

THE PROTECTION OF DISABLED CHILD VICTIMS WITHIN THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM: SHINING A LIGHT ON THE INVISIBLE AND FORGOTTEN VICTIMS OF CRIME

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Summary

It is estimated that one billion people or 15 per cent of the world's population experience some form of disability. While the estimates of children with disabilities vary substantially depending on the definition and measure of disability, it is estimated that 150 to 200 million children under the age of 18 experience some form of disability. Research has, moreover, revealed that persons with disabilities fall in the group with the highest risk of experiencing abuse and violence. Globally, children with disabilities are three to four times more likely to experience violence compared to children without disabilities. This is also true for South African disabled children. In South Africa, socio-economic circumstances such as poverty and a lack of institutional facilities for physically abused children contribute to the vulnerability and victimisation of disabled children. Coupled with this is the difficulty in identifying abuse among disabled children. When crimes committed against disabled children are reported, prosecution and conviction rates are low. Reasons for the unsuccessful adjudication of such crimes include the difficulty in investigating cases, the isolation and communication difficulties of some victims, and the negative stereotypes and prejudices that contribute to discrimination against these vulnerable victims. On top of that, the police and judiciary tend to treat disabled children as unreliable or incompetent witnesses. These children are often further victimised by the very system put in place to protect them. In many ways, disabled children are often the forgotten or invisible victims of crime. In light of this precarious situation, this contribution explores whether the South African legislative framework provides sufficient protection for disabled child victims within the criminal justice system. The international documents affording disabled child

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victims protection are evaluated first; thereafter, the South African legislative framework is assessed to determine its compliance with international and regional standards. Recommendations for improvements are made.

1 Introduction

It is estimated that one billion people or 15 per cent of the world's population experience some form of disability. While the estimates of children with disabilities vary substantially depending on the definition and measure of disability, it is estimated that 150 to 200 million children under the age of 18 experience some form of disability. Of these children, 93 million aged between 0 and 14 experience moderate or severe disability, while 13 million of them experience severe difficulties.¹ Research has, moreover, revealed that persons with disabilities fall in the group with the highest risk of experiencing abuse and violence, with the likelihood of disabled persons suffering from crime being much higher than that of the general population.² This is also true for disabled children that face a wholly different environment than the one non-disabled children live in.³ Globally, children with disabilities are three to four times more likely to experience violence compared to children without disabilities.⁴ While violence against disabled children is endemic in both the developed and developing world, the WHO estimates that 80 per cent of children with disabilities reside in developing countries and come from low-or middle-income households.⁵

No official statistics about the nature and extent of violence against disabled children in South Africa currently exist because the South African Police do not disaggregate their statistics according to disability. Nonetheless, a recent South African study estimates that South African children with disabilities are 1.5 to 2.1 times more at risk of sexual abuse than their non-disabled peers.⁶ A growing body of international and national literature suggests that South African disabled children

1 WHO *Disability and Health* (WHO 2020) <https://www.who.int/news-room/fact-sheets/detail/disability-and-health> (accessed 4 September 2021).

2 K Hughes et al 'Prevalence and risk of violence against adults with disabilities: A systematic review and meta-analysis of observational studies' (2012) 379 *The Lancet* P1621 [https://doi.org/10.1016/S0140-6736\(11\)61851-5](https://doi.org/10.1016/S0140-6736(11)61851-5) (accessed 12 January 2021).

3 L Jones et al 'Prevalence and risk of violence against children with disabilities: A systematic review and meta-analysis of observational studies' (2012) 380 *The Lancet* P899 [https://doi.org/10.1016/S0140-6736\(12\)60692-8](https://doi.org/10.1016/S0140-6736(12)60692-8) (accessed 12 January 2021).

4 WHO *WHO global disability action plan 2014-2021: Better health for all people with disabilities* (2015).

5 WHO (n 1).

6 L Artz et al *Optimus Study South Africa: Technical report sexual victimisation of children in South Africa* (2015); MN Christoffersen 'Violent crime against children with disabilities: A nationwide prospective birth cohort-study' (2019) 98 *Child Abuse and Neglect* 1 at 2; Centre for Child Law, University of Pretoria 'Advocacy brief: Advancing the rights of children with disabilities' (2017) 5-6 <https://centreforchildlaw.co.za/wp-content/uploads/2019/03/3Final-CCL-Advocacy-Brief-Rights-of-Children-with-Disabilities.pdf> (accessed 5 September 2021).

experience violence at similar or higher rates than the general population and, consequently, find themselves in an unenviable position.

A great deal of the violence and abuse directed against disabled children stems from factors that are more prevalent in the lives of non-disabled children. Paramount among these factors is long-term institutionalisation, which exposes many disabled children to physical neglect, physical violence, sexual violence and abuse amongst others.⁷ Social, cultural, economic, physical and psychological factors also contribute to a climate in which disabled children become victims of crime.⁸ Many of them fall victim to physical, mental and sexual abuse at home and at school as well as in private and public institutions. This may stem from the fact that abusers perceive disabled children as easy targets. Their limited mobility, inability to escape violence, and/or communicate their experiences make them easy targets. For disabled girls the picture is even bleaker. Research indicates that disabled girls are at a greater risk of violence, injury, abuse, neglect, maltreatment and exploitation than disabled boys.⁹

In South Africa, socio-economic circumstances such as poverty and very limited support in the care and protection system for physically abused children contribute to the vulnerability and victimisation of disabled children.¹⁰ Coupled with this is the difficulty in identifying abuse among disabled children. If disabled children are accommodated in a care and protection institution such as a residential institution, they find themselves exposed to potential harsh physical restrictions and violence. Several studies indicate that up to 85 per cent of criminal abuse in residential institutions is never reported.¹¹ When crimes committed against disabled children are reported, prosecution and conviction rates are low. Reasons for the unsuccessful adjudication of such crimes include the difficulty in investigating cases, a lack of special skills and training required for investigating these cases, the isolation and communication difficulties of some victims, and the negative stereotypes and prejudices that contribute to discrimination against these vulnerable victims.¹² On top of that, the police and judiciary tend to treat disabled children as unreliable

7 I Bantekas et al (ed) *The UN Convention on the Rights of Persons with Disabilities: A commentary* (2018) 1 at 199.

8 AE Heslink-Louw, K Booysen & A Neethling 'Disabled children as invisible and forgotten victims of crime' (2003) 16 *Acta Criminologica* 165 at 169.

9 M Sabatello 'Children with disabilities: A critical appraisal' in M Freeman (eds) *The future of children's rights* (2014) 327-330; Child Welfare Information Gateway 'The risk and prevention of maltreatment of children with disabilities' (2012) <https://www.childwelfare.gov/pubPDFs/focus.pdf> (accessed 12 Jan 2020).

10 Centre for Child law (n 6) 5-6.

11 Heslink-Louw, Booysen & Neethling (n 8) 175.

12 Heslink-Louw, Booysen & Neethling (n 8) 175-176.

or incompetent witnesses. Within the sphere of disability,¹³ children with communication disabilities are perceived as even more so because of their inability to verbalise victimisation.¹⁴ These children are often further victimised by the very system put in place to protect them. In many ways, disabled children are often the forgotten or invisible victims of crime.

In light of this precarious situation, this contribution sets out to explore whether the South African legislative framework provides sufficient protection for disabled child victims within the criminal justice system. The international documents affording disabled child victims protection will be evaluated first; thereafter, the South African legislative framework will be assessed to determine its compliance with international and regional standards.

2 International instruments

2.1 The United Nations Convention on the Rights of the Child

The 1989 United Nations Convention on the Rights of the Child (CRC) is regarded a landmark instrument in the advancement of children's rights because it outlines the basic human rights of children. Recognising the vulnerability of children and the absence of provisions for and protection of children's rights, the CRC acknowledges children as not only human rights bearers but also human beings who need special protection.¹⁵ The CRC endorses their right to life, survival and development (article 6), and upholds their right to protection from all forms of physical or mental violence, abuse, neglect, maltreatment or exploitation (article 19). South Africa ratified the CRC on 16 June 1995.¹⁶

The CRC was also the first human rights treaty to focus on the rights of disabled children by prohibiting discrimination against children on the basis of their disability.¹⁷ In this regard, article 2 of the CRC imposes an obligation on state parties to respect and ensure the rights afforded to *each*

13 Committee on the Rights of the Child, General Comment 9 (2006): The rights of children with disabilities (2007) UN Doc CRC/C/GC/9, dated 27 February 2007 at para 7, defines persons with disabilities as: 'persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

14 Heslink-Louw, Booysen & Neethling (n 8) 175-176; RM White et al 'Transformative equality: Court accommodations for South African citizens with severe communication disabilities' (2020) 9 *African Journal of Disability* 651 at 652.

15 BD Mezmur *The United Nations Convention on the Rights of the Child* in T Boezaart (ed) *Child law in South Africa* (2017) 403.

16 UN Commission on Human Rights, Convention on the Rights of the Child, 7 March 1990, UN Doc E/CN.4/RES/1990/74 (1990) https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV11&chapter=4&clang=_en (accessed 10 January 2021).

17 CRC Committee (n 13) para 2.

child without discrimination of any kind, including discrimination on the basis of disability.¹⁸ As the CRC applies to all children without exception, disabled children have the same fundamental rights as all other children.¹⁹ It explicitly recognises the additional support that disabled children need to realise their rights by dedicating an entire article to disabled children. Article 23 of the CRC calls upon state parties to recognise that a 'mentally or physically disabled child should enjoy a full and decent life, in conditions which ensured dignity, promote self-reliance and facilitate the child's active participation in the community'.²⁰ It also requires state parties to recognise the right of the child with a disability to have effective access to special care and assistance, emphasising education, training, healthcare services, rehabilitation services, preparation for employment, and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development. These must be provided free of charge.²¹ Article 23(4) deals with international cooperation with the aim of improving state parties' capabilities and skills and widening their experience. Particular account must be taken of the needs of developing countries.²²

While, on the face of it, article 23 provides enhanced protection for disabled children, it has been the object of much criticism.²³ The criticism stems from the fact that article 23 does not afford children with disabilities an absolute right to assistance and care. Their right is subject to conditions such as the availability of resources, the eligibility of the child, and whether the child has applied for such care and assistance. Some commentators are hence of the opinion that the other provisions of the CRC provide more assurance for the vindication of the rights of disabled children than article 23.²⁴ It has even been argued that the CRC fails to improve the rights of children with disabilities.²⁵ Freeman points out that the rights of disabled children are continuously violated even more than before. According to Freeman, the only difference is that, since the CRC's adoption, the violations receive public attention.²⁶ Sabatello suggests that, as the focus

18 My emphasis.

19 T Boezaart 'The Children's Act: A valuable tool in realizing the rights of children with disabilities' (2011) 74 *Journal of Contemporary Roman Dutch Law* 264 at 265; Sabatello (n 9) 328.; S Mephram 'Disabled children: The right to feel safe' (2010) 16 *Child Care Practice* 19 at 20.

20 Art 23(1) of the CRC.

21 See art 23(2) & (3) of the CRC.

22 See art 23(4) of the CRC.

23 Boezaart (n 19 above) 266; Sabatello (n 9) 331; U Kilkelly 'Disability and children: The Convention on the Rights of the Child' in G Quin & T Degener (eds) *The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 192-193.

24 Kilkelly (n 23) 193; H Combrink '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) 300 at 307.

25 Bantekas (n 7) 201; Sabatello (n 9) 331-333.

26 As above.

of article 23 is on welfare rights, it may have given the wrong impression that a needs-based approach to the care of disabled children is the aspect that has to be addressed. This may also explain why the shift to the recognition of children as active bearers of rights since the adoption of the CRC, has seemingly failed disabled children.²⁷

State parties to the CRC are required to submit an initial report followed by periodic reports to the United Nations Committee on the Rights of the Child (the Committee), indicating the measures taken to give effect to the rights embodied in the CRC.²⁸ Already in 1997 the Committee expressed concern about state parties' disregard for article 23. The Committee reported being perturbed at the widespread discriminatory attitudes towards disabled children as well as the negative effects of budgetary reductions on the availability of services for these children.²⁹

In an effort to assist state parties to fulfil their obligations with regard to disabled children, the Committee issued General Comment 9 in 2006 on the rights of children with disabilities. The Committee reiterated that state parties needed to do more to meet the needs of children with disabilities.³⁰ It noted that significant obstacles still prevented children with disabilities to fully enjoy their rights as enshrined in the CRC, and emphasised that these barriers were not because of children's disabilities but rather because of a combination of social, cultural, attitudinal and physical obstacles they encounter in their daily lives.³¹

South Africa submitted its first country report within two years of ratification of the CRC. In January 2000 the Committee issued its concluding observations and comments on South Africa's first report.³² The Committee welcomed the then new Constitution of the Republic of South Africa, 1996 and in particular section 28 that guarantees children a number of specific rights and freedoms also provided for under the CRC.³³ The Committee further observed that the principle of non-discrimination was strongly reflected in the South African Constitution and national legislation.³⁴ However, the Committee expressed concern that insufficient measures had been adopted to ensure that all children are guaranteed access to services. Of particular concern were certain vulnerable groups of

27 As above.

28 Art 44 of the CRC.

29 R Hodgkin & P Novell *Implementation handbook of the Convention on the Rights of the Child* (UNICEF) (2007) 322.

30 CRC Committee (n 13) para 1.

31 CRC Committee (n 13) para 5.

32 UN Committee on the Rights of the Child (CRC), Concluding Observations: South Africa (22 February 2000) UN Doc CRC/C/15/Add.122 (2000) <https://www.refworld.org/docid/3ae6afc8c.html> (accessed 27 January 2021).

33 CRC Committee (n 32) para 3.

34 As above.

children, including children with disabilities and especially those with learning disabilities.³⁵ The Committee accordingly recommended that South Africa increased its efforts to ensure full compliance with article 2 of the Convention.³⁶ The Committee also expressed concern about the high level of violence against and abuse of children. It recommended that actions of violence and abuse be properly investigated according to a child-friendly judicial procedure, that sanctions be applied to perpetrators, and that support services be rendered to children in legal proceedings.³⁷

The Committee considered the second periodic report of South Africa at its meeting held in September 2016 and issued its concluding observations and comments on the report. These included comments on the progress made by South Africa in terms of the CRC as well as on that of the United Nations Convention on the Rights of Persons with Disabilities.³⁸

The Committee welcomed the progress achieved by South Africa since its last review. It commended the adoption of legislation and institutional and policy measures related to children's rights, including the Children's Act³⁹ and the Child Justice Act,⁴⁰ which conform, to a large extent, to the principles of the Convention.⁴¹ As in its first report, the Committee reiterated its concern with the extremely high prevalence of violence against children⁴² and urged South Africa to develop, adopt and implement a comprehensive national strategy to prevent and address all forms of violence against children. When children have been the victims of violence, the necessary support should be offered.⁴³ With regard to the Convention on the Rights of Persons with Disabilities, the Committee indicated that, while it welcomed South Africa's ratification of the Convention on the Rights of Persons with Disabilities, the 'multiple layers of discrimination and exclusion faced by the majority of [South African] children with disabilities' were cause for concern. This included a lack of data on child disabilities; comprehensive laws and policies to realise the rights of children with disabilities; effective multi-sectoral coordination; as well as the provision of reasonable accommodation.⁴⁴

Although the CRC has been criticised for not improving the rights of disabled children as indicated above, as the first human rights instrument

35 As above.

36 As above.

37 CRC Committee (n 32) para 27.

38 Committee on the Rights of the Child (CRC), Concluding Observations on the second periodic report of South Africa (27 October 2016) UN Doc CRC/C/ZAF/CO/2 (2016) <https://www.refworld.org/docid/587ce86b4.html> (accessed 27 January 2021).

39 Children's Act 38 of 2005.

40 Child Justice Act 75 of 2008.

41 CRC Committee (n 38) para 3-5.

42 CRC Committee (n 38) para 33.

43 CRC Committee (n 38) para 34.

44 CRC Committee (n 38) para 43.

to explicitly reference children with disabilities, it set the tone for subsequent international documents on the rights of children with disabilities and, as such, is of significant value.

2.2 The Convention on the Rights of Persons with Disabilities

On 13 December 2006 the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities (CRPD) which came into force on 3 May 2008.⁴⁵ The CRPD was ratified by South Africa on 30 November 2007.⁴⁶ The CRPD is the first international instrument that deals specifically with the rights of persons with disabilities and represents a response to the international community's long history of discrimination, exclusion and dehumanisation of persons with disabilities.⁴⁷ The concept of inclusion is central to the Convention.⁴⁸ The CRPD does not create new rights for persons with disabilities, but rather clarifies the obligations and legal duties of member states to ensure the equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, including the promotion of their intrinsic dignity.⁴⁹ The CRPD complements existing international treaties and, as far as children with disabilities are concerned, elaborates on the provisions of article 23 of the CRC.⁵⁰ The CRPD also reaffirms the CRC's principles of non-discrimination, the best interests of the child as a primary consideration, and the child's right to express his or her views.⁵¹ Although the Convention applies to all persons with disabilities, the rights and needs of children with disabilities occupy an important place throughout the CRPD.⁵² The Preamble, for example, recognises that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children while article 3(h) incorporates a substantive principle: respect for the evolving capacities of children with disabilities. Article 7 of the CRPD focuses solely on disabled children and states as follows:

45 UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, (24 January 2007) UN Doc A/RES/61/106 (2007) <https://www.refworld.org/docid/45f973632.html> (accessed 12 January 2021).

46 As above.

47 Foreword to the 'UN Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol' (2007) <https://www.un.org/disabilities/documents/toolaction/ipuhb.pdf> (accessed 20 January 2020).

48 Sabatello (n 9) 333.

49 See para (a) of the Preamble & art 1 of the CRPD.

50 Boezaart (n 19) 268.

51 See arts 3, 12 & 5 of the CRS; art 7 of CRPD; see also W Vandenhoe, GE Türkelli & S Lembrechts *Children's rights: A commentary on the Convention of the Rights of the Child and Protocols* (2019) 248.

52 See, for example, art 1 and 7 of the CRPD; see also F Bhabha 'Disability rights in South Africa: Concepts, interpretation and the transformation imperative' (2009) 25 *South African Journal of Human Rights* 218.

- (1) 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.
- (2) In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
- (3) States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

Article 7 of the CRPD builds on article 23 of the CRC in the sense that resource constraints and progressive realisation are absent from article 7. States must commit 'all necessary resources' in order to realise the rights in article 7. This addresses some of the criticism directed against article 23.⁵³ Bantekas et al highlight that article 7 sets out a new paradigm for the realisation of child disability rights. This is significant given that poverty is one of the causes of the violation of disabled children's rights.⁵⁴

The CRPD, like the CRC, recognises that in all matters relating to children with disabilities, the best interests of the child shall be a primary consideration.⁵⁵ The best-interests principle in paragraph 2 of article 7 is broader than its counterpart in article 23 of the CRC. Article 23 relates to family relationships and legal capacity, whereas article 7 refers to 'all actions concerning children'. In this regard, the best interests of the disabled child must necessarily encompass *all policies and actions* adopted at state and sub-state level and not just court judgments in the narrow family-law sense.⁵⁶

Paragraph 3 of article 7 of the CRPD emphasises that children have the right to express their views and that such views shall be taken into consideration in accordance with the age and maturity of the disabled child. This wording is in contrast to that of article 12(1) of the CRC, according to which only children that are 'capable of forming [their] views' have a right to express these freely subject to their age and maturity. Article 3 has thus removed one of the limitations concerning disabled children. In effect, paragraph 3 affirms that all disabled children are capable of forming some type or degree of view on matters that affect them, whether directly or through supported decision-making. Such views are to be considered by judicial and administrative authorities. In contrast to the CRC, the CRPD obliges states to, *at all times*, allow the disabled child to be heard.⁵⁷ This is

53 See para 2.1 above.

54 Bantekas (n 7) 206.

55 B Byrne 'Minding the gap? Children with disabilities and the UN Convention on the Rights of Persons with Disabilities' in M Freeman (ed) *Law and childhood studies: Current legal issues* (2012) 428.

56 Bantekas (n 7) 221 (my emphasis).

57 Bantekas (n 7) 225 (my emphasis).

of great significance to disabled child witnesses who are often regarded as incapable of expressing their views.

Of further importance is the fact that the CRPD requires states to provide not only age-appropriate support to disabled children, but also disability support to ensure that the right of disabled children to have their views heard and respected, is realised.⁵⁸ While non-disabled children simply require age-appropriate assistance to have their views heard, disabled children may also require disability-appropriate assistance. Disability-appropriate assistance is crucial for children with cognitive and intellectual impairments. Because they are unable to express their views vocally, they can easily be ignored in the process affecting them. An effective policy should, therefore, ensure that intellectually impaired children are provided with the means, technological or otherwise to have their views heard by the court or decision-makers. This is critical for the child witness. Bantekas et al point out that though this will require additional resources, this right is not resource constrained but obligatory.⁵⁹

Alarmed by the incidents of violence against children with disabilities, the CRPD furthermore requires that states adopt the appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both in and outside the home, from all forms of exploitation, violence and abuse. Child-focused legislation and policies must further be implemented to ensure appropriate legal redress of instances of exploitation, violence, and abuse against persons with disabilities.⁶⁰

In terms of the Convention, state parties are required to submit an initial report followed by periodic reports to the United Nation's Committee on the Rights of Persons with Disabilities (the Committee on the CRPD) including measures that were taken to implement the provisions of the CRPD.⁶¹ South Africa submitted its first report to the Committee on the CRPD which was considered at its meeting held on 28 and 29 August 2018.⁶² The Committee on the CRPD made concluding observations and recommendations on South Africa's first report on 7 September 2018.⁶³ The Committee on the CRPD recognised the efforts made by the South African government, particularly the adoption of a comprehensive White Paper on the rights of persons with disabilities. However, the Committee on the CRPD expressed concern about the fact that it had remained a White Paper and had not resulted in specialised

58 Sabatello (n 9) 335; Byrne (n 55) 430.

59 Bantekas (n 7) 227.

60 See art 16 of the CRPD.

61 See art 35 of the CRPD.

62 South Africa's Initial Country Report on the Rights of Persons with Disabilities <https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx> (accessed on 15 January 2021).

63 As above.

legislation that would enable persons with disabilities to seek legal redress.⁶⁴ With regard to children, the Committee on the CRPD expressed deep concern about children with disabilities' right to education. Of particular concern was the violence against and abuse and bullying of children with disabilities in school hostels.⁶⁵ In addition, concern was expressed about the situation of girls, particularly black girls, who suffer intersectional discrimination on the basis of disability, gender and race, and faced violence on a regular basis.⁶⁶ The Committee on the CRPD hence called for, inter alia, the development, adoption and implementation of legislation and concrete measures to ensure that children with disabilities are protected from violence and that perpetrators are sanctioned.⁶⁷

The CRPD has been hailed as impressive and ground breaking with regard to the rights of persons with disabilities, including that of disabled children.⁶⁸ As for African countries, Van Reenen and Combrinck point out that though disability rights in Africa have developed at a much slower pace than in other jurisdictions, the ratification of the CRPD offers new opportunities for African states to reconsider their national law relating to disability.⁶⁹ However, commentators warn that the CRPD's value lies in its implementation, which will likely be neither easy nor fast. Sabatello warns that it requires significant political will on both national and international level.⁷⁰ The relatively speedy negotiations resulting in the rapid signature and ratification of the CRPD by member states signify wide political support of the treaty. This is certainly cause for optimism. State parties are, nonetheless, urged to learn from their CRC mistakes when they implement or amend existing legislative and other measures. Otherwise, instead of raising awareness of the rights of children with disabilities and preventing their violation, they will, once again, only lend greater visibility to the abusers of these rights.⁷¹

3 Regional instruments

From a rights-of-children-with-disabilities perspective, the African human rights framework consists of the African Charter on the Rights and the Welfare of the Child (ACRWC) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa.

64 South Africa's Initial Country Report (n 62) para 3.

65 As above.

66 South Africa's Initial Country Report (n 62) para 8.

67 As above.

68 Sabatello (n 9) 340 & 343.

69 R Van Reenen & H Combrinck 'The UN Convention on the Rights of Persons in Africa: Progress after 5 years' (2011) 14 *SUR International Journal of Human Rights* 133.

70 Sabatello (n 9) 347.

71 Sabatello (n 9) 347; see also para 2.1 above.

3.1 The African Charter on the Rights and Welfare of the Child

South Africa, as a member state of the African Union, is also a part to the ACRWC adopted in 1990.⁷² The Charter came into force only on 29 November 1999.⁷³ Boezaart rightly regrets the fact that this valuable document, which enhances the rights of children on the continent, has taken so long to gain the recognition of African countries it deserves.⁷⁴ South Africa ratified the ACRWC on 7 January 2000.

Article 3 of the ACRWC sets out the principles of non-discrimination and is the counterpart of article 2 of the CRC. Unlike the CRC, the ACRWC unfortunately does not list disability as a prohibited ground for discrimination and thus misses the opportunity to reaffirm the rights of children with disabilities.⁷⁵ However, with reference to Gose, Combrinck maintains that, because the first part of the article refers to ‘every child’, it is doubtful that this omission implies that discrimination against children with disabilities is allowed.⁷⁶ Article 4(1) explains the best-interest-of-the-child principle in strong terms as ‘the’ primary consideration as opposed to ‘a’ primary consideration in the CRC. Sloth-Nielsen points out that the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) stated that the provision could not be interpreted to mean that any other concern or consideration was inevitably trumped. The scope of the application of the best interests principle is thus similar to the scope of the application of the CRC.⁷⁷

Article 7 affords the child the right to express his or her views in all matters and to disseminate his or her opinions, subject to such restrictions as prescribed by law. Article 4(2) provides for child participation in all judicial or administrative proceedings affecting the child. Numerous initiatives have been undertaken to further the participation of African children. But a recent study of initiatives in Ethiopia, Kenya, Rwanda, Sudan, South Sudan, Somalia, Tanzania and Uganda concluded that despite policies and laws that guarantee child participation as well as important initiatives in this regard, giving effect to this right is still a novel and uncoordinated reality.⁷⁸ Sloth-Nielsen argues that translating the concept into practice remains a key challenge.⁷⁹

72 Organisation of African Unity, African Charter on the Rights and Welfare of the Child (11 July 1990) OAU Doc.CAB/LEG/24.9/49 (1990).

73 J Sloth-Nielsen ‘The African Charter on the Rights and Welfare of the Child’ in Boezaart (ed) *Child law in South Africa* (2017) 426.

74 Boezaart (n 19) 270.

75 Combrinck (n 24) 310.

76 As above.

77 Sloth-Nielsen (n 73 above) 432.

78 African Child Policy Forum *A study on child participation in Eastern Africa* (2015) iii.

79 Sloth-Nielsen (n 73) 433.

Article 13 confers rights on children with disabilities.⁸⁰ In this regard, article 13 largely resembles article 23 of the CRC, although in less detail.⁸¹ Both instruments subject the rights of children with disabilities to the availability of resources. The criticism levelled against the CRC that it does not afford disabled children an absolute right to assistance and care⁸² also applies under the ACRWC. Unlike assistance in article 23(2) of the CRC, assistance under the ACRWC is not subject to the circumstances of the parent or caregiver of the child. Commentators postulate that this may translate into a higher level of protection for the child as only the circumstances of the child, and not that of the child and the parents, need to be taken into account for assistance to be rendered.⁸³ Article 13 contains an additional provision not found in article 23 of the CRC, namely to bolster the mobility of children with disabilities and their access to public institutions and facilities. This paragraph is particularly noteworthy with respect to public prosecutions and disabled children's right to participation in the process as victims and witnesses as well as to their accessibility to court buildings.⁸⁴

A range of other obligations are imposed on state parties in respect of the protection of children with disabilities such as the right to be protected against child abuse and torture;⁸⁵ harmful social and cultural practices,⁸⁶ and sexual exploitation.⁸⁷ These rights are of particular importance for child victims.

As a regional document, the ACRWC contributes to the evolving body of international human rights principles on the rights of children with disabilities and may be used by African courts as an interpretive aid.⁸⁸ Regrettably, the direct operation of the ACRWC has been weakened by well-known shortcomings in its implementation mechanisms.⁸⁹

80 Note that the article refers to 'handicapped' children in its heading.

81 Combrinck (n 24) 311.

82 See para 2.1 above.

83 Combrinck (n 24) 311.

84 As above.

85 Art 16 of the ACRWC.

86 Art 21 of the ACRWC.

87 Art 27 of the ACRWC.

88 DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 157; T Davel 'The African Children's Charter on the Rights and Welfare of the Child, family law and children's rights' (2002) *De Jure* 281. See, for example, the case of *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) when the court referred to art 21(1)(b) in the context of discrimination on the basis of sex and the case of *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) when the court cited the ACRWC with regard to the best-interests-of-the-child principle.

89 Combrinck (n 24) 312.

3.2 The Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa

In January 2018 the African Commission on Human and Peoples' Rights adopted the Protocol on the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (Disability Protocol). At the time of writing this contribution, only nine out of 55 African countries have ratified the Protocol. South Africa ratified it on 29 April 2019.⁹⁰

The Disability Protocol addresses the rights of child victims with disabilities in a number of ways. It acknowledges the harmful practices that persons with disabilities (including children) often face as well as the multiple forms of discrimination, high levels of poverty and the great risk of violence, exploitation, neglect, and abuse that women and girls with disabilities face.⁹¹ It also requires state parties to take all appropriate steps to ensure, respect and promote, and protect and fulfil the rights and dignity of persons with disabilities.⁹² In addition, it prohibits discrimination, including disability-related discrimination,⁹³ as well as any disability-related harmful practices.⁹⁴ It also sets out the right to equality, equal recognition before the law, and access to justice.⁹⁵ In this regard, children with disabilities are also entitled to procedural, age- and gender-appropriate accommodations to ensure their effective participation in court proceedings.⁹⁶

Article 28 addresses the rights of children with disabilities. Like the CRC and the CRPD, it recognises that children with disabilities should have full enjoyment of all human rights on an equal basis with other children. It reaffirms the principle of the best interests of the child as the primary consideration (in the same terms as the ACRWC) as well as the child's right to participation and to be heard. It also enjoins state parties to ensure that children with disabilities are provided with age- and gender-

90 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa> (accessed 15 January 2021). For a discussion on the debate as to whether a regional Protocol is necessary and how it will complement the CRPD, refer to SAD Kamga 'A call for a Protocol to the African Charter on Human and People's Rights on the rights of persons with disabilities in Africa' (2013) 21 *African Journal of International and Comparative Law* 219.

91 Preamble to the AU, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2018) (Disability Protocol).

92 See art 4 of the Disability Protocol.

93 See art 5 of the Disability Protocol.

94 See art 11 of the Disability Protocol.

95 See arts 6, 7 & 13 of the Disability Protocol.

96 See art 13(1) of the Disability Protocol.

appropriate assistance to realise their rights and are protected from exploitation, violence and abuse both within and outside the home.⁹⁷

Like the ACRWC, the Disability Protocol may contribute to the evolving body of international human rights principles on the rights of children with disabilities. The theme of inclusion contained in the CRPD⁹⁸ is strongly carried forward in the two African regional instruments. The concept of protection against violence is prominent in them too. Both contain articles dedicated to the rights of disabled children with reference to non-discrimination and violence. It also guarantees children with disabilities who have been the victims of violence the right of access to justice and particular assistance in realising their rights if so required. As with the ACRWC, concerns have been raised about the effectiveness of an African Protocol on Disability given the weak enforcement mechanisms of the African Charter on Human and Peoples' Rights.⁹⁹ If the current number of signatories to the Protocol is an indication of its success, these concerns may be justifiable.

Although South Africa ratified the CRPD, it has not yet adopted legislation to enact provisions of this document.¹⁰⁰ It also has not adopted legislation that applies to children with disabilities (including child victims with disabilities). Admittedly, some laws do provide for the protection of child victims with disabilities such as the Constitution, the Children's Act 38 of 2005 and the Criminal Procedure Act 51 of 1977. In the following section, the focus is on the South African legislative framework. Its compliance with international and regional standards relating to the protection of child victims with disabilities will be evaluated.

4 South African legislative framework

4.1 The Constitution of the Republic of South Africa

The Constitution contains an extensive Bill of Rights that guarantees everyone, and thus also children,¹⁰¹ the right to equality (including prohibition of unfair discrimination based on a number of grounds such as age, gender and disability),¹⁰² to dignity,¹⁰³ as well as the right to be free

97 See art 28 of the Disability Protocol.

98 See para 2.2 above.

99 Kamba (n 90).

100 Note that the South African Law Reform Commission has begun the process of investigating the domestication of the CRPD *Issue paper 39: Project 148 – Domestication of the United Nations Convention on the Rights of Persons With Disabilities* (2020) <https://www.justice.gov.za/salrc/ipapers/ip39-prj148-UNCRPD.pdf> (accessed 4 September 2021).

101 Except for those rights that are expressly restricted to adults such as the right to vote and to seek public office. See sec 19(3)(a) and (b) of the Constitution.

102 Sec 9 of the Constitution.

103 Sec 10 of the Constitution.

from any form of violence from either public or private sources.¹⁰⁴ It also guarantees everyone, inter alia, the right to freedom of expression.¹⁰⁵

Section 28 or the child clause in the Bill of Rights affords specific protection to children. It grants children the right to a name and a nationality from birth;¹⁰⁶ to family care or parental care or to appropriate alternative care when removed from the family environment;¹⁰⁷ to be protected from maltreatment, neglect, abuse or degradation;¹⁰⁸ as well as the right to the fact that a child's best interests are of paramount importance in every matter concerning the child.¹⁰⁹ In other words, the Constitution recognises that children are particularly vulnerable to violation of their rights and, therefore, are in need of unique and distinct protection. Section 28 gives effect to the recognition of this vulnerability and embodies a dedicated commitment to the realisation of children's rights.¹¹⁰

Perusal of section 28 reveals that it does not favour the child victim with a specific right to protection as a victim. Nor does it provide for the rights of children with disabilities. Nevertheless, the right not to be subjected to neglect, abuse, or degradation, as set out in section 28(1)(d), as well as the right that a child's best interests should be of paramount importance in every matter concerning the child is of particular importance to the disabled child victim.

In section 7(2) of the Constitution, the state is required to respect, protect, promote and fulfil the rights contained in the Bill of Rights. Furthermore, the Constitution states in section 39(1) that courts, when interpreting a right in the Bill of Rights, must consider international law. This includes international treaties such as the CRC, ACRWC and the CRPD.

These provisions and especially the constitutional guarantee to dignity and freedom from all forms of violence, coupled with the child's-best-interests principle, have led to the development of a progressive body of South African case law dealing with the protection of child victims.¹¹¹ For example, in the case of *DPP v Minister of Justice and Constitutional*

104 Sec 12 of the Constitution.

105 Sec 16 of the Constitution.

106 Sec 28(1)(a) of the Constitution.

107 Sec 28(1)(b) of the Constitution.

108 Sec 28(1)(d) of the Constitution.

109 Sec 28(2) of the Constitution.

110 A Skelton 'Constitutional protection of children's rights' in Boezaart (ed) *Child law in South Africa* (2017) 327.

111 See, for example, *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC); *Director of Public Prosecutions v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) (*DPP v Minister of Justice and Constitutional Development*); *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC); *Centre for Child Law v Media 24* 2020 (1) SACR 469 (CC).

Development, the Constitutional Court remarked as follows with regard to the protection of child victims:

Each child must be treated as a unique and valuable human being with his or her individual needs, wishes and feelings respected. Children must be treated with dignity and compassion. In my view these considerations should also inform the principle that the best interests of the child are of paramount importance in all matters concerning the child as envisaged in s 28(2) of the Constitution.

The Constitution thus lays a strong foundation for disabled child victims to be viewed as unique and valuable human beings who deserve to be treated with respect and compassion in a court of law and that in all matters their best interests should be of paramount importance.¹¹²

This stance has been confirmed in the Promotion of Equality and Prevention of Unfair Discrimination Act,¹¹³ which provides that no one should be discriminated against on the grounds of disability and that 'failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons' amounts to unfair discrimination.¹¹⁴ It thus confirms that a child victim with disabilities may not be discriminated against in a court of law because of the child's inability to, for example, communicate. Courts should provide such a child with accommodations to communicate and testify in court.¹¹⁵

Apart from the Constitution, South Africa has also passed legislation that accommodates child victims with disabilities who have to testify in criminal proceedings about atrocities committed against them, thus allowing them equal participation in legal proceedings. This legislation includes the Criminal Procedure Act,¹¹⁶ the Children's Act,¹¹⁷ and the Criminal Law (Sexual Offences and Related Matters) Amendment Act.¹¹⁸

4.2 The Criminal Procedure Act

The Criminal Procedure Act (CPA) contains a number of provisions which are of particular relevance to disabled child victims. These include sections 161(2), 164 and 170A of the CPA.

112 See M Bekink 'The constitutional protection afforded to child victims and child witnesses while testifying in criminal proceedings in South Africa' (2019) for a detailed discussion on the constitutional protection afforded to child victims and child witnesses within the South African criminal justice system <https://dx.doi.org/10.17159/1727-3781/2019/v22i0a5774> at 1-50 (accessed 4 September 2021)

113 Act 4 of 2000.

114 Sec 9 of Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

115 White (n 14) 653.

116 Act 51 of 1977.

117 Act 38 of 2005.

118 Act 32 of 2007.

Section 161 of the CPA provides that witnesses in criminal proceedings must give evidence *viva voce* (orally). The CPA has made some allowances in section 161(2) for witnesses who are unable to communicate in the normal way.¹¹⁹ A witness who is unable to speak such as a deaf-and-dumb witness, may communicate by sign language, through an interpreter, or may write down his or her answers, which are then read out.¹²⁰ The law thus does not necessarily require a witness to speak, but requires a witness to communicate with the court. In the case of a child witness, section 161(2) states that evidence shall be deemed to include 'demonstrations, gestures or any other form of non-verbal expression'.¹²¹ The rationale for the qualification of section 161(1) by section 161(2) is to make provision for the fact that children often nod or shake their heads or make gestures when answering questions. Allowance is thus made for children who have an insufficient vocabulary to describe certain acts or who are too embarrassed to use words of a sexual nature. Although not specifically stated in the Act, the wording of section 161(2) is wide enough to permit children to point to certain parts of their bodies, imitate actions, and use anatomically correct dolls for purposes of demonstration.¹²² Hence, the witness must be allowed to give evidence in their *own words, in their own way and at their own speed*.¹²³ This is of particular importance when the witness is less knowledgeable or sophisticated¹²⁴ or may be a disabled child.¹²⁵

In the case of *S v Roux*,¹²⁶ the court held that it was not the intention of the legislature to set out a *numerus clausus* in section 161(2) of what would constitute *viva voce* evidence, but that the courts have, over the years, adopted a wide interpretation of said concept. It was further held that criminal courts should not create obstacles to evidence by witnesses who

119 Subsec 2 was substituted by sec 1 of Act 135 of 1991 and came into force on 30 July 1993.

120 WA Joubert et al *The Law of South Africa: Vol 9 – Evidence* (2005) para 774.

121 Sec 161(2) of the CPA. Note that the Criminal and Related Matters Amendment Bill (B17-2020) <https://www.parliament.gov.za/bill/2292541> (accessed 5 September 2021) in clause 7 thereof proposes to broaden the scope even further by making allowance through a proposed amendment of sec 161 of the Act for 'a witness under the age of eighteen years or a witness who suffers from a physical, psychological, mental or emotional condition which inhibits the ability of that of a witness to give his or her evidence *viva voce*, be deemed to include demonstrations, gestures or any other form of non-verbal expression'. A disabled child will accordingly qualify under both provisions. Clause 7 further substitutes the description of a 'deaf and dumb' witness for the description of a witness 'lacking the sense of hearing or ability to speak'.

122 R Songca 'The reliability of anatomically correct dolls in child abuse cases' (1993) *South African Journal of Criminal Justice* 83. See also para 3.7 and 4.7 of the Department of Justice and Constitutional Development *Report on the Re-Establishment of Sexual Offences Courts* (2013) for a discussion on the use of anatomically correct dolls and the proposed standards for their usage.

123 My emphasis.

124 *S v Hendriks* 1974 (2) PH H91 (C).

125 Ministry of Justice, Welsh Assembly Government 'Achieving best evidence in criminal proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures' (August 2013) <http://www.justice.gov.uk/downloads/victims-and-witnesses/vulnerable-witnesses/achieving-best-evidence-criminal-proceedings.pdf> (accessed 11 January 2021).

126 *S v Roux* 2007 (1) SACR 379 (C).

could not give their evidence in the usual manner by narrowly interpreting legislation or legal principles. The purpose of the section is to prevent the exclusion of evidence simply because it is not understandable to the court if an alternative method exists to render it comprehensible. In the *Roux* case, the complainant in an indecent-assault case was a ten-year-old boy with Down's syndrome. Although he was able to speak, his sentences and words were incomprehensible to the court. Because a speech therapist was able to interpret his communication, the court subsequently held that there was no reason why the complainant could not testify with the assistance of the speech therapist.¹²⁷ White, Bornman and Johnson suggest that communication may be even further improved by developing and making a Disability Resource Toolkit¹²⁸ available in court when child victims with disabilities, including little or no functional speech, testify.¹²⁹ They point out that this toolkit has been successfully used in Israel during testimony in court.¹³⁰

As a general rule, all witnesses are required to give evidence under oath.¹³¹ However, section 164 of the CPA provides that if the presiding officer is of the opinion that the child does not have a sufficient understanding of the nature and import of an oath, the child may be allowed to give evidence without taking the oath, provided that the child is admonished by the presiding officer to speak the truth. Section 164 thus determines that in order to find application, a finding that the witness does not understand the nature or import of the oath has to be made. The presiding officer then has to determine whether the child is competent to give unsworn testimony in terms of section 164 of the CPA, namely whether the child can distinguish between truths and lies. In terms of section 164, a child may be a competent witness even if he or she does not understand the nature of the oath, provided that the child has been admonished by the court to speak the truth.¹³²

This test has been the subject of much criticism. Schwikkard¹³³ argues that the above-mentioned competency test amounts to a presumption of incompetence as the evidence of children is only permissible once children have been found to be competent witnesses. She correctly contends that no such presumption applies to convicted perjurers or other persons convicted of crimes involving elements of dishonesty. She affirms that this may lead

127 *Roux* (n 126) 383 *fj*.

128 These toolkits include approximately 1 000 picture symbols, different kinds of letter cards, a user manual, and a portable computer with alternative and augmentative communication software.

129 R White, J Bornman & E Johnson 'From silence to justice: Implications for persons with little or no functional speech accessing the criminal justice system' (2018) 31 *Acta Criminologica: Southern African Journal of Criminology* 19 at 29.

130 As above.

131 Sec 162 of the CPA.

132 *S v BM* 2012 (2) SACR 507 (FB).

133 PJ Schwikkard 'The abused child: a few rules of evidence considered' (1996) *Acta Juridica* 148 at 149.

to reliable testimony being excluded and that it may inhibit effective prosecution. While the evidence of adults falling into the aforementioned categories would be admissible even if it is fraught with lies, inaccuracies and improbabilities, children's evidence would not be admissible. If adults' evidence is found to be unreliable, it would be rejected.¹³⁴ White and Msipa point out, and correctly so, that this amounts to differential treatment of witnesses who are admonished or warned by the court.¹³⁵ Combrinck argues that this may, in practice, constitute a disproportionate barrier to the introduction of the evidence of witnesses with intellectual disabilities, which is in opposition to the provisions of article 12 of the CRPD.¹³⁶

I support Erasmus's¹³⁷ suggestion that this presumption of incompetence may, despite research findings to the contrary, be attributed to the perception that young children are, as a rule, untruthful. Yet there is no evidence that children are more prone to lies than adults.¹³⁸ Ovens et al point out, with reference to Quinn,¹³⁹ that 'children do lie, just as adults do lie' but that 'often children make statements that are not factually accurate, but they are not "lies" because the child lacks the intention to wilfully mislead or deceive'.¹⁴⁰

Schwikkard, furthermore, calls attention to the fact that truth and the duty to tell the truth are abstract notions that young children may not understand or be able to explain, but that this does not mean that children cannot give a reliable account of the events in question. She advocates that children should be allowed to testify and stresses that in assessing credibility, the court will give little weight to the fact that a witness took the oath or was admonished to tell the truth. It will rather consider factors such as coherence under cross-examination, evidence of surrounding circumstances, and demeanour.¹⁴¹ Such an approach is supported as it will not only comply with article 12 of the CRPD but also accommodate disabled children's special needs and contribute to their successful participation in the process.

134 As above.

135 R White & D Msipa 'Implementing article 13 of the Convention on the Rights of Persons with Disabilities in South Africa: Reasonable accommodations for persons with communication disabilities' (2018) 6 *African Disability Rights Yearbook* 101.

136 H Combrinck 'Promise of protection? Article 16 of the Convention on the Rights of Persons with Disabilities and gender-based violence in South Africa' (2017) 53 *International Journal of Law and Psychiatry* 59 at 64.

137 D Erasmus "'The truth, the whole truth or nothing...'" Is the competency inquiry applicable to child witnesses an evidentiary barrier to truth finding?' 2010 *Speculum Juris* 103 at 109.

138 As above.

139 MK Quinn 'The credibility of children's allegations of sexual abuse' (1988) 6 *Behavioral Science and the Law* 181 at 185.

140 M Ovens, D Lamprechts & J Prinsloo 'Child witnesses in the criminal justice system' (2001) 14 *Acta Criminologica* 25 at 29.

141 Schwikkard (n 133) 149.

Section 170A of the CPA allows for the appointment of an intermediary if the witness is under the biological or mental age of 18 years and if the court believes that the witness will be exposed to undue mental stress or suffering if he or she testifies in an open court in criminal proceedings.¹⁴² Once an intermediary has been appointed, no examination, cross-examination, or re-examination of the child, except by the court, may take place other than through the intermediary.¹⁴³

The criteria for the appointment of an intermediary, namely if the court believes that the witness will be exposed to 'undue mental stress or suffering' if he or she testifies in an open court, has been the subject of much criticism.¹⁴⁴ The aforementioned phrase is not defined in the Act nor have any guidelines been laid down by the legislature. In earlier research it has been highlighted that the concepts included in the phrase, such as undue mental stress and suffering are by their very nature extremely vague and complex to give content to.¹⁴⁵ Uncertainty also exists as to how acute the mental stress or suffering must be to qualify as undue. In this research it is pointed out that the absence of a clear definition is problematic as it may lead to inconsistent application and consequential injustices.¹⁴⁶ It is precisely for this reason that various commentators have advocated for legislative change that caters for the appointment of an intermediary without the need to show 'undue mental stress or suffering', save where cogent reasons not to appoint an intermediary exists.¹⁴⁷

In this regard cognisance should be taken of the proposed changes to section 170A(1) as set out in clause 8 of the Criminal and Related Matters Amendment Bill.¹⁴⁸ Clause 8 extends the intermediary service to witnesses who suffers from a physical, psychological, mental or emotional conditions and to older persons as defined in the Older Persons Act 13 of 2006. The amendment further provides that the court may order the use of an intermediary, if it appears to the court that the proceedings would expose the witness to *undue psychological or emotional stress, trauma or suffering* if he or she testifies at such proceedings.¹⁴⁹ Though the proposed

142 The intermediary services are currently only available to a child victim and child witness in criminal proceedings. Clause 1 and 18 of the Criminal and Related Matters Amendment Bill (B17-2020) <https://www.parliament.gov.za/bill/2292541> (accessed 5 September 2021) aims to extend the intermediary services to proceedings other than criminal proceedings through the insertion of new sections namely, sections 51A, 51B and 51C in the Magistrates' Courts Act 32 of 1944 and sections 37A, 37B in the Superior Courts Act 10 of 2013.

143 Sec 170 (2)(a) of the CPA.

144 M Bekink 'Defining the phrase "undue mental stress and suffering" in terms of section 170A of the Criminal Procedure Act 51 of 1977' (2014) *Child Abuse Research: A South African Journal* 39 at 40.

145 As above.

146 As above.

147 Bekink (n 144) 40; Schwikkard (n 133) 159; K Müller and M Tait 'Little witnesses: A suggestion for improving the lot of children in court' (1999) 62 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 241 at 256.

148 The Criminal and Related Matters Amendment Bill.

149 Own emphasis.

legislative changes regrettably do not make allowance for an unconditional application of the use of an intermediary the pre-requisition for its application namely undue psychological or emotional stress, trauma or suffering may prove to be less vague and complex than the current requirements.

An intermediary is a person qualified to facilitate communication between the court and a child in a manner that is not only age-appropriate but also understandable to a child. The intermediary takes the child's cognitive and developmental abilities into account when conveying the meaning and contents of the court's questions to the child and acts as a 'barrier or shield' between the formal justice system and the child.¹⁵⁰ An intermediary is allowed to convey questions in terms that are more accessible to child witnesses and thus also to child witnesses with disabilities, provided that the general purport of the questions is maintained.¹⁵¹

If an intermediary is appointed, the court will usually allow for the witness to testify from a separate room that is informally arranged to set the child at ease.¹⁵² The court and the parties must, however, be able to see and hear the child witness and the intermediary. This is usually done through a closed-circuit television system (CCTV). If a CCTV is used, a video camera is mounted on a wall of the room and videotapes both the child witness and the intermediary while the child gives testimony. The intermediary is provided with earphones which enable him or her to follow the proceedings in the courtroom and relay the questions to the child. The child witness's answers are captured on the live video link and relayed to the courtroom. The courtroom is equipped with a television monitor on which the parties to the proceedings and members of the court are able to view the child and the intermediary and hear them speak.¹⁵³

The intermediary system thus has the advantage of being more child-friendly and the child witness does not run the risk of coming face to face with the alleged perpetrator. In addition, the child witness is exposed to neither the complicated language often used during cross-examination nor the hostile or intimidating style of cross-examination. This system is of particular value to not only the normal child victim but also the child victim who has a communication and/or intellectual disability.¹⁵⁴

In terms of section 170A of the CPA, the appointment of an intermediary is subject to the discretion of the trial court (the judicial presiding officer). The judicial presiding officer has to determine whether

150 *DPP* (n 111) para 96.

151 Sec 170(2)(b) of the CPA.

152 *DPP* (n 111) para 97.

153 Müller & Tait (n 147) 243.

154 Combrinck (n 136) 64.

the services of an intermediary are required based on the possibility of undue mental stress or suffering if a child testifies during the proceedings. This test or threshold for eligibility has been criticised for being too vague, too stringent and for excluding many who might benefit from it, such as a victim with little stress but serious communication difficulties.¹⁵⁵

According to Schwikkard, the result of this discretion is that children testifying through intermediaries are viewed as the exception rather than the norm.¹⁵⁶ Some commentators are rightly of the opinion that section 170A would be more effective if subsection (1) were amended to require a court to use an intermediary in all cases when a child is required to testify. The court should be excused from doing so only when it is clear that the child would not be traumatised or when it is impossible to do so.¹⁵⁷

Research has indicated both nationally and internationally that the use of an intermediary is regarded as a best practice for children with communication disabilities. In addition, it has reduced the trauma experienced by children with communication disabilities.¹⁵⁸ The appointment of an intermediary as a standard practice not only for children in general, but also for disabled children in particular, is advocated.

Concern about the availability of intermediaries has been expressed.¹⁵⁹ The relevant role players within the criminal justice system are hence urged to continue to realise and prioritise the importance of the role of intermediaries and to put in place measures to address the unavailability of intermediaries.

4.3 The Children's Act 38 of 2005

The Children's Act, which applies to all children including disabled child victims, also contains appropriate measures to accommodate disabled children through the care and protection system. As it stands the provisions of the Children's Act do not apply to criminal courts and may therefore unfortunately not be of assistance to child witnesses who have to testify in criminal proceedings. It is, however, interesting to note that in the case of *S v Ndwandwe*,¹⁶⁰ the High Court applied section 63 of the Child

155 See *S v Mokoena* 2008 (2) SACR 216 (T) para 79: Müller & Tait (n 147) 247-248.

156 Schwikkard (n 133) 148 & 159;

157 CR Matthias & FN Zaal 'Intermediaries for child witnesses: Old problems, new solutions and judicial differences in South Africa' (2011) 19 *International Journal of Children's Rights* 251 at 257; Bekink (n 112).

158 White, Bornman & Johnson (n 129) 21-22. Note, however, that the authors contend that intermediaries may require additional training to communicate with victims with little or no functional speech.

159 A van der Merwe 'Children as victims and witnesses' in Boezaart (ed) *Child law in South Africa* (2017) 653 at 667-668. Bekink (n 112) 288; Centre for Child Law, University of Pretoria 'Making room: Facilitating the testimony of child witnesses and victims' (2015) 8-10.

Justice Act¹⁶¹ that applies to child accused to child witnesses. The court was of the view that although the section caters for child accused and not for child witnesses, there is no reason why child witnesses should not be afforded the protection of section 63 of the Child Justice Act. It is, therefore, submitted that the criminal courts may afford disabled child victims the protection afforded to them in terms of the Children's Act.

In this regard, section 42(8)(d) of the Children's Act requires that proceedings involving children be held in an informal atmosphere appropriate to the nature of the proceedings and in a room that is 'accessible to disabled persons and persons with special needs'. This provision may thus benefit children with disabilities who need to be accommodated. However, White and Msipa point out that since this provision refers to accessibility, it may be more beneficial to children with physical disabilities than to those with intellectual disabilities.¹⁶²

In addition, the Children's Act makes certain communication accommodations in section 52 thereof. The Act permits necessary changes to the court rules required by the context. These rules must be designed to avoid the adversarial procedures and include rules concerning appropriate questioning techniques for children with intellectual or psychiatric difficulties or with hearing or other physical disabilities that impede communication.¹⁶³

These provisions are welcomed since they provide a legal framework for the obligatory drafting of rules of court to protect children from the traumatising procedures normally associated with courts of law. It also takes account of children's individual capacities, difficulties and disabilities.¹⁶⁴ Sections 42 and 52, furthermore, support article 13 of the CRPD by requiring some form of age-appropriate and procedural accommodation for children with disabilities that have to appear in court.

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

The Criminal Law (Sexual Offences and Related Matters) Amendment Act (SOA) identifies special crimes against children and persons with mental disabilities including sexual exploitation,¹⁶⁵ sexual grooming¹⁶⁶ and the exposure to or display of pornography;¹⁶⁷ thus giving recognition

160 *S v Ndwandwe* (AR99/12) [2012] ZAKZPHC 47 (6 August 2012) para 15.

161 Child Justice Act 75 of 2008.

162 White and Msipa (n 135) 106.

163 Sec 52(2) of the Children's Act.

164 J Gallinetti 'The children's court' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (2007) 4-9.

165 Sec 17 and 23 of the SOA.

166 Sec 18 and 24 of the SOA.

167 Sec 19 & 25 of the SOA.

to their vulnerability and particular need for protection. Children with disabilities are protected in terms of the SOA according to their status as both 'children' and 'persons with mental disabilities'.¹⁶⁸ In the latter case, this will depend on whether the child has a mental disability.

To determine mental disability, the SOA also provides a definition of the concept of a person with mental disability, namely 'a person affected by any mental disability, including any disorder or disability of the mind' to the extent that such a person, at the time of the alleged commission of the offence in question, was:¹⁶⁹

- (a) Unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act.

It should be noted that the SOA refers to mental disability only. This may be attributed to the principle of consent relating to sexual conduct.¹⁷⁰ A person with a physical disability is still able to consent and to understand the consequence of the consent. The National Director of Public Prosecutions has issued a set of directives to prosecutors in terms of section 66 of the SOA to assist them in their onus of proof that a complainant is mentally disabled and unable to consent to a sexual act.¹⁷¹ In this regard, expert evidence has to be lead. An expert-opinion report by either a social worker, psychologist or a psychiatrist is generally obtained.¹⁷² Combrinck argues that, in the case of intellectual disability, the formal assessment of the level of functioning required in terms of the definition should be conducted by a psychologist.¹⁷³ These directives, furthermore, require of public prosecutors to adopt, amongst other things, a victim-centred approach; to give priority to the emotional and psychological well-being of the complainant; to make every effort to reduce secondary traumatisation; and to make additional efforts in this regard in respect of children or mentally disabled complainants.¹⁷⁴ In the case of children, their age,

168 Note that for purposes of the SOA, a child is defined as: (a) a person under the age of 18 years or (b) with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years.

169 Sec 1 of the SOA.

170 *S v Chindrize* 2015 (1) SACR 364 (GP).

171 National Director of Public Prosecutions 'Directives issued in terms of section 66(2)(a) and (c) of the Criminal Law (Sexual Offences and related matters) Amendment Act, 2007 (Act 32 of 2007)' (2010) para B.10. https://www.npa.gov.za/sites/default/files/Library/Sexual%20Offences%20Directive%20tabled%20in%20Parliament%2023%20September%202010%20final_0.pdf (accessed 10 January 2021).

172 As above.

173 Combrinck (n 136) 63.

174 National Director of Public Prosecutions (n 171) para B.2.

developmental stage, and level of maturity should also be taken into account.¹⁷⁵

It is submitted that the sections on children and the mentally disabled in the SOA are sound and ensure that the most vulnerable members of our society are more exhaustively protected. The cataloguing of the range of sexual crimes committed against children and persons with mental disabilities because of their innocence, ignorance, or special vulnerabilities, is a progressive legislative measure. Their inclusion in the Criminal Procedure Act by way of the SOA may minimise the secondary victimisation and traumatisation of victims of sexual offences, including disabled child victims.

In addition to the existing provisions of the SOA, cognisance should be taken of the proposed amendments to the SOA through the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill, 2020¹⁷⁶ that if implemented, will further the protection afforded to victims of sexual offences. The Bill *inter alia* aims to amend Chapter 6 of the principal Act, so to expand the list of persons who are to be protected to include other vulnerable persons, namely women under the age of 25 years of age, and *persons with physical, mental or intellectual disabilities* and persons over 60 years of age who, for example receive community-based care and support services.¹⁷⁷ The Bill in practical terms aims to extend the list by inserting a definition of a 'person who is vulnerable'¹⁷⁸ in section 40 of the principal Act and by replacing the phrase 'child or a person who is mentally disabled' where it appears with 'person who is vulnerable'. Children with disabilities will in terms of the proposed amendments be protected in terms of the amended SOA according to their status as both

175 National Director of Public Prosecutions (n 171) para B.3.

176 The Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill (2020) <https://www.gov.za/documents/criminal-law-sexual-offences-and-related-matters-amendment-act-amendment-bill-b16-2020-19> (accessed 5 September 2021).

177 My emphasis.

178 In terms of clause 5(c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill (n 176)) a 'person who is vulnerable' means:

- '(a) child;
- (b) female under the age of 25 years;
- (c) person who is being cared for or sheltered in a facility that provides services to victims of crime;
- (d) person with a physical, intellectual or mental disability and who –
 - (i) receives community-based care and support services, other than from a family member, for;
 - (ii) lives in a building, structure or facility used primarily as a residence, for; or
 - (iii) is cared for in a facility providing 24-hour care to, persons with physical, intellectual or mental disabilities; or
- (e) person who is 60 years of age or older and who –
 - (i) receives community-based care and support services, other than from a family member, for;
 - (ii) lives in a building, structure or facility used primarily as a residence, for; or
 - (iii) is cared for in a facility providing 24-hour care to, such persons.'

'children' and as 'persons who are vulnerable'. The provisions of the amended SOA will then no longer be restricted to mental disability only but will be applicable to persons with physical, mental or intellectual disabilities and who, for example receive community-based care and support services, thereby enhancing the protection afforded to children with disabilities. The proposed amendments are accordingly much welcomed.

5 Conclusion

Children with disabilities who are the victims of crime experience several barriers to effectively participate in the criminal justice system and, consequently, need protection and support. This is also acknowledged in the international instruments pertaining to children such as the CRC, CRPD and the ACRWC, that bestow on disabled child victims the right to protection and access to justice on an equal basis with others. By ratifying these documents, South Africa, as a state party, not only expressed its commitment to the principles contained in them, but is also compelled to abide by these principles. South Africa must, *inter alia*, ensure that no discrimination against child victims on the basis of their disability or age occurs; that child victims are able to participate freely in any criminal proceedings affecting them; and that their best interests are vigorously protected.

As indicated in the analysis above,¹⁷⁹ the South African Constitution conforms to these notions by guaranteeing disabled child victims the right to equality and dignity; to be free from violence; to freedom of expression; and to have their best interests regarded as of paramount importance in every matter concerning them. To give further effect to these rights, accommodations have been made by way of national legislation such as the CPA and the SOA. This includes the right to communicate in criminal proceedings in non-conventional ways such as demonstrations, gestures, or other forms of non-verbal expressions; to make use of intermediaries; and to testify from a separate room with the use of CCTV or other electronic equipment. With these safeguards, the CPA aims to prevent secondary traumatising in matters where disabled child victims are required to participate, thus facilitating age-appropriate and procedural accommodations as called for by the CRC and the CRPD. Because children with mental disabilities are easy targets for sexual predators, the SOA, by identifying specific crimes against children and persons with mental disabilities, is responsive in addressing this scourge.¹⁸⁰

179 See para 4.1 above.

180 See para 4.2 and 4.4 above.

The impact of these accommodations is, however, reduced because of persistent problems such as the availability of intermediaries.¹⁸¹ Measures should be put in place to address the unavailability of intermediaries. The use of intermediaries is further clouded by the fact that the appointment of intermediaries under section 170A of the CPA is subject to the discretion of the trial court. This has resulted in the exclusion of many child victims, including disabled child victims, who might benefit from the help of an intermediary.¹⁸² Research has indicated both nationally and internationally that the use of an intermediary is regarded as a best practice for children with communication disabilities and has reduced the trauma they experience.¹⁸³ The appointment of an intermediary as a standard practice not only for children in general, but also for disabled children in particular is accordingly advocated.

As indicated above, the CRPD requires of state parties to adopt specialised legislation for disabled persons, including child focused legislation, to ensure appropriate legal redress of instances of the abuse and exploitation of or violence against persons with disabilities.¹⁸⁴ Although a White Paper has been developed by South Africa, it remained just that. As pointed out above, the CPRD's value lies in its implementation, which is not an easy and fast-track process.¹⁸⁵ Specialised legislation may aid in this process and lead to standard setting, more consistency, and legal priority.¹⁸⁶

A further cause for concern is the lack of information on violence against children with disabilities. This was also pointed out by the Committee of the CRC in its comments on South Africa's second periodic report to it. The Committee also expressed concern over the multiple layers of discrimination and exclusion faced by the majority of South African children with disabilities.¹⁸⁷ The data should include the child victim's sex, gender, age and disability as well as the relationship between the perpetrator and the child victim.

Conversely, as pointed out by Combrinck, it would be naïve to assume that a legal framework alone will be efficient in addressing violence directed against disabled victims, including child victims.¹⁸⁸ Nonetheless,

181 A van der Merwe 'Children as victims and witnesses' in Boezaart (ed) *Child law in South Africa* (2017) 653 at 667-668. Bekink (n 112) 288.

182 See *S v Mokoena* 2008 (2) SACR 216 (T) para 79: Müller and Tait (n 147) 247-248.

183 White, Bornman & Johnson (n 129) 21-22. Note, however, that the authors highlight that intermediaries may require additional training to communicate with victims with little or no functional speech.

184 See para 2.2 above.

185 As above.

186 SD Kamga 'Disability rights in South Africa: Prospects for their realization under the White Paper on the Rights of Persons with Disabilities' (2016) 32 *South African Journal on Human Rights* 569.

187 See para 2.1 above.

188 Combrinck (n 136) 67.

it is an essential first step in terms of both article 23 of the CRC and article 7 of the CRPD in ensuring that disabled child victims receive the necessary support and protection they richly deserve.