recommended that the Disability Policy, the NESP, the ESIP and the SNE Policy should be revised to expressly provide that the provision of education to disabled children shall be based on the inclusive schools approach. Hence, they should make it a clear government policy approach to provide primary education of disabled children in inclusive mainstream schools. They should further recognise the obligation to provide reasonable accommodation in ensuring non-discrimination and in implementing inclusive education. Above all, the policies should use the concept of inclusive education as opposed to SNE when referring to education of persons with disabilities.

154 The SNE Policy (n 152 above) 21-22.

155 The SNE Policy (n 152 above) 11 & 12; 14-15.

156 The SNE Policy (n 152 above) 18.

157 The relevant definitions include inclusive education, special school and learners with SEN. See the SNE Policy (n 152 above) 6-7.

158 For further discussion on the SNE policy, see Itimu & Kopetz (n 48 above) 153.

159 The EOPD policy (n 8 above) 15.

160 See eg the NESP (n 148 above) 11.

## 6 Conclusion

The article has observed that international standards and conceptual approaches relating to primary education of children with disabilities require the education to be conceptualised in terms of inclusive education that is based on the inclusive schools approach. Hence, disabled children must learn in regular or mainstream schools together with other children. The article has further observed that Malawi is facing challenges in implementing the right with the effect that most disabled children do not attain primary education. In terms of the article's findings, at least two conclusions can be drawn from Malawi's conceptualisation and implementation of the right to primary education of disabled children which account for the challenges that the country faces in its quest to realise the right. First, Malawi follows the integrated and special schools approaches as opposed to the inclusive schools approach or inclusive education in conceptualising the education of children with disabilities. As a result, the regular education system does not accommodate the learning of most disabled children. Moreover, there are few schools that provide integrated and special education. Consequently, most disabled children are excluded from primary education. Secondly, with the exception of the Disability Act, which emphasises inclusive education, Malawi's constitutional, legislative and policy framework for the implementation of the right does not prioritise inclusive education, especially the inclusive schools approach; and does not recognise the concept of compulsory and FPE that is backed by law. Moreover, the provisions relating to education in the Disability Act do not capture most of the standards that CRPD prescribes in article 24. Therefore, the implementation of primary education of disabled children in Malawi does not comply with both the international legal standards and the prevailing approaches to the education of disabled children.

Nevertheless, it is noteworthy that although most disabled children in Malawi do not enjoy their right to primary education, the government has taken the bold step to ratify a number of human rights treaties that guarantee the right and prescribe its international standards. Accordingly, there is tangible hope that disabled children in Malawi could begin to enjoy the right to primary education if the government takes the further and crucial steps to first modify the implementation framework and align it with the international standards; and second to take a pragmatic shift from conceptualising primary education and the education of children with disabilities in general in terms of integrated and special education to that of inclusive education that is based on the inclusive schools approach.