

Article

40

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



When promulgated, sections 15 and 16 of 'Sexual Offences Act' set the age of consent for sexual activity at 16 and makes it an offence for any person older than 16 to engage in sexual acts with children below the age of 16. The purpose of these two sections was to protect children from undue influence related to sexual engagement with adults or significantly older children.

Criminalising consensual sexual activities of adolescents in South Africa

by Christina Nomdo (RAPCAN), Executive Director of RAPCAN

RAPCAN – Resources Aimed at the Prevention of Child Abuse and Neglect – has been committed, for over two decades, to ensuring that the protection (nurturance) and participation (autonomy) rights of children are realised. Since 2010, the organisation became involved in the court case that challenged the constitutionality of certain sections of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('Sexual Offences Act'). RAPCAN believes these sections of the Sexual Offences Act

were aimed at limiting children's sexual autonomy rights by intervening in the private details of their consensual sexual relations with peers. Criminalisation of these acts also undermined children's right to dignity.

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Welcome to another insightful edition of Article 40, the first edition in 2014.

It is now over four years since the Child Justice Act came into operation, and the Child Justice Alliance continues with the important role of monitoring and measuring the impact of the Act on the administration of justice for children in South Africa.

In this edition, we begin with a feature on consensual sexual relations among children. It is based on the recent case of the Teddy Bear Clinic for Abused Children and RAPAN v The Minister of Justice and Constitutional Development 2013 (12) BCLR 1429 (CC), which addressed the criminalisation of consensual sexual activity between adolescents against the background of children's rights to autonomy and participation. Christina Nomdo, Executive Director of RAPAN - Resources Aimed at the Prevention of Child Abuse and Neglect - sheds light on the inconsistencies between the Children's Act and the Sexual Offences Act occasioned by sections 15 and 16 of the latter, and gives an overview of the role of the Constitutional Court in upholding children's sexual autonomy rights.

The second article by Ms Zita Hansungule, Project Coordinator, Monitoring, Evaluation and Communication, at the Centre for Child Law, University of Pretoria, is a case note that reviews the approach taken by the court in the recent case of S v EA 2014 (1) SACR 183 (NCK). The feature is an insightful piece on the existence of a child sensitive criminal justice system prior to the advent of the Child Justice Act, based on the provisions of section 28 of the South African Constitution.

The third feature expounds on the oversight role of Parliament in monitoring the (implementation of the) Child Justice Act. Lorenzo Wakefield and Samantha Waterhouse present and analyse the challenges that have trailed the full and proper implementation of the Child Justice Act with a focus on the role of the Inter-sectoral Committee for Child Justice, the establishment of which is mandated by section 94(1) of the Act. They conclude that Parliament has a duty to hold the ISCCJ to account in ensuring, among others, that all relevant committees are part of its oversight initiatives on the implementation of the Child Justice Act.

Once again, maintaining its spotlight on regional and global developments, the last article, by Edmund Foley, former Head and Senior Researcher of the CLC's Children's Rights Project, presents an overview of the restorative justice mechanism under the Children's Protection and Welfare Act, 2011 of Lesotho.

After leading the Children's Rights Project diligently for two years, Mr Edmund Foley bid farewell to the Centre and returned to Ghana where he has taken up a position as the Technical Advisor on Children, Ministry of Gender, Children and Social Protection in the Republic of Ghana. During his tenure as Project Head and Senior Researcher of CLC's Children's Rights Project, Mr Foley made significant contributions to the work of the Child Justice Alliance, and to the advancement of children's rights at national and continental levels. The editorial team is grateful to Mr Foley for his work as Editor of Article 40 and wishes him success in his new role in Ghana.

The team welcomes Prof. Benyam Mezmur who assumed the position of Head and Senior Researcher of the Children's Rights Project in January 2014. Prof Mezmur is a former doctoral researcher and research fellow of the Centre under the Children's Rights Project. He is currently the Chairperson of the African Committee of Experts on the Rights and Welfare of the Child, and a member of the United Nations Committee on the Rights of the Child. He therefore brings on board a wealth of knowledge, expertise and experience on children's rights issues at national, regional, and global levels.

Enjoy!

Dr. Usang Maria Assim
For the Editorial Team

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The Teddy Bear Clinic for Abused Children (hereafter referred to as Teddy Bear Clinic) and RAPAN, represented by the Centre for Child Law, recently brought an application against the Minister of Justice and Constitutional Development as well as the National Director of Public Prosecutions to challenge the limitation of children's rights by the Sexual Offences Act. This article will explain RAPAN's position on children's sexual autonomy rights and the manner in which the Constitutional case - in RAPAN's view - upheld children's sexual autonomy rights.

Participation rights for children and adolescents

The participation rights of children are contained in article 12 of the United Nations Convention on the Rights of the Child. The Children's Act 38 of 2005 amended in 2007 and Child Justice Act 75 of 2008 provide the basic framework for children's protection rights. These two laws also contain special provisions for children to participate in decisions that may affect their lives.

Participation rights of children are included in a number of laws, providing South Africa with a strong platform to promote participation. However, barriers and challenges often prevent these participation rights from resulting in a meaningful and genuine process. Gaps remain between these participation provisions and children's experiences in everyday life. The participation rights in the legislation are focused on providing children with decision-making powers in terms of obtaining their consent and expressing their views on matters that affect them directly. For these rights to become real, adults must be willing to listen and learn from children, and to understand and consider their views. The provision of explicit autonomy rights to children to make their own decisions is new terrain in South Africa.

The 'Sexual Offences Act' and its effect on children's sexual autonomy rights

When promulgated, sections 15 and 16 of 'Sexual Offences Act' set the age of consent for sexual activity at 16 and makes it an offence for

any person older than 16 to engage in sexual acts with children below the age of 16. The purpose of these two sections was to protect children from undue influence related to sexual engagement with adults or significantly older children. But this section went further than protecting children from adults or significantly older children it also criminalised any consensual sexual acts between children aged 12 to 16 years.

The real effect of sections 15 and 16 seemed to be aimed more at policing morality and children's sexuality rather than protecting children from sexual abuse. The consensual sexual experiences of children are considered taboo in the South African society. Adults feel more comfortable believing that children are ignorant of sex due to their conceptions of the innocence of childhood. In fact, during the case, evidence was provided by Flisher and Gevers to demonstrate that it is developmentally normative for adolescent children between ages 12 and 16 to be engaged in intimate relationships.

Section 15 and 16 of the Sexual Offences Act criminalised adolescent sexual activity but the law does this in a confusing manner. This can be demonstrated when examining the bizarre anomalies in the provisions. When a case concerns two children who are 12 years or older but not yet 16 years old then sections 15 and 16 state that, should the National Director of Public Prosecutions believe prosecution is warranted, both children must be charged. Section 15 criminalises children older than 12 and younger than 16 who have sex with each other while section 16 criminalises children within the same age group who engage in any sexual activity other than penetrative sex. This means that a 16 year old girl, who has sex with a 15 year old boy, will be prosecuted alone. However, if the boy and the girl were both 15 then they both have to be prosecuted together.

Considering the treatment of the children concerned in, for example, the Jules High School case one can hardly argue that it is not harmful to children to be exposed to the criminal justice system and public scrutiny where children are charged in terms of section 15 or 16. The children under investigation in the Jules high case were required to give detailed statements to investigating officers, prosecutors, and the magistrate in separate interviews, all in the presence of their parents and without the assistance of a lawyer. They were subjected to intense media scrutiny which stigmatised them to the extent that one of the children never went back to school to write year-end exams.

The greatest harm to children in general however, is that access to counselling and health care services related to sexual decision making have now been derailed. The Sexual Offences Act made it mandatory for any person who has knowledge that teenagers are engaging sexually with each other to report that to the police. Consider when a child goes to a school nurse and requests contraceptives or discusses medical symptoms that may indicate a sexually transmitted disease. If they are below the age of 16, then the school nurse is obliged to report that to the police. The same obligation to report is placed on parents, educators, friends, family members, counsellors and health care practitioners. All of these people were open to criminal prosecution if they did not report the information they have to the police.



The emphatic mandatory reporting provision in the Sexual Offences Act was fundamentally at odds with legislation that specifically aims to help and support children. The Children Act stipulates that no person may refuse to sell condoms to children over the age of 12 or to provide a child over the age of 12 with condoms on request where condoms are distributed or provided free of charge. The same section of the Children's Act states that a child over the age of 12 may be given contraceptives after proper medical examination and advice is given to the child. In stark contradiction to the Sexual Offences Act, the Children's Act states that any child who obtains condoms or other contraceptives is entitled to confidentiality.

Teddy Bear Clinic, RAPCAN and the Centre for Child Law believed that the effects of sections 15 and 16 and the mandatory reporting provision in the Sexual Offences Act violated children's Constitutional rights. In particular, the rights to dignity, privacy, bodily integrity and the right to have their best interest considered paramount. Whilst the Children's Act protects and upholds children's right to privacy, the Sexual Offences Act destroyed any prospect of confidentiality through its mandatory reporting provision. Prosecuting children for normal, healthy sexual experimentation fundamentally violated their dignity when they are put through the criminal justice system and forced to talk about something as private as their sexual activities.

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The development of the case in the High Court

Teddy Bear Clinic and RAPCAN were the applicants in the case - to contest sections 15 and 16 as well as the mandatory reporting provisions - as both organisations have an established track record of dealing with sexually abused children and children who commit sexual offences. The First Respondent in this case was the Minister of Justice and Constitutional Development, and the Second Respondent was the National Director of Public Prosecutions. On the 29th November 2010, Teddy Bear Clinic and RAPCAN (the Applicants) filed court papers with the North Gauteng High Court.

The Applicants asked the Court to declare sections 15 and 16 unconstitutional insofar as they criminalise children between 12 and 16 years of age who engage in consensual sexual activity. The effect would be that only persons over 16 years can be charged for consensual sexual acts (statutory rape or sexual violation) of children between 12 and 16 years of age.

The Applicants acknowledged in their affidavits that adolescents are still vulnerable to the influence of adults who may want to engage in sexual activity with them. However, the Applicants contended, adolescents do not need to be protected in law from intimate relationships with their peers. RAPCAN's position is that sexual activity and experimentation between adolescents which is consensual (not coerced) and responsible is normative and healthy. A punitive response to children's sexual activity is not appropriate but adults have a responsibility to provide information and support.

While the case was awaiting a court date, in August 2011, the National Director of Public Prosecutions authorised the prosecution of pregnant teenage girls in Limpopo in terms of sections 15 and 16 of the Sexual Offences Act. This was an outrage to the Applicants in the court case as the National Director of Public Prosecutions had previously stated that they would almost never prosecute on the basis of these sections of the law. This

raised concerns about the gendered nature in which this law was being applied and once again reinforced RAPCAN's perceptions that the sexual autonomy of adolescents was being moralised. The Women's Legal Centre and Tswaranang Legal Advocacy Centre entered as amicus specifically on the gender implications of the two provisions in the Sexual Offences Act.

The case was heard in court on the 23 to 25 April 2012 and judgment was rendered by Judge Rabie on 15 January 2013. Judge Rabie declared the criminalization of consensual sex and sexual acts (including kissing) between adolescents unconstitutional. His judgment explained that criminalization would "constitute an unjustified intrusion of control into the intimate and private sphere of children's personal relationships, in a manner that would cause severe harm to them". The matter then proceeded to the Constitutional Court on 30 May 2013 for confirmation of the declaration of unconstitutionality. The judgement was rendered by the Constitutional Court on 3 October 2013.

The judgement of the Constitutional Court

The Constitutional Court decided unanimously in favour of a judgement rendered by Judge Sisi Khampepe finding that sections 15 and 16 of the Sexual Offences Act infringed adolescents' Constitutional rights to dignity (s10), privacy (s12) and the best interest of the child (s28(2)). The court ruled that when adolescents are publicly exposed to criminal investigation and prosecution they will be stigmatised and shamed. The right to privacy protects the intimate aspects of adolescents' lives and allows adolescents to develop relationships without interference from the outside community. The offences in the Sexual Offences Act allow the criminal justice system role players to scrutinise and assume control of the intimate relationships of adolescents. Trusted third parties are obliged to disclose information which may have been shared with them in the strictest confidence, on pain of prosecution. These reporting provisions create a rupture in family life and invite the breakdown of parental care by severing the lines of communication between parents and their children.

RAPCAN applauded the judgement as recognition of the importance of children's right to dignity, privacy, and their right to participate in decisions about sexuality, especially when engaging with their own peer group. Professionals and parents are now able to provide children with the necessary support and guidance about sexuality to make informed decisions without fear of incriminating the child or themselves.

Conclusion

The manner in which the Sexual Offences Act was initially promulgated highlighted that certain adults feel they have the right to police and regulate young people's sexuality through punitive measures. This position emanates from a protectionist or paternalistic view of children and children's rights, which fails to take into account children's evolving capacities and increased autonomy as they become older. This attitude makes it very difficult for child rights activists, such as RAPCAN, to provide non-judgmental support to adolescents to realise their sexual autonomy rights. ●

Recognising the existence of a court based child sensitive criminal justice system before the advent of the Child Justice Act

by Zita Hansungule, Project Coordinator at the Centre for Child Law, University of Pretoria



A CASE NOTE: S v EA 2014 (1) SACR 183 (NCK)

The introduction of the Child Justice Act 75 of 2008 ('the Act') brought certainty on the procedures to be followed by the courts and those in the criminal justice system when in contact with children in conflict with the law. The Act establishes a criminal justice system for children in conflict with the law in accordance with the Constitution. However this does not mean that before the advent of the Child Justice Act, children in conflict with the law were left completely at the mercy of a criminal justice system that was suited to adult offenders only. The courts had, before the Act, developed progressive attitudes towards children in conflict with the law as a result of the influence of the Constitution, in particular section 28 dealing with the rights of the child.¹

This point is important in instances where courts have to hear cases that began before the commencement of the Child Justice Act 75 of 2008, and courts are required to turn to the approach used before the commencement of the Act in order to formulate their judgments.

The case in question is one such instance. The court had to decide whether it was appropriate to prosecute the accused who had completed a diversion programme for crimes he committed when he was 17 years old in 2009.

This case note reviews the approach taken by the court in coming to its decision and submits that a best interests approach as set out in the Constitution could have been taken. The court, in coming to its decision, did not consider the application of the rights of children set out in the Constitution.

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¹ C Ballard 'Youthfulness and sentencing prior to the operation of the Child Justice Act' (2012) 14-1 Article 40 10.



THE FACTS

In February 2009 the accused, who was 17 years old at the time, allegedly committed 3 counts of assault, with intent to cause grievous bodily harm. He appeared in court where his case was postponed and he attended the prescribed diversion programme in respect of charges 1 and 3. After completion of the diversion programme the prosecutor withdrew the charges.

The complainant in respect of charge 1 was unhappy with the decision to withdraw the charges and approached the senior prosecutor with this dissatisfaction. It seems that the senior prosecutor was in doubt as to whether the accused could be charged again; despite this she decided to summon the accused. He appeared in court in August 2009, where the case was referred to the Director of Public Prosecutions (DPP). The case was removed from the roll in January 2010 because the decision of the DPP was outstanding. During this time the accused turned 18.

The prosecution against the accused was reinstated on written instructions of the DPP. The accused appeared in the Magistrate's Court in Kimberly in April 2010 and was convicted on 31 May 2012 on 3 counts of assault. After conviction, and before imposition of sentence, the presiding officer discovered that the accused had been diverted from the criminal justice system in respect of charges 1 and 3 and charges had previously been withdrawn. The presiding officer sent the case on special review in terms of section 304 (4) of the Criminal Procedure Act 51 of 1977.

THE JUDGMENT OF THE REVIEW COURT

The review court heard the case on 03 June 2013 and delivered judgment on 28 June 2013. Diversion of child offenders is currently regulated by the Child Justice Act, which amongst other things provides that a prosecution based on the same facts may not be instituted if a diversion programme has been completed successfully. The Child Justice

Act came into operation on 1 April 2010 and the court noted section 98(1) of the Act which provides that all criminal proceedings instituted against children and which had not been concluded before the commencement of the Act, must be continued and completed as if the Act had not been passed. The court concluded that the Act has no retrospective operation.

Although courts diverted children on a regular basis prior to the Child Justice Act coming into effect, there was no legislation that regulated this process. Therefore there was no statutory prohibition on the reinstatement of a prosecution after a diversion programme was completed and charges withdrawn.

The discretion to institute proceedings or not (or to continue them) lies with the National Prosecuting Authority. This discretion is not unlimited and can be subject to interference by the courts and therefore reviewable, in exceptional cases.

Review proceedings do not only question whether there was an irregularity in the manner that a case was dealt with by the court *quo*, but also requires the determination of whether the prosecution, including the decision to prosecute, was in accordance with the basic principles of equity and justice.

The Criminal Procedure Act 51 of 1977 does not provide any guidance as it does not prohibit the reinstatement of the prosecution, as the case was withdrawn and the prosecution was not stopped in terms of section 6(b) of the Criminal Procedure Act. There also appeared to be no guidance or directions to the prosecutors at the time the diversion occurred.

The court found no irregularities that constitute grounds for interference. There was no *mala fides* on the part of the prosecutors that influenced the decision to prosecute the accused again. The court, however, found it disturbing that the accused was summoned and brought before the court before the decision of the DPP was known. The case was removed from the roll because no instructions had been given. Instructions to prosecute were issued in February 2010, after which the accused was once again summoned and taken before court.

This led the court questioning whether the decision to prosecute the accused again was in accordance with the basic principles of equity and justice and whether the accused was treated fairly. There is no evidence of an express agreement between the State and the accused that there would be no prosecution on successful completion of the diversion programme. It appears that there was a tacit agreement that might have created an expectation that there would be no further prosecution in relation to charges 1 and 3.

The issues that had to be decided on were, whether the NPA or the prosecutor created the expectation that the accused would not be prosecuted on completion of the diversion programme and if so: whether the expectation was unqualified and reasonable and whether the NPA or the prosecutor was authorised to create such expectation.

On the successful completion of the diversion, the case was withdrawn by the prosecutor and the court was informed of this. This suggests that an expectation was created that the accused would not be prosecuted again on

the same facts. There is no evidence that the representation of the prosecutor was unqualified or unreasonable. There is no evidence that the prosecutor who took the decision to divert acted beyond his powers, diversion was and is recognised and often applied in respect of child offenders.

The accused was 17 at the time the offence was committed. He completed the diversion programme successfully before he turned 18. The prosecution was instituted and reinstated when he was still a minor. The case was removed from the role, and he was in 2010, after turning 18, brought before court. The delay in the finalization of the case was more than three years.

As a result of these circumstances, the court found that the case was unfair and not in accordance with the notions of basic fairness to prosecute the accused again. The court found that it was entitled to interfere and set aside the conviction on counts 1 and 3 and to remit the case to the Magistrate's Court in Kimberly for sentencing in respect of count 2.

THE CASE VIEWED THROUGH A DIFFERENT LENSE

It is acknowledged that the court came to the correct decision to set aside the convictions in regards to count 1 and 3. However, the argument to be put forward is that instead of going through the route of making this decision by concluding that an expectation was created, the court could have found that the decision to prosecute again was not in line with the best interests of the child principle.

APPLYING A CHILD RIGHTS CENTERED APPROACH TO THE CASE

Section 28(2) of the Constitution provides that 'a child's best interests are of paramount importance in every matter concerning the child', it is submitted that this constitutional provision should have been the first port of call for the court in coming to its conclusion.

In *S v CKM* the court accepted that 'constitutional principles enshrined in the Bill of Rights must have been applied by the court generally and by the magistrate trying the child accused...at the time [of the prosecution]. These principles are the paramountcy of a child's best interest that must be observed and given effect to in all circumstances (s 28(2) of the Constitution); and the children's right to not be incarcerated except as a measure of last resort and for the shortest time possible (s 28(1)(g) of the Constitution)².

It is through these constitutional principles that courts (before the advent of the Child Justice Act) began to take into account the youthfulness of child accused during sentencing and considered options like diversion prior to trial.³ The courts recognised that child accused could still benefit from rehabilitative sentences that focused on re-socialisation and re-education, and that thorough preparation to return to society was critical.⁴ Court recognised the

importance individualisation of sentences.

This does not mean that the courts ignored the general purpose of sentencing, which is punishment, deterrence and prevention of the re-occurrence of crime.⁵ They instead came to an understanding that for children in conflict with the law rehabilitation played a more effective role.⁶

After consideration of the above, the question would then have arisen for the court in the case under review: would it, in terms of section 28(2) of the Constitution, be in the best interests of the accused for prosecution to be reinstated after diversion was completed successfully when he was a minor and he was essentially given a second chance, through the withdrawal of charges, to become a law abiding citizen? It is submitted that the reinstatement of prosecution would in essence be completely at odds with and throw out the window the emphasis on individualisation in sentencing, rehabilitation and recognition of youthfulness.

The court would have also been able to further argue that renewed prosecution, conviction and sentencing on the same facts, would not give effect to section 28(1)(g) of the Constitution which calls for children not to be detained except as a measure of last resort.

CONCLUSION

It is acknowledged that application of the two approaches (that of the court and that advanced by the author) to the case would have both led to the same decision. However, application of constitutional principles in the Bill of Rights relating to children would have fallen in line with and promoted the progressive approach already taken by courts when dealing with children in conflict with the law and confirmed that section 28 encourages law enforcement to be child sensitive, showing due respect to children's rights⁷. ●

2 *S v CKM* 2013 (2) SACR 303 at para 30.

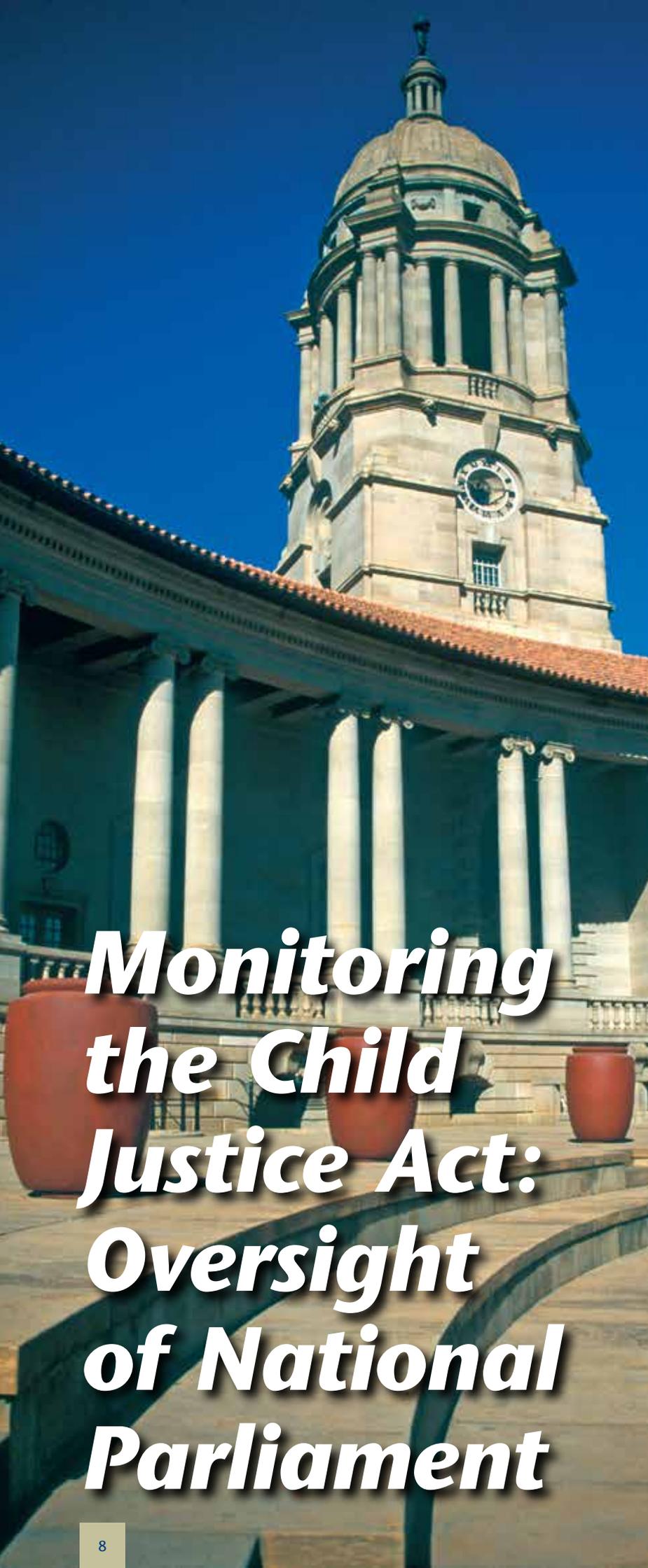
3 Ballard at 10.

4 Ballard at 10.

5 Ballard at 11.

6 Ballard at 11.

7 *S v M* (Centre for Child Law as amicus curiae) 2007 (2) SACR 539 (CC) at para 15.



by **Lorenzo Wakefield**, Research Fellow: Research Consortium on Crime and Violence Prevention and **Samantha Waterhouse**, Parliamentary Programme Head: Community Law Centre, University of the Western Cape

1. Introduction

Beyond developing legislation, the Constitution requires Parliament to exercise oversight over and ensure accountability of the Executive, as well as ensure public engagement in Parliament's functions.

The Child Justice Act 75 of 2008 (the Act) includes important provisions that embed parliamentary oversight over its implementation. Section 96(3) requires that the Minister responsible for Justice, in consultation with ministers for safety and security, social development, correctional services, education and health submit reports to Parliament annually. This provision can be seen as an attempt by the legislature to respond to the rising concerns regarding poor implementation of new laws in general.¹

Regular reporting by the range of departments responsible for its implementation should allow for identification of flaws or gaps in the law itself and to identify problems with programmes and plans required for its implementation. This includes monitoring the budgets allocated to these departments, and the capacity of departments to spend the allocation well.

A further potential benefit is improved coordination across departments through this type of coordinated oversight at Parliamentary level. The significant changes made by the Act to the management of children's cases in the criminal justice system require greater integration of services between various government departments and civil society organisations. Consequently, the

¹ Referring to committee discussions that took place during the law reform process relating to the Criminal Law [Sexual Offences and Related Matters] Amendment Act No. 32 of 2007 as well as the Child Justice Act.

Monitoring the Child Justice Act: Oversight of National Parliament

Act emphasises the need for a 'uniform, coordinated and cooperative approach' to the implementation of the Act.² To this end section 94(1) mandates the establishment of the Inter-Sectoral Committee for Child Justice (ISCCJ) within the executive arm.

This article focuses on the oversight conducted by the Parliamentary Portfolio Committee on Justice and Constitutional Development (the Committee) on the implementation of the Act. Other committees, in particular the Committees on Police, Social Development and Correctional Services amongst others, are also responsible for monitoring aspects of the implementation of the Act. However, this article focuses only on tracking the oversight conducted on implementation by the lead committee.

2. Parliamentary oversight on the Child Justice Act since 2010

There is no consistency in the manner in which Parliament conducts oversight on the implementation of the Act. This may be due to the fact that, whereas departments are named regarding implementation and the ISCCJ, no specific committees are mandated with this role regarding oversight. However, the final responsibility for the implementation of the Act lies with the Minister of Justice, implying a particular responsibility for coordinated oversight on the corresponding Portfolio Committee. The emerging practice is that various committees in the justice and security cluster conduct oversight on the implementation reports on an ad hoc basis, thus causing confusion, losing continuity with the outcomes of previous committee meetings in this regard and undermining the important coordination across departments.

The Portfolio Committees of Justice & Constitutional Development (the Committee) and Correctional Services, held a joint meeting on the first year's implementation of the Act in June 2011. The Portfolio Committee on Police held a meeting on the second year implementation in September 2012,³ while the Select Committee on Security and Constitutional Development, situated in the National Council of Provinces and not the National Assembly as is the case with the Portfolio Committees, held another meeting on the implementation of the Act in October 2013.⁴

Subsequent to the session in June 2011, the Committee has not hosted another meeting with the range of departments responsible or civil society stakeholders. However the Committee has engaged with questions on the implementation of the Act regularly through the process of examining the Department of Justice and Constitutional Development's (the Department) annual reports, strategic plans and budgets. This has therefore only related to the performance of the Department, the National Prosecuting Authority and Legal Aid South Africa. It has not examined the performance of other departments such as Correctional Services, Social Development or Police.

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Regular reporting by the range of departments responsible for its implementation should allow for identification of flaws or gaps in the law itself and to identify problems with programmes and plans required for its implementation.

² Section 93(1) Child Justice Act 75 of 2008

³ See <http://www.pmg.org.za/report/20120912-implementation-child-justice-act-second-annual-report> (Accessed on 18 March 2014) for minutes of this meeting.

⁴ See <http://www.pmg.org.za/report/20131023-child-justice-act-implementation-inter-sectoral-committee-young-in-prison-child-justice-alliance-inputs> (Accessed on 18 March 2014) for the minutes of this meeting.



One of the greatest areas of concern, is regarding the numbers of children being diverted into restorative justice programmes outside of the formal criminal justice system.

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Towards the end of every year, parliamentary committees submit a Budget Review and Recommendations Report (BRRR), this contains the recommendations of committees regarding the strategic focus and spending of the department on which they conduct oversight. These recommendations are made to both the department concerned and to National Treasury if it concerns the allocation of more funds for a department.

3. Themes emerging from oversight

The first oversight meeting led by the Portfolio Committees on Justice and Constitutional Development and Correctional Services, started on a good footing in terms of the range of issues that were presented and discussed. However, since 2011, the Committee's oversight has become less comprehensive and has focused on four key themes. These are: 1) hosting of a meeting with the range of stakeholders involved with the Act's implementation; 2) the overall priority afforded to the implementation of the Act; 3) the issue of reliable data to assess the numbers of children entering the criminal justice system and track the cases; and 4) the lack of establishment of One-Stop Child Justice Centres (OSCJC).

3.1. Engagement with Stakeholders

Most of the parliamentary meetings to date have not engaged the full range of government departments responsible. The meeting hosted in June 2011 included engagement with a broad range of stakeholders responsible for the implementation of the CJA, including civil society. Only Legal Aid South Africa (LASA), tasked with the legal representation of child accused, was noted as not being present at this meeting. The Child Justice Alliance, representing civil society, presented its research on the implementation of the Act.⁵ At this meeting there was strong engagement by both committees on a wide range of issues relating to the implementation of the Act. Whereas the meeting hosted by SAPS in 2012 only engaged representatives from the Department and the South African Police Services, no other departments or civil society organisation participated and no members of other parliamentary committees were present.⁶

In the annual BRRRs to the Department and in the Committee's regular meetings addressing the Annual Reports and Strategic Plans of the Department subsequent to the June 2011 meeting, it is notable that the Committee repeatedly indicates its intention to hold a further meeting on the implementation of the Child Justice Act with all stakeholders including civil society.⁷ In spite of this the Committee has not, to date, hosted such a meeting. Finally, after noting this failure repeatedly, in its BRRR dated 5 November 2013, the Committee acknowledges that despite its intentions, time constraints have prevented this and makes no further reference or suggestion of such a joint oversight session.

⁵ <http://www.pmg.org.za/report/20110622-joint-meeting-implementation-child-justice-act>

⁶ see <http://www.pmg.org.za/report/20120912-implementation-child-justice-act-second-annual-report> (Accessed on 10 April 2014) for minutes of this meeting.

⁷ 26 October 2011, 30 October 2012 and 28 May 2013

3.2. Overall priority for CJA implementation

The extent to which the Department has prioritised the implementation of the Act has been subject to scrutiny by the Committee. It has repeatedly raised concern with the Department and institutions such as the NPA and Legal Aid South Africa in this regard.

In its BRRR in October 2011, the Committee states its dissatisfaction with the progress of implementation of the Act, and the report stresses that the issue is not 'receiving adequate attention from the Department's leadership'.⁸ This is followed in its BRRR to the Department in October 2012, where the Committee rejects the proposal of the Department that a number of pieces of legislation relating to the 'most vulnerable' (including the Child Justice Act) be reprioritized. The Committee indicates in this regard that these pieces of legislation must remain a priority for implementation.⁹ This has resulted in the Act remaining among the priorities list of the Department.

Regarding the pace of implementation of the Act, in October 2011, the Committee requested a progress plan from the Department by the first quarter of 2012.¹⁰ The Committee followed this up in May 2013 and October 2013, indicating that it is 'extremely concerned' and dissatisfied with the progress made regarding the implementation of the Act.¹¹

The extent to which these questions have resulted in greater attention being paid to the implementation of the Act by the Department is questionable. The fact that the issue is repeatedly raised and the latest ISCCJ implementation report (which covers the implementation for the 2013/ 2014 financial year) fails to address some of the key questions regarding the implementation of the Act suggests that this has not been the case.

Linked to the issue of priority given to implementation, the Committee has questioned the issue of budgets and spending for the Act's implementation. Firstly in 2011 in respect of the funding to the Mangaung One Stop Child Justice Centre (OSCJC), where the Committee notes that the centre receives little of its funding directly from the Department.¹²

This seems to be taken up by the Department, in a subsequent meeting the Committee noted that resourcing to this particular OSCJC has increased.¹³

The Committee raises the fact that the information from the Department on budgets and expenditure on the Act cannot be tracked and therefore cannot be monitored. It requests in its 2011 and 2013 BRRRs that spending on 'vulnerable groups' be broken down quarterly and specifically, in 2013, that

the details of spending on the implementation of the Act be provided.¹⁴ To date the Department has not provided this breakdown.

3.3. Data for monitoring

Section 96(3) of the Act does not expressly state that the reports should contain statistics, however, it's inferred that in order to gauge the effectiveness and the implementation of the Child Justice Act, data and analysis of such data is of importance.

Within all annual reports tabled by the ISCCJ in Parliament (2010/11, 2011/12 and 2012/13), the data provided raises more questions regarding their accuracy and the lack of analysis than it provides answers to questions of the Act's implementation. This did not escape members of the Committee when deliberating on the contents of the first annual report.¹⁵ Civil society and experts also identified the inaccuracy and lack of credibility of the data in the annual reports.¹⁶ Causing further confusion was the fact that the Department presented different statistics for the second year implementation report of the Act (2011/12) to the Select Committee on Security and Constitutional Development in 2013, stating that some of the statistics presented in the 2011/12 annual report was inaccurate.¹⁷ The recently tabled third annual report (2012/13) acknowledges the errors in reporting in the second annual report (2011/12).¹⁸ This raises concern about the overall credibility of statistics presented to Parliament on the implementation of the Act within the annual reports, as it seems to change once being printed and tabled in a report to Parliament.

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8 Portfolio Committee on Justice and Constitutional Development Budget Review and Recommendations Report October 2011. Paragraph 8.15.3. (BRRR 26 October 2011)

9 The Budgetary Review and Recommendation Report of the Portfolio Committee on Justice and Constitutional Development, dated 30 October 2012. Paragraph 8.16 (BRRR 30 October 2012)

10 BRRR 26 October 2011. Paragraph 8.15.3

11 BRRR 30 October 2012. Paragraph 8.24.4; Report of the Portfolio Committee on Justice and Constitutional Development on Budget Vote 24: Justice and Constitutional Development, dated 28 May 2013 (Budget Vote 24 May 2013)

12 BRRR 26 October 2011. Paragraph 8.15.3

13 BRRR 30 October 2012. Paragraph 8.24.4

14 BRRR 26 October 2011. Paragraph 8.15.5 and Budgetary Review and Recommendation Report of the Portfolio Committee on Justice and Constitutional Development dated 05 November 2013. Paragraph 15.20 (BRRR 05 November 2013)

15 See: <http://www.pmg.org.za/report/20110622-joint-meeting-implementation-child-justice-act> and <http://www.pmg.org.za/report/20120912-implementation-child-justice-act-second-annual-report> for minutes of these meetings. (Accessed on 11 February 2014).

16 See: L Wakefield "Is the Act working for children? The first year of implementation of the Child Justice Act" South African Crime Quarterly No. 38, pages 47 – 49 (December 2011) and C Badenhorst "The Child Justice Act: What's happening after two years? Article 40 Vol.14, No.3, page 10 (December 2012).

17 See: <http://www.pmg.org.za/report/20131023-child-justice-act-implementation-inter-sectoral-committee-young-in-prison-child-justice-alliance-inputs> for the minutes of this meeting. (Accessed on 17 March 2014).



What was not expected in the implementation of the Act, was the dramatic decrease in the number of children that were referred to diversion programmes post 1 April 2010 ...

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Section 96(1)(e) of the Act states that the ISCCJ must include “the establishment of an integrated information management system to enable effective monitoring, analysis of trends and interventions, to map the flow of children through the child justice system and to provide quantitative and qualitative data...” in the National Policy Framework for the Act. To date, this integrated information management system has not been established. This absence poses a challenge in the recording of statistics on children in the justice system and monitoring the implementation of the Act.

In the absence of an integrated information system, the ISCCJ should investigate alternative measures on how it records statistics and analyse them in order to ensure that an accurate reflection of children in the justice system is published. Parliament has a duty to hold the ISCCJ to account in ensuring that statistics on children in the justice sector is accurate and correctly analysed.

Indeed the Committee has consistently raised this issue. Subsequent to the June 2011 meeting, the Committee is on record raising this concern on four other occasions; in October 2011, May 2012, October 2012 and November 2013.¹⁹ In these meetings the Committee raised concerns regarding inconsistency between data from different departments, the quality of and gaps in data provided on court performance.²⁰ The Committee indicated that this makes its ability to monitor and assess performance ‘considerably more difficult’ and that without better data it cannot make sense of the numbers of children being dealt with, in particular the large drop in numbers of children.²¹

One of the greatest areas of concern, is regarding the numbers of children being diverted into restorative justice programmes outside of the formal criminal justice system. While diversion of children was previously found within policy provisions, prior to the Act’s promulgation, it was applied unequally depending on the jurisdiction. One of the many positive developments of the Act was the codification of diversion within legislation, with an intention of ensuring access to diversion for all children on an equal footing.²²

What was not expected in the implementation of the Act, was the dramatic decrease in the number of children that were referred to diversion programmes post 1 April 2010 (the date that the Child Justice Act came into operation). In all the annual reports on the implementation of the Child Justice Act, the ISCCJ reports a drop in diversion orders being made.²³ Members of the Committee noted this drop in children being diverted, without explanation, as a concern.²⁴ Parliament, in June 2011,

18 See The Department of Justice and Constitutional Development The 3rd consolidated annual report on the implementation of the Child Justice Act No 75 of 2008 (2014) page 33.

19 BRRR 26 October 2011; BRRR 30 October 2012; Budget Vote 24 May 2013; BRRR 05 November 2013.

20 BRRR 26 October 2011.

21 BRRR 30 October 2012 paragraph 8.24.4; Report of the Portfolio Committee on Justice and Constitutional Development on Budget Vote 24: Justice and Constitutional Development, dated 28 May 2013. Paragraph 8.11.4; BRRR 05 November 2013, paragraph 15.20

22 Child Justice Act no. 75 of 2008. Chapters 6 and 8

23 2010-2011 records 16 462 children diverted; 2011 – 2012 records 9 192 children diverted; while 2012 – 2013 records 11 420 children diverted.

24 See <http://www.pmg.org.za/report/20110622-joint-meeting-implementation-child-justice-act> (Accessed on 18 March 2014) for a copy of the minutes of this meeting.

requested that the Department of Justice & Constitutional Development do research on the reasons for the drop in numbers of children accessing diversion programmes and report to Parliament with recommendations in this regard.

Nearly 3 years later and even though the Department did conduct research on the decline in diversions made, Parliament has not engaged with the Department in this regard. This is largely because this report was not tabled in Parliament.

Linked to this, the Committee raised concern about the 'dramatic decrease' in the number of child accused being assisted by Legal Aid South Africa subsequent to the promulgation of the Act in 2010 (54 781 in 2009/10 children to 19 840 in 2012/13).²⁵ While this may be an indicator of the number of children being diverted away from the formal system, the Committee raised the concern with this explanation when considered against the general decrease in the numbers of children being diverted.²⁶ This seems to highlight that attrition among children entering the justice system is somewhat high.

There is currently no accurate reflection of the situation of children allegedly committing offences in South Africa, nor of the manner in which the State responds to this. The incidence of persistently weak and inconsistent data, coupled with a lack of analysis by the ISCCJ is unhelpful in drawing credible inferences regarding the processing of children through the system.

3.4. One-Stop Child Justice Centres

The Act provides that One-Stop Child Justice Centres (OSCJC) may be established. The establishment of these centres are not central to the implementation of the Act, however they improve the processing of child justice cases. Prior to the implementation of the Act, two such centres were already in existence in the Free State and Eastern Cape. The Department had set a target of four such centres. To date three OSCJC have been established, including the two that were in existence prior to the implementation of the Act.

The Committee repeats its concerns regarding the Department's failure to roll out the four centres as planned.²⁷ The Committee then requested a written progress report from the Department on the plans to resource and roll out OSCJC by January 2013. However the Department then removed the indicator to develop OSCJC from the department's strategic plan. In May 2013 the Committee questioned this and indicated that it should be reinserted.²⁸ Finally, in November 2013, the Committee questioned if OSCJCs are affordable, given the inability of the Department to establish any further centres over the past years. They note that the Department has planned a viability study on these and requests that this study be provided to the Committee when it becomes available.²⁹

4. Failure to engage with the range of questions

There are a number of important issues relating to the Act's implementation, on which the Committee has not engaged after its first meeting in June 2011. These include: The question of the availability and quality of diversion programmes as well as their effectiveness; the availability of and standards being applied by probation officers (implemented by the Department of Social Development); the standards, functioning and effectiveness of programmes at Child and Youth Care Centres to which children may be sentenced or detained prior to sentencing and the issue of capacity, training and accountability of role players such as police and magistrates. Finally, although it is only set for review in 2015, the Committee has not discussed its plans or potential challenges regarding the review of the minimum age of criminal capacity.

5. Conclusions

Although the Committee started on a strong note by calling a range of implementing departments to account at its first meeting on the implementation of the Act, this quickly weakened. We recognise that the Committee never loses sight of the Act's implementation, but it is evident, reading the various reports from the Committee, that they ask fewer questions about fewer issues on the Act's implementation. While the issue of numbers of children engaged with the system is undoubtedly important, so too are key questions relating to the quality of implementation, the Committee fails to engage on these effectively. When it does request some of this information from the ISCCJ it does not follow up with them to ensure that they provide this. Further, the nature of recommendations from the Committee appears to have gradually become weaker, to the point

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²⁵ BRRR 5 November 2013. Paragraph 11.7

²⁶ BRRR 26 October 2011. Paragraph 8.15.3

²⁷ BRRR 30 October 2012. Paragraph 8.24.4

²⁸ Budget Vote 24: May 2013 Paragraph 8.11.4

²⁹ BRRR 05 November 2013. Paragraph 15.20

... Parliament is losing the opportunity to ensure coordinated oversight over a law that requires significant inputs from a range of departments if it is to be effective.

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that the Committee by the end of 2013 seems almost complacent and barely recommends anything at all.

The Act requires a significant amount of data for the review on the age of criminal capacity which is to take place in 2015; however, the issue of poor data to date has not been addressed. It is therefore doubtful that the Committee will be able to engage with this issue by 2015. Also, the priority given to the establishment of OSCJC is not, in our view, aligned with the importance of these structures, when compared with Act's requirements.

On the issue of civil society engagement with the Committee, there have been no subsequent engagements with the Committee or the Committee on Police (on the Act's implementation), since the June 2011 meeting. This may be attributed to the failure of the Committee to host another meeting focusing on the implementation of the Act after June 2011 and the associated failure of the Committee to invite civil society input, in spite of the Committee's clear intention to do so which never manifests. At the same time, it is unclear if civil society groups have requested such engagement with the Committee or submitted further information to the Committee irrespective of such an invitation. It's notable that the Shukumisa Campaign, a group of organisations working on the implementation of the legislation relating to sexual offences, have requested opportunities to make input on that issue during the Committee's meetings to assess the Department's annual strategic plans and budgets over the years. This is linked to the absence of dedicated meetings of the Committee on the implementation of that legislation. Upon their request, the Committee has granted them this opportunity. The BRRRs and Reports meetings focused on the strategic plans over the period, reflect a growing concern and stronger responses from the Committee regarding the implementation of the sexual offences legislation.

Finally, Parliament is losing the opportunity to ensure coordinated oversight over a law that requires significant inputs from a range of departments if it is to be effective. The fact that in one year the Committee with the Committee on Correctional Services conducts the oversight meeting, with almost all the stakeholders present, and the next year this is undertaken only by the Committee on Police, with only two of the relevant departments present, means that there is a lack of continuity. This is problematic as it creates too much room for gaps in the oversight process.

It is for this reason that we recommend that Parliament conduct joint meetings, led by the Portfolio Committee on Justice and Constitutional Development, with all of the other relevant committees as part of its oversight initiatives on the implementation of the Child Justice Act. This will allow for joint responses from the committees to the range of departments.

Finally, we encourage civil society organisations working on the Act's implementation, to consider ways in which to approach the Committee outside of the meetings dedicated to oversight on the Act. ●

It still 'takes a village to raise a child'

An overview of the restorative justice mechanism under the Children's Protection and Welfare Act, 2011 of Lesotho

Edmund A Foley, Technical Advisor on Children, Ministry of Gender, Children and Social Protection, Republic of Ghana

1. Introduction

In a globalised world, a number of traditional societal idiosyncrasies are being influenced by other national and international approaches to how society functions. The justice system is one of society's arms which has witnessed such transformation. In child justice, international norms and national best practice have introduced new ways of dealing with children in conflict with the law. Nevertheless, the traditional, communal approach to child development and wellbeing, captured in the African adage, 'it takes a village to raise a child', has been put into practical effect for children in conflict with the law in Lesotho's Children's Protection and Welfare Act, 2011 (No 7 of 2011) (hereafter CPWA). The CPWA has innovatively integrated restorative justice from the village level into the child justice system established under the Act. This article gives a descriptive over-view of the Village Child Justice Committee system established by the Act. It begins with a brief introduction to restorative justice in Lesotho and proceeds to give a description of the village child justice committee structure and restorative justice processes under the CPWA. It concludes with the highlights and challenges of the restorative justice framework under the CPWA.

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The traditional Basotho justice system ... is part of a broader philosophy of societal organisation and functioning which considers the social, religious and economic growth of the society as a communal effort.

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2. Restorative Justice in Lesotho

Restorative justice has always been a part of Basotho society.¹ The traditional Basotho justice system – which is inspired by Moshoeshe the Great, founder the Basotho kingdom – is part of a broader philosophy of societal organisation and functioning which considers the social, religious and economic growth of the society as a communal effort. Consequently, when an individual offends the society, it is considered the responsibility of all members of the community to re-integrate the person.² Some of the core features of the Basotho traditional justice system, showing its restorative justice character include:³

- Expectation that the offender will accept responsibility and take steps towards healing any wound inflicted on the victim, showing that the offender intended no harm;
- Determination of the most appropriate form of compensation for the victim to facilitate reconciliation between the offender and victim;
- Symbolic show of remorse – *itiha* (to drop oneself down as a sign of repentance);
- Show of compassion and agreement to a peaceful settlement by the victim;
- Non-distinction between civil and criminal cases; and
- The right of all members of the community to participate in the proceedings.

Lesotho's justice system has therefore being built on the Roman-Dutch legal tradition and Sesotho customary law. Customary law was administered by chiefs until the chief's courts were replaced by the Local and Central Courts in 1938. The Judicial Commissioner's Court was also established as an intermediate appellate court before the High Court in matters of Sesotho Law.

The development of restorative justice in the formal justice system began with child justice. Faced with an inadequate child justice system, proposals for the revision of the 1980 Children Protection Act (1980 Act), recommended that the new Act include child rights and elements of Basotho culture, which had a great potential to address juvenile delinquency effectively.⁴ Thus, following consultations with stakeholders, study visits to countries with good restorative justice systems, and support from Lesotho's development partners and non-governmental institutions, the Children's Protection and Welfare Act of 2011 incorporated restorative justice, to be primarily administered by the Village Child Justice Committee.

3. Restorative Justice under the CPWA

Enacted to fulfil a dual purpose of protecting children's rights and utilising Basotho culture for the benefit of the child justice system, the CPWA states in its objects that it is intended to:

1 Ntse'keng Theresa Qhubu, (2005) 'The Development of Restorative Justice in Lesotho', Paper presented to the Conference of the Association of Law Reform Agencies of Eastern and Southern Africa, p 1. Available at www.justice.gov.za/alraesa/conferences/2005sa/papers/s4B_qhubu.pdf (Last accessed on 3 March 2014).

2 Ntse'keng, Theresa Qhubu (2005) p 2.

3 Ntse'keng, Theresa Qhubu (2005) p 3.

4 Ntse'keng, Theresa Qhubu (2005) p 6.



*'extend, promote and protect the rights of children as defined in the 1989 United Nations Convention on the Rights of the Child, and the 1990 African Charter on the Rights and Welfare of the Child and other international instruments, protocols, standards and rules on the protection and welfare of children to which Lesotho is a signatory.'*⁵

The Act goes further to provide in section 2(3) that:

'[n]othing in this Act is intended to prevent, discourage or displace the application of informal and traditional regimes that are more promotive or protective of the rights of children except where those regimes are contrary to the best interests of children.'

A further indication of the CPWA's intentions for restorative justice can be found in the 'Statement of Objects and Reasons of the Child Protection and Welfare Act, 2011, published in Government Notice No 19 of 2011. Paragraph 13 of the Statement notes that:

The Bill offers a number of alternatives for dealing with children who come in contact with the law. In place of the normal criminal justice procedures and processes, it advocates for the adoption of interrelated mechanisms that lay emphasis on diversion programmes and restorative justice processes. (emphasis mine).

With that the CPWA provides for Restorative Justice and Diversion in Part XIII.⁶ The objects of restorative justice stated in section 120 include:

- Providing an avenue for the victim(s) or affected community to express their views on the harm caused;
- Encouraging specific or symbolic restitution;
- Promoting reconciliation between the child offender and the victim; and
- Empowering communities to address the problems of children at risk of offending without recourse to the criminal justice system.

3.1 The Village Child Justice Committee

The Act then establishes the Village Child Justice Committee (VCJC) at the village level and vests it with the responsibility to handle all restorative justice processes at the village level. As per section 121(3) of the CPWA, a VCJC shall be composed of a village chief and six other members elected by the community. The VCJC shall elect its own chairperson from among the members, have the power to establish its own procedure and convene as and when it decides or when it has a case to deal with. From the above statement, the freedom to elect a chairperson – other than the chief – emphasises democratic governance in Basotho culture, as it is possible for an ordinary member of the community to direct proceedings in which the chief is involved.

3.2 Functions of the VCJC

The VCJC has a number of functions which can be identified from

sections 123 to 126 of the CPWA which can be summarised as follows:

- Application of one of the restorative justice processes under section 122 of the Act – depending on the nature of the case – namely: Family Group Conference, Open Child Justice (Village Healing) Forum and Victim-Offender Mediation;
- Notification to all concerned and interested parties to a restorative justice process regarding the date, time and venue of the conduct of a selected process;
- Recording and documentation of the proceedings of a selected process and where necessary, provision of copies of the proceedings to all relevant parties; and
- Formulating and reviewing decisions, recommendations and plans formulated and monitoring of their implementation.

These functions are described in more detail under the different restorative justice processes available to the VCJC, and discussed later in this article.

The CPWA also indicates which persons are entitled to refer cases to the VCJC and hence to the restorative justice process. Under section 126(1)(e), these include:

- a child or his parent, guardian or any appropriate adult;
- a chief;
- a police officer;
- a prosecutor; and
- a Children's Court.

In the case of a child who persists in anti-social behaviour that puts him or her at the risk of offending, he or she may be referred to the restorative justice process by:

- his or her parent, guardian or any appropriate adult;
- the chief in whose village the child resides;

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⁵ CPWA, s2(1)

⁶ This article will only focus on the sections dealing restorative justice.

The core elements of acceptance of responsibility, willingness to make reparation and reciprocal forgiveness and compassion from the victim are captured in the restorative justice processes described here.

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- a police officer apprehending a child, other than an arrest in terms of section 94;
- a prosecutor;
- a probation officer, following an age assessment and making a recommendation that the matter be referred back to the Children's Court for further action in terms of section 93(1)(c); or
- an inquiry magistrate considering the possibility of diversion in terms of section 110(1) and (4)(a).

Under section 126(2), in the instance where the referral to a restorative justice process is made by a Children's Court, police or probation officer and the victim and offender do not agree on the decision made, the VCJC shall refer the case back to the Children's Court, police or probation officer for further action.

3.3 Restorative Justice Processes

3.3.1 Family Group Conference

A Family Group Conference – provided for in section 123 – shall be convened by the Chairperson of the VCJC in consultation with the families of the children concerned. Persons who are entitled to attend the Conference include:

- the child(ren) in respect of whom the conference has been convened;
- the parent(s) or guardian(s) of such child(ren);
- family members of the child(ren) concerned;
- a probation officer, given that the conference has been convened on the basis of a report from a probation officer;
- any relevant body or organisation which the concerned families may consider relevant; or
- any person, body or organisation whose attendance is deemed necessary upon the recommendation of the VCJC's Chairperson in consultation with the concerned families.

A Family Group Conference may be convened for the purposes of the following:

- consider matters relating to the care and protection of a child in respect of whom the conference has been called;
- where the conference deems that the child is in need of care and protection, to make such decisions or recommendations and formulate such plans as the conference considers necessary in the best interest of the child; and
- review the decisions, recommendations and plans and their implementation or where necessary, confirm, rescind or modify previous decisions, recommendations and plans. In the case of a confirmation or modification, any new decision, recommendation or plan made shall be deemed to have been made at the initial conference.

For a Family Group Conference, the Chairperson of the VCJC has the responsibility to notify all persons of the date, time and venue of the conference; invite any person whose advice or information is deemed relevant to the proceedings; ensure a written record of the proceedings, decisions, recommendations and plans; re-convene the conference where



the parties are not able to agree on the decisions, recommendations or plan for the purposes of reconsidering them; and ensure that all participants in the conference receive copies of the proceedings.

Any information, statement or admission made or disclosed in a Family Group Conference cannot be admitted in any court as per section 123(18). Further, no person shall publish any report of the proceedings of a Family Group Conference. This prohibition however does not apply to the publication of statistical information or research done in good faith relating to such conferences.

3.3.2 Open Village Healing Forum

An Open Village Healing Forum – as provided under section 124 – shall be convened by the Chairperson of the VCJC in consultation with the families of the victim and offender. Persons entitled to attend the Forum include:

- the children concerned and their families;
- a probation officer, where the Forum has been recommended by a probation officer;
- representation of children of the concerned village;
- any relevant body or organisation (including youth organisations), whose presence is recommended by the VCJC in consultation with the concerned parties; and
- a representation of the concerned village.

The VCJC shall determine the size of the representation of children, bodies or organisations and the concerned village above as well as make the necessary arrangements for the orderly conduct of the proceedings, ensuring safety and security for the Forum.

The Forum shall be convened where there are:

- two or more acts of anti-social behaviour;
- acts like burning of grass and other acts of vandalism, which almost equally affects all members of the community;
- two or more children involved;
- group related conflicts, such as those involving two villages; and
- high prospects of the anti-social behaviour or offence being replicated.

3.3.3 Victim-Offender Mediation

Section 125 provides for a Victim-Offender Mediation to be convened by the Chairperson of the VCJC in consultation with the victim and the offender. The Mediation is to be conducted in a safe and structured setting with the assistance of a trained mediator or the Chairperson of the VCJC.

The purpose of the Mediation will be to:

- enable both the victim and the offender to talk about the offence and express their feelings and concerns;
- enable the victim and offender to directly participate in developing remedial options; and
- offer the offender an opportunity to apologise, provide information and develop plans for reparation, as well as gain insight for personal growth.

The Chairperson of the VCJC who convenes a Victim-Offender Mediation shall ensure that there is a detailed written record of the decisions,

recommendations and plans formulated in the process. He or she shall also communicate decisions, recommendations and plans formulated from the Mediation to every person who will be directly involved in their implementation and seek their agreement.

4. Conclusion

As can be seen from the descriptive overview in this article, the CPWA does well to incorporate the salient features of restorative justice in Basotho culture as the Act was intended to do. The core elements of acceptance of responsibility, willingness to make reparation and reciprocal forgiveness and compassion from the victim are captured in the restorative justice processes described here. The power of the VCJC to elect its own Chairperson (who may not be the chief) and to regulate its own procedure is laudable. It bears testimony to the ability of traditional institutions, which are sometimes perceived as authoritarian, to undertake democratic processes. The mandatory inclusion of documentation in the workings of the VCJC and requirement to provide parties with copies of proceedings is also praiseworthy, against the backdrop of traditional processes often not being formally recorded. The CPWA's requirements would provide a rich source of data for future evaluation and modification of traditional justice processes. As may be observed from the Open Village Healing Forum, the inclusion of youth groups and representation of children gives practical expression to child participation in judicial proceedings, which is one of the core principles of child rights.

While these measures are commendable, the slow progress in establishing the VCJCs needs to be addressed. Since the enactment of the CPWA in 2011, the VCJCs are yet to be fully operational. Although the processes established by the Act are already part of Basotho justice delivery, the additional requirements of documentation and reporting will require that members of VCJCs are well-trained and equipped to capture the right kind of information. It is hoped that the Government will take urgent steps to operationalise the VCJC to give full effect to the CPWA and provide a basis for future and better assessment of the restorative justice processes under the Act. ●



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