

ADAPTING PREVENTION AND EARLY INTERVENTION MEASURES AND PARENTING CAPACITY ASSESSMENTS IN NEGLECT CASES INVOLVING PARENTS WITH INTELLECTUAL DISABILITIES IN SOUTH AFRICAN CHILDREN'S COURTS

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Summary

The study explored how the South African social services and two Children's Courts (Durban and Pietermaritzburg) meet their international and constitutional obligations in promoting access to justice for mothers with intellectual disabilities and their children. This archival study examined the court records of two Children's Courts from 2010 to 2014. The review of child neglect cases found macro-level exclusions experienced by parents with intellectual and psycho-social disabilities, such as experience of heightened poverty, stereotypical ableist assumptions about parenting with a disability exhibited in social work reports, and few or non-existent supports extended to parents to help them exercise their care responsibilities. Against the background of the findings from review of the court records and international law obligations on the South African state, this paper considers the role of the social worker in relation to offering and monitoring prevention and early intervention (PEI) services to families as one way to avoid more intrusive intervention in family life. The paper also considers adaptations to PEI measures and Parenting Capacity Assessments (where needed), and argues for specialist training to help social workers fulfil their role in supporting these parents. The role of presiding officers in actively monitoring the social workers' provision of PEI as well as measures to enhance the meaningful participation of parents with intellectual disabilities in the court process are identified.

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1 Introduction

Social workers are gatekeepers for social service provisions to families, including persons with disabilities.¹ They may pre-judge parents with intellectual disabilities as being incapable of parenting their children where support services, including prevention and early intervention (PEI) measures and parenting capacity assessments (PCAs), are not adapted to ensure inclusivity, accessibility and reasonable accommodation where needed. Parents with intellectual disabilities are at a disproportionately high risk of their children being permanently removed by child protection authorities for alleged child neglect,² on the assumption that they cannot be adequate parents.³ Women with disabilities are prejudiced because of the perception that they are passive and dependent, and that they are cared for by their children (parentification)⁴ – instead of fulfilling their role as caregivers.⁵ The assumption is further underpinned by the belief that parents with intellectual disabilities are likely perpetrators of child abuse and neglect.⁶ This is so, despite studies that show that ‘disability is not a causal factor in child neglect or parental inadequacy’.⁷

Ableist notions of the inadequacy of parents with intellectual disabilities⁸ are partly premised on myths such as they ‘lack sexual agency and desire, and are less sexual than non-disabled people’.⁹ These myths violate the sexual reproductive health rights of women with intellectual disabilities, and their right to family life.¹⁰ Eugenic notions are still prevalent in society despite the removal of most of these policies – except for the retention of involuntary sterilisation of persons with intellectual

1 Social Service Professions Act 110 of 1978.

2 T Booth et al ‘Parents with learning difficulties, care proceedings and the family courts: Threshold decisions and the moral matrix’ (2004) 16 *Child and Family Law Quarterly* 409.

3 D McConnell et al *Parents with a disability and the New South Wales Children’s Court* (2000) 2 (accessed 12 January 2016).

4 TY Khafi et al ‘Ethnic differences in the developmental significance of parentification’ (2014) 53 *Family Process* 267 at 268.

5 R Mykitiuk & E Chadha ‘Sites of exclusion: Disabled women’s sexual, reproductive and parenting rights’ (2011) in MH Rioux, LA Baser & M Jones (eds) *Critical perspectives on human rights and disability law* (2011) 157 at 192.

6 D McConnell et al ‘Providing service for parents with intellectual disability: Parent needs and service constraints’ (1997) 22 *Journal of Intellectual and Developmental Disability* 5.

7 M Starke ‘Descriptions of children’s needs and parenthood among mothers with intellectual disability’ (2011) 13 *Scandinavian Journal of Disability Research* 283.

8 SN Proctor *Implicit bias, attributions, and emotions in decisions about parents with intellectual disabilities by child protection workers* unpublished PhD thesis, Pennsylvania State University, 2011.

9 X Hunt et al ‘The sexual and reproductive rights and benefit derived from sexual and reproductive health services of people with physical disabilities in South Africa: Beliefs of non-disabled people’ (2017) 25 *Reproductive Health Matters* 73.

10 UN Committee on the Rights of Persons with Disabilities, General Comment 3: Article 6: Women and girls with disabilities, 2 September 2016, CRPD/GC/3/2016 (2016) para 46.

disabilities in South African law.¹¹ Control and regulation of the sexuality of persons with intellectual disabilities are still exercised in families and by the state.¹² Social workers are unlikely to ‘consciously discriminate’ against a parent on the basis of their disability, but ‘subconscious bias’ could occur as a result of ignorance about the abilities and competence of the person.¹³ Therefore, despite the constitutional prohibition of discrimination,¹⁴ social workers and potentially judicial decision-makers could employ bias in their decision-making about what is in the best interests of a particular child in Children’s Court inquiries.

Mothers with intellectual disabilities are presumed incompetent, as judged by assessments and reports prepared by social workers or psychologists after an investigation into the family’s circumstances.¹⁵ The decision to intervene in the home is premised on the disability of the parent and not on evidence of child abuse or neglect.¹⁶ This disproportionate emphasis on the disability of parents constitutes unfair discrimination.¹⁷ The assessments or reports of parenting capacity therefore carry significant evidentiary weight and are difficult to challenge. The result is that Children’s Courts may ‘rubberstamp’ diagnostic-prognostic assessments.¹⁸

- 11 W Holness ‘Informed consent for sterilisation of women and girls with disabilities in the light of the Convention on the Rights of Persons with Disabilities’ (2013) 27 *Agenda* 35 at 36.
- 12 CK Kahonde et al ‘Discourse of needs versus discourse of rights: Family caregivers responding to the sexuality of young South African adults with intellectual disability’ (2019) 21 *Culture, Health & Sexuality* 278 at 283.
- 13 V Ooi & JW Loh ‘Considering the best interests test in the context of disabilities’ (2016) 5 *Oxford University Undergrad Journal* 68.
- 14 Section 9(3) of the Constitution of the Republic of South Africa, 1996. Cf sec 11 of the Children’s Act 38 of 2005.
- 15 C Watkins ‘Beyond status: The Americans with Disabilities Act and the parental rights of people labelled developmentally disabled or mentally retarded’ (1995) 83 *California Law Review* 1415.
- 16 D McConnell & G Llewellyn ‘Disability and discrimination in statutory child protection proceedings’ (2000) 15 *Disability & Society* 883.
- 17 R Hayman ‘Presumptions of justice: Law, politics and the mentally retarded parent’ (1990) 103 *Harvard Law Review* 1201 at 1227.
- 18 G Llewellyn et al ‘Prevalence and outcomes for parents with disabilities and their children in an Australian court sample’ (2003) 27 *Child Abuse and Neglect* 235. Law reform has been proposed in Australia, inter alia, to amend the Family Law Act 1975 (Cth) to: ‘(i) include a rebuttable presumption that disability is not, per se, a barrier to parenting (ii) state that the disability of one or both of the parents cannot be grounds for determining the best interests of the child with regards to residence, contact and parental responsibility (iii) give preference to a natural parent in determining who shall have residence and parenting responsibility for a child (iv) provide that where the parent has a disability, before making orders that persons other than natural parents have parental responsibility for a child, the court must be satisfied that: A. appropriate supports have been provided to the family; B. parenting capacity was assessed with supports in place; and C. the parent is unable to adequately parent the child.’ Office of the Public Advocate Submission to the Royal Commission into Violence, Abuse Neglect and Exploitation of People with Disability: Parents and children with disability (2022) <https://www.publicadvocate.vic.gov.au/opa-s-work/submissions/royal-commission-into-violence-abuse-neglect-and-exploitation-in-disability-care/560-parents-and-child-ren-with-disability-opa-submission-to-drc> (accessed 15 January 2024).

Barriers to accessing justice identified in other jurisdictions include non-recognition of legal capacity,¹⁹ lack of accessible procedures, lack of reasonable accommodation in the court process,²⁰ and lack of adequate legal representation.²¹

This archival study examined the court records of two Children's Courts in Durban and Pietermaritzburg, South Africa, from 2010 to 2014.²² The study explored how the South African social services and two Children's Courts meet their international and constitutional obligations in promoting access to justice. The review of 244 child neglect cases found macro-level exclusions experienced by 27 parents with intellectual and psycho-social disabilities, such as experience of heightened poverty, stereotypical ableist assumptions about parenting with a disability exhibited in social work reports, and few or non-existent supports extended to parents to help them exercise their care responsibilities.

In practice, attorneys do not represent parents in these inquisitorial proceedings despite the extension of the right to legal representation to participants in these courts. The reasons for the lack of representation has not yet been studied. The absence of cross-examination of social work reports may prejudice these parents, particularly because of the high probative and evidential weight attached to social workers' reports. The magistrate (also known as the Children's Court Commissioner or the presiding officer) leads witnesses in testimony. It is the magistrate's duty to identify where the rights of a particular person are prejudiced by information appearing in the social worker's report, because the party before the court, usually a parent, must have the opportunity to cross-examine the social worker.²³ The parents' ability to self-represent or advocate and cross-examine reports tendered to court, which assess parenting capacity or evidence of the child or family's circumstances, is impaired without support measures to allow them to do so.

This paper considers the role of the social worker in relation to offering and monitoring PEI services to families as one way to avoid more intrusive intervention in family life. The paper also considers adaptations to PEI measures and PCAs, and the need for specialist training to help social

19 P Weller 'Legal capacity and access to justice: The right to participation in the CRPD' (2016) 5 *Laws* 1 at 2.

20 S Collings et al *Supporting parents with intellectual disability in care and protection proceedings project: Review report* (2017) 1.

21 B Tarleton 'Specialist advocacy services for parents with learning disabilities involved in child protection proceedings' (2008) 36 *British Journal of Learning Disabilities* 133.

22 Permission was obtained from the Chief Magistrate of each Children's Court in terms of sections 66 and 74 of the Children's Act 38 of 2005. Ethical clearance was obtained from the University of Pretoria's Research Ethics Committee on 30 August 2017. The children's identities (and that of their parents) are anonymous and were not revealed in this study as these details were not recorded and random numbers were assigned to case files, and names were not recorded.

23 C Matthias & N Zaal 'The child in need of care and protection' in T Boezaart (2009) *Child law in South Africa* 163 at 171.

workers fulfil their role in supporting these parents. This paper proceeds against the background of an appreciation for the state's duties towards these parents under, inter alia, the United Nations' Convention on the Rights of Persons with Disabilities (CRPD).²⁴

2 The applicable rights framework under international law

States should recognise the rights of persons with intellectual disabilities: to equality before the law; legal capacity (and to provide supports and safeguards, where needed, to exercise such capacity); to family life; and to access to justice.²⁵ Equality before the law entails prohibition of discrimination through positive steps, where necessary, to enable *de facto* equality for persons with disabilities. Mothers with intellectual disabilities may suffer intersectional discrimination due to perceptions about how their disability impacts on their parenting and because they are female.²⁶ Their children may experience associational discrimination.²⁷ Discrimination on the basis of a parent's disability or that of the child is prohibited in the CRPD, the United Nations' Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities (the African Disability Protocol). Both disability-specific treaties emphasise the respect for the family by prohibiting discrimination in relation to family and parenthood.²⁸ Provision of reasonable accommodation²⁹ to parents with disabilities in social work practice can alleviate barriers to accessing justice suffered before, during and after statutory interventions.

Recognition of the right to family life requires dealing with discrimination in matters relating to family and parenthood, including the need to take measures to help persons with disabilities perform their child-rearing responsibilities, and an injunction to only separate children from their parents meeting particular criteria.³⁰ These criteria are: that competent authorities, after judicial review, must determine that such

24 UN General Assembly, Resolution adopted by the General Assembly on 13 December 2006: 61/106. Convention on the Rights of Persons with Disabilities, 24 January 2007, UN Doc A/RES/61/106 (2007).

25 Arts 5, 12, 23 and 13 of the CRPD.

26 Art 6 of the CRPD; CRPD, General Comment 6 (2018) on equality and non-discrimination, 26 April 2018, UN Doc CRPD/C/GC/6 (2018) para 36.

27 Cf arts 5 and 26 of the African Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities (African Disability Protocol).

28 Arts 23(1) of the CRPD and 26(2) of the African Disability Protocol.

29 Art 2 of the CRPD. Cf 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* 99 at 101.

30 Art 23(2) of the CRPD.

separation is needed under relevant laws and is necessary for the best interests of the child, but that children are not to be separated from their parents on the basis of their parents' disability.³¹

Crucially, states should provide families with the necessary support to care for their children, inclusive of relevant social and financial support.³² Such support should be 'community based, adequate, accessible and available and appropriate to the goal of facilitating [their] child-rearing responsibilities'.³³ For example, referral to and consistent support from speech therapists during the provision of social services and in court may enhance communication by and with parents with intellectual disabilities and improve success outcomes.³⁴ Provision of actual social services is not the only aspect of support – access to information is too. For example, compilation of a guide for parents with intellectual disabilities in an Easy Read format on what to expect when attending a Children's Court hearing³⁵ and how to lay a complaint against service providers involved in the court process.³⁶ The apparent conflict between the parent-child obligation and the state-parent obligation is resolved by separating the two sets of obligations and starting with the premise that parents – disabled or not – objectively owe the same standard of care to their children.³⁷ However, this may be predicated on the state's obligation to support parents with disabilities in order to meet their care obligations.

Interestingly, South Africa's Initial Report to the Committee on the Rights of Persons with Disabilities (the Committee), did not identify any aspect of *parenting* with a disability. The Committee commented on the state's progress in meeting obligations under article 19 (on living independently and being included in the community).³⁸ The Committee recommended that the South African state adopt an action plan to develop community support services, including 'personal assistance, grants and

31 Art 23(4) of the CRPD. Cf CRPD (n 26) para 62.

32 CRPD, Concluding Observations on the Initial Report of Italy, 6 October 2016, UN Doc CRPD/C/ITA/CO1 (2016) para 51.

33 J Fiala-Butora 'Article 23: Respect for the home and the family' in I Bantekas et al (eds) *The Convention on the Rights of Persons with Disabilities: A commentary* (2019) 648.

34 J Stansfield 'Parents with learning disabilities and speech and language therapy: A service evaluation of referrals and episodes of care' (2011) 40 *British Journal of Learning Disabilities* 170; B Tarleton et al *Finding the right support: A review of issues and positive practice in supporting parents with learning difficulties and their children* (2006) <https://baringfoundation.org.uk/wp-content/uploads/2014/10/Findingrightsupport.pdf> (accessed 1 October 2020).

35 Scottish Children's Reporter Administration *Going to a children's hearing – Easy Read information for parents/carers* (2018) <https://www.scra.gov.uk/wp-content/uploads/2018/04/Going-to-a-Children's-Hearing---Easy-Read.pdf> (accessed 1 October 2020).

36 Scottish Children's Reporter Administration *Making a complaint to the reporter – Easy read information for parents/carers* (2017) <https://www.scra.gov.uk/wp-content/uploads/2017/10/Easy-Read-Complaints.pdf> (accessed 1 October 2020).

37 Ooi & Loh (n 13) 75.

38 Republic of South Africa, Initial Report to the Committee on the Rights of Persons with Disabilities, 24 November 2014, UN Doc CRPD/C/ZAF/1 (2014) para 191ff; CRPD, Concluding Observations: South Africa, 23 October 2013, UN Doc CRPD/C/ZAF/CO/1 (2018).

support to families of children with disabilities and *parents with disabilities ...*' (emphasis added).³⁹

While South Africa follows a functional test for legal capacity determination which goes against the CRPD's requirements,⁴⁰ in the cases reviewed in this study there is no indication that the Children's Courts pursued this line of inquiry. Diagnostic thresholds are used in functional tests and are considered direct discrimination – as such a threshold treats particular persons, namely those with intellectual or psycho-social disabilities, differently compared to other groups.⁴¹ In childcare proceedings, a parent with an intellectual disability may exercise their legal capacity and may require support in making any decision with legal consequence. This includes being given the opportunity, if necessary with support, to understand the meaning of and consequences arising from legal documents, including a social worker's report; and the provision of testimony about family circumstances and one's ability to care for one's children; and decisions about where children are to be placed should they require alternative care. Multiple decisions are made when participating in legal proceedings and before such proceedings ensue, in relation to how to care for a child and to promote their best interests.

In order to promote access to justice for persons with disabilities, numerous positive steps must be taken by states parties, including provision of procedural accommodation (which is not subject to progressive realisation) and training of those involved in the administration of justice. This is generously interpreted⁴² to extend not only to legal personnel such as police, judges, attorneys and prosecutors, but also to social workers and healthcare workers.⁴³

3 Findings from the archival study

Qualitatively, the data were analysed thematically to show what evidence was led to inform the finding of the magistrate in a particular case, including reports of social workers and other professionals. In 28 per cent of the child neglect cases, parental disability was cited as relevant. Three case studies illustrate the barriers faced by mothers with intellectual disabilities such as: problematic evidential power of uncorroborated social workers' reports on the mother's capacity to parent; the absence of

39 CRPD (n 38) para 35(c).

40 CRPD, General Comment 1 (2014): Article 12: Equal recognition before the law, 19 May 2014, UN Doc CRPD/C/GC/1 (2014) para 15.

41 P Bartlett 'The United Nations Convention on the Rights of Persons with Disabilities and mental health law' (2012) 75 *Modern Law Review* 752.

42 E Flynn 'Article 13: Access to justice' in I Bantekas et al (eds) *The UN Convention on the Rights of Persons with Disabilities: A commentary* (2018) 400.

43 CRPD, Concluding Observations on the initial report of El Salvador, 8 October 2013, UN Doc CRPD/C/SLV/CO/1 (2013) para 30(c).

adequate legal representation; and inaccessible and unaccommodating court proceedings. The social work reports in the case studies exhibited stereotypical generalisations about parenting with an intellectual disability. For example:

- The mother's supposed lack of capacity to change, such as being unable to learn new skills required to be a good enough parent ('unable to learn new skills', 'no prognosis to teach skills to protect the child' and 'not capable of logical reasoning to feed and protect the child').
- Characteristics exhibited by the mother assumed to be universal to persons with intellectual disabilities, such as lack of responsibility or insight ('lack of responsibility, no insight').
- Improvement of the mother's personal circumstances is impossible and remedies for her problems cannot be obtained ('impossible' to solve their problems and have children returned to them; 'prognosis for recovery is poor').
- Categorical statements that intellectual disability equates to incapability or inability to parent ('because of her low intellectual functioning' and the intellectual disability of the mother will 'influence a parent with intellectual [sic] to their children').⁴⁴

The most egregious generalisation is one case where the parent's intellectual disability was relied on for the assertion that she could not adequately care for the children based on the social worker's erroneous reading of the literature which she then cited in her report to court. The court did not question that assertion and may well have relied on this statement. The literature that the social worker cited in fact found the opposite – parents with intellectual disability *can* adequately care for their children if they are provided with support.⁴⁵ A more nuanced interpretation of a child's best interests where a parent has a disability that *may*, if not provided with support or adequate support, impact on that child's care, is needed. This is particularly because of the Children's Act's injunction against unfair discrimination against children based on the health status or disability of family members.⁴⁶

None of the cases reviewed included a PCA of the relevant parents. It can be concluded from this small sample that PCAs are obtained in care and contact cases (custody during divorce proceedings for example),⁴⁷ and not in maltreatment cases. Reasons may include the cost involved in obtaining these and the lack of appreciation of the need for verifiable

44 These findings are consistent with the ableist criteria established in D McConnell *Disability and discrimination in the child welfare system: Parents with intellectual disabilities* (2009); and T Booth & W Booth *Parents with learning difficulties, child protection and the courts: Report to the Nuffield Foundation* (2004) <https://tbooth.staff.shef.ac.uk/projects/NuffieldReport.pdf> (accessed 16 January 2024).

45 R Mildon, J Matthews & S Gavidia Payne *Understanding and supporting parents with learning difficulties* (2003) 2.

46 Section 6(2)(d) of the Children's Act.

47 But see *H v R* (3450/2017) [2018] ZAECPEHC 19 (8 May 2018).

testimony that the care is inadequate for meeting the child's right to have his or her best interests adhered to.

Purported documentary proof of the diagnosis of the parent's disability or illness (evidence) was attached to social work reports as annexures in four cases. However, these were not clear-cut diagnoses. In one case, the psychiatrist and psychologist reports identified the mother as having an intellectual disability, but the extent of the impairment and adaptive functioning was not made clear. This is the only case where medical professionals' (on mental health) input was obtained. However, neither of these were forensic reports and the professionals did not testify in court. For most cases, the averred disability of the parent was not affirmed with proof of the diagnosis. Usually, where evidence was led of the child's circumstances (particularly documentary evidence such as medical reports corroborating harm suffered by the children), the social worker's averment of applicable childcare and protection grounds and the ultimate findings of the presiding officers were supported – particularly at the original (temporary) removal stage. Diagnostic-prognostic thinking could have resulted from mere averments of such disabilities/illnesses becoming deciding factors in determinations relating to the children's care. Since Children's Court orders are not reportable judgments, and since reasons are not proffered for the statutory outcome, the deliberative decision-making of the presiding officers is unclear.

While intellectual disability as a diagnostic label is generally permanent, the parents' ability to learn and implement parenting skills is a potential positive factor for building their parenting capacity as well as the presence of supports.⁴⁸ While in 14 instances the social work reports indicated that parenting skills' programmes as therapeutic interventions would be offered to the mother, in only one case was a parenting skills' programme (an informal one) actually offered to a mother with a psychosocial disability and monitored by the social worker. In that one case, the child was reunified with the parents as a direct result of their engagement with the intervention offered. In no other cases was the social worker's proposal of parenting skills programmes followed up on in subsequent reports, indicating these were offered and the parents' level of involvement therein – and in none were parenting skills offered as a PEI measure.

In four case studies of mothers with intellectual disabilities, it is notable that the social workers were unconcerned about the participation of the mothers in the statutory processes, as they did not identify communication challenges or the need to implement measures to support their communication. Their communication needs may have required support in the interviews conducted by the social workers or during their

48 B Tarleton & D Turney 'Understanding "successful practice/s" with parents with learning difficulties when there are concerns about child neglect: The contribution of social practice theory' (2020) 13 *Child Indicators Research* 387.

court attendance. Court information, including the social workers' reports, was not made available to the parents in Easy Read format. This means that the ability of the parents to absorb the information from the statutory process is indeterminable. Section 63(2)(a) and (b) of the Children's Act mandates cross-examination of a social worker's report if a person is 'prejudiced' by the report. Parents were, however, not meaningfully offered this opportunity.

Linking the data from this study with the literature reviewed, the following can be noted. In other jurisdictions, social services' support was recommended in the form of dedicated (and adapted) programmes such as Head Start.⁴⁹ Llewellyn et al's study considered the social workers' and magistrates' perceptions of parenting incapacity, the attorneys' challenges, and the court's decision-making process.⁵⁰ The lack of suitable support to these parents is corroborated in this study, as is diagnostic-prognostic decision-making. The small sample size however suggests that these findings should be cautiously interpreted.

McConnell's study on the inevitability of parental failure⁵¹ is partially correct for the findings from this study, considering the review of the evidence offered to the courts in the court files. Self-evidently, this study did not determine the perceptions of the magistrates and social workers in the cases where a parent's disability was identified as relevant. Without empirical data, one cannot decisively state that the magistrates and social workers are biased against parenting with an intellectual disability. However, the cases surveyed show that proof of diagnosis was not obtained in any of the cases, nor was a link with inadequate parenting decisively drawn on clear evidence.

4 Adaptions to social work practice

4.1 Adapted PEI measures

The drafters of the Children's Act foresaw the need to include primary and secondary interventions for children, not only tertiary measures, with the court having a measure of oversight. These services would no longer fall outside of government, having previously only been offered by NGOs, and would be regulated under the legislation.⁵² Prevention programmes are aimed at strengthening and building the family's 'capacity and self-reliance to address problems that may or are bound to occur in the family

49 ST Azar et al 'Practices changes in the child protection system to address the needs of parents with cognitive disabilities' (2013) 7 *Journal of Public Child Welfare* 610.

50 McConnell & Llewellyn (n 16) 235.

51 McConnell et al (n 3) 23.

52 Matthias & Zaai (n 23) 293.

environment which ... may lead to statutory intervention'.⁵³ Early intervention programmes are anticipated to address children identified as 'vulnerable' or 'at risk of harm', in order to prevent removal into alternative care. This would ameliorate any need for court intervention, as these programmes are aimed at 'preserving a child's family structure' and 'avoiding removal of the child from the family environment'.⁵⁴ These programmes are to develop the parent's skills and capacity to ensure the well-being and best interests of their children, and to address and prevent neglect and other types of failures in the family environment, in order to better meet children's needs.⁵⁵ Parenting skills programmes are an example of a PEI measure. Existing parenting skills programmes in South Africa are generally not adapted for or targeted at parents with intellectual disabilities.⁵⁶

PEI and therapeutic measures mandated by the Children's Act,⁵⁷ where they can be implemented to ameliorate or address concerns about the care of children and can enhance their best interests – can positively affect their best interests. Social workers should identify the PEI measures employed for children in their reports to court:

For this information to be of value to the court, the report should at the very least contain information about the nature of programmes provided and the impact of these programmes on the child, parent, care-giver and/or family. This requirement reinforces the need for the court to be able to act proactively, and to be enabled by the relevant information to do so. This provision also enables the court to ensure that social welfare services have made efforts to ensure that children and their parents, care-givers and families have been enabled to seek resolution for their problems before efforts to remove the child are instituted.⁵⁸

The Children's Act also explicitly mandates the participation of children, parents or caregivers and other family, to identify and seek 'solutions' to 'their problems'.⁵⁹ Frank argues that this involvement relates to 'application of *all* forms of PEI programmes, including those ordered by the Children's Court'.⁶⁰ Their engagement should be solicited in the assessment of the nature of the problems experienced; the development of alternatives in response to these problems; and 'decision-making regarding

53 Sec 143(1)(b) of the Children's Act.

54 Sec 144(1)(i) of the Children's Act.

55 Secs 144(1)(b) and (f) of the Children's Act.

56 W Holness 'The implications of article 6 of the Convention on the Rights of the Child for the state, children of parents with intellectual disabilities who are "at risk of neglect" and their parents' (2015) 26 *Stellenbosch Law Review* 318 at 357.

57 Sec 149 of the Children's Act.

58 C Davel & A Skelton *Commentary on the Children's Act* (2010) 8-18.

59 Sec 144(3) of the Children's Act.

60 C Frank (updated by J van Niekerk) 'Chapter 8: Prevention and early intervention' in A Skelton *Commentary on the Children's Act* (2018) RS 9 ch9-p9 ch9-p16.

a course of action'.⁶¹ Matthias and Zaal anticipated that jurisprudence on the interpretation of these provisions would provide further clarity and guidance down the line.⁶² Unfortunately, appeals from the Children's Courts to the High Courts are rare. Jurisprudence on PEI services and their scope for change has not developed.

The regulations to the Children's Act include national norms and standards for PEI programmes.⁶³ These *inter alia*, must 'strengthen and support family structures and build capacity'; 'be aimed at the improvement of the well-being of families and children'; 'be family centred with family members seen as the main focus'; and 'focus on the strengths and capabilities of family members'.⁶⁴ The emphasis is clearly on family strengthening and capacitation. The regulations are a good start, but it is not clear to what extent social services self-monitor provision of these services, nor whether the courts are adequately supervising such interventions in the court inquiries which focus, generally, on the most at-risk families. Then there are institutional barriers to full implementation of community and family-based services such as: high case load of social workers; underfunded NGOs providing statutory and non-statutory services; insufficient social workers; and financial capacity constraints in the NGO sector.⁶⁵

A serious flaw in the legislation was identified when the Children's Act was still in the drafting stage: PEI programmes were to fall within the purview of social services only. These services cannot, due to lack of capacity, be provided by social workers alone and must involve a host of stakeholders and providers, including child and youth care workers, community workers, educators, and healthcare workers.⁶⁶ This multi-sectoral approach – to be effectively implemented on the scale anticipated – would require adequate resources, including funding.⁶⁷ The Children's Act does promote an intersectoral approach through its strategy that involves an array of stakeholders. However, the strategy remains the primary responsibility of the Department of Social Development, with provincial application indicated with a provincial strategy. The funding needed for these programmes is addressed in the legislation, requiring these programmes to comply with the quality espoused in the norms and standards.⁶⁸ The legislation prioritises funding for programmes that address poverty-related issues (shelter, food, basic necessities) and

61 As above.

62 n 23, 293.

63 Reg 52 of the General Regulations regarding Children, 2010.

64 Items (1)(a), (b), (e) and (f) of Part IV to Annexure B of the General Regulations regarding Children, 2010.

65 L Landman & A Lombard 'Integration of community development and statutory social work services within the developmental approach' (2006) 42 *Social Work* 1.

66 C Matthias 'Can we legislate for prevention and intervention services for children? An analysis of aspects of the 2002 draft Children's Bill' (2004) 40 *Social Work* 172 at 174.

67 Matthias (n 66) 177.

68 Sec 146(3) of the Children's Act.

programmes for children with disabilities.⁶⁹ Services to parents with disabilities are not prioritised. The Committee on the Rights of Persons with Disabilities recommends that South Africa develop and adopt an ‘effective implementation plan’ for PEI programmes – to assist with early identification of disability and to provide support for children *and* adults with disabilities.⁷⁰ The Committee stressed that an adequate budget needs to be allocated for these programmes.

Makoae et al⁷¹ looked at the lack of prevention and support to parents at risk of maltreating their children based on reviews of 30 maltreatment cases – each from five Children’s Courts in 2006. They found that the social workers seldom reported in their investigation reports what kind of preventative actions were taken before the statutory intervention in court. A major flaw of some of the reports, according to the authors, was that

they were not comprehensive reports, they did not present the chronology of events and specified social worker interventions appeared to be ad hoc actions that did not reflect continuous relationships with families. Consequently, most of the interventions though not specified for every case under review seemed to be consistent with the nature of risks diagnosed partially. In many instances, social workers left much to be implemented by caregivers who had multiple vulnerabilities including alcohol and drug abuse.⁷²

The authors surmised that the poor outcomes for prevention may result from high social worker case-loads, and early interventions involved placing children in places of safety, meaning that it marked the entry into statutory services for these children. Reunification was not the norm, and most children did not return to the care of their biological parents.⁷³ While Makoae et al’s study indicates some of the risk factors for children of parents that are single mothers, have substance abuse problems, or have psycho-social disabilities – it did not consider children of parents with intellectual disabilities. It is, however, valuable in sketching the systemic failures in providing PEI interventions.

In the US context, Title II of the Americans with Disabilities Act (the ADA),⁷⁴ and section 504 of the Rehabilitation Act of 1973,⁷⁵ extend to child welfare agencies. Accordingly, full and equal access to their services in relation to inter alia investigations, witness interviews, assessments, removal of children procedures, reunification services, and court hearings (including proceedings to terminate parental rights), is mandated. For example, individualised assessment must be conducted, even where in

69 Sec 146(4)(b) of the Children’s Act.

70 CRPD (n 38) para 13(d).

71 M Makoae et al *Children’s court inquiries in the Western Cape* (2008) HSRC 1 at 67.

72 As above.

73 Makoae et al (n 71) 70.

74 Americans with Disabilities Act PPub L No 101-336, 104 Stat.

75 Sec 504 applies to agencies receiving federal assistance in the form of financial subsidies, for example.

emergency investigations assessments of a child's situation are to be based on facts and objective evidence and not stereotypical notions of parental incapacity of the parent with the disability.⁷⁶ Full and equal opportunity to participate is to be ensured, for example through adapting a method of teaching parenting skills (such as a class on feeding and bathing a child) to enable the mother with an intellectual disability to learn the techniques.⁷⁷ One of the guidelines of the Technical Assistance Guidelines to the ADA issued to child welfare agencies and courts stipulates that:

To ensure that persons with disabilities have equal opportunity to retain or reunify with their children, it may be necessary for the agency to reasonably modify policies, practices, and procedures in child welfare proceedings. In general, agencies should consider whether their existing policies, practices, and procedures; their actual processing of cases; and their training materials comply with the nondiscrimination requirements.

Title II of the ADA provides that 'no qualified individual with a disability shall be denied the benefits of services, programs, or activities of a public entity or be subjected to discrimination by any such entity' – 'by reason of the disability'.⁷⁸ In Michigan, the services recommended to a mother with an intellectual disability to allow her to benefit from a reunification plan, were not received by her.⁷⁹ The termination of her parental rights was therefore deemed premature without reasonable accommodated services offered to her. The court held that the child welfare agency has a duty to provide reasonable accommodations once it is aware that a person has a disability.⁸⁰

Section 63-21-20 of the South Carolina Persons with Disabilities Right to Parent Act requires provision of reasonable accommodations in services rendered to parents with disabilities, including

the reasonable efforts made by the department to avoid removal of the child from the parent or legal guardian, including reasonable efforts made to address the parenting limitations caused by the disability.⁸¹

76 ADA National Network *Parents with disabilities in child welfare agencies and courts* (2017) <https://adata.org/factsheet/child-welfare> (accessed 30 October 2020).

77 US Department of Health and Human Services and US Department of Justice *Protecting the rights of parents and prospective parents with disabilities: Technical assistance for state and local child welfare agencies and courts under Title II of the Americans with Disabilities Act and section 504 of the Rehabilitation Act* (2015).

78 42 USC § 12132 (2018).

79 *In re Hicks/Brown* 89 NW2d 637 (Mich 2017).

80 As above.

81 South Carolina Children's Code Chapter 21, 2018, South Carolina Code of Laws Title 63.

Building on the success of the South Carolina legislation, a toolkit for legislators recommends that legislation promoting the rights of parents with disabilities, including intellectual disabilities, define adaptive parenting equipment, strategies and supportive services.⁸² For example, parental supports can be understood to be a range of services that allow the parents to ameliorate aspects that affect their parenting responsibilities, such as activities of daily living. Parental supports are defined to include:

Parents may need human support in Activities of Daily Living (ADLs) such as dressing, bathing, walking, transferring, feeding, toileting; Instrumental Activities of Daily Living (IADLs) such as meal planning and preparation, managing finances, shopping for food, clothing, and other essential items, performing essential household chores, communicating by phone and other media, and getting around and participating in the community; education and training to help develop parenting skills; and parenting activities such as parental care and supervision, subsistence, medical or other care or supervision necessary for child well-being.⁸³

Parental supports may include day-care services, respite care and informal support networks from faith-based organisations or community members such as neighbours, childcare assistants or personal assistants and supported housing.⁸⁴ Modifications to social services rendered to a parent with a disability may include: increased ‘repetition of information and training’; modified ‘counselling/parenting skills training to provide more concrete hands-on instruction in a natural environment’; provision of ‘in-home parent modelling’; linking the parent with ‘a co-parent or mentor’; and tailoring the ‘parenting education to the needs of the parent’.⁸⁵ The norms and standards on PEI programmes under the Children’s Act contain some of these examples. However, these are not adapted for parents with disabilities.

The UK provides for dedicated services to parents under the Care Act of 2014 and its regulations. It requires an assessment of the parents’ needs for support and provision for eligible parents on receiving such assistance – subject to available resources. In *Re G and A (Care Order: Freeing Order: Parents with a Learning Disability)* the court highlighted the meaning of ‘parenting with support’ as undergirding the approach of professionals and courts as follows:

82 RM Powell & J Rubinstein *Supporting legislation to protect the rights of parents with disabilities and their children: Toolkit for legislators* (2020) <https://heller.brandeis.edu/parents-with-disabilities/pdfs/legislative-toolkit-legislators.pdf> (accessed 1 October 2020).

83 E Lightfoot et al *Guide for creative legislative change: Disability status in termination of parental rights and other child custody statutes* (2007) 4 <https://casew.umn.edu/wp-content/uploads/2013/12/LegislativeChange.pdf> (accessed 1 October 2020).

84 Lightfoot et al (n 83) 10.

85 As above.

Courts must be aware of the distinction between direct and indirect discrimination. Careful consideration must be given to the assessment phase and in the application of the threshold test. Too narrow a focus must not be placed exclusively on the child's welfare with an accompanying failure to address parents' needs arising from their disability which might impact adversely on their parenting capacity. Joint training needed for adult and children's services.⁸⁶

The social work participants in a study evaluating supports offered to parents with disabilities found that neglect of the children was due to a lack of knowledge of the child's specific needs, which could be remedied through provision of long-term support.⁸⁷

4.2 Parenting capacity assessment

Considering that adaptations to obtaining evidence (how social workers go about interviewing parents with intellectual disabilities) and what constitutes evidence of parental capacity is lacking in the South African context, regard should be had for the situation in other jurisdictions such as the United States of America (USA) and European regional case law.

The heavy reliance by judges on evaluations in the USA can reinforce the existing bias of professionals conducting assessments.⁸⁸ To counter this, the American Bar Association issued a resolution that states should not remove children or terminate parental rights on the basis of a parent with a disability, unless it can be shown 'supported by clear and convincing evidence – that the disability is causally related to a harm or an imminent risk of harm to the child that cannot be alleviated with appropriate services, supports, or other reasonable modifications'.⁸⁹ The resolution was used to bring about change in South Carolina's legislative protection.⁹⁰ However, even this novel solution places emphasis on the disability of the parent. Instead, the harm or risk of harm to the child should be cited as the ground for consideration, not the disability as a 'casual explanation for the likelihood of harm'.⁹¹

The US National Council on Disability (NCD) drafted a model law to preserve families that include a parent with a disability, as well as a

86 [2006] NIFam 8.

87 B Tarleton & D Turney 'Understanding "successful practice/s" with parents with learning difficulties when there are concerns about child neglect: The contribution of Social Practice Theory' (2020) 13 *Child Indicators Research* 387.

88 JB Kay 'Representing parents with disabilities in child protection proceedings' (2009) 13 *Michigan Child Welfare Law Journal* 27 at 33.

89 ABA *Resolution 114* (2017) https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/disabled-parents-and-custody--visitation--and-termination-of-par/ (accessed 29 October 2020).

90 L Francis 'Maintaining the legal status of people with intellectual disabilities as parents: The ADA and the CRPD' (2019) 57 *Family Court Review* 21 at 22.

91 Francis (n 90) 23.

proposed amendment to the ADA to ensure the rights of these parents.⁹² These draft laws are based on the NCD's comprehensive review of the barriers persons with disabilities face when exercising their right to create and maintain families.⁹³ The NCD found that persons with disabilities in family courts often encounter evidence regarding their parental fitness, which is developed using inappropriate and unadapted parenting assessments'.⁹⁴ The NCD found that this unbalanced evidentiary burden is exacerbated by the lack of resources to provide 'adapted services and adaptive parenting equipment, and to teach adapted parenting techniques'. The NCD recommended that legislation, rules of court, and professional standards require those tasked with assessing parental capacity or a child's circumstances to thoroughly investigate whether these documents comply with: a) disability-sensitive assessment guidelines; and b) the 'need to modify the evaluation process or incorporate parenting adaptations' to provide more 'valid, reliable assessment of a parent's capacities'.⁹⁵ These standards should 'require explicit evidentiary support for statements' made 'about a parent's capacity and prohibit the use of speculation and global diagnostic or disability labels' as grounds for intervention.⁹⁶ For parents with intellectual disabilities, assessors must use the tools developed to assess their capabilities and needs, and should include existing and natural supports in the assessment.⁹⁷ Evaluators using adapted PCAs must be trained in working with parents with disabilities, including on the need for accommodations of disability.⁹⁸

The American Psychological Association (APA) issued guidelines for adapted assessments.⁹⁹ These guidelines encourage disability-sensitive approaches to clients with disabilities, but also appropriate and accommodative assessment and intervention measures and protocols. The guidelines receive their impetus from core values from the APA's *Ethical Principles of Psychologists and Code of Conduct* adopted in 2003 and amended in 2016 – namely justice and respect for rights and dignity.¹⁰⁰ Social workers could also benefit from similar guidelines to ensure that their

92 NCD *Rocking the cradle: Ensuring the rights of parents with disabilities and their children* (2012) 369-374 and 375-381.

93 The Americans with Disabilities Act PPub L No 101-336, 104 Stat 327 (1990).

94 NCD (n 92) 311.

95 NCD (n 92) 312.

96 As above.

97 As above.

98 Powell & Rubinstein (n 82).

99 *APA Guidelines for assessment of and intervention with persons with disabilities* (2011) <https://www.apa.org/pi/disability/resources/assessment-disabilities> (accessed 30 October 2020).

100 Principles D and E of the APA *Ethical Principles of Psychologists and Code of Conduct* (2002, updated in 2016, effective 2017) <https://www.apa.org/ethics/code/ethics-code-2017.pdf> (accessed 30 October 2020). See, also, British Psychological Society *Clinical psychologists when assessing parents with learning disabilities* (2011) <https://www.bps.org.uk/sites/www.bps.org.uk/files/Member%20Networks/Faculties/Intellectual%20Disabilities/Good%20Practice%20Guidelines%20for%20Clinical%20Psychologists%20when%20assessing%20Parents%20with%20Learning%20Disabilities%20%282011%29.pdf> (accessed 1 October 2020).

investigation and assessments are appropriate in the disability context and are not discriminatory. Psychologists are also expected to be familiar with laws that support and protect persons with disabilities.¹⁰¹

Suitable direction from other jurisdictions on how to adapt assessment, is therefore available to South Africa to ensure that assessments provided by psychologists, social workers and other professionals do not inadvertently discriminate against persons with intellectual disabilities, in particular. Appropriate assessments, where required in neglect cases, should be obtained in all cases, not only in cases where the parent has a disability. The reinforcement of disability prejudice is ever present in the formulation of assessments, as are prejudices against single-parent households, for example. That does not mean that the assessments lose their value from an evidential perspective. Rather, social workers, psychologists and other relevant professionals as well as magistrates (and lawyers) need training on what appropriate assessments are in relation to adaptability for persons with disabilities to remove embedded disability prejudice – whether stated or unstated. Currently, PCAs are not utilised for parents without disabilities as a routine practice. Singling out parents with disabilities to undergo such assessments would be discriminatory.

PCAs are blunt instruments and on their own are not flawless predictors of parenting ability. The validity of these tools considering the historical colonial and current use of these instruments on minorities such as aboriginal parents is questionable.¹⁰² Similarly, the unquestioning reliance on PCAs that rely on ableist stereotypes of parenting would be problematic and discriminatory for parents with disabilities. The Eurocentric bias in relation to family and good parenting should be unmasked and professionals involved in child protection should reflect on their 'knowledge, beliefs and values' to determine what expectations are placed on parents and also to consider how the best interests of a child is considered from the 'Indigenous worldviews'.¹⁰³ Similarly, a disability perspective would require considering how the best interests of a child are observed from the worldview of a parent with a disability, including those operating in kinship care frameworks or where outside of this African kinship form, within smaller family unit or as single parents. Such a perspective should aim to dismantle ableist bias embedded in PCAs, including in relation to cultural aspects of parenting that may differ from the social worker, assessor or presiding officer involved.

101 Guideline 4: 'Psychologists strive to learn about federal and state laws that support and protect people with disabilities.'

102 G Lindstrom & PW Choate 'Nistawatsiman: Rethinking assessment of aboriginal parents for child welfare following the Truth and Reconciliation Commission' (2017) 11 *First Peoples Child & Family Review* 45.

103 P Choate, R Bear Chief & D Lindstrom et al 'Sustaining cultural genocide – a look at indigenous children in non-indigenous placement and the place of judicial decision making – a Canadian example' (2021) 10 *Laws* 59.

Curtis argues that judges (in Canada) are essentially gatekeepers for the ‘qualifications of and the quality of assessors’, as the assessors (social worker, psychologist, psychiatrist or similar professional) are unregulated.¹⁰⁴ Curtis posits that judges should critically examine the assessment process to determine the validity and reliability of the opinion offered and should be familiar with the testing process and the fact that the clinical observation of the assessor is an opinion, not a scientific fact.¹⁰⁵

While over-reliance on assessments occurs elsewhere,¹⁰⁶ in South Africa low utilisation continues and the question is then when they are relied on – is this a critical engagement? The role of the presiding officer is more acute where the parents are unrepresented as the parents may not understand the import of the evidence. Even in cases where the parent is legally represented, the presiding officer’s critical role is imperative as the assessor is the ‘court’s expert’ and not that of the parties.¹⁰⁷

While PCAs may contravene the full recognition of the legal capacity of persons with disabilities,¹⁰⁸ where they indirectly or directly discriminate against the parent with the disability, some evidence of relevant parenting practice or conduct in relation to how the parent’s conduct and disability or health where relevant may impact on the child’s best interests, is needed in court. The European Court of Human Rights (ECtHR) in *Cința v Romania*,¹⁰⁹ stated that clear evidence is needed where an allegation is put forward that a parent’s mental health (or intellectual disability) impairs their ability to care for their child at a particular time. The ECtHR clarified that psycho-social disability cannot justify differential treatment in maintaining contact with children compared to parents without such a disability.¹¹⁰ A prima facie case of discrimination based on the mental health of the parent was made out.¹¹¹ The ECtHR held that:

The respondent State must also convincingly show that the difference in treatment was not discriminatory, that is to say that the applicant’s contact with his child was not restricted on discriminatory grounds, but rather that his mental illness had indeed impaired his ability to take care of his child or that there were other reasonable grounds for such a restriction.¹¹²

104 C Curtis ‘Limits of parenting capacity assessments in child protection cases’ (2009) 28 *Canadian Family Law Quarterly* 1 at 16.

105 n 104, 10.

106 Curtis (n 104) 5.

107 Curtis (n 104) 12.

108 Required by art 12 of the CRPD.

109 [2020] ECHR 150 (a divorced father with a psycho-social disability was denied adequate access to and care of his daughter; the ECtHR found articles 8 and 14 of the European Convention on Human Rights were violated – right to family life and discrimination). Cf *Kocherov and Sergeeva v Russia* [2016] ECHR 312; *RP v United Kingdom* [2012] ECHR 179.

110 *Cința* paras 68 and 78.

111 *Cința* para 79.

112 As above.

This kind of evidence may be set out in a PCA as long as the report identifies the actual deficient parenting of the adult concerned as implicating the child's best interests – as opposed to reports where the assessment solely (and discriminatorily) identified the health or disability status of the person as the decisive factor. However, such a PCA would have to, if needed at all, comply with relevant ethical and legal safeguards so as to not violate the parent's rights. Decoupling such an assessment from the legal personhood (capacity) of the disabled parent is required.¹¹³

A PCA which identifies the support needs of the parent to enable him or her to exercise his or her legal capacity in relation to parenting decision-making, as well as in participation in the court proceedings, would comply with article 12 of the CRPD. The support that these parents may require to enable them to effectively exercise their actual *parenting*, in other words how to care for their children to meet their best interests, should be identified in such assessments.

PCAs then remain a useful tool that should force the professional to engage with what support measures parents may need to fulfil their parenting responsibilities – including parents with disabilities. However, the presiding officer's role as gatekeeper requires adept critical evaluative skills to ensure that the assessment is fair, valid, reliable, admissible, and that the weight attached thereto is appropriate. Since most parties in the Children's Courts are currently unrepresented, the court's active role in evaluating the assessment process is even more vital. Moreover, where the parent has an intellectual disability, the presiding officer must ensure that the parent consented to the PCA and understands the process and content of the assessment. Further research into the utility of PCAs in the South African context of family law proceedings is needed.

4.3 Specialised training

The investigation preceding the court proceedings is potentially the beginning of discriminatory treatment. Accordingly, specialised protocols for investigations of a person with a disability are needed. Here, risk assessments and the conduct of the interview should focus on the person's behaviour, and not on their condition. Legislation should stipulate that: 'Investigations of child maltreatment cases involving people with disabilities shall use a protocol that has been modified based on the individual with disabilities' abilities.'¹¹⁴

Social workers should receive social context training to debunk stereotypical attitudes about intellectual disability and parenting that may permeate their investigations and reports to court. They are not adequately

113 CRPD (n 40) paras 15 & 17.

114 Lightfoot et al (n 83) 5.

qualified and trained to conduct PCAs (adapted or not) and sorely need such specialised training as well. A code of ethics is lacking, and the relevance thereof to social workers should also be considered in future research.

Developing appropriate supports and a reliable referral network to provide services to parents with intellectual disabilities, is needed. This should be in line with the Committee's guidance of support that is: 'community based, adequate, accessible and available and appropriate to the goal of facilitating [their] child-rearing responsibilities'.¹¹⁵ While the primary consideration in childcare matters is the best interests of the child, social workers should remember that service provision is for the benefit of the whole family and family preservation is the main aim – with child removal a last resort. The norms and standards in the Children's Act emphasise family strengthening and capacitation, but not the monitoring and implementation of PEI programmes. Specialised training for social workers and magistrates on the reasons for and how to implement adapted PEI measures for parents with intellectual disabilities, can remedy this gap.

5 Conclusion

The denial of the freedom and responsibility to raise their children and stereotypes that pervade statutory proceedings continues to detract from the gains made in recognising the rights of persons with intellectual disabilities to sexual reproductive health, fertility, and to live in the community. This denial continues to be underpinned by the perception of incompetence on the part of persons with intellectual disabilities.

PEI measures must be adapted and be made accessible, with reasonable accommodation offered to parents with intellectual disabilities, where needed. While in theory presiding officers are expected to consider the effectiveness of measures offered by social workers and other stakeholders to parents and families, the cases surveyed in this study reveal that this largely did not happen. Social workers' recommendation of parenting skills to be offered to parents was often not followed up by averments that these programmes or type of counselling were indeed implemented. Presiding officers should be obliged, through legislative amendment, to actively monitor the provision of PEI and therapeutic measures identified by social workers in their reports. In subsequent reports, where a social worker updates the court on the measures offered, specific reporting on these measures (when they were offered, by whom, the level of parental involvement, and monitoring and evaluation of their effectiveness) is needed. This supervision aspect can be strengthened in dedicated training of presiding officers – in relation to these measures. The

115 Fiala-Butora (n 33) 648.

court retains much discretion to ask a social worker to report back on the adequacy of such measures offered. This may then mitigate against the veritable 'shopping list' of measures identified by social workers in their reports, without proper follow through in actual provision of such measures. Multi-sectoral approaches to help parents with disabilities should be aligned with budgetary allocations to involve other professionals such as child and youth care workers and health workers, and disciplines such as speech and occupational therapy.

PCAs should be adapted for the appropriate assessment of persons with intellectual disabilities, if, in fact, they are needed at all. It was argued in line with comparative and international jurisprudence that evidence indicating that parenting is deficient may be set out in a PCA, as long as the report identifies the actual deficient parenting of the adult concerned as implicating the child's best interests – as opposed to reports where the assessment solely (and discriminatorily) identified the health or disability status of the person as the decisive factor. Compliance with the CRPD would be assured if the PCA identifies the support needs of the parent in relation to exercising their legal capacity and supports needed for effective parenting. Here the link with PEI measures is clear – if social workers offer adapted measures as primary and secondary interventions, then the need for tertiary (statutory) intervention is less likely. All stakeholders should receive dedicated training to dispel harmful parenting myths and also on inclusive and non-discriminatory PEI and assessment protocols. Provision of information in Easy Read format and careful explanation of the import of legal documents such as the social work reports, will promote these parents' meaningful participation in accessing justice in Children's Courts.