



The Child Justice System in South Africa-children in conflict with the law

Policy Brief¹

Before the implementation of the Child Justice Act, many policy positions were in place that guided child justice matters. After the implementation of the Act, many policy documents were also adopted that, to a large extent are still adequate and suitable.

This policy brief highlights various policy considerations to take into account in order to ensure that the child justice system, as legislated in the Child Justice Act, is effective, efficient and more importantly, in the best interests of all children. It is recommended that this brief be read with the topical guide developed in this series for PAN: Children.

1. The criminal capacity regime

As stated in the topical guide – and in many other reports – South Africa's current position on the minimum age of criminal capacity is in contravention of international law. Setting the age of criminal capacity at 10 years is an improvement from the Common Law that set the age of criminal capacity at 7 years. However, it is still not in line with the recommendation of the United Nations Committee on the Rights of the Child that the age of criminal capacity should be 12 years.

¹ This policy brief was prepared for PAN:Children by Lorenzo Wakefield (Consortium on Crime and Violence Prevention).

It is thus recommended that the minimum age of criminal capacity should be raised to 12 years, as per the international recommendations of the United Nations Committee on the Rights of the Child.

South Africa also inherited its criminal capacity regime from the Common Law. This regime, also known as the *doli capax* rule, allows for various presumptions to be created in determining whether or not a person has criminal capacity. The Child Justice Act kept this regime and just increased the minimum age of criminal capacity, as mention above. In other words:

- It is irrebutably presumed that children below the age of 10 years old do not have criminal capacity and therefore cannot commit offences;
- It is rebutably presumed that children between the ages of 10 and 14 years do not have criminal capacity. This presumption places an obligation on the prosecution to prove that a child in this age category has criminal capacity and therefore can be held liable for committing offences; and
- It is rebutably presumed that a child older than 14 years has criminal capacity. Should such a person have some intellectual or mental disability that might impair his/her criminal capacity, then the defence would have bring proof of this.

The United Nations Committee on the Rights of the Child recommends that “lower” and “upper” ages of criminal capacity should be abolished, as it is confusing and can cause unfair discrimination in its practices.ⁱ Local experts on criminal capacity have also recommended the same.ⁱⁱ Therefore if a one-age category should find application, then children below the age of 12 years would not have criminal capacity and children above the age of 12 years would have criminal capacity. Should a child have an intellectual and/ or mental disability at the time of commission of the offence, then it would be obvious that s/ he would not have any criminal capacity, whether s/he is below or above the age of 12 years. It is suspected that there might be some resistance to depart from the Common Law regime. It would be for this purpose that:

It is recommended that a debate should be started on the criminal capacity regime and how it would apply to children. Such dialogue should inform a policy position by the Department of Justice and Correctional Services, with a view to either retain or abolish the current criminal capacity regime.

2. Position on reporting provisions and statistics

Section 96(3) of the Child Justice Act requires that the Minister of Justice and Correctional Services report to Parliament annually on the implementation of the Child Justice Act. The Department of Justice have tabled these reports before Parliament on a yearly basis, albeit inconsistently. This report should contain statistics and information on the implementation of the Act and such statistics should be collected via an integrated information management system as required in terms of section 96(1)(e) of the Act.

Various authors, experts and Members of Parliament have challenged the accuracy of statistics presented in the annual reports as not providing an accurate reflection of the implementation of the Act.ⁱⁱⁱ At the same time experts have also recommended that the establishment of the integrated management tool be expedited in order to ensure that reliable and accurate data exists on children in the justice system, as alleged perpetrators.^{iv} At the time of writing this has still not been finalised, despite the process already commencing in 2010.

It is recommended that the Department of Justice and Correctional Services complete the integrated management system as a matter of urgency and train the relevant departments and persons that will implement the Act on such system in order to ensure an accurate reflection of statistics in annual reports on the implementation of the Act.

The inter-sectoral committee on child justice agreed to a reporting template that will be used for all annual reports on the implementation of the Act. A standard template would ensure uniformity in reporting across the years and would make tracking the impact of the Act on the lives of children accused of committing offences much easier.

However, there are aspects of this template that do not provide one with an accurate reflection on the specific vulnerabilities of children. For example, the annual report – as it currently stands – does not provide one with statistics on children referred to a children’s court as a child in need of care and protection at the child justice court phase of the procedure. It only provides statistics on the number of children referred to a children’s court at the preliminary inquiry. Therefore, one could not accurately know the total number of children found to be in need of care and protection that have made their way into the justice system as alleged perpetrators of crime.

It is recommended that a policy position should be taken to amend the annual reporting template to accurately reflect the entire child justice system. This would ensure that children are tracked throughout the system. This would serve as a much better measuring tool when planning to implement the Act.

3. Position on parliamentary oversight

Parliament plays an important role in ensuring that the Act is implemented and that the justice system runs as smoothly as possible for children. As mentioned above, section 96(3) of the Act requires that the Minister of Justice and Correctional Services table annual reports on the implementation of the Act. This means that Parliament has an obligation to consider the reports by interrogating such reports at committee meetings.

Parliament started off on a good footing in engaging with the Department of Justice and Correctional Services in its oversight role. As time went by the manner in which this was done

became irregular and inconsistent.^v As the topical guide explains, different committees in Parliament conducted meetings on the implementation of the Act at random times. The Portfolio Committee on Justice and Correctional Services only did this once. The Portfolio Committee on the Police followed having the second meeting. The Select Committee on Security and Constitutional Development hosted the third meeting. The 2013/ 14 annual report has not yet been considered, despite 2 months remaining in the 2014/15 financial year (at the time of writing).

It is recommended that Parliament, more specifically, the Portfolio Committee on Justice and Correctional Services adopt a policy on its oversight function to ensure consistency and uniformity in the implementation of the Act.

Oversight is not just the role of Parliament. Provincial legislatures also have a role in this regard. Accessing information on provincial legislatures' oversight and meetings on the implementation of the Act remains difficult and notices prior to meetings are not well communicated.

It is recommended that provincial legislatures develop an oversight policy that would see engagements on the implementation of the Act. Such a policy should consist of both oversight meetings and visits to the various role-players, such as police cells, child and youth care centres and correctional centres.

4. Conclusion

This policy brief only provides the reader with selective matters that require policy reform and decisions on the implementation of the Child Justice Act. Experts and authors have

written extensively on the implementation of the Child Justice Act and made various recommendations to be taken into account.

With the implementation of the Child Justice Act, the justice system for children definitely improved. Primary research is still needed on the impact of the child justice system. However, in theory the reviewed legislative framework provides a much better, child friendly and integrated approach to justice for children.

Challenges remain in the implementation of the Act. The inter-sectoral committee on child justice can solve these, but only once the necessary policy positions (a few mentioned in this brief) are in place.

References

ⁱ United Nations Committee on the Rights of the Child (2007) *op cit* para. 30.

ⁱⁱ A Skelton and C Badenhorst (2011) *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review* page 28.

ⁱⁱⁱ See C Badenhorst (2011) "Overview of the implementation of the Child Justice Act (Act 75 of 2008): Good intentions, questionable outcomes" *Criminal Justice Initiative Occasional Paper Series 10* (Open Society Foundation) and L Wakefield (2011) "Is the Act working for children? The first year implementation of the Child Justice Act" *South African Crime Quarterly* No. 38 and www.pmg.org.za/report/20110622-joint-meeting-implementation-child-justice-act. (Accessed on 17 October 2014).

^{iv} M Courtenay and Z Hansungule "Protecting the rights of children in conflict with the law: A review of South Africa's Child Justice Act" (2014) in P Proudlock (ed) *South Africa's Progress in Realising Children's Rights: A law review* (page 163).

^v L Wakefield & S Waterhouse (2014) "Monitoring the Child Justice Act: Oversight of National Parliament" *Article 40* Vol.16, No.1 (page 9).

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