Article 40

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

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Article 40(1)

States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

THE SITUATION OF CHILDREN IN PRISON AFTER THE IMPLEMENTATION OF THE CHILD JUSTICE ACT

Has anything changed?

By Clare Ballard

The Child Justice Act 75 of 2008 (the Act), which, in April 2011, has been in operation for a year, introduced a markedly different sentencing and detention regime for children than the previous system regulated by the Criminal Procedure Act 51 of 1977.

The most recent statistics from the Department of Correctional Services indicate a significant reduction in the number of children being detained prior to trial and sentenced to imprisonment – a reflection, one assumes, of the Act's preference for the use of detention of children as "the least restrictive option possible."

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EDITORIAL

Welcome to the first edition of Article 40 *for 2011. This edition will focus on child justice developments in South Africa.*

On 1 April 2011 South Africa has celebrated the 1 year implementation of the Child Justice Act. In terms of the Act, the Department of Justice and Constitutional Development is to present to Parliament on the 1 year implementation thereof. We still await any developments in this regard.

Even without such implementation report, this edition of Article 40 *investigates a number of interesting articles in relation to the implementation of Child Justice Act in South Africa.*

Clare Ballard investigates the sentencing and detention of children after one year of implementation of the Child Justice Act in South Africa. Nicole Breen then discusses an interesting topic of children with conduct Disorders and the child and criminal justice system. Finally, Nkatha Murungi writes on the National Prosecuting Authority's Directives with a focus on diversion criteria and requirements for children accused of committing offences.

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Prior to the Act's promulgation, the Constitution was, and remains, a clear enunciation of the principles applicable to both the detainment and sentencing of children. Section 28(1)(g)(i) and (ii) states that:

"Every child has the right – not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be ... kept separately from [from adults] and treated in a manner, and kept in conditions, that take into account the child's age."

Sentencing and Last Resort Principle

In 2009 (before the Act came into operation), a majority of the Constitutional Court in *The Centre for Child Law v Minister of Justice and Constitutional Development* held that mandatory minimum sentences applicable to 16 and 17 year old children (including life imprisonment for certain offences) was an unjustifiable infringement of children's constitutional rights, particularly their right to imprisonment as a last resort and for the shortest period of time. These rights, Justice Cameron stated, have a bearing "not only on whether prison is a proper sentencing option, but also on the nature of the incarceration imposed ... if there is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen."

A related debate has been the topic of recent litigation in the United States of America (USA) and a comparison between the two jurisdictions is, perhaps, informative. In October 2010, the US Supreme Court held, in *Graham v Florida*, that juvenile offenders cannot be sentenced to life imprisonment without parole for non-homicide offences. (It was only in 2005, in the case of *Roper v Simmons*, that the Supreme Court abolished the death penalty for juvenile offenders.) There are currently 129 people in the USA serving life sentences without the option of parole for non-homicide crimes which they committed when juveniles, some of whom were tried as adults and sentenced at the age of 13 years.

To the extent that the constitutional jurisprudence of both jurisdictions held strong against the legislative tide of harsher sentencing penalties, it seems that the USA and South African experiences are similar. However, despite the Act's progressive and detailed protections, there appear to be some problems with its implementation.

Children Awaiting Trial – Statistics

In its 2009/2010 Annual Report, the Judicial Inspectorate for Correctional Services reported that the number of children awaiting trial in correctional facilities had decreased by 80% since 2003, bringing the national figure down to 504. The Department of Correctional Service's Management and Information System (MIS) indicate that on 31 December 2010, the number of children awaiting trial was 290. This is considered a positive development. But it raises the question of whether children are still being detained in child and youth care centres or being released into the care of parents in terms of the Act.

The Department of Correctional Service's 2009/2010 Annual Report

shows that there were children under 14 years of age awaiting trial in correctional facilities. The Act states clearly in section 30 that a presiding officer cannot order the detention of a child to prison under the age of 14 years. In addition, section 27 states that before a child's first appearance at a preliminary inquiry, the police official must give consideration to the detention of a child in an appropriate child and youth care centre if the child is between the ages of 10 and 14. The detainment of a child under 14 in a correctional facility is therefore prohibited.

Conditions of Detention

A recent application filed in the Durban High Court by the Centre for Child Law, on behalf six children detained in Westville Prison Medium C perhaps demonstrates some of the problems associated with child detention in South Africa. The application alleges the following violations:

- on average, the children were being allowed only thirty minutes of exercise outside of their cells in the prison courtyard, the rest of their day being spent in their cells watching television or sleeping;
- the children were receiving only two meals per day;
- corporal punishment took place;
- the children were not enrolled in any formal education programmes;
- bedding, throughout the season, consisted of two sheets; and
- children were forced to "squat" when addressing or being addressed by a correctional officer.

These alleged circumstances and practices infringe a number of constitutional rights. In addition to the rights enjoyed specifically by children in terms of section 28 of the Constitution, children also enjoy the rights to dignity, to freedom and security of the person (which includes the right to be free from all forms of violence from either public or private sources, and the right not to be treated or punished in a cruel, inhuman or degrading way), to an environment that is not harmful to their wellbeing, and to have access to sufficient food and water.

The length of time some of these children have been detained is also disturbing. Two boys, for example, at the time the application was filed, had been detained for eight months. Only one of them had seen a social worker. Another boy, charged with armed robbery, had been detained for a year and five months. Of equal concern, is the nature of the offences for which two of the children are being detained in prison: these are possession of dagga and common robbery. Assuming these children are over the ages of 14, the Child Justice Act requires that the child be accused of having committed a schedule 3 offence before they can be considered for detention in prison. In addition, the following criteria must have been met:

- an application for bail has been postponed or refused or bail has been granted but one or more conditions have not been complied with;
- the detention is necessary in the interests of the administration of justice or the safety or protection of the public or the child or another child in detention; and
- there is a likelihood that the child, if convicted, could be sentenced to imprisonment.

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Section 30(5)(a) and (b) of the Act provide that a presiding officer can detain a child accused of a schedule 1 or 2 offence in prison only if, in addition to the above, the presiding officer finds 'substantial and compelling reasons, including serious previous convictions against the child' to do so. Neither dagga possession nor common robbery is listed in schedule 3. Even if the children were detained prior the coming into operation of the Act, it is submitted that their continued detention should be regulated under the provisions of the Act.

The Department, for the most part, denies the allegations. It has admitted, however, that only sentenced inmates receive formal education since it "is impossible to provide formal education to a prisoner awaiting trial who may be released by the Court at any time." Unlike socio-economic rights, the right to basic education (Grades 1 – 9) is not subject to available resources and progressive realisation. Therefore, to the extent that the Department suggests that resource constraints justifiably limit the right to education, this can only be true for 'further education' and if it complies with the limitation of rights criteria in section 36 of the Constitution. The Department also admits to requiring the boys to "squat" when being addressed by a correctional officer. This, the Department alleges, is for "security reasons." If the boys were to be addressed standing up and in a large group, "it becomes very easy for the boys to stab each other." If squatting, however, "it is difficult to stab each other and if they do, it will be easier for the correctional officer to identify the one who stabs the other." It is not clear, however, whether this practice is required in addition to regular weapons searches, to ensure the safety of the children.

Children Sentenced to Imprisonment

As of 31 December 2010, the Department reported that 632 children were sentenced to prison, the majority of which had been convicted of "aggressive" crimes, with "sexual crimes" as a close second. Again, the Department's Annual Report for 2009/2010 indicates that children between 7-14 were serving sentences of imprisonment. But the numbers seem to have dropped significantly: the Department's MIS indicates that only one 14 year old child was in prison on 31 December 2010. The number of sentenced admissions for all ages has dropped by nearly 50% over the last six years. The reduction in the number of children should rather be seen as part of this general trend. (L Muntingh, SACQ, 2008)

A recent magistrate's court decision is perhaps indicative of some of the adjudicative challenges facing child justice courts. In October 2010, a 15-year-old boy was sentenced to 10 years imprisonment for murder. This is a long sentence given that he was only 13 years old at the time of the commission of the offence. Although the commission of the offence had occurred prior to the commencement of the Act, as the record of the boy's trial and sentencing indicate, relevant and important sentencing principles were perhaps not taken into account.

The reason, it appeared, for such a lengthy sentence, was to enable the accused to "get an education." The magistrate did not address what, if anything would prevent the boy from getting an education at a child and youth care centre, generally understood to be more suitable option for younger offenders. Second, the magistrate relied heavily on the mother of the boy's testimony that she would prefer a prison sentence for her son, given that there was no-one to supervise her son if he were to be sentenced to house arrest or correctional supervision. The "best interests of the child" principle (section 28(2) of the Constitution) requires a much more vigorous analysis of what an appropriate sentence would be. And while the opinion of the parent or guardian is no doubt relevant, it is by no means the final say on a child's best interest. ●

Between the Cracks

How the State fails to provide for and protect children with a debilitating form of conduct disorder

By Nicole Breen

Introduction

The Children's Act ("the Act") creates an all-encompassing legislative framework that aims for compliance with South Africa's constitutional and international obligations. The Act places particular emphasis on the rights of children with disabilities. In practice, however, children with mental health disabilities seem to remain in a limbo situation when it comes to real provision being made for services to them. A prime example of such a failure of services has recently come to light with the identification of a number of children suffering from a debilitating form of conduct disorder and the realisation that appropriate care facilities for such children simply do not exist. The Centre for Child Law ("CCL") has brought applications on behalf of two children in this regard (hereafter referred to by their initials "A" and "G") and has managed to identify up to twenty others in Gauteng alone currently suffering due to the State's failure to provide appropriate facilities and services for the protection, care, education and treatment of children afflicted with this condition. Children diagnosed with conduct disorder often end up in the criminal justice system where their criminal capacity is at issue. Details of the A and G applications can be found in the accompanying case study note.

What is conduct disorder?

Conduct disorder is a little-known phenomenon in South Africa, although it has been extensively researched in the United States of America. An excerpt from the Diagnostic and Statistical Manual of Mental Disorders, 4th edition ("DSM IV") describes it as a:

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"repetitive and persistent pattern of behaviour in which the basic rights of others or major age-appropriate societal norms or rules are violated ... individuals with conduct disorder may have little empathy and little concern for the feelings, wishes and well-being of others ... conduct disorder is often associated with an early onset of sexual behaviour, drinking, smoking, use of illegal substances ... conduct disorder may lead to school expulsion, problems in work adjustment, legal difficulties, sexually transmitted diseases, and physical injury from accidents or fights. These problems may preclude attendance in ordinary schools or living in a parental or foster home. Suicidal intention, suicidal attempts, and suicide occur at a higher-than expected rate. Conduct disorder may be associated with lower-than-average intelligence ... Academic achievement ... is often below the level expected ... and may justify the additional diagnosis of a Communication Disorder. Attention-Deficit/Hyperactivity Disorder is common in children with Conduct Disorder. conduct disorder may also be associated with one or more of the following disorders: Learning Disorders, Anxiety Disorders, Mood Disorders and Substance-Related Disorders."

This disorder becomes "debilitating" once the child in question:

- suffers significant and dramatic upheaval in consequence of the symptoms and behavioural patterns caused by this disorder and its associated conditions;
- poses a significant danger to him/herself and those around him/her and;
- is unable to live in mainstream care or to benefit from mainstream education.

The DSM IV makes it clear that due to the predisposition of children with conduct disorder to violent outbursts and wayward behaviour, they are exceedingly difficult to manage, particularly if the child concerned is severely affected. This has the effect that care facilities are generally unable or unwilling to take them in and even less inclined to keep them there for extended periods of time. Consequently, there exists a trend of referring such children to psychiatric institutions. The provisions of the Mental Health Care Act 17 of 2002, however, only find operation where a person has been found to be mentally ill. Mental Health practitioners are reluctant to make such a finding in respect of conduct disorder and are thus opposed to providing in-patient care of children so diagnosed. It is maintained that the behaviour emanating from conduct disorder is not associated with a pathological disease of the mind and that as such, psychiatric hospitals are ill-equipped to manage and treat such children. As a result, those afflicted with this condition are shunted from one institution to another with no measure of stability or access to treatment, therapy or education.

What happens when children with conduct disorder enter the criminal justice system?

As a result of the poor impulse control exhibited by such children, they are extremely likely to have criminal charges brought against them. Such charges are often a cry for help on the part of their caregivers who simply cannot cope with their violent behavioural patterns. The lack of appropriate designated placement facilities mean that every time a child with conduct disorder enters the criminal justice system a flurry of panic arises as to where to place the child pending the outcome of the matter and thereafter.

Although medical professionals insist that a finding of pathological incapacity is unacceptable, magistrates are nevertheless reluctant to regard children suffering from a debilitating form of this condition as fit to stand trial. As a result, their course of action is often to refer such children to the Children's Court in terms of sections 50 or 64 of the Child Justice Act or alternatively for psychiatric evaluation in terms of sections 77, 78 and 79 of the Criminal Procedure Act. A consequence of the former is often that such children are found to be in need of care and protection and are removed in terms of sections 151(2) of the Children's Act. The latter also generally yields a finding that suitable alternative care must be identified. It is at this point that the question of where to send them comes to the fore and where the immense void between what these children need and what actually exists in the care system becomes apparent. The Department of Social Development seems unable to proffer any legitimate, sustainable solutions and the courts thus far have served as no more than a mechanism through which children are moved from one inappropriate living situation to the next.

The question of criminal capacity

According to Snyman (in Criminal Law 5th ed at p161), an assessment of the criminal capacity of an individual is hinged upon the presence or absence of certain cognitive and conative aspects. The former denotes the child's reason, intellect and insight, his or her ability to perceive, to reason and to remember and the latter relates to the child's ability to control his or her behaviour in accordance with his or her insights. When a child suffers from a debilitating form of conduct disorder the cognitive mental function is absent.

In the context of the capacity of children to commit a crime, the Child Justice Act prescribes the following:

- A child who commits an offence while under the age of 10 years does not have criminal capacity;
- A child who is ten years or older but under the age of 14 years is presumed to lack criminal capacity unless the State proves otherwise;
- A child over the age of 14 is presumed to have full criminal capacity.

In the case of children suffering from a debilitating form of conduct

disorder who are under the age of 14, it is highly likely that a court would find that they lack criminal capacity. It is submitted that even if the State was to lead evidence suggesting the contrary, that expert testimony regarding the child's condition and consequent diminished conative functioning would lead to the child being acquitted. With regard to children over the age of 14 years of age, as observed in the cases of A and G, a deduction based on chronological age of an individual alone is an inadequate test for capacity. This is because it is evident from the CCL's test cases as well as from the DSM IV that children suffering from conduct disorder encounter significant developmental delays. This means that their chronological age often far exceeds their mental and emotional age. This, compounded by their inherent lack of impulse control and natural tendency to resist authority, renders them unable to make considered decisions leaving them without the inhibitions one would observe in a child of the same age who does not exhibit symptoms of conduct disorder. On this basis, holding a child who suffers from conduct disorder to the same standard as a child who is developmentally on par is an inequitable application of the provisions of the Child Justice Act. It is therefore asserted that when assessing the capacity of a child of 14 years or older who suffers from conduct disorder the presumption of capacity ought to be challenged. The approach of the magistrate in the case of G was correct and that such children ought not to be prosecuted but rather referred to the Children's Court where their needs can be better addressed. Unfortunately, due to the fact that appropriate facilities for the treatment of this disorder do not exist, the Children's Court is not in a position to make any real beneficial order to this effect.

The way forward

In his report for G the curator *ad litem* set out a model detailing the appropriate care of children with conduct disorder. In doing so, he drew from an expert report by the Director of the National Association of Child Care Workers, Merle Allsopp. In describing the clinically indicated approach to children with conduct Disorder, she indicated the following:

"Many children referred to residential care are diagnosed as 'conduct disordered'. However, such a condition cannot be psychiatrically treated. Rather, in the context of consistent nurturing and holding environments, re-education processes can be effected and competencies can be built in children with such and other diagnoses that can ameliorate their symptoms or result in more socially productive behaviour patterns being developed."

The psychiatrist involved in the case of G is of the opinion that children who are conduct disordered require a structured environment with fixed and strict rules, a high staff-patient ratio and a behaviour modification programme. He argued that with this in place, such children can begin to learn to adapt to authority and the rules governing society.

The attitudes of these two professionals, as well as other who were consulted, appears to be that it is possible to see a marked improvement in the behaviour and overall functionality of children with conduct disorder, if they are treated appropriately. They also indicate that the current practice of administering drugs to the children and moving them frequently and abruptly from one environment to another exacerbates their condition. The model of care proposed by the curator in the CCL's application hence represents an important step forward in understanding and correcting the behaviour of children with conduct disorder. The proposed model will provide a mode of care that will make children with conduct disorder less likely to commit crimes and thus less likely to enter into the criminal justice system. Over time it will also allow for the development of a heightened understanding of the condition which will allow for the development of a more sophisticated mechanism through which criminal capacity can be assessed.

Despite this, even if the recommendations of the curator in the cases of A and G are met favourably, this only provides a solution for children living in Gauteng. Although the curator's report provides clear direction for a model of care for children with conduct disorder, many problems remain. Questions regarding appropriate education and institutions designated for such individuals once they attain majority remain unanswered. This leaves the fate of those affected by the debilitating form of this condition hanging in the balance. A carefully considered approach is needed in order to catalyse systemic change that will provide for sustainable quality of life of the affected persons.

Conclusion

The unfortunate circumstances of children with this condition, as well as their care-givers, represent a classic "falling through the cracks" of those truly in no position to advocate for themselves. Without access to the care and treatment they so desperately need, children who suffer from a debilitating form of this disorder have no way of bettering themselves and are likely to continue committing criminal acts and posing a danger to themselves and those around them. Constant vigilance on the part of government officials and members of civil society is required in order to prevent situations of this nature arising and to ensure that once such matters are brought to light that action is taken to alleviate the suffering of affected persons. The curator's report in the cases of A and G represents an important milestone: namely, the recognition of the current untenable situation and the commitment to making important changes. However, it is clear that much remains to be done if such children with conduct disorder's rights are to be fully recognised and respected.

CONDUCT DISORDER CASE STUDIES

The Centre for Child Law (CCL) has brought applications on behalf of two children; "A" and "G" age 14 and 16 respectively. Both of them have suffered tremendously in consequence of neglect, erratic care, lack of stability and continuity and a lack of access to appropriate education and treatment of their condition. Both of them have been removed from their families and have spent time alternating between care facilities and psychiatric hospitals and both have been charged with multiple offences. Despite the fact that neither of them has been declared as mentally ill, they are kept "under control" by so-called chemical restraints: a cocktail of potent psychotropic medication so that their caregivers (none of whom have received the appropriate training to adequately care for them) can manage them. Currently they are both in-patients of a psychiatric hospital pending the outcome of their applications-this amid a wave of protest from the hospital.

In both cases the children concerned suffer from severe learning difficulties. Both are predisposed to frequent outbursts of violence that have resulted in placement after placement breaking down. All of the options that have been explored- which include schools of industry, child and youth care centres, temporary safe care facilities, foster care and detention facilities- have proven to be wholly inadequate. The type of behaviour observed in these children and others with the same condition includes:

- In "G's" case, the outcome of the criminal proceedings in respect of charges of assault, attempted murder and malicious damage to property was an acquittal based on criminal incapacity. This was found, in spite of the testimony to the contrary by a panel of psychiatrists who asserted that although his criminal capacity was diminished as a result of his condition, he was; in fact fit to stand trial.
- In the case of "A", the magistrate (frustrated that there was no appropriate placement for the child) requested that the CCL intervene. In both cases a curator ad litem was appointed to investigate issues pertaining to placement and work towards a sustainable, systemic solution of issues pertaining to placement of children suffering from this disorder.

Recommendations of the curator included:

- That the MEC urgently make a decision regarding the registration of an existing twenty-bed facility in Pretoria as a child and youth care centre providing for the reception, development and secure care for children with behavioural, psychological and emotional difficulties. Alternatively, it is recommended that the MEC identify another suitable child and youth care centre that should be so registered or to make a decision regarding the urgent establishment of such a facility;
- When a facility is selected or established, that such a facility should be assessed by an independent child and youth care expert to determine its suitability;
- That the MEC, after consultation with interested parties provide a detailed plan (including timeframes) as to how suitable care can be provided at the nominated facility;
- That "A" and "G" be placed at an appropriate temporary safe care facility pending the selection/establishment of the aforementioned facility;
- That a provincial strategy be developed in respect of the identification/ establishment of child and youth care centres in the Gauteng Province, including those which cater for children with behavioural, psychological or emotional difficulties specifically those with conduct disorder.

The CCL awaits a response from the Department of Social Development with regard to these recommendations and has managed to identify 20 other candidates in the Gauteng province alone who could stand to benefit from implementation thereof.

An appraisal of the NDPP's section 97(4) Directives of 2010

By Nkatha Murungi

In March 2010, the National Director of Public Prosecutions (NDPP), in consultation with the Minister for Justice and Constitutional Development, issued Directives in terms of section 97(4) of the Child Justice Act 75 of 2008 (the Act). According to the Act, the Directives are to cover 'all matters reasonably necessary or expedient' in order to facilitate the realisation of the objectives of the Act. Such matters include diversion, particularly the standards thereof and the factors to be considered when selecting a diversion option, diversion with respect to persons who were beyond the age of 18 years, but below 21 years at the time they are issued with summons, written notice or are arrested, and prosecutorial diversion before the preliminary inquiry. The Directives are also meant to address the manner in which matters are to be dealt with where an error as to age has been discovered subsequent to the matter being diverted, and to set out the exceptional circumstances in which a matter relating to schedule 3 offences may be diverted.

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The main focus of the directives issued under section 97(4) of the Act is the issue of diversion. Diversion covers programmes and practices employed for young people who have initial contact with the criminal justice system. Child offenders who are diverted are removed from the conventional justice process that leads to court adjudication. The concept of diversion is derived from the provisions of the UN Convention on the Rights of the Child (CRC). Article 40(3)(b) of the CRC calls for the use of non-custodial measures as alternatives to traditional criminal trials. In view of the overarching principle that detention of children should be used as a last resort and that when resorted to, it should be for the shortest time possible, diversion is a critical element in a child justice system. The Directives reflect this emphasis in as far as most of their content is focused on diversion.

The directives and diversion

The Act requires the Directives to set out the minimum standards applicable to diversion and the factors to be considered when selecting a diversion option. Seeing that such minimum standards applicable to diversion, and to diversion programmes, as well as the range of diversion options are already established in section 55 of the Act, the Directives rather prescribe prosecutorial principles to safeguard these standards. These principles are outlined in Part F of the Directives. Though the efficacy and sufficiency of the Directives may only really be tested through application, it may be argued that most issues relevant to diversion are adequately addressed in the Directives.

Children: 18-21 years

Part M of the Directives responds to the requirement to give guidance in respect of the diversion of persons above the age of 18 years but below 21 years if they were children at the time they were arrested, summoned or issued with written notice to appear at a preliminary inquiry. Both the Act and the Directives reserve the decision to divert such persons to a Director of Public Prosecutions (DPP) and outline the various circumstances in which such a decision may be taken. The Directives establish that such diversion is to be an exception where the person under consideration is jointly accused with an adult(s). In as far as cases where an error as to age determination has happened, Part N of the Directives vests the duty of disclosing such an error on the prosecutor. However, the decision in response to such a disclosure is left to the presiding officer. The prosecutor is to advise the presiding officer on how the discovery would affect the decision to divert or the conditions of such diversion.

Exceptional circumstances and refusal to divert

Section 97(4)(a)(iii) requires the NDPP to set out the exceptional circumstances that may be considered in diverting a child accused of committing a schedule 3 offence in terms of section 52(3) of the Act. This list of considerations is set out in Part J(2) of the Directives and is not conclusive. In essence, it affords an opportunity for inclusion of other circumstances that may be identified over time. A further explicit requirement relates to prosecutorial diversion in respect of schedule 1 offences. This is covered in Part G of the Directives which goes further to set out the explicit obligations of the prosecutors in that regard, and gives an extensive list of circumstances in which the prosecutor should not divert a child irrespective of the (petty) nature of the offence.

Children in need of care and protection

These circumstances include cases where the offence has serious consequences, where the offending child has a previous diversion or conviction record or where the child has a pending charge in respect of a similar or more serious offence. The prosecutor may also not divert a child if it is apparent to him or her that the child is in need of care and protection. The Directives adopt verbatim the provisions of section 150

Both the Act and the Directives reserve the decision to divert such persons to a Director of Public Prosecutions (DPP) and outline the various circumstances in which such a decision may be taken.

of the Children's Act 38 of 2005 on the identification of children in need of care and protection. Save that, in terms of the Directives, victims of child labour and child-headed households are automatically considered ineligible for diversion, which implies that they are automatically in need of care and protection. The Directives dispense with the need for assessment of this category of children by a social worker. By referring children in need of care and protection to the preliminary inquiry, the Directives afford a presiding officer the opportunity to consider appropriate measures for their protection.

Prosecutorial diversion

Part G of the Directives also puts into perspective prosecutorial diversion in light of the timelines within which a child must must appear at a preliminary inquiry. Where the prosecutor considers it necessary or appropriate to divert a child in relation to a schedule 1 offence, s/he must expedite the decision in order to comply with the 48-hour maximum period within which the child must be presented for a preliminary inquiry, if such a child is in detention in a police cell.

Analysis

The Act requires that the NDPP, in developing the guidelines, consult with the Minister for Justice and Constitutional Development. As such, there is neither a duty on the NDPP to consult with other role players such as civil society organisations involved in child justice issues, nor is there a bar to such consultation. The pertinent question is whether input from such organisations would have added value to the guidelines, by infusing the experience gained in the work in interpreting the duties of the prosecutors.

The Directives are written in lay person's language making it more accessible. However, there are a few remnants of technical language such as 'contact crime,' though it may be presumed that this is easily understood by the target audience; i.e. prosecutors. No doubt, they shed more light on the actual and practical responsibilities of prosecutors in the implementation of the Act. By clearly outlining these responsibilities, the Directives facilitate accountability. They clearly set out the practical steps to be taken in the implementation of the Act.

The Directives also capture the essence of the Constitutional Court's decision in Centre for *Child Law v Minister for Justice and Constitutional Development and Others*,[1] a decision of 2009, a year after the adoption of the Act. The decision pronounced the inapplicability of section 51 of the Criminal Law Amendment Act 105 of 1997 to child offenders. Before this decision, 16 and 17 year old children convicted of serious offences were subject to minimum sentences prescribed in the Criminal Law (Sentencing) Amendment Act 38 of 2007. In this case, the Constitutional Court ruled that the application of minimum sentences to child offenders was unconstitutional.

What next?

In terms of the Act, the Minister of Justice and Constitutional Development must submit the Directives to Parliament for approval, before they are published in the Government Gazette. The current Directives were published on 30 March 2010, a day before the date that the Act came into force on 1 April 2010. Subsequently, the NDPP has to develop training courses on the Directives, facilitate social context training in respect of child justice, and provide for and promote the use of uniform norms, standards and procedures so as to ensure that all prosecutors are able to deal with child justice matters in an appropriate, efficient and sensitive manner. Thus, while it is commendable that the Directives were developed in time, the responsibility of the NDPP is not fully discharged until requisite training has been done. It should also be noted that the Directives can be withdrawn or amended, and that the Act does not give the circumstances under which such withdrawal or amendment can be done. ●

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HOW DO YOU RATE THE IMPLEMENTATION OF THE CHILD JUSTICE ACT?

The Child Justice Act of South Africa is just over one year into implementation now. Are you experiencing any challenges or successes in relation to the implementation of this Act? Please write to the Child Justice Alliance by using the 'Child Justice Act Monitoring Implementation Tool' (CJAMIT).

This tool is designed with the purpose to document the best practice in relation to the implementation of the Child Justice Act and to address any challenges with the implementation thereof. For further information on CJAMIT and to download this tool, please visit the website.

http://www.childjustice.org.za/publications/CJAMIT.pdf

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