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**A FRAMEWORK FOR CHILDREN'S RIGHT TO SEXUAL
AND REPRODUCTIVE HEALTH EDUCATION**

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Abstract

Sexual and reproductive health (SRH) education has incredible potential for the wellbeing and development of children. It gives children the tools to think critically, identify unhealthy relationships, protect their SRH, make informed choices and respond consciously to human sexuality. This paper constructs a framework for children's right to SRH education, a right borne from the rights to health and education. The foundation of the framework is an understanding of children as subjects of rights, in need of protection and respect for their autonomy. A child's right to SRH education, according to their evolving capacities, best interests and participatory rights requires SRH education be comprehensive, accurate, age-appropriate, accessible, non-discriminatory and participatory. This paper determines that parent's right to ensure their child's education conforms with their convictions is an adjunct to children's education rights, and cannot be engaged to prevent or narrow the delivery of SRH education in state schools so long as it is objective, critical and plural. Two lenses are employed to explain the persistence of parental resistance and state complacency in the implementation of this right: cultural relativism and the public/private divide. Highlighting children's citizenship is identified as a way forward. This rights framework is applied to New Zealand, revealing issues in implementation, accessibility and children's ability to participate.

Key words:

Children's rights – sexual and reproductive health education – compulsory education – parent's rights – New Zealand

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I Introduction

Sexual and reproductive health (SRH) education has the potential to equip young people with the knowledge and critical thinking skills to form healthy relationships, make informed choices, respond consciously to media, examine gender roles in society and protect their health. SRH education is the sharing of information about the biological, psychological, socio-cultural and reproductive dimensions of human sexuality.

The purpose of this paper is to construct a framework for children's right to SRH education, something not yet done, and to apply this framework to New Zealand to deduce what, if any, changes are needed for a rights compliant approach to SRH education. This paper investigates five questions, each follows from the last:

1. Do children have a right to SRH education?
2. If yes, what is the rights framework that states must respect, protect and fulfil?
3. What complicating factors prevent states and parents facilitating the full realisation of this right?
4. What do these complicating factors tell us about key ideas, tensions and principles in children's rights discourse?
5. How does New Zealand fare in the realisation of children's SRH education rights, and where should we go from here?

In examining children's rights to health and education, this paper concludes children have the right to SRH education. Building a framework for this right, this paper proceeds on an understanding that children are subjects of their rights, with an interest in both autonomy and protection. Further, that the right to SRH education must be implemented according to the evolving capacities of the child, the best interests principle and children's right to participate. Ultimately, every child has the right to receive comprehensive SRH education that is accurate, age-appropriate, accessible, non-discriminatory and participatory. States have an obligation to ensure delivery of such in state schools. Parent's rights in relation to their child's education are analysed in this framework; they are an adjunct to children's educational rights and cannot be engaged to prevent or narrow the delivery of SRH education in state schools so long as it is objective, critical and plural.

Implementation of children's right to SRH education is challenged by two major obstacles: parental resistance and state complacency. Two lenses are employed to explain the persistence of these obstacles: cultural relativism and the public/private divide. Children's citizenship, an idea of rising significance in children's rights discourse, is offered as a concept to support overcoming these barriers.

Finally, the rights framework outlined in this paper is applied to New Zealand. Three issues are revealed in New Zealand's implementation of children's right to SRH education: poor implementation, inaccessibility and a lack of opportunities for children to participate.

From an appreciation of the harms perpetuated by limiting children's access to information about their developing reproductive capacity and sexuality, this paper seeks to highlight the value of rights-compliant school-based learning which is objective, critical and plural. To clarify, the inquiry of this paper is limited to education in state schools, and any reference to parents is inclusive of guardians and caregivers.

II Do children have a right to sexual and reproductive health education?

This paper will examine the right to health and the right to education to show that the intersection of these two rights produces a right to SRH education.

A Right to health

The right to health is a right that guarantees more than the absence of disease or infirmity, but the highest attainable state of health.¹ The right to health is explicitly recognised in a number of international legal instruments. The Universal Declaration of Human Rights (UDHR) guarantees a standard of living "adequate" for everyone's health and wellbeing.²

¹ *The Right to Health* (Office of the United Nations High Commissioner for Human Rights and the World Health Organisation, Fact Sheet No. 31), at 3.

² Universal Declaration of Human Rights (10 December 1948), art 25.

This standard requires a minimum package of physical and physiological needs be met by the state, in addition to provision of social security.³ The International Covenant on Economic, Social and Cultural Rights (ICESCR) articulates the right to health as an entitlement to enjoy “the highest attainable standard of physical and mental health”.⁴ Like the UDHR’s articulation, this includes positive obligations for states to fulfil.⁵ Being a convention, the ICESCR is a stronger legal instrument than the UDHR as signatories bind themselves under international law.⁶ The ICESCR specifically refers to the health needs of children; state parties have an obligation to provide for the “healthy development of the child”.⁷

A definition of “health”, and “healthy development of the child” is not apparent from the text of the ICESCR. However, the Committee on Economic, Social and Cultural Rights (CESCR) has elaborated on the meaning of both.⁸ The CESCR has noted that the World Health Organisation’s (WHO’s) extremely broad definition of health was purposefully not adopted in the ICESCR as a narrower definition was preferred.⁹ The WHO’s definition of health is “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”.¹⁰ The right to health under the ICESCR, “embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life”.¹¹ This definition is vague but it certainly means health is more than the delivery of

³ Article 25.

⁴ International Covenant on Economic, Social and Cultural Rights (open for signature 16 December 1966, entered into force 3 January 1976), art 12(1).

⁵ Article 12(2).

⁶ Article 29(3).

⁷ Article 12(2)(a).

⁸ Committee on Economic, Social and Cultural Rights *General Comment No. 14 The Right to the Highest Attainable Standard of Health (Art. 12)* (United Nations, E/C.12/2000/4, August 200), at [4].

⁹ At [4].

¹⁰ Constitution of the World Health Organisation (opened for signature 22 July 1946, entered into force 7 April 1948), at 1.

¹¹ Committee on Economic, Social and Cultural Rights *General Comment No. 14*, above n 8, at [4]; and John Tobin "Children's Right to Health" in Ursula Kilkelley and Ton Liefwaard (eds) *International Human Rights of Children* (Springer, Singapore, 2019) 277, at 281.

medical services; that it includes measures that promote health, prevent ill-health and tackle inequalities.¹²

Health promotion is particularly relevant to the inquiry of this paper. SRH education is a measure intended to prevent physical, mental, emotional and social harm. The C ESCR has confirmed that the right to health is inclusive of access to health-related information, including SRH education.¹³ In fact, the “healthy development of the child” is understood by the C ESCR as “requiring measures to improve child and maternal health, sexual and reproductive health services... and access to information”.¹⁴ This affirms that children have the right to access information relating to their reproductive health and sexuality.¹⁵ It is clear that the right to health, guaranteed by the ICESCR, requires states to pursue health promotion inclusive of SRH information dissemination to children.

In considering children’s rights, the United Nations Convention on the Rights of the Child (UNCRC) must be turned to. The UNCRC is a comprehensive international agreement on the civil, political, economic, social and cultural rights that all children are entitled to.¹⁶ It is the most widely ratified international human rights treaty in history.¹⁷ The UNCRC includes specific guarantees relating to children’s health rights.¹⁸ Article 24 outlines children’s right to health.¹⁹ The right is not a guarantee of health, but an entitlement for conditions that create pathways for children to enjoy their highest attainable standard of health.²⁰ The specified positive obligations required of state parties to fulfil the right to health are expanded upon those articulated including the UDHR and ICESCR. The

¹² Aart Hendriks “The Close Connection Between Classical Rights and the Right to Health with Special Reference to the Right to Sexual Reproductive Health” (1999) 18 *Medicine and Law* 225, at 230.

¹³ Committee on Economic, Social and Cultural Rights *General Comment No. 14*, above n 8, at [11].

¹⁴ At [14].

¹⁵ At [22].

¹⁶ Convention on the Rights of the Child (open for signature 20 November 1989, entered into force 2 September 1990).

¹⁷ Convention on the Rights of the Child; and United Nations International Children’s Emergency Fund “What is the UN Convention on Child Rights?” UNICEF United Kingdom <unicef.org.uk>.

¹⁸ Convention on the Rights of the Child, art 24.

¹⁹ Convention on the Rights of the Child.

²⁰ Tobin, above n 11, at 280.

UNCRC confers positive obligations on states to ensure children have access to healthcare, nutritious food, clean water and health technology.²¹

Similar to the ICESCR, the UNCRC views educational health promotion is an important component of children's health rights. The C ESCR describes the obligation to ensure child-friendly access to education on preventative and health-promoting behaviour as a common goal of the UNCRC and ICESCR.²² Under the UNCRC, children's right to health is inclusive of an obligation to ensure "all segments of society, in particular parents and children, are informed" or have access to education relating to child health,²³ and family planning.²⁴ The Committee on the Rights of the Child (C CRC) has stated that the obligation to promote health is inclusive of child-friendly education on sexual health.²⁵

State parties to the aforementioned international instruments must respect, protect and fulfil children's right to health and in doing so, "all appropriate measures" must be taken.²⁶ The C CRC and C ESCR has provided clarity on what is expected of states, specifically from a SRH perspective. States must *refrain* from limiting access to contraceptives and other means of maintaining SRH.²⁷ States must also refrain from censoring, withholding or intentionally misrepresenting health-related information, including SRH information.²⁸ To *protect* the equality of people, health service delivery and education must be non-discriminatory by: promoting the social equality of genders,²⁹ by being anti-racist,³⁰ and

²¹ Convention on the Rights of the Child; art 24(2).

²² Committee on Economic, Social and Cultural Rights *General Comment No. 14*, above n 8, at [22].

²³ Convention on the Rights of the Child, art 24(2)(e).

²⁴ Article 24(2)(f).

²⁵ Committee on the Rights of the Child *General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)* (United Nations, CRC/C/GC/15, 17 April 2013).

²⁶ Convention on the Rights of the Child, arts 24 and 4; and International Covenant on Economic, Social and Cultural Rights, art 2.

²⁷ Committee on Economic, Social and Cultural Rights *General Comment No. 14*, above n 8, at [34].

²⁸ At [34].

²⁹ Convention on the Elimination of All Forms of Discrimination against Women (open for signature 18 December 1979, entered into force 3 September 1981), art 5.

³⁰ International Covenant on Elimination of All Forms of Racial Discrimination (opened for signature 21 December 1965, entered into force 4 January 1969), art 5(e)(iv).

being anti-discriminatory on the basis of any disability.³¹ Finally, to *fulfil* children’s right to health from a SRH lens, states must ensure child healthcare services are available, accessible and to a standard of acceptable quality.³² They must also promote health education which includes a focus on SRH and domestic violence.³³

B Right to education

A broad understanding of health, as affirmed by the aforementioned instruments, insists that the right to health is interdependent with other human rights.³⁴ So, how does the right to health intersect with the right to education?

Education is one of the most widely recognised rights of children, as childhood is understood to be a time of sustained and rapid learning and development. Therefore, education is one of the less controversial entitlements of children. Very few governments do not already see themselves as bound to provide children with an education, and they are incentivised by education being a personal and public good.³⁵ Education is recognised as one of the best financial investments states can make.³⁶ It is advantageous for the state and society that the next generation receive a comprehensive education. An educated individual can better pursue their own interests, and an educated society or social grouping can better pursue their collective interests. A comprehensive education is a social good.

The UDHR guarantees everyone the right to an education directed at the “full development of the human personality and ... respect for human rights and fundamental freedoms”.³⁷

³¹ Convention on the Rights of Persons with Disabilities (open for signature 13 December 2006, entered into force 3 May 2008), art 25.

³² Tobin, above n 11, at 278; see also Committee on Economic, Social and Cultural Rights *General Comment No. 14*, above n 8, at [35].

³³ Committee on Economic, Social and Cultural Rights *General Comment No. 14*, above n 8, at [36].

³⁴ Hendricks, above n 12, at 232.

³⁵ Laura Lundy and Patricia O’Lynn “The Education Rights of Children” in Ursula Kilkelly and Ton Liefwaard (eds) *International Human Rights of Children* (Springer, Singapore, 2019) 259, at 260.

³⁶ Committee on Economic, Social and Cultural Rights *General Comment No. 13: The Right to Education (Art. 13)* (United Nations, E/C.12/1999/10, December 1999), at [1].

³⁷ Universal Declaration of Human Rights, art 26.

The Declaration recognises the particular relevance of education for children, and guarantees parents a “prior right to choose the kind of education that shall be given to their children”.³⁸

The ICESCR endorses the wording of the UDHR and expands upon the scope of educational direction in three ways.³⁹ Firstly, that education shall be directed towards human personality’s “sense of dignity”.⁴⁰ Second, that education must enable “all persons to participate effectively in a free society”.⁴¹ Finally, that education shall promote understanding among all “racial, ethnic or religious” groups.⁴² Like the UDHR, article 13(3) of the ICESCR recognises the liberty of parents in relation to their children’s education; parents are acknowledged as having the freedom to choose the school their child will attend, and to ensure the religious and moral education of their children conforms with their own convictions.⁴³ The ICESCR refines the scope of parent’s rights articulated in the UDHR.

The CESCR has noted that the education rights articulated in the ICESCR should be read in accordance with the UNCRC.⁴⁴ The UNCRC expands the scope of education rights further than the prior two instruments, detailing children’s education rights in articles 28 and 29. The combination of the two articles reflects the fact that children have a package of education rights, rather than just the right to *an education*.⁴⁵ Article 28 pertains to access, while article 29 relates to the quality and aims of a child’s education.⁴⁶ The aims of a child’s education are described in much more detail than in the other two instruments:⁴⁷

³⁸ Article 26(3).

³⁹ Committee on Economic, Social and Cultural Rights *General Comment No. 13*, above n 36, at [4].

⁴⁰ International Covenant on Economic, Social and Cultural Rights, art 13(1).

⁴¹ Article 13.

⁴² Article 13(1).

⁴³ Article 13(3).

⁴⁴ Committee on Economic, Social and Cultural Rights *General Comment No. 13*, above n 36, at [5].

⁴⁵ Lundy and O’Lynn, above n 35, at 261.

⁴⁶ Convention on the Rights of the Child.

⁴⁷ Article 29(1).

1. State Parties agree that the education of the child shall be directed to:
 - (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own;
 - (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
 - (e) The development of respect for the natural environment.

It is clear that children not only have the right to an education, a child's right to education is a matter of content and access.⁴⁸ A child's education must be "child-centred, child-friendly and empowering",⁴⁹ with a goal to empower children by fostering their learning, human dignity, self-esteem and self-confidence.⁵⁰ The C CRC envisages an education rooted in these aims as being one that equips every child with the tools to respond to the challenges of our world, including the tensions between the global and the local, the individual and the collective and tradition and modernity.⁵¹ Children are entitled to an education satisfactory of certain standards. They have more than the right be informed sometimes, on some things. The effect of art 29 is that children have the right to be educated in life skills, not just literacy and numeracy. The C CRC states that education must include upskilling for decision-making, conflict resolution, healthy living, healthy relationships, critical thinking, creativity and other abilities which give children the tools to pursue opportunities available to them.⁵² Thus, a child's education should not be limited to

⁴⁸ Committee on the Rights of the Child *General Comment No. 1* (United Nations, CRC/GC/2001/1, 17 April 2001), at [3].

⁴⁹ At [1].

⁵⁰ At [2].

⁵¹ At [3].

⁵² At [9].

practical skills, it should enlighten and activate their mind to wander freely and widely, to enjoy and investigate our human existence.⁵³

Like the right to health, non-discrimination rights intersect with children's education rights. This defines the parameters of how education must be delivered. In this case, the aims articulated in art 29(1) of the UNCRC affirm this; education must promote gender equality, be anti-racist, unprejudiced and tolerant of other ways of living.⁵⁴ Education has a vital role in empowering women, preventing exploitation and promoting human rights.⁵⁵

C Right to sexual and reproductive health education

The right to comprehensive SRH education is not directly mentioned in any major international treaty, so is it still a right? Melissa Curvino and Meghan Grizzle Fischer argue that human rights are created by either treaty or custom, and that neither has created a right to SRH education.⁵⁶ However, their analysis rests on discounting the contributions of the C CRC and C ESCR. Curvino and Fischer argue that SRH education is not explicitly mentioned in any treaties,⁵⁷ and any commentary from the C CRC and C ESCR urging states to provide SRH education is an “erroneous and misleading” interpretation of law.⁵⁸ They argue that parents, not states, are the final arbiter of the content of education. Parents have a right to ensure their child's education is in conformity with their convictions.⁵⁹ This paper contends that *this* is an erroneous and misleading interpretation of parents rights, and that the call for recognition of the right to SRH education by many authoritative sources cannot be ignored.

⁵³ Committee on Economic, Social and Cultural Rights *General Comment No. 13*, above n 36, at [1].

⁵⁴ Committee on the Rights of the Child *General Comment No. 1*, above n 48, at [11]; see also Lundy and O'Lynn, above n 35, at 267.

⁵⁵ Committee on Economic, Social and Cultural Rights *General Comment No. 13*, above n 36.

⁵⁶ Melissa Curvino and Meghan Grizzle Fischer “Claiming Comprehensive Sex Education is a Right Does Not Make it So: a Close Reading of International Law” (2014) 20 *The New Bioethics* 72, at 73.

⁵⁷ At 76 – 81.

⁵⁸ At 97.

⁵⁹ At 94; and International Covenant on Economic, Social and Cultural Rights, art 13(3).

Prior analysis of the right to health and right to education has begun to reveal that the right to SRH education sits at the intersection of the health and education.⁶⁰ SRH is integral to the right to health, and a state's obligation to fulfil it cannot be satisfied simply via family planning clinics.⁶¹ A broad understanding of health affirms an obligation on states to implement preventative measures in addition to responsive medical services to fulfil citizen's right to health. Education is possibly the most meaningful way to prevent future harm; education is empowering and it breaks cycles of disadvantage.⁶² SRH cannot be separated from education.⁶³

The United Nations Human Rights Office of the High Commissioner (UNHROHC), C ESCR, C CRC and C EDAW and SR on Education have all identified SRH education as a right in-and-of-itself, and as a means of guaranteeing both the right to health and the right to education.⁶⁴

The UNHROHC stated that “the right to education includes the right to receive comprehensive, accurate and age-appropriate information regarding sexuality”.⁶⁵ The Special Rapporteur on Education (SR) has made a similar statement: that states must provide comprehensive SRH education at all levels of schooling that is positive,

⁶⁰ Special Rapporteur *Report of the Special Rapporteur on the right to education* (United Nations General Assembly, A/65/162, July 2010), at [62]; *Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law* (United Nations Human Rights Office of the High Commissioner, HR/PUB/12/06/Rev.1, 2019); and Committee on Economic, Social and Cultural Rights *General Comment No 22* (United Nations, E/C.12.GC/22, May 2016).

⁶¹ Committee on Economic, Social and Cultural Rights *General Comment No 22*, above n 60, at [1].

⁶² Meghan Campbell "The challenges of girls' right to education: let's talk about human rights-based sex education" (2016) 20 *The International Journal of Human Rights* 1219, at 1227.

⁶³ Special Rapporteur, above n 60, at [12].

⁶⁴ Committee on Economic, Social and Cultural Rights *General Comment No 22*, above n 60, at [9] and [49]; *Committee on the Rights of the Child General Comment No. 4*, at [26] and [28]; *Adolescent Health and Development in the Context of the Convention on the Rights of the Child* CRC/GC/2003/4 (1 July 2003), at [28] and [40]; Ban Ki-moon and Babatunde Osotimehin *International Conference on Population and Development: Programme of Action* (United Nations Population Fund, 2014), at [6.15] and [7.47]; and Special Rapporteur, above n 60, at [19].

⁶⁵ *Born Free and Equal*, above n 60, at [63].

responsible and respectful.⁶⁶ The SR conceptualises sexuality, health and education as being “three interdependent rights”.⁶⁷

The C ESCR describes the right to health, combined with the rights to education and non-discrimination as entailing “a right to education on sexuality and reproduction that is comprehensive, non-discriminatory, evidence-based, scientifically accurate and age-appropriate”.⁶⁸ The committee specifies that “all educational institutions [must] incorporate unbiased, scientifically accurate, evidence-based, age-appropriate and comprehensive sexuality education into their required curricula”.⁶⁹

The C CRC has noted that SRH information is essential for health, development and the ability of children to participate meaningfully in society. The CRC has specified states have an obligation to provide SRH education in schools.⁷⁰

These authoritative comments are incredibly consistent, and cannot be ignored; they originate from the bodies best placed to comment on the requirements of the international instruments relied upon. All people, including children, have the right to SRH education. States must provide SRH education in state schools and the framework discussed below will reveal that parents have no right to prevent this so long as it is objective, critical and plural.

III The potential of full realization

There are a number of reasons why realising children’s right to comprehensive SRH education is a worthwhile endeavour. First, and most obviously, SRH education is associated with improved SRH and a reduction in unwanted consequences from

⁶⁶ Special Rapportuer, above n 60, at [1].

⁶⁷ At [12].

⁶⁸ Committee on Economic, Social and Cultural Rights *General Comment No 22*, above n 60, at [9].

⁶⁹ At [63].

⁷⁰ Committee on the Rights of the Child *General Comment No. 4*, above n 64, at [26].

adolescent sexual activity.⁷¹ SRH education equips young people with knowledge to prevent poor SRH, tools to access SRH services and understanding of consequences of sexual activity.⁷² In developing countries, 40 per cent of girls have their first child before 20 years old.⁷³ Pregnancy-related risks, including unsafe abortion, are the leading cause of death for women aged 15 to 19 worldwide.⁷⁴ SRH education is associated with a reduction in sexually transmitted infections (STI's), abortions and adolescent pregnancies.⁷⁵ Young people between 15 and 24 years old account for 40 per cent of new HIV infections around the globe.⁷⁶

Second, comprehensive SRH education is part of a “holistic and transformative” strategy against gender-based violence and gender-norms.⁷⁷ A survey in 21 countries found that 7 – 36 per cent of girls and 3 – 29 per cent of boys suffered sexual abuse during their childhoods.⁷⁸ The SR on Violence against Women has identified power-imbalances as the root of gender-based violence and inequality, and that these imbalances are sustained through gender norms.⁷⁹ SRH education is a tool to reframe and critically address gender norms and to discuss gender-based violence; it is one of many tools that should be engaged to overcome the prevalence of these norms by emphasising bodily autonomy, consent, female pleasure and by encouraging critical thought on gender, sex and sexuality.⁸⁰

Third, SRH education can help spread tolerance, respect and acceptance of marginalised groups. This can be a matter of life or death for LGBTQI+ people, depicting their

⁷¹ United Nations Population Fund *Comprehensive Sexuality Education: Advancing Human Rights, Gender Equality, and Improved Sexual and Reproductive Health* (United Nations, December 2010), at 9.

⁷² At 9.

⁷³ At 9.

⁷⁴ At 9.

⁷⁵ Special Rapporteur, above n 60, at [35]

⁷⁶ United Nations Population Fund *Comprehensive Sexuality Education*, above n 7171, at 9.

⁷⁷ Campbell, above n 62, at 1230.

⁷⁸ United Nations Population Fund *Comprehensive Sexuality Education*, above n 7171, 9.

⁷⁹ Campbell, above n 62, at 1230; and Special Rapporteur, *UN Special Rapporteur on Violence Against Women Report to the Human Rights Council* (United Nations Human Rights Council, A/HRC/26/38, 2014).

⁸⁰ Campbell, above n 62, at 1230.

sexuality as legitimate can foster a culture of non-discrimination and tackle societal stigmatisation.

Fourth, critical examination of the way human sexuality influences the biological, psychological, socio-cultural and reproductive dimension of our lives can equip young people with the skills to deal with challenges beyond the SRH curriculum:⁸¹

sexuality education is about far more than body parts, contraception and condoms. It supports young people to build skills, knowledge and values they need to have healthy, consensual relationships, to respect diversity and to think critically about media, sexually explicit material and gender roles in society.

Finally, realising children's right to SRH education can contribute to fulfilment of other rights. Children have the right to human rights education in-and-of-itself under s 29(1) of the UNCRC.⁸² Children have the right to develop;⁸³ the C CRC has commented that SRH education is a positive obligation to assist parents in providing for children's physical, mental, spiritual, moral and social development.⁸⁴ Children also have the right to be free from discrimination.⁸⁵ As mentioned above, SRH education is a tool to reduce gender violence and discrimination.⁸⁶ Attention to sexual violence through SRH education is a preventative tool to fulfil the right to protection from exploitation and maltreatment.⁸⁷ Finally, being an intrinsic part of human life, SRH education is closely linked to the right to freedom of expression and participation in social life.⁸⁸

⁸¹ New Zealand Family Planning *Sexual and Reproductive Health and Rights in New Zealand: Briefing to Incoming Members of Parliament* (2017), at 12.

⁸² Lundy and O'Lynn, above n 35, at 268; and Special Rapportuer, above n 60.

⁸³ Convention on the Rights of the Child, art 6.

⁸⁴ Committee on the Rights of the Child *General Comment No. 4*, above n 64, at [16].

⁸⁵ Convention on the Rights of the Child, art 2.

⁸⁶ Special Rapportuer, above n 60, at [32].

⁸⁷ Save the Children *Children and Adolescents Sexual and Reproductive Health Rights Toolkit: Information Guide* (August 2013).

⁸⁸ Save the Children, above n 87.

IV Rights Framework: children's right to sexual and reproductive health education

The first research question has been answered in the affirmative, children have the right to SRH education. The second question requires an examination of international legal instruments, authoritative commentary and academic literature to reveal the rights framework against which children's right to SRH education must be implemented.

A Foundation

The basis for this rights framework is an understanding that children are the subject of rights and their evolving capacities require a balance of protecting children and enhancing their autonomy in the exercise of their rights.

1 Subjects v objects

The preferred conceptualisation of personhood adopted influences one's understanding of children's rights in relation to the child, the parent and the parent-child relationship. In Western European tradition, the traditional conceptualisation of personhood flows from liberal individualism. Liberal individualism perceives people as being primarily separate individuals who make choices and form relationships by free agreement. Exercising autonomy is central to this understanding of personhood as it is a necessary ingredient of executing individual will. The traditional conceptualisation understands children to be "entirely dependent and incapable of having formulated or previously expressed views about what their interests are".⁸⁹ Being inherently dependent, children are perceived as lacking rational expression or evaluation.⁹⁰ Without any autonomy, children are conceptualised as objects of their rights.⁹¹ Therefore, parents must act as agents of their children's rights till the child fulfils their autonomous potential by crossing the threshold

⁸⁹ Harry Brighouse and Adam Swift "Parents' Rights and the Value of the Family" (2006) 117 *Ethics* 80, at 83 – 84.

⁹⁰ At 83 – 84.

⁹¹ At 80 – 83.

into adulthood.⁹² Thus, constructing a pseudo-fiduciary relationship.⁹³ Due to the focus on a child's dependency, the parent-child relationship is understood to be a private family matter within which individuals must be free to act without significant state inference.⁹⁴

The traditional conceptualisation of personhood and parent-child relationship has two major flaws. First, it assumes children are wholly dependent. Second, it views autonomy as a binary: you are either autonomous or you are not. This means that three important ideas are ignored. First, the evolving capacities of children, the process where children gradually accumulate abilities as they develop. Second, the reliance of all humans, whether parent or child, on connections with others.⁹⁵ Finally, the agency and autonomy of adults who are dependent on others due to illness and disability.⁹⁶ The traditional conceptualisation does not view children in the context of their community, and fails to grasp the complex interconnectedness of all people.

The modern conceptualisation of the parent-child relationship is not wholly defined by the dependency of children, but by the interconnectedness of both parties; it is a relational responsibilities conceptualisation.⁹⁷ The modern understanding of the parent-child relationship is more robust and with fewer flaws. The modern understanding is based on a view of personhood as the having of connections with others. This situates children as beings, connected and attached to their parents.⁹⁸ This school of thought recognises that children and parents are each holders of their own rights, and that parents must use their rights and liberties in accordance with the best interests principle.⁹⁹ This understanding is

⁹² Jo Bridgeman *Parental Responsibility, Young Children and Healthcare Law* (Cambridge University Press, New York, 2007), at 5.

⁹³ Brighthouse and Swift, above n 89, at 86 – 96.

⁹⁴ Ashley Huck "UNESCO's Proposed Voluntary Guidelines on Comprehensive Sex Education and Their Role in Advancing Children's and Parents' Rights" (2012) 20 *Transnat'l L & Contemp Probs* 825, at 834.

⁹⁵ Bridgeman, above n 92, at 11.

⁹⁶ At 12.

⁹⁷ Bridgeman, above n 92.

⁹⁸ At 13.

⁹⁹ Huck, above n 94, at 834; and Roger Marples "Parents' Rights and Educational Provision" (2014) 33 *Studies in Philosophy and Education* 23, at 25.

a reaction to the assertion that the dependency of a child is the *whole* of their identity.¹⁰⁰ It recognises children as participants in their development.¹⁰¹ This framing reduces the power imbalance between parent and child, and removes the assumption that parents have absolute power over their children's lives beyond review or control.¹⁰² The modern conceptualisation of personhood and parent-child relationship understands children as subjects of their rights, with a graduating ability to exercise autonomy in respect of their rights, as their capacities evolve.

The modern conceptualisation of the parent-child relationship affirms the notion that parents should not control their children's views. Instead, children should be allowed to acquire some distance from their family's conception of good, and develop awareness of other potentially viable conceptions of an acceptable lifestyle.¹⁰³ Children are born into their community, but whether or not they become a member is up to them, and to deny them information which may assist them in making choices to live another lifestyle is not within the ambit of parental rights.¹⁰⁴

The modern conceptualisation of the parent-child relationship has been engaged by the courts, most notably by the House of Lords in *Gillick*.¹⁰⁵ The majority of this case rejected absolute parental control by accepting children's right to engage graduating levels of autonomy in the exercise of their rights.¹⁰⁶ The majority admitted that defining the limits of parental control is very difficult.¹⁰⁷ However, where a child is deemed sufficiently mature, they are able to exercise their autonomy to act against their parent's wishes.¹⁰⁸ The

¹⁰⁰ Bridgeman, above n 92, at 9.

¹⁰¹ Manfred Liebel "From Evolving Capacities to Evolving Capabilities: Contextualising Children's Rights" in D Stoecklin and JM Bonvin *Children's Rights and The Capability Approach* (Springer, Dordrecht, 2014), at 81.

¹⁰² Andrew Bainham *Children, Parents and the State* (Sweet & Maxwell, London, 1988).

¹⁰³ Marples, above n 99, at 25.

¹⁰⁴ At 37.

¹⁰⁵ *Gillick v West Norfolk and Wisbech AHA* [1985] UKHL 7, [1986] AC 112, [1986] 1 FLR 229, [1985] 3 WLR 830.

¹⁰⁶ *Gillick*, above n 105, at 411; and Bainham, above n 102, at 40.

¹⁰⁷ *Gillick*, above n 105, at 420; and Bainham, above n 102, at 50.

¹⁰⁸ *Gillick*, above n 105, at 423; and Bainham, above n 102, at 52.

majority held that the case does not provide a legal basis for circumventing most age-related barriers to children exercising autonomy which grant parents decision-making powers. However, where the age-barrier in question is not specifically required by statute, a child with *Gillick* competence can proceed against their parent's wishes.¹⁰⁹

Therefore, a pillar of the foundation of this rights framework is that children's rights must be applied according to their evolving capacities and with an understanding that children are the subjects of their rights.

2 *Autonomy v protection*

Children's rights literature is divided on whether the law should treat children as autonomous beings, or becomings in need of protection. This debate flows from the differing conceptions of personhood just discussed. Proponents of children as becomings come from a traditional conceptualisation of the child, focusing is on the function of childhood as development.¹¹⁰ Whereas, focusing on the intrinsic value of all people regardless of their capacities, engaging the modern conceptualisation of the child, supports the idea of children as beings. Understanding children as beings gained popularity during the 1970s/80s when young children's thought and reasoning was shown to be more sophisticated than adults had assumed.¹¹¹ Recent research has affirmed this, showing that children exert agency in their families, schools and society while they navigate challenges.¹¹²

Michael Freeman argues for an approach that balances children as both beings and becomings. He contends that the UNCRC is framed in this way; the paternalism of the best interest principle reflects the perception of children as becomings, whereas, children's participatory and citizenship rights reflect an understanding of children as beings.¹¹³

¹⁰⁹ *Gillick*, above n 105, at 425; and Bainham, above n 102, at 66.

¹¹⁰ Michael Freeman "The Human Rights of Children" (2010) 63 CLP 1, at 9.

¹¹¹ At 12.

¹¹² At 13.

¹¹³ At 12 and 19.

Freeman argues for a balanced approach to level the valid criticisms against a binary approach. Conceptualising children as becomings, and thus in need of protection, ignores the fact that many adults do not exercise agency over all aspects of their lives, whether by choice, illness or disability.¹¹⁴ The hierarchy of adults as beings and children as becomings ignores the skills and competencies children have that adults do not. On the other side, conceptualising children as beings does not align with societal expectations that children are not fully responsible for all their actions.¹¹⁵ Freeman's approach to children as both beings and becomings reflects the approach taken by the criminal justice and health care systems.

This paper proceeds on the basis that children's rights must be applied with an understanding that children are both beings and becomings, so a balance must be struck between autonomy and protection in the way children are guided and empowered in the exercise of their rights. Therefore, another pillar of the foundation of this rights framework is that children cannot be abandoned to their developing capacities, but should be protected in a way that reduces as they develop.¹¹⁶

B Principles

According to the C CRC, anyone who implements the UNCRC must do so in accordance with the four guiding principles of the convention, determined by the Committee, derived from articles 2, 3, 6 and 12.¹¹⁷ These articles guarantee the right to non-discrimination;¹¹⁸ the best interests of the child;¹¹⁹ the right to life, survival and

¹¹⁴ At 15.

¹¹⁵ At 22.

¹¹⁶ Marples, above n 99, at 28.

¹¹⁷ Committee on the Rights of the Child *General Comment No. 5 General measures of implementation of the Convention on the Rights of the Child* (United Nations, CRC/GC/2003/5, November 2003); Laura Lundy and Karl Hanson "Does Exactly What it Says on the Tin?" (2017) 25 *Intl J Child Rts* 285, at 286; and Noam Peleg "International Children's Rights Law: General Principles" in Ursula Kilkelly and Ton Liefaard (eds) *International Human Rights of Children* (Springer, Singapore, 2019), at 139.

¹¹⁸ Convention on the Rights of the Child, art 2.

¹¹⁹ Article 3.

development;¹²⁰ and the right to participation.¹²¹ The guiding principles require that any decision, whether legal or day-to-day, must ensure: children are not discriminated against; the child's life, survival and development is promoted; the child's best interests are the primary consideration when balancing conflicting rights or interests; and that children meaningfully participate in such decision-making.¹²²

Academics do not unanimously agree that the principles articulated by the C CRC fully capture the principles of the UNCRC. Noam Peleg notes that the implementation of the Convention is subject to the evolving capacities of the child, art 5 of the UNCRC, which he considers to be the "fifth" guiding principle.¹²³ The evolving capacities of the child has been heralded by other academics who consider it to be an "overarching",¹²⁴ or "cross-cutting" principle of the UNCRC.¹²⁵ Article 5 provides an instrument for parental authority to be limited when a child is able to engage their autonomy to exercise their rights.¹²⁶ The wording of art 5 intersects all aspects of implementation of the UNCRC, so it's overarching relevance cannot be ignored.¹²⁷ This paper accepts the cross-cutting relevance of art 5 and proceeds on the basis that the evolving capacities of the child must act as a principle in any rights framework. Following, Laura Lundy and Karl Hanson's "overall implementation obligations" are adopted as the principles for this rights framework.¹²⁸ These are non-discrimination, the evolving capacities of the child, best interests principle, and right to be heard.¹²⁹

¹²⁰ Article 6.

¹²¹ Article 12.

¹²² Noam, above n 117, at 140.

¹²³ At 152.

¹²⁴ Sheila Varadan "The Principle of Evolving Capacities under the UN Convention on the Rights of the Child" (2019) 27 *Intl J Child Rts* 306, at 332.

¹²⁵ Lundy and Hanson, above n 117, at 300.

¹²⁶ Noam, above n 117, at 152.

¹²⁷ Varadan, above n 124, at 326; Noam, above n 117, at 152; and Lundy and Hanson, above n 117, at 300.

¹²⁸ Lundy and Hanson, above n 117, at 300.

¹²⁹ At 300.

1 Evolving capacities of the child

The “evolving capacities of the child” term appears twice in the UNCRC, in articles 5 and 14(2).¹³⁰ It is one of the more contentious elements of the Convention.¹³¹ There is no *right* for children to exercise their rights in accordance with their evolving capacities. Instead art 5 *recognises* children’s right to receive appropriate guidance and direction from parents to secure enjoyment of their rights in a way that is consistent with their evolving capacities.¹³² As such, assuring children’s rights are fulfilled in accordance with a child’s evolving capacities is an “overall implementation obligation”.¹³³

This term was a direct response to the concern of some drafters that the Convention granted parents too much power to ensure the religious and moral education of the child occurred in conformity with parental convictions. The drafters wanted to balance the role parents have in the religious and moral upbringing of the child with the child’s role as rights-holder.¹³⁴ However, inclusion of this term, and its intended dilution of parents rights was not unanimously accepted; 21 state parties reserved on article 14, the was largest reservation on any single provision in the UNCRC.¹³⁵

The emergence of the evolving capacities concept is a product of the transition from the traditional conceptualisation of the child which focuses on their vulnerability and dependency, towards the modern understanding of children as rights-holders.¹³⁶ Sheila Varadan argues that this concept, and its use in the UNCRC, calls for a collective expectation that parents facilitate their children exercising increasing levels of agency and responsibility in the exercise of their rights.¹³⁷ This means that parental guidance and direction must be provided in a manner that reflects a child’s unique needs.¹³⁸ Evolving

¹³⁰ Convention on the Rights of the Child.

¹³¹ Varadan, above n 124, at 306.

¹³² Varadan, above n 124, at 308.

¹³³ Lundy and Hanson, above n 117, at 300.

¹³⁴ Varadan, above n 124, at 310.

¹³⁵ At 312.

¹³⁶ At 307.

¹³⁷ At 307.

¹³⁸ At 320.

capacities is a fluid and individualised assessment. A component of the assessment is recognising the special capacities of children.¹³⁹ That children's capacities are not a passive result of adult intervention in children's lives, but that children co-produce their development.¹⁴⁰ At very early ages children choose and select their developmental aims and influence their environment. Also, their involvement in their development increases over time.¹⁴¹

Integration of the evolving capacities of the child into the UNCRC has been lauded by academics for its effect in balancing the growing agency and autonomy of the child with the protection children require.¹⁴² Greirson Lansdown has conducted an intensive inquiry into children's evolving capacities, and has outlined three uses of this concept.¹⁴³ Firstly, the evolving capacities of the child is a developmental concept which helps to recognise the extent to which states must fulfil the promotion of children's development, competence and autonomy.¹⁴⁴ Second, the term is a participatory concept which recognises the obligation of states to protect children's evolving capacities by transferring rights from parents to child in accordance with their development.¹⁴⁵ Third, the child's evolving capacities is a protective concept which recognises the obligation of states to protect, via state or parental intervention, children from exposure to activities likely to cause them harm.¹⁴⁶ Ultimately, the concept of children's evolving capacities promotes children's gradual accumulation of knowledge and skills. To give practical meaning to this concept, Lansdown lists four abilities that demonstrate more evolved capacities. First, an ability to understand and communicate relevant information. Second, to think and choose with some degree of independence. Third, to assess the potential for benefit, risk and harm. Finally, to achieve a fairly stable set of values.¹⁴⁷ Lansdown's contributions flesh out the meaning

¹³⁹ Liebel, above n 101, at 69.

¹⁴⁰ At 81.

¹⁴¹ At 81.

¹⁴² Gerison Lansdown *The Evolving Capacities of the Child* (UNICEF Innocenti, 2005), at ix.

¹⁴³ Lansdown, above n 142.

¹⁴⁴ At ix.

¹⁴⁵ At ix.

¹⁴⁶ At ix.

¹⁴⁷ At xi.

and use of children's evolving capacities in children's rights analysis. By articulating the abilities that demonstrate evolved capacities, the fluidity of the assessment is also revealed. Children will exhibit abilities in different contexts and in different ways dependent on each challenge they're faced with.

Implications

The evolving capacities of the child is relevant to this paper. Using Lansdown's model for engaging with this concept, we can see the developmental, participatory and protective elements of children's right to receive SRH education.

From a developmental perspective two things are revealed. First, the unique interest of adolescents in receiving SRH education. Adolescence is the vaguely delineated transition between childhood and adulthood accompanied by rapid physical, sexual and cognitive development.¹⁴⁸ It is a period of life where opportunities, capacities and aspirations expand whilst significant vulnerabilities exist.¹⁴⁹ A person's reproductive capacity and sexuality become tangible and immediate during adolescence.¹⁵⁰ As young people transition through puberty, there is particular salience in SRH information, it prevents children from grappling with these changes in isolated ignorance. The C CRC calls for a human-rights based approach to adolescents rights which recognises and respects their dignity, agency, empowerment and citizenship.¹⁵¹ In much of their commentary relating to SRH education, the C CRC has purposefully chosen to refer to "adolescents" rather than "children", despite the UNCRC referring universally to "the child".¹⁵² The C CRC understands adolescents to have special needs in relation to SRH education because SRH rights are most relevant at the later stages of childhood.¹⁵³

¹⁴⁸ Committee on the Rights of the Child *General Comment No. 20 on the implementation of the rights of the child during adolescence* (United Nations, CRC/C/GC/20, 6 December 2016), at [9].

¹⁴⁹ At [2].

¹⁵⁰ At [9].

¹⁵¹ At [4].

¹⁵² Committee on the Rights of the Child *General Comment No. 4*, above n 64.

¹⁵³ Tobin, above n 11, at 823.

Second, the developmental perspective calls for information to be delivered in an age appropriate manner, paying attention to the development of the child. Realising the rights of adolescents requires different approaches to realising that of younger children.¹⁵⁴ The “special needs” of adolescents, requires attention to sexuality, responsible sexual behaviour, responsible family-planning, gender relations, equality and violence.¹⁵⁵ Whereas, the less-evolved capacities of younger children calls for more foundational education on appropriate relationships and human biology.

Second, from a participatory perspective, the evolving capacities of the child makes the case for adolescents to determine whether or not they should attend SRH education classes at school, rather than their parents. The evolving capacities concept creates a direct relationship between the child and the state, acknowledging that parents do not always act in the best interests of the child.¹⁵⁶ This was recognised in *Gillick*, where the House of Lords held that parental powers are gradually diminished as the child matures into independence, and once a child is sufficiently mature and competent, they should make their own decisions.¹⁵⁷ The medical field has recognised the capacities of adolescents by recognising them as the giver or with-holder of consent.¹⁵⁸ Thus, children who are *Gillick* competent should have the choice, not parents, to attend SRH education.

Finally, from a participatory perspective, the evolving capacities concept cannot be satisfied by parents having the power to opt their adolescent children out of SRH education. This supports the preceding assertion: that from adolescence onwards, being sufficiently mature and competent, adolescents as holders of their own rights, should have the choice to exempt themselves from SRH education.

Therefore, SRH education must give special recognition to the needs of adolescents, be age-appropriate, ensure children who are *Gillick* competent are empowered to choose

¹⁵⁴ Committee on the Rights of the Child *General Comment No. 20*, above n 148, at [1].

¹⁵⁵ Ki-moon and Osotimehin, above n 64, at [7.47].

¹⁵⁶ Lansdown, above n 142, at ix.

¹⁵⁷ Bainham, above n 102, at 52.

¹⁵⁸ Bridgeman, above n 92, at 42.

whether or not to engage their right and inclusive of children in its design and implementation.

2 *Best interests principles*

The best interests principle is a longstanding principle in children's rights, it predates the UNCRC.¹⁵⁹ Despite the history of the principle, it is still a relatively vague concept, open to subjective interpretation.¹⁶⁰ There is significant discretion granted to the decision-maker in determining how the best interests principle applies. However, the idea behind the principle is that children's rights assured by the UNCRC should be fulfilled to their fullest and most effective extent.¹⁶¹

The best interests principle is woven into seven other articles in the UNCRC,¹⁶² and has been described by the C CRC as a dynamic concept that requires consideration of the particular issue at hand.¹⁶³ The best interest principle is a substantive right,¹⁶⁴ interpretive principle,¹⁶⁵ and procedural rule.¹⁶⁶ Where the rights of parent and child conflict, the best interests of the child offers the way forward. However, Michael Freeman argues that the best interests principle is a paternalistic instrument, its satisfaction a subjective interpretation of an adult decision-maker.¹⁶⁷ Although there is scholarly debate about how child's rights friendly the article is, it can still be used to

¹⁵⁹ Noam, above n 117, at 141.

¹⁶⁰ Robert Mnookin "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975) 39 LCP 226, at 230.

¹⁶¹ Noam, above n 117, at 141.

¹⁶² Convention on the Rights of the Child, arts 9, 10, 18, 20, 21, 37, 40.

¹⁶³ Committee on the Rights of the Child *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* (United Nations, CRC/GC/14, 29 May 2014).

¹⁶⁴ John Eekelaar "Two Dimensions of the Best Interests Principle: Decisions About Children and Decisions Affecting Children" in Elaine Sutherland and Lesley-Anne Barnes Macfarlane *Implementing Article 3 of the United Nations Convention on the Rights of the Child* (Cambridge University Press, Cambridge, 2017), at 100.

¹⁶⁵ Tobin, above n 11, at 287.

¹⁶⁶ Noam, above n 117, at 143.

¹⁶⁷ Michael Freeman "The Human Rights of Children", above n 110, at 12.

support a rights compliant approach to the UNCRC. The C CRC has commented that an adult's judgement of the best interests principle cannot override the obligation to respect the rights guaranteed by the UNCRC.¹⁶⁸

Implications

The inclusion of the best interests principle in the UNCRC confirms that parents are not always the final arbiters of what constitutes the best interests of a child.¹⁶⁹ Parents have a role in influencing their child's values and beliefs, but even proponents of the traditional conceptualisation of the parent-child relationship contend that it is not in the best interests of the child for parents to indoctrinate their child, or compromise their prospective autonomy.¹⁷⁰ It is not in the best interests of the child to insist that they are not exposed to other world-views.¹⁷¹

In the framework of children's right to SRH education, the best interests principle is relevant in highlighting that it is in a child's best interest to not be abandoned in their discovery of sexual autonomy.¹⁷² Developing an understanding of SRH is in a child's best interests.¹⁷³ The best interests principle supports prioritisation of children's rights to SRH education over parent's right to ensure their child's education is in conformity with their convictions. The Special Rapporteur on Education has explicitly stated such; parental liberty to choose the type of education for their child may never run counter to the rights of children and adolescents in accordance with the best interests principle.¹⁷⁴ Thus, the best interests principle supports the removal of state and parent constructed barriers in the realisation of children's right to SRH education.

¹⁶⁸ Committee on Economic, Social and Cultural Rights *General Comment No. 14*, above n 8, at [4].

¹⁶⁹ Bettina Cass "The limits of the public/private dichotomy: a comment on Coady & Coady" (1992) 6 *IntJLFam* 140, at 141 – 142.

¹⁷⁰ Brighthouse and Swift, above n 89, at 104; and Peter Crumper "Sex education and human rights – a lawyer's perspective" (2004) 4 *Sex Education* 125, at 132.

¹⁷¹ Crumper, above n 170, at 132.

¹⁷² Tobin, above n 11, at 282.

¹⁷³ Julie Pernet "Ground-breaking ruling by European Court of Human Rights on children's right to sexual and emotional literacy" (30 May 2018) International Planned Parenthood Federation European Network <www.ipffen.org>.

¹⁷⁴ Special Rapporteur, above n 60, at [72] and [73].

3 Participation

The UNCRC confirms that children who are capable of forming views have the right to express them freely in “all matters affecting” them, and that those views should be given due weight in accordance with the child’s age and maturity.¹⁷⁵ This nods to the link between children’s participatory rights and their evolving capacities.¹⁷⁶ Further, that children’s agency must be balanced with their need for protection.¹⁷⁷ This aligns with the view of this paper that autonomy and protection must be balanced in any children’s rights framework.

The participatory rights of children, as affirmed by the UNCRC, supports the view of children under the law as beings.¹⁷⁸ These rights recognise children’s citizenship,¹⁷⁹ and gives children the right to have a seat at the table when decisions are being made,¹⁸⁰ particularly in the realm of education,¹⁸¹ and health.¹⁸² The right to participation, and its articulation in art 12 conceptualises a child’s age not as a barrier to participation, but a factor that matters later, when determining the weight to be given to children’s views.¹⁸³

Participation can take different forms, Lundy contends that children must be given opportunity to express their views, be facilitated in expressing them, be given an audience to listen to their views and have appropriate influence on the decision being made.¹⁸⁴

¹⁷⁵ Convention on the Rights of the Child, art 12(1).

¹⁷⁶ Gerison Lansdown, Shane R Jimerson and Reza Shahroozi “Children’s rights and school psychology: children’s right to participation” (2014) 52 *Journal of School Psychology* 3, at 5.

¹⁷⁷ At 4.

¹⁷⁸ Nick Lee *Childhood and society: growing up in an age of uncertainty* (Open University Press, Buckingham, 2001) per Noam, above n 117, at 148.

¹⁷⁹ Aoife Nolan “The Child as a ‘Democratic Citizen’ – Challenging the ‘Participation Gap’” (2010) *Pub L* 126 per Noam, above n 117, at 148.

¹⁸⁰ Noam, above n 117, at 148.

¹⁸¹ Lansdown, Jimerson and Shahroozi, above n 176, at 7 – 8.

¹⁸² Michael Freeman “Rethinking Gillick” (2005) 13 *The Intl J Child Rts* 201, at 211.

¹⁸³ Noam, above n 117, at 149.

¹⁸⁴ Laura Lundy “‘Voice’ is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child” (2007) 33 *British Educational Research Journal* 927, at 933.

When it comes to decision-making in schools, Lundy argues that children’s participation can make a powerful contribution to the creation of a children’s rights culture in schools.¹⁸⁵ Lansdown, Jimerson and Shahroozi agree; full implementation of children’s participatory rights in schools would foster a “profound transformation” in moving towards a culture of respect for children’s rights.¹⁸⁶

Implications

Thus, the UNCRC requires that children participate in the design, implementation and evaluation of SRH education according to art 12.¹⁸⁷ Children should be actively involved in the development activities they are affected by, especially in respect SRH education.¹⁸⁸

C Parents rights over their child’s education

In constructing a framework for children’s right to SRH education, we must examine how, if at all, parent’s rights are relevant. Parents have a package of rights and liberties that influence the realisation of their child’s education rights, including the child’s right to SRH education. Parents have the right to: choose the kind of education that shall be given to their children,¹⁸⁹ to advise their child,¹⁹⁰ and provide direction to their child in respect of their rights.¹⁹¹ Most relevantly, they have the right to ensure that the religious and moral education of their children conforms with their convictions.¹⁹² This right, and a child’s right to SRH education, can sit squarely in conflict where a parent’s cultural, religious or moral convictions call for narrow and conservative depictions of acceptable sexual behaviours. For example, Catholicism declares homosexuality, masturbation and sexual

¹⁸⁵ At 940.

¹⁸⁶ Lansdown, Jimerson and Shahroozi, above n 176, at 4.

¹⁸⁷ Committee on the Rights of the Child *General Comment No. 4*, above n 64, at [28]; and Ki-moon and Osotimehin, above n 64, at [6.15].

¹⁸⁸ Ki-moon and Osotimehin, above n 64, at [6.15].

¹⁸⁹ Universal Declaration of Human Rights, art 26(c).

¹⁹⁰ Convention on the Rights of the Child, art 5.

¹⁹¹ Article 14(2).

¹⁹² International Covenant on Economic, Social and Cultural Rights, art 13(3).

behaviour other than for the purpose of reproduction as sins.¹⁹³ Shari’ah law also prohibits homosexuality and premarital sex.¹⁹⁴ Parents with conservative beliefs regarding acceptable sexual behaviours may wish to prevent their children from exposure to comprehensive SRH education as such a curriculum will positively depict a range of lifestyles, some of which their cultural, religious or moral convictions condemn. As such, a fully realised right to choose the kind of education that shall be given, according to parental convictions, can conflict with a child’s right to SRH education.

Proper examination of parent’s right to ensure that the religious and moral education of their child conforms with their own convictions reveals that this right does not entitle parents absolute control over education in state schools. Rather, this right is an adjunct to children’s education rights, and cannot be engaged to obstruct the education states are obliged to provide to children in state schools. The ECHR has affirmed that a child’s right to education is the “primary right”, and the parental education rights are an “adjunct of the fundamental right”.¹⁹⁵ In April 2020 the ECHR released a guide on the interpretation of art 2 of Protocol No 1 of the European Convention of Human Rights.¹⁹⁶ Article 2 ratifies art 13(3) of the ICESCR, the provision that articulates the right to education as inclusive of the right of parents to ensure “education and teaching in conformity with their own religious and philosophical convictions”.¹⁹⁷ The guide states that for art 2 to be interpreted in harmony with the UDHR, ICESCR, UNCRC and UNCRPD, parents must not be permitted to refuse a child’s right to education on the basis of their convictions. However, parents require respect for their convictions, meaning they must be more than acknowledged or taken into account in the setting of curricula.¹⁹⁸ To satisfy parental rights, parental convictions must be portrayed respectfully.¹⁹⁹ The Court stated that it is *sometimes*

¹⁹³ Huck, above n 94, at 835.

¹⁹⁴ At 835.

¹⁹⁵ European Court of Human Rights *Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights: right to education* (April 2020), at [2].

¹⁹⁶ European Court of Human Rights *Guide on Article 2*, above n 195.

¹⁹⁷ European Convention of Human Rights (1 June 2010), art 2.

¹⁹⁸ European Court of Human Rights *Guide on Article 2*, above n 195, at [57]-[60].

¹⁹⁹ At [67].

necessary to allow parents to exempt their children from certain classes,²⁰⁰ but exemptions should not be offered systematically.²⁰¹ On the topic of sex education, the ECHR states that if sex education is scientifically based and transmitted neutrally, a schools refusal to exempt children is not a breach of parental rights.²⁰² Essentially, parents rights in relation to their child's education do not permit parents to call for systematic limitations on SRH education in state schools.

Within state schools, it is not acceptable for a state to permit religious and cultural values to set patterns of education designed to apply to all citizens whether they belong to that religion or culture.²⁰³ Primacy must be given to delivering the education children have a right to receive. Comprehensive education is a “guarantor of a democratic and pluralistic environment”.²⁰⁴ Systematically, education must embrace the diversity of society by promoting tolerance and understanding of others. This means traditional values and attitudes should be contested and desirable outcomes and norms should never be rigid through time.²⁰⁵ This doesn't mean conservative religious, cultural or moral opinions must be deplatformed, they just must not be used to deplatform others.

Implications

Children are entitled to comprehensive education however, this doesn't mean state schooling should cast doubt on the validity of parent's convictions. Plurality, presented neutrally, is key. The UNCRC requires that the child's education be directed at a number of aims including: respect towards the parent and child's culture,²⁰⁶ and understanding, tolerance and friendship among all people.²⁰⁷ The two aims may exist in tension where a parent wishes for their child's education to portray certain lifestyles as unacceptable according to their culture, religion or values. However, an education which accepts a more

²⁰⁰ At [64].

²⁰¹ At [65].

²⁰² At [65].

²⁰³ Special Rapportuer, above n 60, at [6].

²⁰⁴ At [6].

²⁰⁵ Campbell, above n 62, at 1234.

²⁰⁶ Convention on the Rights of the Child, art 29(1)(c).

²⁰⁷ Article 29(1)(d).

expansive definition of acceptable behaviour does not necessarily frustrate parental rights and liberties, if presented neutrally. The C ESCR has advocated for such an approach in respect of SRH education; parental rights and freedoms do not extend to interference on school curriculum if the curriculum is delivered in an “unbiased and objective way, respectful of freedoms of opinion, conscience and expression”.²⁰⁸ This aligns with ECHR’s guidelines which assert that parents are not entitled to systematic exemptions from SRH education provided it is scientific and neutral. The implication of these comments is that SRH education must be plural to balance parent’s rights with children’s right to SRH education.

In navigating this balance, the C CRC encourages reconciliation of opposing values through “dialogue and respect for difference”.²⁰⁹ This approach recognises the intrinsic value of whatever culture, religion or value-set of the community within which a child exists, while promoting acceptance of others. Parents certainly have rights and an important role in the education of their children. However, their ability to control classroom education in state schools is limited. When it comes to SRH education, they have no right to prevent states from fulfilling their obligations in respect of their child’s right to SRH education. The fact remains, that if parents wish to prevent their child from exposure to SRH education, they can send their child to a private schools which will teach according to their convictions.

D International jurisprudence

International courts have affirmed the scope of parent’s rights as articulated above. The jurisprudence shows that international courts have been willing to limit a parent’s right to ensure their child’s education is in conformity with their own convictions where such a limitation is in the best interests of the child. The three most relevant judgements are from

²⁰⁸ Committee on Economic, Social and Cultural Rights *General Comment No. 13*, above n 36, at [28].

²⁰⁹ Committee on the Rights of the Child *General Comment No. 1*, above n 48, at [4].

the European Court of Human Rights (ECHR), which deem access to SRH education as in the child's best interests.²¹⁰

In 1976 the ECHR heard *Kjeldsen, Bush Madsen and Pedersen v Denmark (Kjeldsen)* and found that compulsory SRH education in public schools does not violate parental rights.²¹¹ The parents argued that compulsory SRH education violated their right to ensure their children's education was in conformity with their convictions.²¹² The ECHR held that the SRH educational delivered did not amount to "indoctrination" or advocacy for a specific set of sexual behaviours.²¹³ Rather, so long as SRH education is conveyed in an "objective, critical and pluralistic manner", compulsory sex education serves the preservation of democracy by ensuring pluralism in education.²¹⁴ If parents wish to avoid such instruction, they were advised by the court to educate their children at home or privately.²¹⁵ Additionally, the Court made it clear that parents are not prevented from advising their children of their views in line with their own convictions.²¹⁶ This made clear that parents have an unincumbered right to educate their children as they please in the private sphere, whether that be at home or in private schools, but their rights do not extend to controlling mandatory curriculum in state schools.

In a number of following cases, *Kjeldsen* has been relied upon by the ECHR to ensure children's right to receive comprehensive SRH education is fulfilled. In *Dojan v Germany* a group of Christian Evangelical Baptist parents protested compulsory SRH education in a German state primary school, arguing that parental-exemption to this education should be permitted due to parent's right to educate their children in accordance with their religious and philosophical convictions.²¹⁷ The parents contended that SRH education provided

²¹⁰ *A.R. and L.R. v. Switzerland* [2018] (no. 22338/15), at 2.

²¹¹ *Kjeldsen, Busk Madsen and Pedersen v. Denmark (Applications 5095/71, 5920/72 and 5926/72) (1976) 1 EHRR 711, [1976] ECHR 5095/71.*

²¹² At [14] and [44]-[45].

²¹³ At [53].

²¹⁴ At [53].

²¹⁵ At [50].

²¹⁶ At [54].

²¹⁷ *Dojan v. Germany* [2011] (Application 319/08), at 11.

contradicted their beliefs that sexual behaviour should be limited to matrimony.²¹⁸ Following *Kjeldsen*, the ECHR held that the mandatory SRH education (without parental exemptions) is a safeguard for pluralism in education and is justified if portrayed in an “objective, critical and pluralistic” manner.²¹⁹ The parents could not point to anything in the curriculum that was not conveyed in this manner.²²⁰ The Court observed that the transmission of information in the school was neutral and evidence-based.²²¹ Parent’s right to educate in conformity with their convictions was not breached as the Court noted that parents are free to inform their children outside of school hours in their natural role as educators.²²² States were encouraged to ensure their SRH education programmes in schools encouraged tolerance of sexual orientation and identity.²²³ Any faith-based exemptions to this education was considered a barrier to democracy; thus, any interference on parent’s rights in relation to education, private life or religion were justified in ensuring children’s comprehensive education.²²⁴

In 2018 the ECHR revisited the issue of compulsory SRH education in *AR v Switzerland*, and again the Court followed *Kjeldsen* and held that a school’s refusal to approve a parent’s request that their child be exempted from SRH education was justified. The parent argued the exemption was within their right to ensure the child’s education was in conformity with their convictions.²²⁵ The Court held that the aims of sex education for younger children, the child in this case being seven years old, was prevention of sexual violence and preparation for social realities; exempting children from these classes would be disproportionately in favour of parental rights.²²⁶ The child’s best interests were grounded in acquiring knowledge preventative of sexual violence.²²⁷ This judgement implemented

²¹⁸ At 3.

²¹⁹ At 13 – 14.

²²⁰ At 15.

²²¹ At 14.

²²² At 16.

²²³ At 15.

²²⁴ At 17.

²²⁵ *A.R. and L.R. v. Switzerland*, above n 210, 1 – 2.

²²⁶ At 1 – 2.

²²⁷ Julie Pernet, above n 173; and *A.R. and L.R. v. Switzerland*, above n 210.

the best interests principle in light of the modern conceptualisation of the parent-child relationship.

These judgements confirm that so long as SRH education is “objective, critical and pluralistic manner” parent’s rights over their child’s education do not extend to a right to exempt them from this education.²²⁸

E Fulfilling children’s right to sexual and reproductive health education

In outlining the foundation, principles and influence of parent’s rights on children’s right to SRH education, it is clear that SRH education must be mandatory at all stages of state schooling, without parental exemptions. Rather, children should be offered the ability to opt themselves out of SRH education when deemed *Gillick* competent. However, parental exemptions can be considered where parents can prove SRH education is not objective, critical and plural.

To realise the potential of SRH education, the right to SRH education requires that SRH curriculum offered in state schools is comprehensive,²²⁹ accurate,²³⁰ age-appropriate,²³¹ accessible,²³² non-discriminatory.²³³

1 Comprehensive

To prepare young people for the full social, cultural, emotional and physical implications of human sexuality, SRH health education must be comprehensive. This means that sex education is not reduced to the biological elements of sex.²³⁴ Rather, that the curriculum

²²⁸ *Kjelden*, above n 211, at [53]; and *Dojan v. Germany*, above n 217, at 13 – 14; and *A.R. and L.R. v. Switzerland*, above n 210, 1 – 2.

²²⁹ Committee on Economic, Social and Cultural Rights *General Comment No 22*, above n 60, at [9].

²³⁰ At [9].

²³¹ Committee on the Rights of the Child *General Comment No. 4*, above n 64, at [28].

²³² At [28].

²³³ Committee on Economic, Social and Cultural Rights *General Comment No 22*, above n 60, at [9].

²³⁴ Committee on the Rights of the Child *General Comment No. 15*, above n 25.

is broad and fosters critical thinking about responsible sexual behaviours and the many ways human sexuality is expressed.²³⁵ The biological, psychological, socio-cultural and reproductive dimensions should be covered.²³⁶ SRH education must be structured in a manner that provides opportunities for children to explore their own values and attitudes towards sex, and to build their decision-making, communication and risk reduction skills in all aspects of sexuality.²³⁷ The curriculum should be geared towards the development children’s sexual autonomy.²³⁸ Thus, SRH education should cover family-planning, pregnancy and prevention of sexually transmitted infections (STIs),²³⁹ in addition to acceptance for the diversity of sexual orientations, gender identities and sex characteristics.²⁴⁰ Further, gender and gender-based violence should be addressed,²⁴¹ as should the connection of sexual and reproductive health to other rights.²⁴² A comprehensive approach also means positively addressing sexual pleasure rather than restricting sex to its reproductive function and the heteronormative implications this has.²⁴³

To ensure the curriculum is portrayed in an “objective, critical and pluralistic manner”,²⁴⁴ the SR on Education recommends that states form strategic relationships with families and communities in the design and implementation of SRH curricula.²⁴⁵

²³⁵ Special Rapporteur, above n 60, at [12].

²³⁶ Council of Europe *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia* (European Committee of Social Rights, Complaint No 45/2007, March 2009), at [46].

²³⁷ *Born Free and Equal*, above n 60, at [63]; and Special Rapporteur, above n 60, at [16].

²³⁸ Claire Greslé-Favier “Adult discrimination against children: the case of abstinence-only education in twenty-first-century USA” (2013) 13 *Sex Education* 715, at 718.

²³⁹ Committee on the Elimination of Discrimination against Women *General Comment No. 36* (United Nations, CEDAW/C/GC/36, November 2017), at [68]; Special Rapporteur, above n 60, at [15]; and Committee on the Rights of the Child *General Comment No. 4*, above n 64, at [28].

²⁴⁰ *Born Free and Equal*, above n 60, at [63].

²⁴¹ Campbell, above n 62, at 1232.

²⁴² Campbell, above n 62, at 1232.

²⁴³ Special Rapporteur, above n 60, at [16].

²⁴⁴ *Kjelden*, above n 211, at [53].

²⁴⁵ Special Rapporteur, above n 60, at [68(h)]; see also Campbell, above n 62, at 1237.

2 *Accurate*

The curriculum must also be accurate, this means information provided must be evidence-based and scientifically supported.²⁴⁶

3 *Age-appropriate*

As discussed earlier, all the information conveyed in SRH education must be delivered according to the evolving capacities of children; it must be age-appropriate.²⁴⁷ This means the distinction between adolescents and younger children must be recognised, and that adolescents must receive much more detailed information.²⁴⁸ As a suggestion, the learning objectives of the UN's International Technical Guidance on Sexuality Education are grouped according to four age ranges: 5 to 8, 9 to 12, 12 to 15 and 15 to 18+.²⁴⁹ Teachers should be specifically trained in how to ensure age-appropriate education.²⁵⁰

4 *Accessible*

Any barriers to accessing SRH information should be removed so that fulfilling children's right to SRH information is accessible. It is the right of, and in the best interests of all children to receive comprehensive SRH education. Following the international jurisprudence,²⁵¹ and commentary from the C CRC and C EDAW, SRH education must be mandatory at all levels in state schools.²⁵² So long as it is objective, critical and plural, parents should not have the ability to opt their children out of SRH

²⁴⁶ Committee on the Elimination of Discrimination against Women *General Comment No. 36*, above n 239, at [69]; Committee on Economic, Social and Cultural Rights *General Comment No 22*, above n 60, at [9] and [47]; and Special Rapporteur, above n 60, at [16].

²⁴⁷ Committee on the Rights of the Child *General Comment No. 15*, above n 25; and Tobin, above n 11, at 823.

²⁴⁸ Committee on the Rights of the Child *General Comment No. 4*, above n 64, at [28].

²⁴⁹ Global Education Monitoring Report Team *Facing the facts: the case for comprehensive sexuality education* (United Nations Educational, Scientific and Cultural Organization, June 2019), at 2.

²⁵⁰ Committee on the Elimination of Discrimination against Women *General Comment No. 36*, above n 239, at [68].

²⁵¹ *Kjelden*, above n 211; *Dojan v. Germany*, above n 217; and *A.R. and L.R. v. Switzerland*, above n 210.

²⁵² Committee on the Rights of the Child *General Comment No. 4*, above n 64, at [28]; and Committee on the Elimination of Discrimination against Women *General Comment No. 36*, above n 239, at [69].

education. Rather, a *Gillick* competent child should have the ability to opt-out of the education if they wish.

Echoing the C CRC and C EDAW, the European Committee of Social Rights has stated that the most appropriate structure for providing of SRH education is in school,²⁵³ and that it should be provided at all levels of schooling.²⁵⁴ Integrating mandatory SRH education into state schools is a positive obligation and matter of accessibility. Additionally, schools present the most appropriate structure for states to fulfil their obligations to provide SRH education.²⁵⁵ Schools are places of teaching, learning and personal development. There are already mechanisms in place for long-term program delivery. Teachers are trained in the effective transmission of information, and in doing so in an age-appropriate manner.²⁵⁶ It is where the state can ensure they are fulfilling their obligations in respect of children's right to SRH education.²⁵⁷

Extra efforts should be made to ensure SRH education is accessible to students with disabilities as they experience a wide denial of access to such information.²⁵⁸

5 *Non-discriminatory*

To facilitate accessibility, SRH education must also be non-discriminatory. This means that information must be presented in a manner in which all sexual-orientations,

²⁵³ *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia*, above n 236, at [44].

²⁵⁴ At [45].

²⁵⁵ *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia*, above n 236, at [44].

²⁵⁶ Global Education Monitoring Report Team, above n 249249, at 19.

²⁵⁷ United Nations Population Fund *Comprehensive Sexuality Education*, above n 7171, at 28.

²⁵⁸ Committee on the Rights of the Child *General Comment No. 20*, above n 148, at [31] and [61].

genders,²⁵⁹ races,²⁶⁰ abilities,²⁶¹ and cultures are treated equally and sensitively.²⁶² This requires critical discussion that is respectful of many perspectives.²⁶³ Non-discrimination requires that the abstinence only approach to SRH education be abandoned. Such teaching marginalises young people already having sexual relationships and promotes discrimination by denying the existence of lesbian, gay, transsexual, transgender and bisexual people.²⁶⁴ The experiences of LGBTQI+ people must be covered respectfully. The European Committee of Social Rights criticised Croatia for othering and stigmatising homosexuals as “promiscuous” in their SRH curriculum; stating that the content was manifestly biased, discriminatory and demeaning such that the curriculum amounted to a violation art 11 of the European Social Charter.²⁶⁵ Despite the discretion granted to states in the cultural appropriateness of education material, this discrimination was not tolerated as education cannot be a tool to enforce demeaning stereotypes and denial of the humanity of marginalised groups.²⁶⁶

F Enforcement mechanisms

All international human rights require states to fulfil three duties: to respect, protect and to fulfil.²⁶⁷ The obligation to respect requires that states refrain from any interference with people’s dignity and enjoyment of their rights. The obligation to protect requires states to

²⁵⁹ Committee on Economic, Social and Cultural Rights *General Comment No 22*, above n 60, at [28].

²⁶⁰ Special Rapportuer, above n 60, at [23]; and International Covenant on Elimination of All Forms of Racial Discrimination.

²⁶¹ Special Rapportuer, above n 60, at [62]; and Convention on the Rights of Persons with Disabilities.

²⁶² United Nations Educational, Scientific and Cultural Organization, UNAIDS Secretariat, United Nations Population Fund, United Nations Children’s Fund, United Nations Women and the World Health Organisation *International technical guidance on sexuality education: an evidence-informed approach* (United Nations Educational, Scientific and Cultural Organization, 2018); and Special Rapportuer, above n 60, at [16].

²⁶³ Special Rapportuer, above n 60, at [22].

²⁶⁴ At [69].

²⁶⁵ *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia*, above n 236, at [60].

²⁶⁶ At [58] – [59].

²⁶⁷ Henry Shue *Basic Rights: Substance, Affluence and US Foreign Policy* (Princeton University Press, Princeton, 1980).

ensure third parties do not interfere with these rights. Finally, the obligation to fulfil requires actions to facilitate people's realisation of the right by providing and promoting them through legal, administrative, budgetary and other means.²⁶⁸

At a glance, states must implement the framework described above in a way that respects, protects, and fulfils children's right to SRH education. This means that any law, policy or practice which prevents children's access to SRH education should be removed.²⁶⁹

Further, any necessary changes to law, policy and practice should be implemented to ensure the delivery of comprehensive, accurate, age-appropriate, accessible and non-discriminatory SRH education in state schools. This also requires investment in specialised training for teachers,²⁷⁰ and partnership with children, families and communities in curriculum design and implementation.²⁷¹

States are kept accountable to their UNCRC and ICESCR obligations through the reporting mechanisms that exist under each instrument. Every state that ratifies the UNCRC must report to the C CRC on how it is fulfilling its human rights obligations two years after ratification and every five years following.²⁷² Being a right implicit in the intersection of health and education rights, states should report on their SRH education programmes.

²⁶⁸ Inga Winkler "Respect, Protect, Fulfill: The Implementation of the Human Right to Water in South Africa" in Phillipe Cullet, Alix Gowlland-Gualtieri, Roopa Madhav, and Usha Ramanathan *Water Governance in Motion: Towards Socially and Environmentally Sustainable Water Laws* (Cambridge University Press, Cambridge, 2010), at 423 – 424; and Hendricks, above n 11, at 233.

²⁶⁹ Special Rapportuer, above n 60, at [68(a)].

²⁷⁰ At [68(e)].

²⁷¹ At [68(h)].

²⁷² Convention on the Rights of the Child, art 44.

State parties to the ICESCR must report to C ESCR every five years and the Committee has laid out specific guidance on what must be reported on.²⁷³ Under the right to health,²⁷⁴ states must report on measures taken to:²⁷⁵

(a) improve child and maternal health, as well as sexual and reproductive health services and programmes, including through education, awareness-raising, and access to family planning, ...

...

(e) prevent HIV/AIDS and other sexually transmitted diseases, educate high- risk groups, children and adolescents as well as the general public on their transmission, provide support to persons with HIV/AIDS and their families, and reduce social stigma and discrimination;

These reporting mechanisms require states be transparent and accountable to what they have or have not done in respect of SRH education. However, they do not provide an instrument to force states to respect, protect or fulfil rights. They also do not provide any pathways of appeal for those whose rights have been breached.

V Obstacles for realization

A Parenting according to cultural, religious and moral convictions

The framework outlined above reveals the legal limitations of a parent's right to educate their children in accordance with their convictions. Regardless, the status quo in many places, including New Zealand, is parental control of SRH education in state schools.

²⁷³ Committee on Economic, Social and Cultural Rights *Guidelines on treaty-specific documents to be submitted by states parties under articles 16 and 17 of the international covenant on economic, social and cultural rights* (United Nations, E/C.12/2008/224, March 2009).

²⁷⁴ International Covenant on Economic, Social and Cultural Rights, art 12.

²⁷⁵ Committee on Economic, Social and Cultural Rights *Guidelines on treaty-specific documents*, above n 273, at 57.

There are two common methods engaged by parents to restrict children's right to SRH education. Both of these are wrongly justified by a parent's right to educate their children in accordance with their convictions. Parents either prevent their children from attending SRH education at schools,²⁷⁶ or pressuring their child's school to limit the provision of SRH education.²⁷⁷ Such an outcome prioritises parental rights and liberties over children's rights.

Regardless of someone's religion, cultural or value-set, a common concern of parents is the potential loss of childhood innocence as a result of exposure to 'mature' information.²⁷⁸ This concern ignores the relevance of human sexuality in its broad sense, relationships and emotions, being an important part of children's lives and development.²⁷⁹

B State recognition and accountability

Unfortunately, states treat implementation of comprehensive SRH education as an option, when it is a positive obligation required of states to fully realise the human rights committed to in the UNCRC.²⁸⁰ This attitude has feed into a practice where states either completely neglect to fulfil this right, or develop progressive national policies that are poorly implemented at the local level with no accountability mechanisms.²⁸¹

²⁷⁶ Kerry Robinson, Elizabeth Smith and Cristyn Davies "Responsibilities, tensions and ways forward: parents' perspectives on children's sexuality education" (2017) 17 Sex Education 333, at 341.

²⁷⁷ Patricia Donovan "School-Based Sexuality Education: the Issues and Challenges" (1998) 30 Perspectives on Sexual and Reproductive Health 188, at 189.

²⁷⁸ Robinson, Smith and Davies, above n 276, at 341.

²⁷⁹ At 341.

²⁸⁰ Campbell, above n 62, at 1238.

²⁸¹ At 1223.

The C ESCR has been aware and critical of state's failures to implement this right. The Committee has critiqued Bosnia and Herzegovina,²⁸² Peru,²⁸³ Argentina,²⁸⁴ Moldova,²⁸⁵ Colombia,²⁸⁶ Mauritius,²⁸⁷ and Kazakhstan for their failure to implement sexual and reproductive health curriculum fully or in part.²⁸⁸ Additionally, the C CRC has been critical of states who fail to implement the right in full, including the participatory aspect. In its first report on the United Kingdom, the C CRC critiqued the failure of the state to secure school children's views on their parents ability to remove them from sex education programmes in school.²⁸⁹ Other human rights monitoring bodies have been critical of implementation failures. The Human Rights Committee of the ICCPR has commented their concern about of the lack of any mention of homosexuality or sexual minorities in the SRH education guidelines in the Republic of Korea.²⁹⁰

²⁸² Committee on Economic, Social and Cultural Rights *Concluding observations on the second periodic report of Bosnia and Herzegovina* (United Nations Economic and Social Council, E/ C.12/BIH/CO/2, 16 December 2013).

²⁸³ Committee on Economic, Social and Cultural Rights *Concluding observations of the Committee on Economic, Social and Cultural Rights: Peru* (United Nations Economic and Social Council, E/C.12/PER/Q/2-4, 30 May 2012).

²⁸⁴ Committee on Economic, Social and Cultural Rights *Concluding observations of the Committee on Economic, Social and Cultural Rights: Argentina* (United Nations Economic and Social Council, E/C.12/ARG/CO/3, 14 December 2011).

²⁸⁵ Committee on Economic, Social and Cultural Rights *Concluding observations of the Committee on Economic, Social and Cultural Rights: Republic of Moldova* (United Nations Economic and Social Council, E/C.12/MDA/CO/2, 12 July 2011).

²⁸⁶ Committee on Economic, Social and Cultural Rights *Concluding observations of the Committee on Economic, Social and Cultural Rights: Colombia* (United Nations Economic and Social Council, E/C.12/COL/CO/5, 7 June 2010).

²⁸⁷ Committee on Economic, Social and Cultural Rights *Concluding observations of the Committee on Economic, Social and Cultural Rights: Mauritius* (United Nations Economic and Social Council, E/C.12/MUS/CO/4, 8 June 2010).

²⁸⁸ Committee on Economic, Social and Cultural Rights *Concluding observations of the Committee on Economic, Social and Cultural Rights: Kazakhstan* (United Nations Economic and Social Council, E/C.12/KAZ/CO/1, 7 June 2010).

²⁸⁹ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, 15 January 1995, CRC/C/15/Add.34, at [14]; and Laura Lundy "'Voice' is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child" (2007) 33 *British Educational Research Journal* 927, at 928.

²⁹⁰ Human Rights Committee *Concluding Observations on the Republic of Korea* (United Nations, CCPR/C/KOR/CO/4, November 2015), at [14(d)].

VI How these obstacles reveal key tensions and ideas in children's rights discourse

The fourth question this paper seeks to answer is: what do these complicating factors tell us about key ideas, tensions and principles in children's rights discourse? Parents do not have the right to exempt their children from SRH education that is objective, critical and plural. However, many states, like New Zealand, legislatively require that parents are able to remove their children from SRH education if they desire.²⁹¹ The C CRC and C ESCR have been critical of states failure to fully respect, protect and fulfil children's right to SRH education, as noted above.²⁹² In the resistance to, and failure of states to fully implement children's right to SRH education, a few things are revealed. Cultural relativism and the public/private divide bring to light reasons for resistance to SRH education. Children's citizenship, an idea of growing prominence in children's right literature, bolsters the call to advance efforts in respect of children's right to SRH education.

A Cultural relativism

A longstanding debate within the human rights arena is the universality versus cultural relativism contest. This debate has been contentious since the drafting of the UDHR,²⁹³ the preamble of which proclaims that all human rights require "universal and effective recognition and observance" by member states.²⁹⁴ The UNCRC received near-universal ratification, but despite this nearly unanimous agreement on children's rights norms, there were 33 reservations made on a variety of issues, many of which were grounded in

²⁹¹ Education and Training Act 2020, s 51.

²⁹² See above n 291 to 298.

²⁹³ Erich Hou "Universalism or Cultural Relativism? Case Study of Same-Sex Marriage in Taiwan" in Javaid Rehman, Ayesha Shahid, Steve Foster *The Asian Yearbook of Human Rights and Humanitarian Law* (Brill Nijhoff, Leiden, 2019), at 57.

²⁹⁴ Universal Declaration of Human Rights, preamble.

cultural concerns.²⁹⁵ Cultural relativism is a stance that all points of view are equally valid, and that it is morally illegitimate to impose one culture's norms upon another.²⁹⁶ The Western roots of the United Nations (UN) and international legal human rights instruments have been criticised for imposing Western norms, values and ideals on other cultures. Cultural relativism reacts to this, asserting that each culture has its own inherent integrity with unique values and practices that cannot be judged without understanding of cultural context.²⁹⁷ Cultural relativism is used by states to justify policy and practices appear to contravene human rights.²⁹⁸

Cultural relativist concerns were evident in the drafting of the UNCRC, and the 21 reservations made on art 14 which flowed from the concern that parent's rights would be unduly limited.²⁹⁹ Cultural relativism is relevant to the right to SRH education as it a basis for the argument that it is inappropriate to require children from more conservative communities to attend SRH education.

It is not within the scope of this paper to analyse the merits of cultural relativism, or whether cultural relativism can support a valid argument that in some states, children do not have the right to SRH education. In many respects, cultural relativism is used more readily to consider how, and the extent to which, human rights norms are applicable in different cultures; a question of implementation not legitimacy.³⁰⁰ Following, this paper considers the concern of parents wishing to prevent their children from attending SRH education from a cultural relativist lens. This paper engages the view proposed by Sally Merry whereby:³⁰¹

²⁹⁵ Sonia Harris-Short "International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child" (2003) 25 Hum Rts Q 130, at 135 and 151.
²⁹⁶ At 58.

²⁹⁷ Carolyn Fluehr-Lobban "Cultural Relativism and Universal Human Rights" (1998) 20 AnthroNotes 1, at 1.

²⁹⁸ Harris-Short, above n 295, at 135.

²⁹⁹ Varadan, above n 124, 309 – 312.

³⁰⁰ Harris-Short, above n 295, at 164.

³⁰¹ Sally Merry "Human Rights and Gender Violence" in H Steiner, P Alston and R Goodman *International Human Rights in Context* (American Anthropological Association, 2007), at 525

rather than seeing universalism and cultural relativism as alternatives which one must choose, once and for all, one should see the tensions between the positions as part of the continuous process of negotiating ever-changing and interrelated global and local norms.

Parents take on the burden (and privilege) of raising their children, and they do so within the context of their own culture, religion and value-set. Children exist within their local communities, and their development is heavily influenced by their socio-cultural environment.³⁰² It can be against the interests of parent and child to promote acceptance of behaviours fundamentally condemned by a child's community. Additionally, it is unacceptably intolerant, and suffocating of diversity, to require one acceptable way of parenting. The intimate relationship between parent and child means that both have an interest in sharing views and values. On the other hand, both parent and child have an interest in the child receiving an education of extensive depth and breadth as this stimulates the development of the child's capabilities. A thorough education canvases the various choices people make and encourages individual analysis of the validity of those choices.

Ultimately, some of the content in comprehensive SRH education will be outside the realm of what is acceptable to some communities. However, comprehensive SRH education must be plural, and present all approaches to SRH as valid. A plural approach can appease the concerns of a cultural relativist as the foundation of each is that all ways-of doing must be respected for their intrinsic value.

The fact is, whether formally educated or not, young people will learn about sexuality, sources of information outside of formal education can be sources of misinformation.³⁰³ Of 250 adolescent female students surveyed in Iran, 48 per cent of girls believed

³⁰² Committee on the Rights of the Child *General Comment No. 1*, above n 48, at [7].

³⁰³ Johanna Van Vliet and Rebecca Raby "Too Little, Too Late: The Right to Comprehensive Sexual Health Education in Childhood and Adolescence" in Tom O'Neill and Dawn Zinga *Children's Rights, Multidisciplinary Approaches to Participation and Protection* (University of Toronto Press, Toronto, 2008), at 251.

menstruation was a disease.³⁰⁴ Failing to implement comprehensive, plural SRH education causes damage as social stigmas are left unchallenged. These can have very real and harmful effects. Stigmatisation is a leading reason for the invisibility of child sexual abuse.³⁰⁵ The fear of shame and isolation associated with the stigma means that sexual abuse is unseen by children, and they have no vocabulary to raise it.³⁰⁶ SRH education is preventative of harm, it teaches people about appropriate and inappropriate sexual behaviour, body ownership, and how to disclose abusive situations.³⁰⁷

Some resistance to SRH education may be fuelled by underlying misconceptions about SRH education, that it encourages sexual behaviour and ‘alternative lifestyles’.³⁰⁸ However, many of those fears are unfounded. A 2008 study commissioned by the United Nations Educational, Scientific and Cultural Organization reviewed 87 studies of 85 SRH education interventions and ascertained that SRH education programmes do not increase sexual activity.³⁰⁹ The nature of human sexuality, and its ubiquitous relevance means that information about SRH is relevant and preventative of harm for all people.

B Public v private divide

Analysis of the feminist legal concept of the public/private divide is useful in this inquiry to bring light to some of the potential reasons family decisions are typically thought to be beyond the scope of regulation. Conceptualising the family as beyond the scope of regulation effects a devaluation of children’s rights and reduces social appetite for regulation. The public/private divide is an analytical lens useful in revealing how some power dynamics influence social realities. The divide presents life as occurring in two dimensions: the public sphere of work and politics, and the private sphere of home and

³⁰⁴ Sarah House, Thérèse Mahon and Sue Cavill *Menstrual hygiene matters: a resource for improving menstrual hygiene around the world* (Water Aid, 2012), at 31.

³⁰⁵ Beate Goldschmidt-Gjerløw "Children's Rights and teachers' responsibilities: reducing or transforming the cultural taboo on child sexual abuse" (2019) 2 Human Rights Education Review 26, at 31.

³⁰⁶ At 31.

³⁰⁷ At 32.

³⁰⁸ Global Education Monitoring Report Team, above n 249249, at 4.

³⁰⁹ United Nations Population Fund *Comprehensive Sexuality Education*, above n 7171, at 20.

family.³¹⁰ The dichotomy is underpinned by individual liberalism which perceives individuals as being sovereign, autonomous, self-determining and thus having unbridled freedom in the private realm.³¹¹ Thus, creating resistance to bringing domestic decisions into the public domain. As such, the public good of government interference has been barred from entering the private sphere as the family home is perceived as necessitating freedom from state scrutiny.³¹²

Feminists argue that gender roles have relegated women to the private sphere and given men given free domain over the public sphere; bringing violence against women in the home and beyond, devaluing domestic labour, objectifying and repressing female sexuality and legitimising discrimination in the home and market-place.³¹³ Failing to regulate the private sphere consolidates the status quo and supports pre-existing power relationships, continuing the oppression of those in the private sphere in a way which allows the government to clean it's hands of any responsibility.³¹⁴ This view contributes to the difficulty in re-distributing power to those who mainly operate in the private sphere: traditionally women and children. The most commonly referred to example of the harm of the public/private divide is the historic reluctance to criminalise and respond to domestic violence.

Feminist literature on the public/private divide has been widely criticised by it's identification of sex as the primary cause of women's oppression, undermining the impact race, culture, class, sexuality and disability.³¹⁵ Thus, generalised statements about women's experience in either sphere cannot be made.³¹⁶ Although the state has been historically reluctant to interfere with the private realm, the state has been ready to do so

³¹⁰ Bridgeman, above n 92, at 46-59.

³¹¹ At 8.

³¹² Susan B Boyd *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (University of Toronto Press, Toronto, 2000), at 10.

³¹³ Ronnie Cohen and Shannon O'Byrne "'Can You Hear Me Now... Good!' Feminism(s), the Public/Private Divide, and *Citizens United v Fec*" (2013) 20 *UCLA Women's Law Journal* 39, at 40.

³¹⁴ Boyd, above n 312, at 3.

³¹⁵ At 6.

³¹⁶ At 12.

for some people. Homosexuality has been banned and declared illegal and morally reprehensible, despite the private nature of sexuality.³¹⁷ Additionally, the experience of many indigenous women or women of minority races shows that the state has been all too ready to interfere in families by removing children from their homes.³¹⁸ Indigenous families have been particularly victimised by this practice, revealing the highly selective nature of when the state chooses to reach into the private sphere.³¹⁹ This criticism reveals that where people differ from the norm privileged by the public/private divide, they are more likely to be regulated by nature of their deviation from the norm.³²⁰ The public/private divide privileges men that are white, heterosexual, middle/upper-class and Christian.³²¹ Against this norm, sexual behaviours are acceptable and unregulatable when they occur within a married, white, heterosexual, middle or upper-class couple for the purpose of reproduction. Sexual behaviour is deviant when it is for other purposes like pleasure or self-exploration. Comprehensive SRH education contributes to dismantling the norms which privilege some but not others. The public/private divide reveals why comprehensive SRH education may be unpalatable to some.

Children have historically been relegated to the private realm by nature of their dependency and perceived lack of autonomy.³²² Their belonging to the private sphere is strengthened by their inability to move between public and private spaces with ease.³²³ Michael Freeman examines the child from the public/private divide. He asserts that children's connection to

³¹⁷ Dorothy E Chunn "A Little Sex Can Be a Dangerous Thing: regulating sexuality, venereal disease, and reproduction in British Columbia" in Susan B Boyd *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (University of Toronto Press, Toronto, 2000), at 63.

³¹⁸ Boyd, above n 312, at 13/

³¹⁹ Jennifer Koshan "Sounds of Silence: the Public/Private Dichotomy, Violence, and Aboriginal Women" in Susan B Boyd *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (University of Toronto Press, Toronto, 2000), at 96.

³²⁰ Boyd, above n 312, at 14; and Cohen and O'Byrne, above n 313, at 47.

³²¹ Boyd, above n 312, at 14; and Cohen and O'Byrne, above n 313, at 47.

³²² Solveig Østrem "The Public/Private Dichotomy: a threat to children's fellow citizenship?" (2008) 40 *International Journal of Early Childhood* 15, at 23; and Gareth Rouch, George Thomson, Nick Wilson and others "Public private and personal: qualitative research on policymakers' opinions on smokefree interventions to protect children in 'private' spaces" (2010) 10 *BMC Public Health* 797, at 800.

³²³ Østrem, above n 322, at 22.

the private sphere via the family and home is so strongly held by society that even occupying public spaces as persons separate to their parents is very difficult.³²⁴ This is contributed to by the desire to protect children. School provides an opportunity for children to access the public sphere, though school is a site deemed equally public and private by Freeman.³²⁵ As a place where children learn about the world, their place, power and inequality, the classification of school being “quasi-private” makes it more difficult to limit the influence of parents on children’s education.³²⁶ Being the domain of the family, we can see how parent’s rights are preferred to children’s through the public/private lens. This reveals a possible source of the temptation to over-extend parents’ rights to ensure the child’s education conforms with their convictions by hindering children’s right to receive SRH education. Ashley Huck contends that the idea that parents have the right to educate their children in accordance with their own convictions is grounded in, and was born from, the notion that the family and parenting decisions are a part of the private sphere of life in which people may act without state interference.³²⁷

Finally, the international nature of children’s rights and UNCRC requires examination of the public/private divide from an international perspective. Susan Boyd argues that the public/private divide plays out in the international legal system; international law constructs a ‘public’ world of interstate activity that is separate from the ‘private’ sphere of domestic affairs. This protects the sovereignty of the state within its borders, and heightens the barrier for intervention to facilitate realisation of rights.³²⁸ However, Bettina Cass argues that the UNCRC straddles the public/private dichotomy as it records obligations on both the family and state to facilitate the development of the child; therefore, the family is expected to care for and nurture the child while the state is obliged to provide adequate resources for this to occur.³²⁹ The implication from this conceptualisation is an acceptance that families may not always be best placed to serve the best interests of

³²⁴ Michael Freeman “The Human Rights of Children”, above n 110, at 8.

³²⁵ At 6.

³²⁶ At 6.

³²⁷ Huck, above n 94, at 834.

³²⁸ Boyd, above n 312, at 11.

³²⁹ Cass, above n 169169, at 141.

children, and governments have a proper role in child protection.³³⁰ Ultimately, this supports the notion that states can be justified when interfering with the private realm, limiting parental rights, where such intervention facilitates the realisation of children's rights. This implies that implementing compulsory comprehensive SRH education is an appropriate state action.

C Children's citizenship

A growing body of academic work advocates for understanding children as more than their needs, as citizens who are entitled to public space in which to exert influence.³³¹ Children's citizenship is based on the need to understand children as more than dependents, as equal human subjects that have a fundamental right to participate in the society in which they live.³³² This framing supports respecting children's autonomy because children's understanding, perspectives and experience must be recognised as legitimate following their recognition as equal subjects.³³³ Matias Cordero Arce argues that focusing on children's lesser capacities assumes that adult knowledge, discourse and reasoning is better than children's.³³⁴ Cordero Arce claims that democracy doesn't require literacy or knowledge for valued participation;³³⁵ so if children are humans being who are free and equal, they have the right to define their rights and be autonomous.³³⁶

Children have a growing interest in, and ability to exercise their autonomy. They are in need of protection though, this reduces as they develop. Following, the case for a fluid and balanced approach to children's autonomy and need for protection is strong. This can be achieved by recognising children's citizenship. Valuing children's citizenship is not a matter of leaving children to their own devices, but protecting their rights. Laura Lundy's model for children's participation, outlined earlier, is based on the idea that children are

³³⁰ At 142.

³³¹ Østrem, above n 322, at 27 – 29.

³³² Michael Freeman "The Human Rights of Children", above n 110, at 42.

³³³ Østrem, above n 322, at 16 and 19.

³³⁴ Matias Cordero Arce "Maturing Children's Rights Theory" (2015) 12 Intl J Child Rts 283, at 285.

³³⁵ At 297.

³³⁶ At 302.

persons whose exercise of agency is essential for the realisation of their rights, and that adults must protect those rights.³³⁷ Her model reveals that protectionist approaches can make space for children’s autonomy. This approach was engaged by the England and Wales Court of Appeal (EWCA) in *Mabon v Mabon*.³³⁸ Thorpe LJ granted two teenage boys the right to dispense with their guardian ad litem and instruct their solicitor directly on the basis that the autonomy and consequential rights of the adolescents had to be protected.³³⁹

Recognising children’s citizenship illuminates the need to protect the validity of the autonomous choices children may make, particularly in relation to their sexuality. Having access to information which will support the child in making well informed choices balances protection and autonomy.

D Discussion

So what does this analysis reveal about the way forward, considering the rights framework and status quo?

First, cultural relativism provides a lens which confirms that the concerns of parents opposed to SRH education in state schools cannot be ignored, but they should not be the reason for a system which supports parental opt-outs. This is conditional upon SRH education being objective, critical and plural. Instead, parent’s concerns should be valued and respected in the delivery of SRH education. The C CRC argues for a “balanced approach” where parents rights conflict with children’s right to SRH education.³⁴⁰ This involves delivering SRH education in an unbiased and objective way, grounded in science, with dialogue and respect for difference.³⁴¹

³³⁷ Lundy “Voice”, above n 289, at 940.

³³⁸ *Mabon v Mabon* [2005] EWCA Civ 634, [2005] All ER (D) 419 (May).

³³⁹ Jennifer Driscoll “Children’s Rights and Participation in Social Research: Balancing Young People’s Autonomy Rights and Their Protection” (2012) 24 *Child & Fam LQ* 452, at 453.

³⁴⁰ Committee on the Rights of the Child *General Comment No. 1*, above n 48, at [4].

³⁴¹ At [4].

Second, analysis of the public/private divide reveals that SRH education which is comprehensive, accurate, age-appropriate, accessible and non-discriminatory can be perceived as a threat to the primacy of those privileged by the public/private divide. SRH education pulls public awareness towards and encourages critical reflection of gender roles, sexuality and safe sexual practices. Young girls pay the highest price of the protectionist approach towards SRH education as they are disproportionately affected by sexual stigmatisation, sexual violence and consequences from engaging in sexual behaviours.³⁴² Comprehensive SRH education can be a tool for young people to analyse and deconstruct ideas that maintain gender-hierarchy.³⁴³ Over time, typically private issues have been brought into public consciousness and regulated when re-framed as public issues. Sexually transmitted infections (STIs) were historically a private issue. However, upon rising awareness of the prevalence, STIs have been reframed as a public health issue and the global response has generally become secular and science-based.³⁴⁴ This supports the hope that SRH education can be re-framed as a matter of public interest, despite the typically private nature of children's sexuality. The structure of UNCRC obligations, falling on both parents and the state, supports the notion that the state can reach into the private realm of the family to ensure children's rights get realised.

Third, recognition of children's citizenship highlights the need to ensure human rights implementation protects the autonomy of more developed children. This lens offers weight to the assertion of this rights framework that SRH education opt-out's should be offered to children, not their parents, who are *Gillick* competent. This respects children as subjects of their rights and respects their agency by facilitating the choice not to exercise a right.

Families have an important role in the education of children, but so does the state. The state has a in interest in fostering diversity and in addressing social, cultural, religious and

³⁴² Campbell, above n 62, at 1223.

³⁴³ Special Rapportuer, above n 60, at [9].

³⁴⁴ Chunn, above n 317, at 64.

philosophical topics to encourage individuals to critically think for themselves.³⁴⁵ Parental barriers to SRH education in state schools undermine diversity and their child's development of tolerance. Thus, the "balanced" approach to SRH education as suggested by the C CRC should be pursued.³⁴⁶

VII New Zealand's position, and the way forward

The final question this paper seeks to answer is: how does New Zealand fare in the realisation of children's right to SRH education, according to the framework laid out. There are three major issues: poor implementation, a legal framework that over-extends parent's rights and a lack of opportunity for children's participation.

A Current framework

Teaching in state schools is guided by the National Curriculum,³⁴⁷ and secondary students work towards achieving the National Certificate of Educational Achievement (NCEA) in years 11 to 13.³⁴⁸ SRH health education, referred to as sexuality education, is part of the New Zealand Curriculum, specifically within Health and Physical Education (HPE).³⁴⁹ Being part of the New Zealand Curriculum, sexuality education is mandatory for all students in state schools in years one to ten,³⁵⁰ it has been so since 1999.³⁵¹ HPE is an optional NCEA subject for students in years 11 to 13.

³⁴⁵ Huck, above n 94, at 837.

³⁴⁶ Committee on the Rights of the Child *General Comment No. 1*, above n 48, at [4].

³⁴⁷ *The New Zealand Curriculum* (Ministry of Education, 2015); and Education and Training Act, s 90.

³⁴⁸ "NCEA" New Zealand Qualifications Authority <nzqa.govt.nz>.

³⁴⁹ Ministry of Education "Sexuality education: a guide for principals, boards of trustees, and teachers" (2015) Te Kete Ipurangi <health.tki.org.nz>.

³⁵⁰ Ministry of Education "Sexuality education: for parents" Parents Education <parents.education.govt.nz>.

³⁵¹ Ministry of Education "Sexuality education: for parents", above n 349.

The Ministry of Education develops curriculum and assessment standards for students and teachers,³⁵² intervenes in instances of school failure,³⁵³ and determines funding.³⁵⁴ All state schools must have a Board of Trustees (Board).³⁵⁵ Boards are a group of elected individuals who are tasked with school governance.³⁵⁶ They are responsible for maintaining plans, setting the school's education policies and ensuring compliance with the National Education Guidelines (NAGs).³⁵⁷

Under the Education and Training Act 2020, Boards are required to consult with the school community on the delivery of sexuality education.³⁵⁸ The health curriculum is the only part of the curriculum Boards are required to consult on, meaning sexuality education is treated differently to all other parts of the curriculum. Under s 91, Boards must, at least once every two years, consult with the school community and adopt a statement on the delivery of the health curriculum.³⁵⁹ The purpose of this consultation is to inform the school community of the SRH curricula, ascertain their wishes in the respect of the health curriculum and determine the health education needs of students.³⁶⁰ Boards must "consider" any comments received during the consultation process.³⁶¹

Parents have access to a systematic exemption of sexuality education. Under the Education and Training Act, parents of a child enrolled in a state school may, by writing to the school's principal, ask that their child be exempted from "parts of the health curriculum related to sexuality education".³⁶² On the receipt of such a request, the

³⁵² Education and Training Act, s 23.

³⁵³ Section 171.

³⁵⁴ Section 419.

³⁵⁵ Section 118.

³⁵⁶ Section 125.

³⁵⁷ *Education Policy Outlook: New Zealand* (Organisation for Economic Co-operation and Development, June 2013).

³⁵⁸ Education and Training Act, s 91.

³⁵⁹ Section 91(1); and Ministry of Education "Sexuality education: a guide", above n 360.

³⁶⁰ Education and Training Act, s 91(2).

³⁶¹ Section 91(3)(c).

³⁶² Section 51(1).

principal must ensure the student is excluded from such education,³⁶³ meaning that any cultural or religious belief will be respected.³⁶⁴

In 2013 the Health Select Committee released their *Inquiry into improving child health outcomes and preventing child abuse*.³⁶⁵ The inquiry highlighted the importance of access to health services and quality SRH education programmes for all young people. A recommendation of the committee was that the government should:³⁶⁶

develop a co-ordinated cross sectoral action plan with the objective of giving New Zealand world-leading, best-practice evidence-based sexuality and reproductive health education, ... matched with appropriate, sustainable resourcing.

This call to action followed the Education Review Office's (ERO's) findings in 2007 that most sexuality education programmes were not meeting student's needs and had major weaknesses in assessing student's learning.³⁶⁷ Two thirds of New Zealand schools were found to be "weak" in the delivery of sexuality education.³⁶⁸ Noting the lack of appetite in schools to improve sexuality education, the Committee recommended that the government require ERO to "actively monitor and report" on all schools application of best-practice criteria for SRH education, with particular attention to schools competence in meeting the needs of students in respect of their culture, ethnicity, gender and sexual orientation.³⁶⁹

Following the Health Select Committee's report, in Ministry of Education refreshed the New Zealand Sexuality Education Guidelines in 2015.³⁷⁰ These were renewed again in 2020.³⁷¹ The Relationships and Sexuality Education Guidelines (the Guidelines)

³⁶³ Section 51(2).

³⁶⁴ Ministry of Education "Sexuality education: for parents", above n 349.

³⁶⁵ Health Committee *Inquiry into improving child health outcomes and preventing child abuse with a focus from preconception until three years of age* (New Zealand Parliament, November 2013).

³⁶⁶ At 8.

³⁶⁷ At 28.

³⁶⁸ At 29.

³⁶⁹ At 34.

³⁷⁰ Ministry of Education *Sexuality Education: A guide for principals, boards of trustees, and teachers* (July 2016).

³⁷¹ "Refreshed resource 'Relationships and Sexuality Education' released" (8 September 2020) Ministry of Education <education.govt.nz>.

strengthened content in a number of areas include including healthy relationships, Māori and Pacific views of sexuality, LGBTQIA+ concepts and issues, pornography.³⁷² The Guidelines are divided into two documents to cater for primary and secondary schools.³⁷³

The 2020 refresh was in response to the ERO’s 2018 report *Promoting Wellbeing through Sexuality Education*.³⁷⁴ This report indicated that schools needed better support in complying with consultation requirements, covering the curriculum and addressing aspects such as consent, digital technologies, and relationships.³⁷⁵ The 2020 Guidelines are informed by:³⁷⁶

an awareness of changing family structures, shifting social norms in relation to gender and sexuality, the rise of social media, and the increased use of digital communications and devices. It acknowledges the increased calls for social inclusion and for the prevention of bullying, violence, and child abuse. It recognises the importance of social and emotional learning for healthy relationships.

The Guidelines themselves present an excellent, rights-based approach to SRH education. Against the rights framework presented earlier in this paper, the Guidelines exhibit a comprehensive, evidence-based, age-appropriate, and non-discriminatory approach.

The aims of sexuality education, as provided by the Guidelines are:³⁷⁷

- (a) learning about the self (physically, socially, emotionally, and spiritually);
- (b) gaining knowledge and skills for meaningful and supportive relationships with others; and

³⁷² “Refreshed resource ‘Relationships and Sexuality Education’ released”, above n 371.

³⁷³ *Relationships and Sexuality Education: a guide for teachers, leaders and Boards of Trustees, years 1 – 8* (Ministry of Education, 2020); and *Relationships and Sexuality Education: a guide for teachers, leaders and Boards of Trustees, years 9 – 13* (Ministry of Education, 2020).

³⁷⁴ Education Review Office *Promoting wellbeing through sexuality education* (New Zealand Government, September 2018).

³⁷⁵ Christine Dew “Sexuality Education Guidelines (2015) and Relationship and Sexuality Education Guidelines (2020)” (6 September 2020, via email) (Obtained under Official Information Act 1982 Request to the Ministry of Education).

³⁷⁶ “Refreshed resource ‘Relationships and Sexuality Education’ released”, above n 371.

³⁷⁷ Ministry of Education *Relationship and Sexuality Education, years 9 – 13*, above n 373373, at 12; Ministry of Education, *Relationship and Sexuality Education, years 1 – 8*, above n 373373, at 10.

- (c) learning about social, political, cultural, and environmental contexts, and taking action within these contexts.

These aims are underpinned by hauora (the Māori philosophy of health and wellbeing), health promotion, the socio-ecological perspective, and attitudes and values that develop respect for other's rights and a sense of social justice.³⁷⁸ The Guidelines are informed by a commitment to the Treaty of Waitangi, and Māori and Pacific worldviews.³⁷⁹ The curriculum in Primary School covers friendship, families and respect in the first few years, then and graduates to puberty, body development, image, reproduction and social media in later years.³⁸⁰ The secondary school curriculum covers positive and supportive intimate relationships, contraception, health management, sexuality and gender.³⁸¹

The Guidelines exist to assist principals and teachers with the design and delivery of sexuality education within the HPE curriculum. They also support Boards in their engagement with their local communities in the development of a localised HPE curriculum.³⁸² The issue lies in implementation, accessibility and participation. The recent refresh to the Guidelines exhibits a promising commitment to children's right to SRH education in New Zealand, but unfortunately the Guidelines themselves were not the source of New Zealand's issues. New Zealand Family Planning welcomed the refresh but stated that new Guidelines "won't deliver the fundamental change we need", arguing for more support from the Ministry of Education in helping schools deliver this work.³⁸³ Family Planning expressed the concern that unless fully and nationally implemented with accompanying resources and professional development, there will not be progress in the state of SRH education in New Zealand.³⁸⁴

³⁷⁸ Ministry of Education *Relationship and Sexuality Education, years 9 – 13*, above n 373373, at 12; Ministry of Education, *Relationship and Sexuality Education, years 1 – 8*, above n 373373, at 10.

³⁷⁹ Ministry of Education *Relationship and Sexuality Education, years 9 – 13*, above n 373373, at 14 – 17; Ministry of Education, *Relationship and Sexuality Education, years 1 – 8*, above n 373373, at 13 – 15.

³⁸⁰ Ministry of Education "Sexuality education: for parents", above n 349.

³⁸¹ Ministry of Education "Sexuality education: for parents", above n 349.

³⁸² Christine Dew, above n 375.

³⁸³ New Zealand Family Planning "Family Planning Welcomes New Sexuality Education Guidelines" (press release, 8 September 2020).

³⁸⁴ New Zealand Family Planning "Family Planning Welcomes New Sexuality Education Guidelines", above n 383.

B Issues

1 Implementation

The structure of New Zealand’s HPE system means there is no high level control over SRH education content. ERO’s 2018 report found that sexuality education is taught “not at all well” in 28% of schools, and only “somewhat well” in the next 20% of schools.³⁸⁵ In this review process, schools were declared to be performing “well” even if they completely missed teaching on some of the 13 identified knowledge areas.³⁸⁶

Second, Boards are ill-equipped to perform their role in the design and review of SRH education curriculum. There has been significant controversy over whether Boards are able to perform all functions delegated to them. In 2008 the Ministry of Education concluded that they were ill-equipped to perform all functions, and recommended narrowing the roles of Boards and creating regional Education Hubs to provide local curriculum governance.³⁸⁷ In ERO’s 2018 review, almost 30 per cent of Boards were deemed to have not consulted the school community in the design of SRH education, a statutory requirement.³⁸⁸ Boards were determined as unable to keep pace with the changes in how technology has rapidly changed children’s exposure to sexuality; social media and pornography were found to be the least well covered aspects in sexuality education.³⁸⁹ Further, Boards are required to report to students and their parents on the progress and achievement of individual students in plain language, in writing, and at least twice a year; and across the National Curriculum.³⁹⁰ However, ERO found that *most* schools were not evaluating students learning in respect of the sexuality education curriculum.³⁹¹

³⁸⁵ Education Review Office *Promoting wellbeing through sexuality education*, above n 374, at 6.

³⁸⁶ At 18.

³⁸⁷ Centre on International Education Benchmarking “New Zealand: Governance and Accountability” National Centre on Education and the Economy <ncee.org>.

³⁸⁸ Education Review Office *Promoting wellbeing through sexuality education*, above n 374, at 12.

³⁸⁹ At 18.

³⁹⁰ Education and Training Act, s 165; and *The New Zealand Curriculum* (Ministry of Education, 2015).

³⁹¹ Education Review Office *Promoting wellbeing through sexuality education*, above n 374, at 17.

Third, teachers are not receiving sufficient resourcing and professional development to deliver SRH education as effectively as desired, creating inconsistent teaching across schools.³⁹² ERO's 2018 review found that in 21 per cent of schools, there was an unsatisfactory capacity to teach whereby teachers either had no recent professional development, no understanding of the salience of sexuality education, or a belief that SRH education is unimportant.³⁹³ Implementation of the curriculum across schools and within is inconsistent, and has been this way for a long time. Groups reported in 2007 as less well catered for remain less well catered for.³⁹⁴ These groups include Māori and Pacific students, international students, students with strong cultural or religious beliefs, students with additional learning needs and students who are sex, gender or sexuality diverse.³⁹⁵ This is connected to inequitable outcomes; sexually active students attending low decile schools and those living in poor neighbourhoods are at least 20 per cent less likely to use contraception consistently than those attending medium or high decile schools.³⁹⁶

Thus, the level of discretion extended to Boards and lack of investment in teachers has contributed to poor implementation of the Guidelines. Many state schools are failing to fulfil the state's obligation to provide comprehensive SRH education to children. The current structure is not good enough, the Ministry of Education must actively review whether Boards are performing their duties in respect of sexuality education, and where they are failing to do so, they must intervene.

³⁹² Education Review Office *Promoting wellbeing through sexuality education*, above n 374, at 15; see also New Zealand Family Planning *Briefing to Incoming*, above n 81, at 4.

³⁹³ Education Review Office *Promoting wellbeing through sexuality education*, above n 374, at 15.

³⁹⁴ At 5.

³⁹⁵ At 5.

³⁹⁶ New Zealand Family Planning *Briefing to Incoming*, above n 81, at 8.

2 *Accessibility*

The current framework of SRH education in New Zealand has two accessibility issues: the legislative ability of parents to opt-out their children from sexuality education, and the lack of mandatory SRH education for students in years 11 to 13.

First, parental opt-outs are available systematically in New Zealand via s 51 of the Education and Training Act 2020. Parental opt-outs, particularly for adolescents, contravene the rights framework presented earlier in this paper. It is absurd that adolescents in New Zealand can legally consent to sexual activity, an abortion and get contraception without their parent's consent, but that their parents can veto their access to SRH education.³⁹⁷ In line with this paper's framework, New Zealand should repeal s 51 and replace it with an ability for adolescents to opt themselves out if they so choose. This paper suggests 16 years of age as the appropriate age as a mirror to the current boundary at which children are determined competent to consent to sexual activity. Parents do not have the right to opt their children out of SRH education provided in state schools. Therefore, the ability of parents to exempt their children should be removed, unless parents can prove that the education being delivered is not objective, critical and plural.

Second, children's right to SRH education would be better fulfilled if it was compulsory and systematically integrated into learning for students years 11 to 13. In the Ministry of Education's own report, it noted that students in years 11–13 *need* opportunities to learn about sexuality and relationships as it is in these years that young people are more likely to be in intimate relationships. The average age of the first sexual intercourse is 17 years, at which there is no compulsory sexuality education offered.³⁹⁸ With the current system, exposure to sexuality education in years 11 to 13 varies immensely, many schools have no health programme for senior students.³⁹⁹ It is not within the scope of this paper to suggest exactly how mandatory SRH education should be integrated into the programme of

³⁹⁷ Andrea Monin "Sex education in New Zealand schools illuminated by Gillick" (1995) 1 BFLJ 268.

³⁹⁸ Ministry of Education *Sexuality Education: A guide for principals, boards of trustees, and teachers*, above n 370, at 26.

³⁹⁹ Education Review Office *Wellbeing for Young People's Success at Secondary School* (New Zealand Government, February 2015), at 20.

learning for students in years 11 to 13. However, this paper suggests that a one off, credited, pass-or-fail assessment could be integrated within NCEA levels 1 – 3.

3 Participation

Finally, there is no provision in the Guidelines or statute which call for student's participation in the design or delivery of SRH education.⁴⁰⁰ In fact, in 40 per cent of schools, ERO found that there was no opportunity for student participation in SRH education.⁴⁰¹ The Guidelines must be amended to require student participation in line with this paper's framework.

To respect, protect and fulfil children's right to SRH education in New Zealand, the aforementioned changes to legislation, policy and practice must be made.

VIII Conclusion

All people have the right to receive SRH education. The right to SRH education is borne from the rights to health and education. This paper outlines a framework for the implementation of children's right to SRH education. The foundations are an understanding of children as subject of rights, in need of protection and respect for their autonomy. According to the evolving capacities of the child, best interest principle and children's participatory rights, children must receive SRH education that is comprehensive, accurate, age-appropriate, accessible, non-discriminatory and participatory. Unfortunately, both parents and states interfere with the full realisation of this right. Cultural relativism and the public/private divide provide an explanatory lens, and children's citizenship offers a rights-compliant way forward. New Zealand's SRH education framework is not accessible or participatory according to the rights framework presented in this paper. Further, the delivery of SRH education in New Zealand is not rights-compliant because of

⁴⁰⁰ Ministry of Education *Relationship and Sexuality Education, years 9 – 13*, above n 373373; and Ministry of Education, *Relationship and Sexuality Education, years 1 – 8*, above n 373373.

⁴⁰¹ Education Review Office *Promoting wellbeing through sexuality education*, above n 374, at 17.

implementation failure. It is imperative that attention be paid to children's right to receive SRH education, and that parent's rights are not over-extended to inhibit children's access to this information.

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