Article 40

The Dynamics of Youth Justice & the Convention on the Rights of the Child in South Africa

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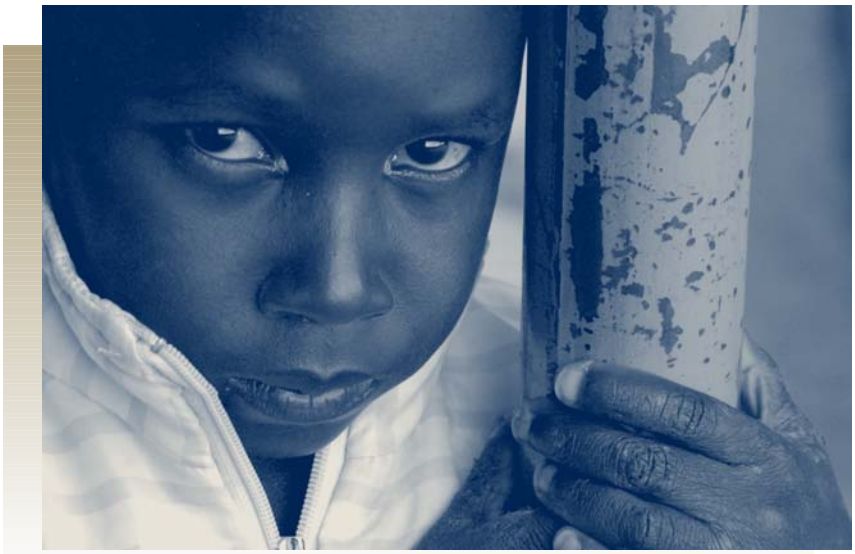


Article 37 (b)

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time

Minimum sentences legislation for child offenders found unconstitutional

Centre for Child Law v Minister of Justice and Constitutional Development and Others (11214/08 TPD)

by Ronaldah Ngidi, Centre for Child Law

On 12 September 2008 the Pretoria High Court heard an application by the Centre for Child Law against the Minister of Justice and Constitutional Development, the Minister of Correctional Services and the Legal Aid Board, challenging the constitutionality of section 51(1); 51(2); 51(6), 51(5) (b) and 53A (b) of the Criminal Law Amendment Act 105 of 1997 (the "Amended Act"), as amended by section 1 of the Criminal Law (Sentencing) Amendment Act 38 of 2007 (the "Amendment Act"). The Minister of Correctional Services and the Legal Aid Board filed notices to abide by the order of the Court, while the Minister of Justice and Constitutional Development opposed the application.

The Amended Act was brought into operation on 31 December 2007 and makes minimum sentences, ranging from 5, 10, 15, 20 years and life imprisonment for certain crimes applicable to 16- and 17-year-olds. This new law is similar to a law passed in 1997, which the Supreme Court of Appeal (SCA) already found to be against the Constitution and international law in relation to children.

Continued on page 2

EDITORIAL

This final edition of Article 40 *for 2008 marks the end of the 10th year of its publication. It is significant that 2008 should also signal the eventual passing of the Child Justice Bill. It can be argued that* Article 40 *played an important role in keeping the Child Justice Bill in the spot-light during the years when it seemed that the process of adopting a separate criminal justice system for children in South Africa had stalled.*

Apart from the law reform process, Article 40 *has consistently aimed to highlight developments in child justice practice and over the years has highlighted some important advances in this field.*

First, in relation to implementation, Article 40 *has featured developments such as training on child justice in the North-West (July 2002); the Mangaung One-Stop Child Justice Centre (December 2002); the Western Cape Child Justice Forum (October 2003) and the launch of the Volunteer Assistant Probation Officer Programme (October 2005).*

Secondly, discussion has centered on developments in international law and law reform in Africa, such as child justice law reform developments in Africa (July 2004); the Gambia's new law on juvenile justice (December 2005); the UN Committee's on the Rights of the Child; General Comment No. 10 on Juvenile Justice (March 2007) and the new juvenile justice regime of Nigeria (July 2007).

Third, diversion and diversion programmes have always been an issue Article 40 *has paid attention to, as evidenced by articles on diversion in Brits (July 2002); the 'From Scars to Stars' programme (December 2002); diversion in Mpumalanga courtesy of the Restorative Justice Centre (October 2004); and the development of minimum standards for diversion (December 2004).*

Finally, Article 40 *has also sought to make case law accessible to its wide readership through, for instance, articles on* S v Zuba and 23 similar cases *(December 2003) and* B v S *(May 2005). This trend continues in the present edition where we examine the recent case of* Centre for Child Law v Minister of Justice and Constitutional Development and Others.

As we usher out the first decade of Article 40, *we wish to thank our readers and Editorial Board for their continued support and look forward to a new era of child justice under the Child Justice Act!*

Continued from page 1

The Centre for Child Law (the "Centre") did not have a client that it was representing, but initiated this case as part of its strategy to end the application of the minimum sentences regime to 16- and 17-year-old child offenders. The Minister of Justice and Constitutional Development (the "Minister") opposed the application and also raised a point *in limine* with regard to the Centre's *locus standi* to bring the application.

Judgment was delivered on 4 November 2008.

The point in limine

The Centre brought the application in its own interest as a organisation dedicated to upholding and protecting children's rights; on behalf of children at risk of being sentenced to serve a minimum sentence, and in the public interest as provided for respectively in section 38(a), (c) and (d) of the Constitution as well as section 15(2) (c) and (d) of the Children's Act 38 of 2005.

The Minister argued that the Centre's reliance on section 38(a) and (d) for *locus standi* was insufficient as Courts should not be required to deal with abstract or hypothetical issues. Therefore, due to the absence of facts on which the application was based, the application was premature and the Court should decline to hear the application.

The Court, per Potterill AJ found that the Centre had *locus standi* to bring the application as the Centre:

> *"although not acting on behalf of a specific child within a set of facts, is attacking the Amended Act's constitutional validity on the principle and does not require a set of facts; the facts speak for themselves. The child will be 16 or 17 years old, has committed a serious offence of either rape, robbery or murder and the Presiding Officer will have to start the sentencing process with the minimum sentence prescribed by the Legislature".*

The Court stated that the application was not hypothetical or academic and that the Centre had a real interest of its own: that of the public and the interest of those children who are at risk of being sentenced in terms of the minimum sentence regime. Therefore the Centre had *locus standi* to bring the application.

The merits

Counsel for the Centre argued that the Amended Act was inconsistent with Section 28(1) (g) and 28(2) of the Constitution as it made minimum sentences applicable to 16- and 17-year-old child offenders convicted of very serious crimes. The effect of the Amended Act is that these child offenders are subject to very long prison sentences, including life imprisonment, as a starting point and the Courts may only depart where there are substantial and compelling circumstances to do so. Therefore imprisonment in terms of the Amended Act is a measure of first resort and does not allow the Courts to consider the principles of individuality and proportionality.

The Centre further argued that the Amendment Act negated the approach of the Court in S v B 2006 (1) SACR 311 (SCA); [2005] 2 All SA 1 (SCA), where the SCA held that when sentencing child offenders aged 16 and 17

"The Centre brought the application in its own interest as a organisation dedicated to upholding and protecting children's rights; ..."

years, the Court must start with a "clean slate". This approach entailed that where a Court sentenced a child offender for a very serious crime, it would be at liberty to impose any sentence. A Court would be required to start with a clean slate and work forward to reach a final decision on sentence, guided by the constitutional principle that, when dealing with child offenders, imprisonment is a measure of last resort and for the shortest appropriate period of time.

In reply the Minister argued that the Amended Act was not unconstitutional. According to the Minister the Court retains its discretion when interpreting the law and the Amended Act does not subject child offenders to the same sentencing regime as adult offenders. The Courts are always at liberty to consider youthfulness as a mitigating factor when imposing sentence, therefore the question whether the Courts start with a "clean slate" or not when sentencing is purely academic.

The Court disagreed with the Minister and in her judgment, Potterill AJ stated that:

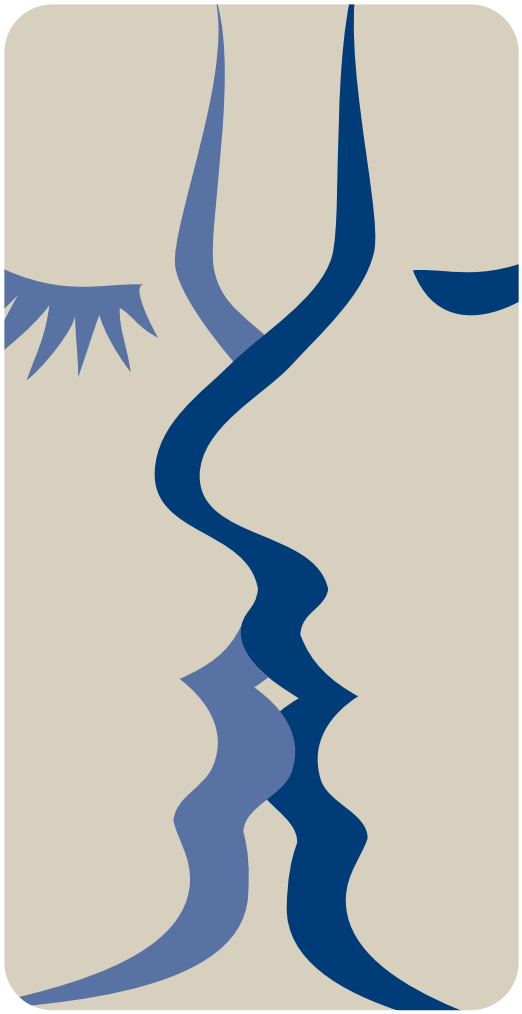
> *"This approach [that of the Minister of Justice and Constitutional Development] is incorrect, with a clean slate approach the Court has many sentencing options to consider, although imprisonment is conceivable it is an option of last resort, but with the Amended Act the Court must start with the minimum sentence of life imprisonment or long-term imprisonment as an option for first resort and then look for compelling and substantial circumstance and proportionality. The result will not always be the same and is not purely academic. The Amended Act must adhere to the principles enshrined in the Constitution as aptly set out in S v B."*

She went on to say that:

> *"In view of S v B I cannot agree that the sentencing regime pertaining to 16- and 17-year-olds is the same in terms of the Act (Act 105 of 1997 before the amendment) an the Amended Act."*

According to the Court the Amended Act has made minimum sentences a measure of first resort for 16- and 17- years-old child offenders, which is inconsistent with section 28(1) (g) and 28(2) of the Constitution. The Court declared all the offending provisions unconstitutional and referred the matter to the Constitutional Court in terms of section 172(2)(a) of the Constitution for confirmation.

The judgement is the first step towards removing minimum sentences for 16- and 17-year-old child offenders. However, the declarations of invalidity are of no effect until such time as the Constitutional Court confirms the orders. The Centre has moved with haste and referred the matter to the Constitutional Court as a prompt resolution of the issues is a matter of urgency for those 16- and 17-year-olds who continue to be sentenced under the minimum sentences regime. The matter is set down to be heard on 5 March 2009.



And seal it with a kiss...

by Helene Combrink,
Gender Project, Community Law Centre

When the first chapters of the new Sexual Offences Act came into operation in December 2007, the issue of this new law, making it a criminal offence for teenagers to kiss in public, was one of the aspects that generated most publicity around the legislation. Indignant young people staged "kiss-athons" in shopping malls in protest against the law, and public opinion generally seemed to be that the legislature had gone too far in its attempt to be protective.

But in their haste to condemn "The Kissing Law" (as it soon came to be known), many young activists failed to properly read the provisions of the legislation or to look into the background and motivation for putting these measures into place. In this article, we take a closer look at why these rules found their way into the Sexual Offences Act in the first place, and we consider whether teenagers are really in danger of being prosecuted for kissing in public.

The Sexual Offences Act

The provisions in question are sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The difference between the two sections is that section 15 deals with an act of sexual penetration committed with a child (in other words a person under the age of 18 years), whereas section 16 relates to an act of sexual violation with a child. Both "sexual penetration" and "sexual violation" are comprehensively set out in the definition section of the Act. This distinction is in line with the rest of the Act, which draws this line between penetrative and non-penetrative sexual acts throughout. (The assumption is made that penetrative sexual acts generally have more serious consequences that non-penetrative ones, and are treated as such.)

Background: "Age of Consent"

In order to understand the rationale for the inclusion of these provisions in the Act, it is useful to have a brief look at the predecessor of the new Sexual Offences Act, namely the Sexual Offences Act 23 of 1957. This Act provided in section 14(1) that any male person who has "unlawful carnal intercourse" with a girl under 16 years or committed an immoral or

indecent act with a girl under 16 years or a boy under 19 years, would be guilty of an offence. Attempting to commit these acts, or soliciting a girl or boy to commit such acts, similarly constituted an offence. Section 14(3) contained the converse provisions relating to female persons committing these acts with boys under 16 years or girls under 19 years. The 1957 Sexual Offences Act defined "unlawful carnal intercourse" as "carnal intercourse other than between husband and wife".

The initial motivation for enacting these provisions lay in the fact that young persons (originally women) between the ages of 12 years and 16 years were regarded as potentially vulnerable to predatory older men, and it was deemed necessary for the legislature to intervene in order to protect their sexual integrity.

It is useful to remember here the common law "presumption" that girls under the age of 12 years cannot in law consent to sexual intercourse – because of their young age. This means that sexual intercourse with a girl under the age of 12 years would always constitute rape, since she could not consent. (In spite of the popular belief that 16 years is the "age of consent", we see that in law, this age is actually set at 12 years.)

Between the ages of 12 years and 16 years this position changed. The girl could now legally consent to sexual intercourse; however, because of her young age and remaining vulnerability, the legislature had still intervened and enacted the statutory offence of consensual sexual intercourse with a young person. This means that where she didn't consent to sex, it would constitute rape; where she did consent, the other party would be charged with contravention of section 14(1) of the Sexual Offences Act. The latter offence was (unfortunately) known as "statutory rape"; this was an unfortunate misnomer, since the presence of consent meant that the situation didn't in any way resemble rape. However, the title remained and has even been incorporated in the new Sexual Offences Act!

As one can see from the description of the offences set out above, there were several discrepancies in the old Sexual Offences Act. Firstly, there was a distinction between hetero-sexual acts, where the age limit was 16 years, and homosexual acts, where the age limit was 19 years. Secondly, a distinction was also drawn between the type of acts involved, ie "unlawful carnal intercourse" and "immoral and indecent acts" (the latter category being far broader). For this reason, it was necessary to reform and update this section when the review of sexual offences came before the legislature in the form of the new Sexual Offences Act.

Rationale

The motivation for retaining this offence was first and foremost to provide young persons between the ages of 12 years and 16 years with protection against predatory adults who may use their age and influence to convince the younger person to consent to sexual acts to their detriment. (Remember that once the "influence" becomes strong enough that one can say that the young person no longer freely consents, the charge against the older person will become one of rape.)

During parliamentary debates on the draft Bill, the possibility of raising this age to 18 years was discussed. Given the high numbers of teenagers who start having sexual intercourse at an age earlier than 18 years, it was realised that this was not a feasible suggestion.

One concern raised by a number of children's rights organisations was the possibility that teenage sexual experimentation would now be criminalised, since the Act clearly provides for both parties to be prosecuted. In order to address this concern, the Act provides that only the National Director of Public Prosecution may authorise prosecution in the situation where both parties are under the age of 16 years. The assumption here is that the National Director will be the appropriate person to weigh matters of public interest together with the personal interests of the two young persons, and will not institute prosecutions lightly without having consulted with all interested parties, including experts, where necessary. (One of the concerns expressed by children's organisations was that inexperienced prosecutors, without the necessary background knowledge, might too easily decide to institute prosecutions in these cases.) For similar reasons, only Directors of Public Prosecution are entrusted with authorising prosecutions in section 16.

A further safeguard against undesirable prosecution of experimenting teenagers is found in section 56(2) (b), which provides accused persons with a complete defence if they are charged with contravention of section 16, both parties are under 16 years and the age difference between them is not more than two years. The motivation here was again that if no penetrative sexual intercourse has taken place, both are under 16 years and the prospect of undue influence resulting from an age gap of more than two years is absent, then the parties should not be prosecuted for whatever sexual activity happened between them.

Conclusion

As we can see from the above, the "kissing provisions" are not first and foremost aimed at punishing teenagers for having sex. It may well be that in its intention to protect vulnerable young persons, the legislature cast its net slightly too wide, at least in a technical sense (one could argue that the inclusion of the word "unlawful" in both sections might have remedied this aspect). However, the additional provisions dealing with the powers of the prosecuting authority to institute prosecutions and the defence contained in the Act make it clear that these sections have been sadly misunderstood. Something that teenagers should be able to sympathise with only too well...

UPDATE ON THE Child Justice Bill (Act!)

by Daksha Kassan

As reported in the last edition of Article 40, the Child Justice Bill was passed at its first reading by the National Assembly on 25 June 2008. However, in terms of parliamentary process it had to then proceed to the National Council of Provinces (NCOP) for consideration and recommendations for possible amendments.

The Select Committee on Justice and Security Affairs deliberated on the Bill on 27 and 28 August, and 2 September 2008. On 5 September 2008, the Select Committee on Justice and Security Affairs approved and adopted the Child Justice Bill, with a few technical amendments.

These amendments generally related to the following:

- including a definition for "guardian" in clause 1;
- adding the word "guardian" in all the clauses referring to "a parent or appropriate adult";
- replacing the word "recognisances" with the word "recognisance";
- adding the phrase "take into account their particular vulnerability" in clause 28(1)(b) so that the needs of gay and lesbian children and also children with disabilities are taken into account;
- including "assistant probation officers" in the list of persons that should be allowed to visit a child in police custody in clause 28(1) (c); and
- including the word "National" in clause 94(2) (d) referring to the Commissioner of Correctional Services.

The one substantive amendment related to redrafting clause 80 in respect of when a legal representative should be held liable and be subjected to remedial action or sanction for not fulfilling the requirements listed.

The Bill was then passed by the NCOP on 25 September 2008 and referred back to the Portfolio Committee on Justice and Constitutional Development for them to decide whether to accept the amendments proposed by the Select Committee on Justice and Security Affairs.

Legal Representation

At the Portfolio Committee deliberations, the Centre for Child Law made a further submission on the proposed change to clause 80. The submission analysed the NCOP's recommendation as proposing that if a lawyer failed to allow a child to provide independent instructions, this was not essential and accordingly the presiding officer should not record displeasure at such failure through the making of a sanctions order. Essentially the Select Committee decided that there are no consequences if the legal representative does not allow the child to give independent instructions.

The Centre submitted that this was incorrect. They argued that the requirement that a legal representative should allow the child to give independent instructions (as far as is reasonably possible) is a very important requirement. It is aimed at avoiding a situation where the parent is doing all the talking, and the lawyer is listening to the parent instead of to the child. It is also aimed at avoiding a situation where the lawyer just acts on his or her own ideas instead of listening to what the child is saying. The lawyer is there to defend and represent the child, which is a different role, and it is a role which is dependent on the child being able to give independent instructions. The Centre submitted that clause 80 as it appeared in the version of the Bill approved by the National Assembly is the version that presents the correct position, and will provide protection for the child, and a platform for the child to participate meaningfully in his/her own case. They argued that it is important to build a cohort of legal representatives for children who know what their duties are.

The Portfolio Committee deliberations

Following this submission, the Portfolio Committee discussed the recommendations of the NCOP with the Select Committee on Justice and Security Affairs. After further deliberations, it was decided to accept the NCOP's recommendations with the exception of the proposed amendment to section 80. The Portfolio Committee then voted and passed the new version of the Bill on 13 November 2008.

Second reading of the Bill at the National Assembly

On 19 November 2008, the National Assembly passed the Child Justice Bill. It will now be submitted to the President for his assent, which will mark the end to a long process of law reform and a new era for child justice in South Africa. The Act will come into operation on 1 April 2010.

NEW BOOK

Children's Rights in Africa: A Legal Perspective

edited by Julia Sloth-Nielsen

This collection is anchored in an African conception of children's rights and the law, and reflects contemporary discourses taking place in the region of the children's rights sphere. The majority of the contributors are African and adopt an individual approach to their topic which reflects their first-hand experience. The book focuses on child rights issues which have particular resonance on the continent and the chapters span themes which are both broad and narrow, containing subject matter which is both theoretical and illuminated by practice. For instance, in relation to child justice, Godfrey Odongo deals with the impact international law on children's rights has on juvenile justice law reform in the African context, and Ann Skelton deals with restorative justice in child justice systems in Africa.

The book profiles recent developments and experiences in furthering children's legal rights in the African context, and distills from these future trends regarding the specific role the law can play in the African children's rights environment.

In reviewing the book, Bernadine Dohrn from Northwestern University School of Law in Chicago stated:

'A virtuoso and indispensible resource on children's legal and human rights from the unique perspective of the African context. This volume breaks new ground, firmly rooting the tragic and too familiar calamities of child hunger, displacement, AIDS, and violence in the surprisingly fresh terrain being cultivated to promote a vibrant child-rights agenda with specifically African solutions'.

Likewise, Jaap Doek, former Chairperson of the UN Committee on the Rights of the Child, had the following to say:

'This book not only reflects the many problems African children are facing but also elaborates on the strong potential of child rights implementation illustrated with concrete examples. It provides a unique and comprehensive overview of the many aspects of the developments and experiences in furthering the respect for and the implementation of the rights of African children. A very welcome tool for practitioners, politicians and researchers in the field of children's rights in Africa'.

The book was launched in Cape Town at a function hosted by the Children's Rights Project at the Community Law Centre, University of the Western Cape, and introduced by Judge Belinda van Heerden of the Supreme Court of Appeal.

The book can be ordered from Ashgate Publishers: www.ashgate.com

The editor, Julia Sloth-Nielsen (right) with Judge Belinda van Heerden (left) and Zenobia du Toit of Miller Du Toit Inc.

Two of the authors: Ann Skelton (left) and Cheryl Frank (right).

The expungement of criminal records
under the Child Justice Act

by Lukas Muntingh[1]

Introduction

The expungement of criminal records is well-recognised in South African law[2] and the provisions in the Child Justice Bill (clause 87) are broadly in line with this, although there are important differences. At the time of writing a bill (Criminal Procedure Amendment Bill 42 of 2008) dealing with the expungement of criminal records in general and not restricted to children, is before Parliament and has not yet been finalised. The Criminal Procedure Amendment Bill also raises some questions on the expungement of criminal records in relation to the Child Justice Bill. This article will, however, look specifically at the provisions of the Child Justice Bill, as described in clause 87.

Fundamental to the debate on the expungement of criminal records is the acknowledgment that having a criminal record can be severely detrimental to a person's access to employment and social status in general. Moreover, the effect of a criminal record is that the punishment for the crime committed lasts much longer than the sentence imposed by the court. It is this lasting effect that ex-offenders and ex-prisoners often experience as being exclusionary and marginalising. The effect of a criminal record is that it becomes a debt to society that cannot be repaid.[3] It is this debt that Van Zyl Smit calls a 'civil disability' – individuals are excluded from certain civil functions and types of employment because at some time in the past they had committed and were convicted of a crime.[4] In the American literature this is also referred to as 'collateral disabilities'.[5] As Van Zyl Smit observed in respect of prisoners in 2003: *'There has been no systematic effort to think through what the fundamental change to the constitutional order should mean for the legal disabilities imposed on former prisoners. Current disabilities are something of a neglected ragbag, typically relegated to a passing paragraph in the major legal textbooks dealing with their legal status generally'.*

Criminal records also serve a protective function; they signify to society that a specific offender is dishonest or poses a danger to children, or is violent. The protective value of criminal records in such instances have now also found expression in recently passed legislation providing for a sex offenders' register[6] and a register of persons found unsuitable to work with children[7]. Criminal records are also used by courts when imposing sentences to assess the criminal history of the offender. Previous convictions would normally count against the offender and result in a more severe penalty. There are also different schools of thought on this issue.[8]

The retention or expungement of criminal records then centres on two issues: on the one hand, the duty to promote safety in society and protect citizens from dangerous and dishonest individuals and, on the other hand, the right to equality[9] and the constitutional duty 'to free the potential of each person'.[10] In the case of children, the Constitution (section 28) affords them special status and requires that their interests shall be paramount in all decisions taken that affect them. This position is also in line with Article 40(1) of the Convention on the

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1 *The author is project coordinator of the Civil Society Prison Reform Initiative (CSPRI), a project of the Community Law Centre at the University of the Western Cape. All correspondence can be directed to lmuntingh@uwc.ac.za .*

2 *Provision is made for expungement of criminal records in the Criminal Procedure Act (section 271A).*

3 *Love MC (2002) 'Starting over with a clean slate – in praise of a forgotten section of the model penal code' Fordham Urban Law Journal, Vol. 30 p. 1705.*

4 *Van Zyl Smit D (2003) 'Civil disabilities of former prisoners in a constitutional democracy: building on the South African experience' Acta Juridica, pp. 221–237.*

5 *Love MC (2002) 'Starting over with a clean slate – in praise of a forgotten section of the model penal code' Fordham Urban Law Journal, Vol. 30 p. 1714.*

6 *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.*

7 *Children's Act 38 of 2005.*

8 *Three approaches are discernible: (1) Flat-rate sentencing only acknowledges the crime that is being punished now as the punishments for previous crimes have already been executed and it would be unfair to punish again for a crime that was already punished. (2) Cumulative sentencing argues that for each crime the punishment should be more severe in order to build on the deterrent value of the punishment. (3) The progressive loss of mitigation works from an upper ceiling downwards, giving maximum benefit to the first offender and least to the repeat offender up to him/her receiving the maximum specified penalty. [Ashworth A (2005) Sentencing and Criminal Justice, Cambridge University Press, pp. 184–187].*

9 *Constitution: section 7.*

10 *Constitution: Preamble.*

Rights of the Child, which speaks of *'the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.'*

Current legislation relies on two variables in respect of the expungement of criminal records. The Child Justice Bill uses the offence that was committed as the defining variable to determine whether a record can be expunged, whereas the Criminal Procedure Act uses the sentence that was imposed to determine if a record would qualify for expungement after a specified period of time has lapsed. Both pieces of legislation refer to the date of conviction as the starting time for the applicable period to lapse before a record can be expunged.

The provisions in the Child Justice Bill

Expungement under Schedule 1 and 2

The Figure 1 flow chart summarises the provisions of clause 87 which are described in more detail below. The Bill recognises records of diversion orders, convictions and sentences, and provides for the expungement thereof under certain conditions. It is important to note at the outset that convictions for offences under Schedule 3 (see box on page 11) to the Bill do not qualify for expungement under the Child Justice Bill, although expungement may be possible under the Criminal Procedure Amendment Bill referred to above. Clarity on this will only emerge once that Bill has been finalised. The description below follows the flowchart in Figure 1.

The Bill makes specific provision for three categories of records that can be expunged and excludes by implication a fourth. If a court has convicted a child of an offence listed in Schedules 1 or 2 (see boxes on page 10 and 11), the conviction and sentence fall away as a previous conviction and the criminal conviction of that child must, subject to certain conditions, following an application by the child or parent/guardian or appropriate adult (hereafter applicant), be expunged. Provided that the child is not convicted of a similar or more serious offence, the record can be expunged after five years in the case of Schedule 1 offences and after 10 years in the case of Schedule 2 offences.

If these requirements are met (sufficient time-lapse, Schedule 1 or 2 offence, and no further convictions for similar or more serious offences), the first step would be to make an application to the Director General: Justice and Constitutional Development to have the conviction expunged. If the Director General is satisfied that the child meets the requirements, he or she must issue a certificate of expungement to the applicant. If there is a dispute about whether a subsequent offence (during the five- or ten-year period) is 'similar or more serious', the Minister of Justice and Constitutional Development will have the final say. The same Minister may also, under exceptional circumstances, issue a certificate of expungement prior to the period of five or ten years, as applicable, lapsing and the child has complied with the other requirements. The legislation does not specify what such exceptional circumstances may be.

After the Director General or the Minister has issued a certificate of expungement to the applicant, the applicant must then submit this certificate to the head of the Criminal Record Centre (CRC) at SAPS. The head of the CRC, or duly authorised person, will then accordingly expunge the record of conviction and sentence. At the written request of the applicant, the head of the CRC must confirm that the record of conviction and sentence has been expunged. If a record of a child is expunged without due authorisation or in an intentionally gross negligent manner, the responsible official is liable to a fine and/or imprisonment of up to ten years.

Expungement of a diversion order

The expungement of records of diversion orders is somewhat simpler, although regulations have as yet not been drafted. The record of a diversion order is automatically expunged by the Director General of Social Development when the child concerned reaches the age of 21 years, unless the child has been convicted of any other offence before that date or has failed to comply with the diversion order in question.

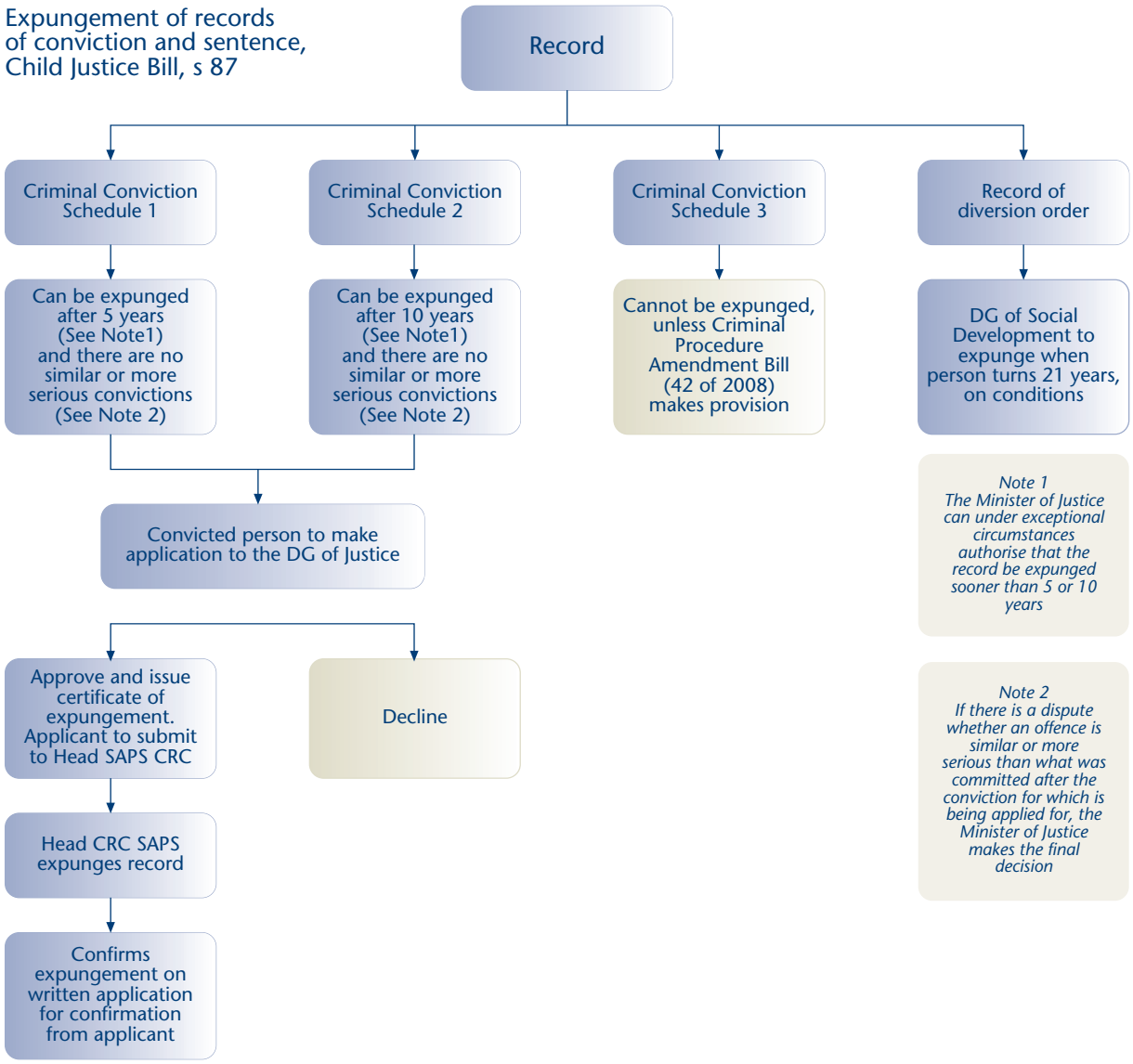
Conclusion

The Child Justice Bill sets out a fairly clear and simple framework for the expungement of criminal convictions and sentences as well as the expungement of diversion orders. It also appears as if progress is being made in establishing a proper mechanism for dealing with expungement; something that was very unclear up to now. It must be acknowledged that special recognition is now given, for the first time, to offences that a person has committed when he or she was a child; this was not the case previously.

The periods of five and ten years respectively for offences listed on Schedules 1 and 2 may elicit some questions as the periods seem rather arbitrary. Whether the drafters based this on research evidence is uncertain. Perhaps of more concern is the absence of a dispute resolution mechanism when the Director General of Justice declines an application for an expungement. The Bill does not deal with such a situation and whether the Regulations will be able to address it is unclear. Although the Minister has the authority to deal with exceptional cases, as described above, there may be more mundane cases about which there is a dispute about interpretation.

The Child Justice Bill therefore makes a critically important contribution to removing at least some of the 'civil disabilities' that so frequently haunt adults and enable them to settle the debt that they owed to society.

Figure 1: Expungement of records of conviction and sentence, Child Justice Bill, s 87



Schedule 1

- Theft (incl. receiving stolen goods) below value of R2 500
- Fraud, extortion, forgery and uttering or offence referred to in the Prevention and Combating of Corrupt Activities Act below value of R1 500
- Malicious injury to property with value below R1 500
- Common assault
- Perjury
- Contempt of court
- Blasphemy
- Compounding
- Crimen iniuria
- Defamation
- Trespass
- Public indecency
- Engaging sexual services of persons 18 years or older [section 11 of the SOA]
- Bestiality [section 13 of the SOA]
- Acts of consensual sexual penetration with certain children (statutory rape) and acts of consensual sexual violation with certain children (statutory sexual assault) [sections 15 and 16 of the SOA]
- Possession of illicit dependence-producing drugs below value of R500, but excluding any statutory offence where the maximum penalty determined by that statute is imprisonment for a period of no longer than three months or a fine for that period, calculated in accordance with the Adjustment of Fines Act
- Any other statutory offence where the maximum penalty determined by that statute is imprisonment for a period of no longer than three months or a fine for that period, calculated in accordance with the Adjustment of Fines Act
- Any conspiracy, incitement or attempt to commit any offence referred to in Schedule 1

Schedule 2

- Theft (incl. receiving stolen goods) above value of R2 500
- Fraud, extortion, forgery and uttering or offence referred to in the Prevention and Combating of Corrupt Activities Act above value of R1 500
- Robbery, other than robbery with aggravating circumstances
- Malicious injury to property above R1 500
- Assault, involving the infliction of grievous bodily harm
- Public violence
- Culpable homicide
- Arson
- Housebreaking (common law or a statutory provision, with the intent to commit an offence)
- Administering poisonous or noxious substance
- The abandonment of an infant with the intention to kill it (Crimen expositionis infantis)
- Abduction
- Sexual assault, compelled sexual assault or compelled self-sexual assault [sections 5, 6 and 7 of the SOA and grievous bodily harm was not inflicted]
- Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation [section 8 of the SOA]
- Exposure or display of or causing exposure or display of child pornography or pornography [sections 10 or 19 of the SOA]
- Incest and sexual acts with a corpse [sections 12 and 14 of the SOA]
- Exposure or display of or causing exposure or display of genital organs, anus or female breasts to any person (“flashing“) [sections 9 or 22 of the SOA]
- Violating a dead body or grave
- Defeating or obstructing the course of justice.
- Any offence referred to in section 1 or 1A of the Intimidation Act
- Any offence relating to criminal gang activities referred to in Chapter 4 of the Prevention of Organised Crime Act.
- Any contravention of section 2 of the Animals Protection Act, 1962
- Possession of illicit dependence-producing drugs above the value of R500 but below R5 000, but excluding any statutory offence where the maximum penalty determined by that statute is imprisonment for a period exceeding three months but below five years or a fine for that period, calculated in accordance with the Adjustment of Fines Act
- Any other statutory offence where the maximum penalty determined by that statute is imprisonment for a period exceeding three months but less than five years or a fine for that period, calculated in accordance with the Adjustment of Fines Act, 1991
- Any conspiracy, incitement or attempt to commit any offence referred to in Schedule 2

Schedule 3

- Treason
- Sedition
- Murder
- Extortion, where there are aggravating circumstances present
- Kidnapping
- Robbery, where there are aggravating circumstances or it involves the taking of a motor vehicle
- Rape or compelled rape [sections 3 and 4 of the SOA]
- Sexual assault, compelled sexual assault or compelled self-sexual assault [sections 5, 6 and 7 of the SOA] involving the infliction of grievous bodily harm.
- Sexual exploitation of children, sexual grooming of children and using children for or benefiting from child pornography [sections 17, 18 and 20 of the SOA]
- Exposure or display of or causing exposure or display of child pornography or pornography to children [section 19 of the SOA], if that exposure or display is intended to facilitate or promote
  - the sexual exploitation or sexual grooming of a child [sections 17 or 18 of the SOA]
  - the use of a child for purposes of child pornography or in order to benefit in any manner from child pornography [section 20 of the SOA]
- Compelling or causing children to witness sexual offences, sexual acts or self-masturbation [section 21 of the SOA]
- Sexual exploitation of persons who are mentally disabled, sexual grooming of persons who are mentally disabled, exposure or display of or causing exposure or display of child pornography or pornography to persons who are mentally disabled or using persons who are mentally disabled for pornographic purposes or benefiting therefrom [sections 23, 24, 25, and 26 of the SOA]
- Trafficking in persons for sexual purposes referred to in section 71(1) and involvement in trafficking in persons for sexual purposes [section 71(2) of SOA Act, 2007]
- Any offence referred to in Parts 1, 2 and 3 of Chapter 2 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004
- Any offence relating to racketeering activities referred to in Chapter 2; or the proceeds of unlawful activities referred to in Chapter 3, of the Prevention of Organised Crime Act, 1998
- The crimes of genocide, crimes against humanity and war crimes referred to in the Implementation of the Rome Statute of the International Criminal Court Act, 2002
- Any offence under any law relating to the dealing in or smuggling of ammunition, firearms, explosives or armament; and the possession of firearms, explosives or armament.
- Any offence referred to in section 13(f) of the Drugs and Drug Trafficking Act, 1992
- Any offence of a serious nature if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise, acting in the execution or furtherance of a common purpose or conspiracy.
- Any offence under any law relating to the illicit possession of dependence-producing drugs, other than an offence referred to in the following item of the Schedule, where the quantity involved exceeds R5 000 in value.
- Any other statutory offence where the maximum penalty determined by that statute is imprisonment for a period exceeding five years or a fine for that period, calculated in accordance with the Adjustment of Fines Act, 1991
- Any conspiracy, incitement or attempt to commit any offence referred to in Schedule 3

NOTICE-BOARD

NEW REPORT LAUNCHED

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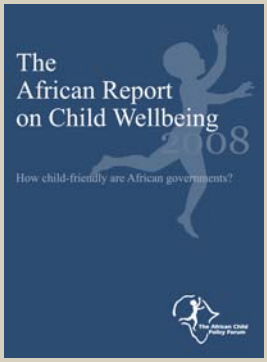

In introducing the report the African Child Policy Forum stated as follows: *'African governments have an impressive record in their formal accession to the relevant child-focused international treaties. But the extent of their commitment to children's issues varies widely, and the gap between promises and reality remains wide in many countries. Why is this so? How well are African governments doing in meeting their national and international obligations? Which governments are doing well and which ones are not? How do countries rank in relation to each other? What is it that is right that child-friendly governments are doing, which poorly performing countries can emulate? The report – The African Report on Child Wellbeing 2008: How child-friendly are African governments? – prepared by The African Child Policy Forum (ACPF), addresses these questions. It reviews and compares the performance of 52 African governments using a common set of indicators and an innovative Child-friendliness Index developed by ACPF.'*

The report can be downloaded at:
http://www.africanchildforum.org/index.asp

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