Article 40

THE DYNAMICS OF YOUTH JUSTICE & THE CONVENTION ON THE RIGHTS OF THE CHILD IN SOUTH AFRICA

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Article 3(1)

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Parliament reviews the implementation of the Child Justice Act

By Samantha Waterhouse

The Child Justice Act 75 of 2008 (the Act) was signed into law during May 2009 and became operational on 01 April 2010. The Act includes innovative provisions to establish a separate criminal justice process for children accused of committing offences. The system established by the Act has the potential to provide greater protection to these children and to promote a restorative justice approach to these cases.

In this article I will attempt provide an overview of the issues that were recently discussed in Parliament during a review on the first year of operation of the Act. It is not possible to have an in-depth discussion of the extensive range of issues covered in the Act and the Parliamentary

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EDITORIAL

Welcome to the second edition of *Article 40* for 2011. In South Africa, many things have happened in relation to child justice since the last edition of *Article 40* during May 2011. These activities have been undertaken by both government and civil society.

The Department of Justice and Constitutional Development, as the chair of the Inter-sectoral Committee on Child Justice, presented the first annual report in relation to the implementation of the Child Justice Act in South Africa one year on to the Parliamentary Portfolio Committees on Justice & Constitutional Development and Correctional Services. This briefing was attended by a ray of civil society actors and the Child Justice Alliance also presented its views on the implementation of the Child Justice Act after one year to these portfolio committees. Samantha Waterhouse eloquently highlights these proceedings in this edition of *Article 40*.

Diversion service providers in South Africa have been voicing their concerns in relation to a decrease of diversion referrals from the National Prosecuting Authority in terms of the Child Justice Act. Usiko, a diversion service provider in the Stellenbosch area of the Western Cape is one of these organisations. Elzette Rousseau, Marilyn Kruger and Saskia van Oosterhout of Usiko write on the services provided by them, together with the practical implementation of diversion services after one year of operation of the Child Justice Act.

Staying with the theme of child justice related activities, Lorenzo Wakefield and Violet Odala provides us with an overview of two important activities of the Child Justice Alliance that took place during 2011. These are a workshop for heads of child and youth care centres that receive sentenced children and research on the criminal capacity of children as provided for in terms of the Child Justice Act.

In keeping abreast with developments on the African continent, Emily Ruhukwa provides us with a thought provoking article on child justice provisions as contained within the new children's rights legislation of Botswana.

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meeting in this article. However, a recording of the proceedings as well as the presentations made and documentation provided at the meeting are available on the Parliamentary Monitoring Group website: http://www.pmg.org.za/report/20110622-joint-meeting-implementation-child-justice-act

Strengthening implementation through parliamentary oversight

Importantly, the Act embeds within its provisions a system of Parliamentary oversight over the implementation thereof by government departments. Section 96(3) requires the Cabinet Member responsible for the administration of justice to consult with the Cabinet Members responsible for safety and security, social development, correctional services, education and health in order to submit reports from these associated departments to Parliament on the implementation of the Act. These reports must be submitted to Parliament within one year of the commencement of the Act and annually thereafter.

This requirement to report to Parliament allows the legislature to exercise its oversight function through monitoring the implementation of the Act and ensuring that implementation is consistent with the original intention of the legislation. Regular reporting allows for the identification of strengths, weaknesses and gaps in the process of implementation, and it should enable the legislature to identify gaps and weaknesses in the provisions of the Act.

The great disparity between policy and legislation and the implementation of these have been the subject of much attention in South Africa. This has forced the question of how to strengthen the implementation of important laws that protect and promote basic human rights. Section 96(3) and other provisions in the Act can be seen as an attempt by the legislature to take steps to close the gap through systematising oversight.[1]

This approach in the legislation is particularly important to the Act which fundamentally changes certain elements and practices of the criminal justice system and process in respect of children; which requires essential shifts in perceptions about and responses to children accused of committing offences; which requires the cooperation of a range of government departments and civil society to provide integrated services; and which requires the strategic investment of resources by these different departments to realise the intention of the legislation.

Finally, civil society, in particular non-governmental organisations and research institutions, have an important role to play in implementing and monitoring the implementation of the Act. The requirement for regular reporting to Parliament allows for improved civil society scrutiny of and engagement with the effective implementation of the Act. Information that may not otherwise be publicly available is placed in the public sphere and the potential exists for public

1 This trend can also be seen in Section 65(3) of the Criminal Law [Sexual Offences and Related Matters] Amendment Act No. 32 of 2007, which contains similar provisions.

participation directly in the parliamentary process of describing, questioning and recommending improvements to implementation by government departments.

Parliamentary briefing on implementation of the Act

On 22 June 2011 the Parliamentary Portfolio Committees on Justice and Constitutional Development and Correctional Services[2] held a joint meeting. The Committees were briefed by the Department of Justice and Constitutional Development (DoJCD) on behalf of the Inter-sectoral Committee on Child Justice (ISCCJ)[3] on the annual report for the first year of implementation of the Act.[4] Representatives of various departments were in attendance to address the questions of the committees.

In addition to the government departments, civil society organisations were also in attendance. The Parliamentary Programme of the Community Law Centre, University of the Western Cape, facilitated civil society engagement in the meeting. The Child Justice Alliance (the Alliance), an alliance of non-governmental and community-based organisations, were provided with the opportunity to present civil society perspectives on the implementation of the Act to the committees. Dr Charmain Badenhorst, a senior researcher at the CSIR, presented her research on the one year implementation of the Act on behalf of the Alliance.[5] In addition to the presentation by the Alliance, a number of civil society organisations were present at the meeting to observe the proceedings, and to provide additional information to committee members through making additional documentation available and through informal engagements with committee members during breaks in the proceedings.

Key issues from the presentations and discussions

The ISCCJ presentation briefed the committees on a wide range of issues. This included: the establishment of national and provincial governance child justice structures; the human resource capacity of the DoJCD, Social Development (DSD), Correctional Services (DCS) and Education (DBE) and of institutions such as the South African Police Service (SAPS) and Legal Aid South Africa (LASA); the training that has been delivered and the infrastructural capacity development, including the establishment of child and youth care centres and one stop child justice centres. The ISCCJ presentation also provided an overview of numbers of children in the criminal justice system. This included information on the numbers of children arrested or being dealt with by the police, the numbers of children assessed by the DSD, the number of preliminary inquiries that have taken place, how children have been sentenced, and diversions.

The Alliance presentation was based on research undertaken on the implementation of the Act and highlighted a number of key challenges to its implementation.

Some agreement on key challenges to implementation

The presentations of the ISCCJ and the Alliance were in agreement on some of the challenges to implementation of the Act. All but one of the six key challenges that were identified and presented by the ISCCJ were also identified as challenges in the presentation by the Alliance. However, the Alliance presentation identified numerous other challenges that were not raised by the ISCCJ.

There was agreement on the challenges posed by the drop in the number of cases being diverted; the non-existent integrated information management system and lack of accurate statistics; problems with the rollout of training and training of all police officials; and insufficient community awareness raising on the Act. The ISCCJ also identified budgetary allocations as insufficient for the implementation of the Act. The Alliance presentation further identified the decrease in the number of children arrested; insufficient probation officers; problems with preliminary inquiries; postponements; legal representation; evaluation of criminal capacity; transport; non-uniformity of norms; and education for awaiting trial children as significant challenges to the implementation of the Act.

Structures, systems and framework for implementation

The ISCCJ provided information to the committees on the establishment of the various structures and systems to facilitate effective coordinated implementation of the Act. The ISCCJ established a National Operational Intersectoral Committee on Child Justice (NOICCJ). The role of the NOICCJ is to manage operational aspects of implementation, to make recommendations to the ISCCJ and to monitor implementation by the relevant departments and institutions. In addition to the

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2 For the purposes of this article, both Committees will be collectively referred to as "the Committee". 2

3 The ISCCJ is established in terms of section 94 of the Act. It includes the Director General of Justice and Constitutional Development; the National Director of Public Prosecutions; the National Commissioners of the South African Police Service and Correctional Services and the Directors-General of the Departments of Social Development, Education and Health.

4 ISCCJ. *Presentation to Portfolio Committee on Justice and Constitutional Development: Consolidated progress report on implementation of Child Justice Act, 2008 (Act No. 75 of 2008): Inter-sectoral Child Justice Steering Committee (ISCCJ)*. Presented by Advocate P Kambula, Chief Director: Promotion of Rights of Vulnerable Groups, Department of Justice and Constitutional Development on behalf of the Director-General of the National Department of Justice and Constitutional Development and the Chair of the National ISCCJ. (22 June 2011.)

5 The Child Justice Alliance. *Implementation of the Child Justice Act 2008 (Act No. 75 of 2008): Portfolio Committee on Correctional Services. Joint meeting with the Portfolio Committee on Justice and Constitutional Development on the implementation of the Child Justice Act. (*22 June 2011.) This presentation was based on Badenhorst C (2011). *Overview of the implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good intentions, questionable outcomes*. Occasional Paper 10. Open Society Foundation for South Africa.

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NOICCJ, Provincial Child Justice Fora have been established in each province. These fora report to the NOICCJ. Undoubtedly strong provincial fora are an essential aspect of implementing this Act correctly. Unfortunately no indication or assessment was provided regarding the functioning of these different structures and forums and the issue was not discussed further in the meeting.

Information management systems and the quality of statistics

Serious concerns were raised regarding the issue of information management and the availability of accurate statistics. The ISCCJ reported that the development of the Integrated Information Management System to capture information regarding children in the criminal justices system has met with some delays and *'teething challenges'*. Committee members expressed strong dissatisfaction with the information provided. They questioned the significant inaccuracies and inconsistencies in the statistics that were presented which failed to correlate. The analysis of the numbers that was given was also questioned. This was echoed in the presentation of the Alliance. Committee members and the Alliance emphasised that without accurate information, it is not possible to effectively monitor the implementation of the Act.

The statistics, as they were presented, raised serious questions regarding the management of children's cases in the system, although, based on the information available, these questions could not be satisfactorily answered.

Significant amongst these questions was the substantial difference between the numbers of children the SAPS reportedly arrested, summoned or issued with a written notice to appear in court (75 436)[6] and the numbers of children reportedly assessed by the DSD (32 494).[7] The gap between these two figures is extremely problematic as almost all children arrested should be assessed. Mr Jeffrey, a member of the Justice and Constitutional Development Portfolio Committee, questioned if this discrepancy was due to significant numbers of children being arrested but not charged, which would be gravely concerning. He noted however, that without accurate data this could not be confirmed. He further highlighted that according to the Annual Report, only 14 471 preliminary inquiries were conducted during the period. This is problematic as preliminary inquiries are required for all children except for children under 10 years old who are dealt with according to section 9 of the Act (reportedly 795 children) and children diverted prior to the preliminary inquiry according to section 41 of the Act (reportedly 2 444 children).[8] The gap in the statistics between the 32 494 children reportedly assessed and the 14 471 preliminary inquiries is thus alarming.

Fewer children in correctional facilities

The ISCCJ reported "a remarkable decline in the number of children awaiting trial in correctional facilities" as one of their primary successes. The presentation indicated that the numbers of children in prison had dropped to 536 in March 2011. This figure was 658 in 2010 and 973 in 2006. Mr. Smith, Chair of the Portfolio Committee on Correctional Services and Mr. Jeffery questioned the numbers presented by the ISCCJ presentation and the Annual Report regarding children awaiting trial or sentenced in DCS facilities. They suggested that 536 may be the average number of children over a period of time and not the actual figure at March 2011, as the report indicates that the actual number in March 2011 was 863. They emphasised that the numbers are confusing and do not make sense. The report is also unclear in differentiating between children awaiting trial and those sentenced to DCS facilities. This makes it more difficult to understand the statistics presented. Mr. Smith requested a report on all of the children being held in DCS facilities. He requested that this report provide information on the numbers of children awaiting trial, the length of time these children have been awaited trial and the offences with which they are charged. The report should also include the number of sentenced children in DCS facilities. The DCS undertook to provide this within seven days.

Capacity and staffing: shortage of probation officers

The ISCCJ presented on the efforts to build the staff capacity to implement the Act. This included the additional appointment of 111 Child Justice Court Clerks. Besides this, all SAPS officials, prosecutors, legal aid attorneys and magistrates are responsible for implementing the Act. The NPA did not provide information on the number of prosecutors dedicated to child justice.

The Alliance presentation raised serious concern regarding the critical shortage of probation officers (POs) and assistant probation officers (APOs). In total there are 484 POs and 370 APOs who are responsible for all assessments and for monitoring diversions and sentences of all children arrested across the country. The effectiveness of the new child justice system hinges on the implementation of good quality initial assessments of children by skilled POs as they enter the system. Unfortunately the issue of the quality of assessments was not addressed by the presentations or the discussion. POs are thus central to the effective implementation of the Act and a strategy to increase the numbers and capacity of POs should be a high priority.

6 ISCCJ Presentation. Slide 37. Note that the slide includes the word "arrest *or method of securing attendance of criminal proceedings*". During discussions committee members irraneously referred to this number repeatedly as the number arrested.

7 Department of Justice and Constitutional Development. 2001. *Annual Report on the Implementation of the Child Justice Act, 2008*. (Act No. 75 of 2008) p26

8 As above pg 33 for both these statistics.

Training

The ISCCJ presentation provides a breakdown of the training that has been conducted on the Act, which demonstrated significant efforts to train relevant officials. However, the numbers of DCS officials trained was concerning. In addition, while the numbers of police officials trained is significant at 15 891, the Alliance presentation cautioned that since most SAPS officials may interact with children in the system, it is essential that all SAPS officials receive training on the Act. No information was provided on the nature and quality of the training. Given the significant attitudinal and practice shifts required by the Act, training must go beyond simply providing a summary of the provisions of the Act.

Assessment of criminal capacity

The Alliance presentation indicated that there has been an increase in the number of requests by magistrates for assessments of the criminal capacity of children between the ages of 10 and 14 years. According to the Alliance presentation, this places a burden on the Department of Health (DoH) and on the budgets of the DoJCD as it requires the services of expensive psychologists and psychiatrists. Of concern is that the Government Notice (GNR273) which sets out the categories of people who can provide these assessments according to section 97(3) of the Act do not require specific skills or experience in respect of child development, but authorises people to do this based on their profession. This means that social workers and other professionals who may have the necessary expertise are excluded, while psychiatrists and psychologists who may have no specialisation in child development and whose services are more costly are authorised.

The Act requires that the minimum age of criminal capacity be assessed in 2015 in order to establish if it should be raised or not.

Drop in diversions

Diversions are an important innovation in the child justice system. The ISCCJ presentation indicated a 3% drop in diversions in the year under review from the previous year. The ISCCJ indicated that research has been commissioned to understand this drop. Mr Swart of the Committee on Justice and Constitutional Development questioned the discrepancy between the 24% in the Annual Report and 3% reported in the presentation. The Alliance presentation also raised concern regarding the drop in diversions. It went further to provide more detail on the implementation of diversions according to the Act. Prof Ann Skelton, a representative of the Alliance, indicated that prior to the Act prosecutors had the authority to divert less serious offences. The Act provides a legislative framework for this in section 41, whereby children accused of first time offences that fall within schedule 1 may be diverted prior to a preliminary inquiry. She noted that it appears that prosecutors are making fewer diversions at this stage than was the case prior to the Act. More diversions are being made at a preliminary inquiry, in terms of section 49 of the Act. Due to the role of diversion in the system, research to gain better understanding of the factors affecting decisions to divert are important.

The DSD reported that they have accredited diversion service providers who applied for this in all provinces, they indicated that they are satisfied with the content of programmes and that the accredited programmes are able to address all different categories of crimes. They have however reported that they still need to issue the accreditation certificates.But is the Act working?

The question as to whether the Act is working was raised repeatedly in the meeting. In spite of assurances from officials present that the Act is working, Committee members expressed grave concern on this issue. In particular Committee members highlighted that it is impossible to assess this fundamental question due to the absence of good monitoring information and statistics regarding the implementation. Prof Skelton noted in response that in spite of their being a number of issues and problems with implementation and with the systems and figures for monitoring this, that departments and service providers were earnest in their efforts to implement the Act and that the ISCCJ provided an important platform to engage with this.

Conclusion

The opportunity for Committees to exercise their oversight function and question government's implementation of the Act was important and resulted in strong engagement by Committee members with the departments present. The participation of other relevant Committees such as the Portfolio Committees on Social Development and Police will enhance this oversight in future.

It is notable that as a result of a request for this, some space was afforded to civil society. Increasing the space on the agenda for civil society engagement in future will allow for a wider range of service providers to participate and to assist committees' qualitative understanding of the challenges and successes related with implementing the Act.

The poor quality of the data reported on by departments significantly impacted on the ability of the committees to engage satisfactorily with the different issues raised. The impact of the weak data on discussions was exacerbated by a lack of qualitative information to assist in a meaningful analysis of the situation. However, this was the most problematic aspect of the review. It is important to note, as Prof Ann Skelton suggests, that a clear willingness exist on the part of Government and Parliament to see that the Act works.

Ideals, obstacles & the way forward

after one year of the CJA

By Elzette Rousseau, Marilyn Kruger and Saskia van Oosterhout

The implementation of the Child Justice Act (CJA) from April 2010 was regarded as a major step in addressing the rights of the estimated 100 000 South Africa children who are charged each year in connection with crime. This law would also benefit the communities they reside in through the practice of restorative justice. Prior to the enactment of the CJA, the law governing child offenders and its constituent stakeholders, could not adequately ensure that children's basic constitutional rights would be upheld when in conflict with the law. Various problems within the law at that time complicated the process of justice for all affected parties: the young offenders, their victims, presiding and police officers, and staff in the different layers of the judiciary system.

The aim of the CJA is to create a separate criminal justice and procedural system for children. One that is focused on restorative justice principles and the promotion of crime prevention initiatives. The Act domesticates numerous international treaties and consolidates national laws, including the United Nations Convention on the Rights of the Child (CRC) and the South African Constitution of 1996. A key objective of the CJA is to protect the rights of children by using restorative justice values, the involvement of parents and the community in interventions to ensure adequate integration of a child, and cooperation between government departments and other organisations who are involved in topics related to of child justice.

Since the release of the draft Child Justice Bill in 1998, numerous South African organisations have made attempts to develop programmes of restorative justice and diversion in anticipation of the new law that would ensure the protection of children in conflict with the law by improving child justice. One of these, Usiko, an NGO based in the Western Cape province, has been providing diversion services to young people in conflict with the law in the Stellenbosch area since 2005.

Diversion at Usiko

The overall aim of Usiko is to improve opportunities available to young people, especially those at risk, to enable them to break out of a cycle of poverty, crime and violence. Usiko employs a multi-modal programme which includes exposure to the wilderness, use of rituals, life-skills and family counseling, with a further focus on mentoring and vocational skills. Literature indicates that mentoring interventions impact positively on many crucial areas of a young person in trouble.

Usiko's target group includes the children of impoverished farm workers, adolescents from townships and remote rural settlements, as well as young offenders referred by the court system. A large component of Usiko's work is focused on school-based prevention. A reason for this being that when a young person at risk drops out of school, or finds her or himself on the margins of their community, the risk of remaining trapped in the cycle of poverty and crime is increased. Many of the children benefiting of Usiko's work have no permanent base, drifting between living with extended family members and on the streets. Instability in the family structure caused by poverty, unemployment, along with HIV/AIDS has led to a high incidence of single-headed households where young people may lack the necessary authoritative and supportive adult figures during their most critical formative years. This allows them to become susceptible to negative influences that lure them into gang culture.

Addressing the needs of these children is challenging, as the communities Usiko work with are generally poor, marginalised, struggle with gang infiltration, increasing levels of crime and other social problems and lack the capacity and infrastructural resources to deal with these issues.

In order to work with young people in conflict with the law, Usiko has developed a diversion programme based on restorative justice principles to engage participants meaningfully with their offences and their life choices. The programme offers a community-based rehabilitation process as an alternative to incarceration. With its use of community mentors in all its programmes, Usiko seeks to provide an alternative community sanctioned rites of passage programme to support young people with the daily challenges they encounter.

Usiko provides the following services:

1. School-based prevention

This programme serves two high schools and four primary schools in the Stellenbosch area. It is informed by research indicating that the greatest impact is made through primary prevention (universal programmes designed to prevent a particular problem from occurring) and secondary prevention (programmes targeting youths who are at risk of a poor outcome. For example, children who have been exposed to high levels of violence). Usiko's school-based prevention programme offers some life-skill sessions, sports and recreation, experiential learning on wilderness camps with mentors, green club activities, celebration for girls and mothers on Women's Day, and much needed excursions to areas of historical and cultural interest. Since 2011 the programme has been extended to a younger age group (eg. the last year of primary school) due to the high levels of violation experienced by girls of this age.

2. Diversion

Usiko's diversion programme commenced in 2006 after a pilot programme in 2005. This is a multi-model, structured programme including interpersonal and social skill development and targets multiple settings (school, family, peer group, community and the environment). This programme comprises of weekly sessions that run over an eight week period, and incorporates a prison visit, a four day wilderness intervention, and up to three months of post-session one–on-one mentoring. A recent innovation has been for a social worker to run parallel sessions for parents to improve their parenting skills and to provide a forum for discussion and support for parents of children at risk. The parenting sessions have been very well received and parents have made a passionate plea for more sessions of this nature. Usiko receives referrals of child offenders from the Stellenbosch court prosecutor, the Department of Social Development (Paarl regional office), Nicro and from the communities and local schools.

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3. Sustainable livelihoods

Usiko's sustainable livelihoods programme is in its first year of operation and facilitates the transition from school to work. Currently it offers some career counseling, assistance with the completion of various application forms, limited vocational training, substantial financial assistance with bursaries, as well as related further training costs.

4. Mentoring

At Usiko mentoring is implemented in the diversion programme as a method of both reducing re-offending and increasing positive life outcomes such as enhancing interpersonal relations and increasing education and employment. It has been determined at Usiko that a lower recidivism rate exist for children involved in a positive mentoring relationship. The introduction of a reliable mentor at the completion of the diversion programme and the ensuing mentor-mentee sessions that follow greatly reduce the likelihood of further criminal activity. The mentors act as positive role models who promote values of acceptance, equality, integrity, empathy and social justice. At Usiko mentors help to change a child's minor offences into major achievements. Usiko greatly values its mentors as responsible members of the community who have the ability to change the outcome of children in conflict with the law to law abiding citizens. While mentors at Usiko have been on regular wilderness camps and take part in many of its activities (thereby supporting staff members) the mentor programme has been recently enhanced through psycho-social training courses.

5. Youth led clubs

Over the past year, a pilot project has been run whereby young males who have graduated from the schools-based prevention and legal diversion programmes have set up their own wilderness hiking club to provide a forum for the participant to discuss issues directly related to their lives as young men. Use is made of ritual and self-organisation, supported by a staff member to strengthen youth leadership and self-determination skills.

A community-based alternative approach

In this current state of affairs, where legislation is still not translating into the realisation of rights, Usiko is reassessing the responsibilities it can fulfill in ensuring not only children's access to rights, but also their freedom to exercise and enjoy their rights. Thus during 2011, Usiko together with schools in the Stellenbosch area and provided restorative justice interventions to school-going children who had violated the law on school grounds. The children referred to Usiko by the school governing bodies have been found to be at risk of being arrested for crimes listed as schedules one and two offences in the CJA. These cases included offences such as theft, common assault, trespassing, public indecency, engaging in sexual services, possession of drugs, malicious injury to property, sexual assault, and assault involving the infliction of grievous bodily harm. With these children Usiko has introduced a restorative justice programme outside of the formal legal system that allows for community-based, holistic approaches to successfully rehabilitate and reintegrate these children into society. Through this community-sanctioned intervention, Usiko now also strive to educate civil society and young people about their rights to justice and the possible services available to them.

Conclusion

In this current state of affairs, where legislation is still not translating into the realisation of rights, Usiko is reassessing the responsibilities it can fulfill in ensuring not only children's access to rights, but also their freedom to exercise and enjoy their rights. Thus during 2011, Usiko together with schools in the Stellenbosch area and provided restorative justice interventions to school-going children who had violated the law on school grounds. The children referred to Usiko by the school governing bodies have been found to be at risk of being arrested for crimes listed as schedules one and two offences in the CJA. These cases included offences such as theft, common assault, trespassing, public indecency, engaging in sexual services, possession of drugs, malicious injury to property, sexual assault, and assault involving the infliction of grievous bodily harm. With these children Usiko has introduced a restorative justice programme outside of the formal legal system that allows for community-based, holistic approaches to successfully rehabilitate and reintegrate these children into society. Through this community-sanctioned intervention, Usiko now also strive to educate civil society and young people about their rights to justice and the possible services available to them. Usiko's hope is that through these improvised interventions the rights of children in conflict with the law, the victims and their communities can be made real, until responsible institutions can deliver on the promises contained in the CJA.

Are you experiencing any successes and/or challenges with the implementation of the Child Justice Act?

Why not tell us and we'll see what we can do to escalate your success story or concern to the relevant bodies.

The Child Justice Act has been in implementation for more than one year already. Please write to the Child Justice Alliance on your experiences of the Act by using the Child Justice Act Monitoring Implementation Tool (CJAMIT).

This tool can be downloaded at: www.childjustice.org.za

The activities of the Child Justice Alliance during 2011

By Lorenzo Wakefield & Violet Odaga

The Child Justice Alliance (the Alliance) focussed on several activities during 2011, which is worthwhile mentioning to others interested in child justice issues in South Africa. In this article we will discuss two main activities of interest, which are the workshops on sentencing children to child and youth care centres and the criminal capacity of children, especially those between the ages of 10 and 14 years.

Criminal capacity of children

The workshop on the criminal capacity of children was held on 4 May 2011 at the Centre for Continuing Education at the University of Pretoria. About 27 people drawn from different sectors including government, academics and the civil society, were in attendance. The professions represented were law, psychology and social work. Seven presentations were delivered at the workshop, of which a brief summary of five follows in this article

The contextual background - 1st presentation

When the Act was being debated in Parliament the Portfolio Committeee on Justice and Constitutional Development decided that it did not have enough information about how many and what kind of crimes are committed by 10-13 year olds, the result of which the minimum age of criminal capacity was increased from 7 to 10, and the rebuttable presumption of criminal incapacity for children below the age of 14 was retained. A compromise was, however, reached. Within 5 years from the passing of the Act, Parliament will again consider the issue of age of criminal capacity, with more information at its disposal. As such, section 8 of the Act provides that within 5 years, the law on criminal capacity of children should be reviewed. The Alliance was of the opinion that It would be useful for civil society to also investigate this issue and come up with a recommendation within five years of the CJA coming into force, on whether the minimum age of criminal capacity should remain at 10 or be raised.

Provisions of the Act - 2nd presentation

A legal perspective on criminal capacity of children, focusing on case law and the issue of rebuttable presumption of criminal incapacity, in terms of common law presumptions, guidelines and factors from case law, and the Act was given. Amongst other things, the court in assessing criminal capacity, looks at factors such as the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child, the nature and seriousness of the alleged offence, the impact of the alleged offence on any victim, the interests of the community, the probation officer's assessment report, the prospects of establishing criminal

capacity if the matter were to be referred to a preliminary inquiry, the appropriateness of diversion, and any other relevant factors. Of the issues examined involved probation/social work perspectives and psychological perspectives – including special issues such as children with developmental delays or other mental health problems.

The workshop was therefore a good opportunity to look at different debates on the minimum age of criminal responsibility and who should be doing the assessment of children in the procedures where the rebuttable presumption is at issue. Some of the questions considered were whether or not South Africa has the capacity to undertake the required number of assessments, evaluations and expert reports, for children, especially as persons suitable to carry out evaluations include psychologists and psychiatrists only. Regarding mental health issues and borderline cases, should our energies rather be focussed on these? These questions were pertinent because although the presumption of criminal capacity has existed for decades, it does not work well for children because the court mostly uses unprofessional assessment by asking a set of superficial questions.

A social work perspective of criminal capacity - 3rd presentation

Apart from the 2 presentations mentioned above, a further presentation was made on the criminal justice social work perspective on criminal capacity issues. The presenter defined criminal justice social work as a specialised practice whose approach is aimed at identifying and addressing offending behaviour, reducing the risk of re-offending and restoring those that have been injured by crime. He explained that forensic, probation, or private social workers all deliver services to the same system and client, therefore there is need for a unified way of approaching the child justice system in South Africa. Violent behaviour is relatively common in childhood, but moral development is not a once off but a lifelong process. Children learn patterns of behaviour from the socialising institutions of the community. Therefore, it is not enough to assess the child only, but also the community.

Forensic Mental Health Assessments - 4th and 5th presentations

The next presenter looked at several provisions in the Child Justice Act pertaining to criminal capacity and spoke about the practical and clinical challenges in executing these sections. The practical challenges relate to lack of proper facilities in all provinces to conduct forensic evaluations, the insufficient capacity of professional nationally, and, lack of understanding what the examination entails.

The presentation thereafter highlighted that probation officers play an important role in dealing with children in the justice system to make recommendations and assessments regarding criminal capacity, yet looking at the level of expertise expected of probation officers. What is their training and what level of supervision exists? Thus, an assessment of personal and social competency is probably more helpful than an intelligence test. The presenter found that the Act is generally a well intended document. Striking a balance between its twin intentions of acknowledging the rights of children, and providing a rehabilitative function, is difficult and demands considerable personnel and resources. He concluded that the law asks questions of psychology which currently it is unable to answer satisfactorily.

The final two presentations were on the effect of foetal alcohol syndrome and children with conduct disorder on a child's cognitive ability to understand what is right and wrong, and its conative understanding of how to act in accordance with such distinction.

Wrapping up

Participants raised a number of issues during plenary discussions and amongst the recommendations made were that South Africa should adopt a minimum age of criminal capacity, as opposed to the two approaches adopted, where one follows the view that children below the age of 10 years is irrebuttably presumed to lack criminal capacity and the other stipulates that children between the ages of 10 and 14 years are rebuttably presumed to lack criminal capacity. However, there is a risk of ending up with a lower cut off age than recommended by the Commitee on the Rights of the Child. Therefore, research to support the age of 12 and the rationale behind it ought to be done. One reason is the fact that internationally, 12 years has been recommended as the minimum age of criminal responsibility. There is also a need to revisit the tools and tests for assessing criminal capacity. Thus the need to train probation officers has to be a priority as competency is a big issue requiring skills and attitude.

Sentencing children to child and youth care centres

The Child Justice Act

As part of the Alliance's strategic activities for 2011, it facilitated a workshop for child and youth care centre heads and provincial coordinators of where these centres are situated, that specifically have children sentenced to its facilities (previously reform schools). The purpose of this workshop was to discuss with the child and youth care centre heads, the provisions related to the sentencing of children to child and youth care centres and their mandate in ensuring that the best interests of children are taken into account when presiding officers sentence children to such centres. The first important provision in relation to sentencing children in general (in other words to any option provided

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by the Child Justice Act) are the objectives that sentencing should serve. Section 69 of the Child Justice Act (the Act) lists the following 5 objectives of sentencing:

- Encouraging the child to understand the implications of and be accountable for the harm caused;
- Promoting an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interest of society;
- Promoting the reintegration of the child into the family and community;
- Ensuring that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and
- Using imprisonment only as a measure of last resort and for the shortest appropriate period of time.

These objectives should serve as an interpretative guide to anyone working in the sentencing fraction on whether a particular sentence has reached its goal or intended outcome.

The reason why the Alliance only chose to focus this year on sentences to child and youth care centres relates to the provisions of the Act as stipulated in section 76. This section allows for the following two types of sentences to child and youth care centres:

- A sentence to a child and youth care centre not exceeding 5 years or a period when the child turns 21 years of age, whichever comes first; or
- A sentence to both a child and youth care centre and possibly imprisonment or another sentencing option after attending a period at a child youth care centre. This can only be the case where the child was convicted of committing a serious offence mentioned in schedule 3 to the Act and which would have justified a prison sentence of more than 10 years to imprisonment if the child was an adult.

The first option is not an entirely new sentence, while the second is. In order to ensure that children are sent to prison as a form of last resort, the Alliance was of the opinion that It would be useful to engage with child and youth care centre heads on what exactly this sentence would entail by way of a one day workshop held at the University of the Western Cape on 8 June 2011.

The workshop

At the workshop only two presentations were made. The first presentation was on the sentencing framework contained in the Act. The purpose was not only to inform the participants of the child and youth care centres sentence mentioned above, but also to provide them with a holistic overview of all the options of sentencing, as they will have to make a recommendation of another suitable option for sentencing in terms of the second option mentioned above.

The second presentation was based on the consequences of sentencing children to child and youth care centres in terms of section 76(3) of the Act. During this presentation, the presenter highlighted the importance of properly warning children about how their actions and behaviour will influence the objectives of sentencing and their further incarceration after the child and youth care centre part of the sentence is completed. She also mentioned the possibility of forming case review committees as established in the Correctional Services Act 11 of 1998. This could be used as a forum to evaluate on whether each child has reached the objectives of sentencing (in terms of the Act) and if not, what would be an appropriate alternative sentencing option.

The rest of the workshop was spent in group work, where representatives from the various provinces had to do the following three things:

- Highlight any success stories in the performance of their duties;
- Mention any challenges in relation to doing their work; and
- Provide possible solutions for those challenges.

Of the recommendations made by the participants, are the following:

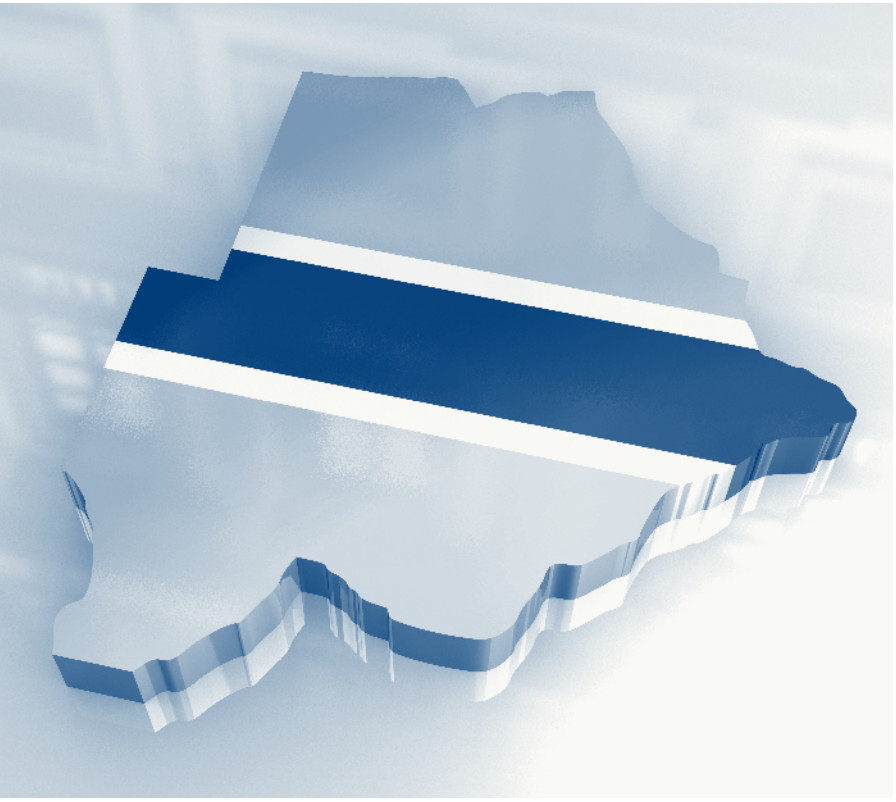
- That debates on child and youth care centres taking place at a national level, should be filtered down to provincial and district levels;
- Before presiding officers sentence children to child and youth care centres, probation officers should consult with child and youth care centres to determine if the placement would be suitable; and
- The current programmes need to be revisited.

Wrapping up

The organisers of the workshop drafted a report on the workshop and its recommendations and presented this to the Inter-Sectoral and the Commitee on Child Justice on 28 July 2011. A copy of the report can be downloaded at: www.childjustice.org.za/publications/Sentencing_of_Children.pdf.

Concluding Remarks

These are only but two activities that were very focused in its content areas which sparked a fair number of debates on the effect of the child justice system on children. There are many further areas in the Act that can be dealt with in the same manner in order to provide a proper analysis of the Act and to ensure that those who implement the Act are aware of the underlying value and reasoning behind certain provisions in the Act.



The key legal framework guiding policy with regards to children in Botswana is the Children's Act of 2009, which was approved by Parliament on 16 June 2009. The Act is a significant policy update from the 1981 law. The Act harmonises with both the Convention on the Rights of the Child *(U.N. General Assembly, 1989) and the* African Charter on the Rights and Welfare of the Child *(Organisation of African Unity, 1990). The Act includes a Bill of Child Rights and some provisions on parental duties and rights, community and government support to parents, children in need of protection, alternative care of children, foster care, and children in conflict with the law.*

The Child Justice System in Botswana

by Emily C. Ruhukwa

Constitutional and legislative history

The Children's Act, the Penal Code, the Constitution and the Criminal Procedure and Evidence Act are the principal legal instruments which create specific provisions on how to deal with children in conflict with the law. The previous Act did not adequately provide strategies to deal with children in conflict with the law and in practice customary courts, magistrates' courts and high courts do send children to prison as evidenced from the figures of children recorded as being incarcerated. According to the 2009 Human Rights Report for Botswana produced by the US Department of State, there were 63 children incarcerated in adult prisons in 2009.

A child in conflict with the law is entitled to the constitutional safeguards of secure protection by the law (section 10 of the Constitution). This provides that every person charged with a criminal offence shall be afforded a fair trial within a reasonable time by an independent and impartial court established by law. Furthermore, provision is made that every person charged with a criminal offence shall be presumed innocent until proven guilty, and shall be informed as soon as reasonably practicable of the charges against him/her in a language he/ she understands. He/she must be given adequate facilities and time to prepare his/her defence and a right to legal representation at his/ her own expense and a right to examine witnesses. A person also has the right to be informed of his/her right to legal representation.

The Children's Act, 2009

The Children's Act recognises that a child under the age of 14 years shall not be presumed to have the capacity to commit a criminal offence unless it can be proved that at the time of committing the offence the child had capacity to know that

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he or she ought not to do so. The previous Act pegged the age of criminal responsibility at 8 years of age. The new Act has increased the age of criminal responsibility to 14, a step which goes beyond international standards.

According to the Act, where any person has reasonable cause to believe that an offence has been committed by a child, a report should be made to a police officer in the district in which the offence was alleged to have been committed. The police officer should in turn conduct necessary investigations should he/she be satisfied that there are reasonable grounds for an investigation and should request a social worker to enquire into, and file a report to, the children's court, on the general conduct, home environment, school records and medical history of the child. The social worker should also provide recommendations on the best way of dealing with the child.

The 2009 Act mandates the creation of structures to support the implementation and enforcement of its provisions, including the Children's Courts and homes, schools, and institutions for the reception of children. Under the Act, social workers are assigned a variety of responsibilities, including investigating the conduct and home environment of children accused of crimes, appearing before children's courts, applying for and executing protection orders, and assisting in arranging alternative care for children where needed.

As part of his/her duties, the social worker who acts as the probation officer is expected to, among other duties:

- make an assessment of the risk posed by a child offender to the community;
- prepare a pre-sentence report for the court setting out relevant personal information about the child offender, an analysis of the offences committed, and a proposal about the manner in which the child should be sentenced;
- devise and carry out any measures for the observation and correction of tendencies to delinquency in children, and for the discovery and removal of any conditions causing or contributing to the delinquency of children;
- work with any child convicted under this or any other Act both during and after sentence; and
- make arrangements for the release, from prison, of any child sentenced to imprisonment and to assist in the resettlement of that child in the community.

The Act and the implementation

As social workers in Botswana provide social welfare support to all vulnerable and needy sectors of the population, this raises a concern as to whether they are able to effectively carry out the duties and responsibilities assigned to them under the Children's Act. This concern is heightened in the 2008 National Situation Analysis on Orphans and Vulnerable Children in Botswana. The Situation Analysis was a study conducted by the Government of Botswana to collect baseline information to guide the development of national policies and programmes on orphans and vulnerable children. The Analysis found that there were too few social workers, and a large proportion of their time were taken up by overseeing food basket distribution, leaving them less time to devote to supporting OVC and caregivers.

It is, however, noted that the Minister may appoint a probation committee chosen by reason of their experience and character, which would have the responsibility of reviewing the work of probation officers. To date, a Probation Committee has not been appointed.

After concluding his or her investigations into the alleged crime, the police officer shall refer the docket relating to the child's matter to the Director of Public Prosecution who shall take such steps as are appropriate in respect of the matter.

In terms of instituting proceedings against a child, the previous Act required the complaint to be lodged with the district commissioner who would in turn request a probation officer to conduct investigations and make a report on the basis of which the district commissioner would determine whether the child should be committed to court for trial. The reason for requiring that offences committed by children be presented to police officers rather than the district commissioners might have been obviated by the limited number of district commissioners in the country.

A party in a matter before a children's court may appoint a legal representative of his or her own choice and at his or her own expense. The State shall provide counsel to represent any person involved in proceedings before a children's court if that person cannot afford the cost of legal representation.

The Act establishes children's courts to try cases of children charged with offences. While the Act provides clear and specific stipulations about child-appropriate environments and procedures in courts, children's courts do not physically exist in Botswana as there are no specific courts built for this purpose. The Act does however state that every magistrate court shall be a children's court and magistrates will act as

presiding officers in such cases. The children's court is expected to be held informally and should sit in a room other than that in which any other court ordinarily sits. It is however noted that no training of judicial officers is being conducted to ensure that such officers are sensitive to children's needs and reactions, taking into account their age, maturity and special needs. In addition, it is important to ensure that all relevant parties—that is magistrates, the police, juvenile delinquency officers, medical examiners, and other related workers—are trained on various children's issues. Furthermore, law schools and training programmes for existing lawyers and barristers should incorporate child protection issues into their curricula.

In a bid to protect the privacy of the child, only officers of the court, the child in question, parents/guardians/caregivers of the child and the social worker for the child are permitted to be present during the court sittings.

Like the previous Act, for purposes of protecting the child from emotional or psychological trauma, this Act prohibits the publishing of the name or address of any child before a children's court, or the name and address of any school which that child is or has been attending, and/ or any photograph of such child. The current Act goes further to prohibit the disclosure or publishing of any information relating to the previous convictions, records of finger, palm or foot prints of any child unless ordered by the court to do so. Generally both the public and the private media abide by this provision.

Sentencing children

In the event that the child is found guilty of committing an offence the matter should be disposed of in a number of ways. The first option is to place the child on probation for a period of not less than six months and no more than three years. Secondly the matter can be disposed of by sending the child to a school of industry for a period not exceeding three years or until he/she attains the age of 21 years. The third possible scenario is by sentencing the child to community service for a period considered as appropriate by the court. Alternatively the child may be sentenced to corporal punishment or sentenced to imprisonment. In terms of section 27(1) of the Penal Code, a sentence of imprisonment cannot be passed on any person under the age of 14 years.

The death penalty cannot be imposed on any person below the age of 18 years. However, a child may be detained at the President's pleasure at such a place and for such a period that the President may deem reasonable, in lieu of the death penalty (section 26 of the Penal Code).

There is currently one school of industry in Botswana. It only admits male offenders. The purpose of the school is to protect the public, rehabilitate young offenders and to equip them with skills such as auto mechanics and carpentry. In practice, however, the school serves as a prison. The conditions are poor and overcrowded thereby raising concern about the safety of the children. There are anecdotal stories of how the children who are committed to the school of industry become hardened criminals after their stay at the school and terrorize the local residents. Girls
are currently held in prisons for women and again this raises concerns about their welfare.

A sentence of corporal punishment shall not be more than six strokes in the case of persons aged 18 and below. Corporal punishment shall be inflicted in accordance with the provisions of section 305 of the Criminal Procedure and Evidence Act as read with section 28 of the Penal Code, which provides that no corporal punishment shall be imposed on females. The parent/guardian of the child has a right to be present when such corporal punishment is administered, as per section 305. In *Clover Petrus and Ano v S* the court pronounced that corporal punishment per se is not inhuman and degrading punishment and that it is the administration of such punishment in instalments that is inhuman and degrading. The fact that corporal punishment continues to be used as a sanction in the child justice system is a matter which has been raised as a concern by the Committee of Experts on the Convention on the Rights of the Child as well as the Universal Periodic Review Report of 2008. A proposed amendment to the Act which would have prohibited corporal punishment as a sentence of a children's court was rejected by policy makers and members of the public.

Any child or his or her parents, other relatives or guardian, who is dissatisfied with any decision or order of a children's court may appeal or make an application for a review to the High Court against such decision or order.

Conclusion

With regards to the actual implementation of the Act, it has been noted that limited knowledge and understanding of the 2009 Children's Act is one of the barriers in implementing its provisions. It has also been observed that the Act set up a number of structures but did not provide the necessary support in terms of setting up those structures by way of providing resources.

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7TH-8TH NOVEMBER 2011

On 7 & 8 November 2011 a conference on the deprivation of a child's liberty as a last resort will be held in Kampala, Uganda. This conference will be aimed at contributing to the improvement and development of laws, policies, systems and procedures in the various child justice systems in Africa. The conference is organised by Defence for Children International and the African Child Policy Forum. For further information please visit: http://www.kampalaconference.info.

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