The Child Justice System in South Africa: Children in conflict with the law*

This is one in a series of topical guides developed for PAN: Children that provide key information on the current state of affairs in South Africa related to the topic and highlight practical guidance, lessons learnt and case studies (both national and international) that will be helpful in policy development dialogue and knowledge sharing.

1. International, African and National Instruments on children in conflict with the law

There are various international treaties and soft laws[1] that address children in conflict with the law. These are as follows:

(a) The United Nations Convention on the Rights of the Child;
(b) The United Nations Standard Minimum Rules for the Administration of Juvenile Justice;
(c) The United Nations Guidelines for the Prevention of Juvenile Delinquency;
(d) The United Nations Rules for the Protection of Juveniles Deprived of their Liberty;
(e) The United Nations Committee on the Rights of the Child's General Comment No. 10 on the Children's Rights in Juvenile Justice (2007);
(f) The African Charter on the Rights and Welfare of the Child;
(g) The African Union Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa (2014);

In South Africa various developments with regards to the domestication of these international and regional treaties have led to the adoption of the following legislation:

* This topical guide was prepared for PAN: Children by Lorenzo Wakefield (Consortium on Crime and Violence Prevention).

[1] Soft laws refer to guidelines and rules established that are not treaties and therefore not necessarily binding on States Parties. They have mere persuasive value.

(a) The Constitution of the Republic of South Africa, Act 108 of 1996;
(b) Amendments to the Criminal Procedure Act 51 of 1977;
(c) The Children's Act 38 of 2005;
(d) The Children's Amendment Act 41 of 2007;
(e) The Criminal Law Amendment (Sexual Offences and Related Matters) Act 32 of 2007; and
(f) The Child Justice Act 75 of 2008

Policy developments were also imminent before and after the passing of legislation to give effect to children's rights in the justice system as alleged perpetrators. These are as follows:

(a) The National Policy Framework on the Child Justice Act 75 of 2008;
(b) The Norms and Standards on Child and Youth Care Centres; and
(c) The White Paper on Correctional Services; among others

All of these international treaties, legislation and policy documents in some way or another address components in relation to children in conflict with the law. It is also framed within the justice response to children in conflict with the law. The international treaties, especially the United Nations Convention on the Rights of the Child, and the soft laws developed prior to and after this treaty have very specific provisions that should guide states in domesticating a child-appropriate justice system.

The Constitution, in section 28(1)(g), calls for the deprivation of a child's liberty only as a measure of last resort and should a child be detained, then the detention should be for the shortest appropriate period time. The Children's Act provides for a child protection system for children in need of care and protection. Importantly, it regulates the establishment of child and youth care centres that are suitable for children in conflict with the law. The Child Justice Act amends the minimum age of criminal capacity and provides for a new justice system for children that is in compliance with international and constitutional obligations placed upon South Africa.

2. Situation assessment and analysis

South Africa has a rich history that shaped the policy environment for children in conflict with the law. This started in 1998 when the then Minister of Justice instructed the South African Law Reform Commission to investigate and develop a draft Bill on children in conflict with the law. This project was completed by the year 2000 and a draft Bill was tabled in Parliament in 2002. It was not until 2009 that this Bill was passed by Parliament and not until 1 April 2010 that this Act was implemented. The 12-year lead-up to the overhaul of the justice system for children in conflict with law speaks volumes to the progress made in ensuring that South Africa has an adequate regime in place that would take the vulnerabilities of children into account. The current regime is not completely ideal and has its flaws, which are both substantive and operational in nature. However, it is a much better system than the one in operation prior to the Child Justice Act.

The situation assessment and analysis will discuss various challenges with regards to both substantive provisions and implementation of the Child Justice Act 75 of 2008. Despite these challenges, it should be noted that there were many gains made with the passing of the Child Justice Act and that the procedure currently in place is much better than the previous one.

This topical guide will discuss the following headings – which, as it stands are current and topical in nature:

- Criminal capacity
- The overall child protection elements
- Independent oversight and ensuring accountability

2.1 Criminal Capacity

Criminal capacity is a necessary element to prove that someone has committed an offence. Criminal capacity is defined as the mental ability to distinguish between right and wrong and

to act in accordance with such appreciation (Burchell 2005 (page 358) and Snyman 1995 (page 146).

South Africa inherited a criminal capacity regime from the Common Law. This regime operated as follows:

(a) An irrebutable presumption of no criminal capacity would apply to children below the age of 7 years. In other words, children below the age of 7 years old could not legally commit offences.
(b) A rebutable presumption of no criminal capacity would apply to children between the ages of 7 – 14 years. In other words, it was presumed that children within this age category could not legally commit offences, unless the prosecution can prove the opposite.
(c) A rebutable presumption of criminal capacity would apply to children above the age of 14 years. In other words, it was presumed that children above the age of 14 years could legally commit offences, unless the defence can prove the opposite.

In essence, this regime meant that children, as young as 7 years old, could be held criminally liable for their actions.

South Africa ratified the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) in 1996 and 2000, respectively. These two treaties do not mention any minimum age of criminal capacity, or an accepted regime of criminal capacity. It requires that children accused of committing offences, should be treated in a manner that would take their vulnerabilities as children into account and have longer-term rehabilitation and crime prevention benefits, as opposed to a retributive form of justice.

In order to give interpretive meaning to the criminal justice provisions for children, as stipulated in the UNCRC, the United Nations Committee on the Rights of the Child (CRoC) adopted General Comment No. 10 on "Children's Rights in Juvenile Justice" during 2007. This General Comment recommends that States Parties to the UNCRC should have a minimum age

of criminal capacity set at 12 years or older (United Nations Committee on the Rights of the Child 2007 para. 33). This was not an arbitrary decision. Multiple experts in the field of psychology and psychiatry presented their opinions to the CRoC before such a decision was taken. In relation to the broader criminal capacity regime, the CRoC was of the opinion that only a minimum age of criminal capacity should be set, as multiple age categories would only cause confusion. In other words, the CRoC is of the view that the previous and current criminal capacity regime, as found within the common law, and applied in South Africa with its various presumptions, is not an appropriate child rights position.

During deliberations on the Child Justice Bill in Parliament in 2008, the then Portfolio Committee on Justice and Constitutional Development decided not to take the recommendations of the CRoC into account, even after this was pointed out to the Committee. It can be argued that the committee's disregard of the CRoC's recommendation is in contravention of the international law obligations placed on South Africa. The Portfolio Committee did increase the minimum age of criminal capacity from 7 years to 10 years and retained the rest of the common law provisions. In other words, children between the ages of 10 – 14 years were rebutably presumed not to have criminal capacity, while children 14 years and older were rebutably presumed to have criminal capacity. This decision was taken despite the multiple submissions made by civil society advocating for a minimum age of 12 years. The Child Justice Act also states that children below the age of 10 years that have allegedly committed an offence should be referred to a probation officer that will do an assessment and recommend a proper protection outcome for such child. In addition, children between the ages of 10 and 14 years, who have allegedly committed offences, may be assessed regarding their criminal capacity by psychiatrists and psychologists.

To be ultimately convinced that the minimum age of 12 years should be the appropriate age, the Portfolio Committee inserted section 8 into the Act. This section states that:

> *In order to determine whether or not the minimum age of criminal capacity as set out in section 7(1) should be raised, the Cabinet member responsible for the*

administration of justice must, not later than five years after the commencement of this section, submit a report to Parliament, as provided for in section 96(4) and (5).

Sections 96(4) and (5) mention very clearly that certain statistics must be considered when reviewing the minimum age of criminal capacity, with a view to increase such age. The previous Department of Justice and Constitutional Development (it is now referred to the Department of Justice and Correctional Services) tabled reports to Parliament every year on the implementation of the Act. Members of Parliament and experts in the sector have challenged the statistics in these reports as being inaccurate and not reflecting a true position of the extent to which children commits offences in South Africa (Badenhorst 2011 and Wakefield 2011 pages 45-50).[2] Thus these statistics cannot be used to inform the debate on whether the minimum age of criminal capacity should be raised to 12 years. The Department of Justice and Correctional Services has issued a call for proposals to conduct research at selected courts that would inform the debate on raising the minimum age of criminal capacity. This Department is also planning a workshop on the minimum age of criminal capacity during February 2015.

Skelton and Badenhorst argue that South Africa should abolish the common law regime on criminal capacity and simply state 12 years as the only threshold for criminal capacity (Skelton and Badenhorst 2011 page 28). In other words, if a child does not have a mental or intellectual disability, the over-riding threshold to determine a child's criminal capacity would be whether s/he is 12 years old or not. This would be less burdensome on the resources of the state that cannot sustain criminal capacity evaluations for 10 to 13 year old children, as required by the Child Justice Act. Such a position would be in line with what the CRoC proposes in order to avoid any confusion with regards to the different ages of criminal capacity.

Increasing the minimum age of criminal capacity and reviewing the regime, as it pertains to children would be beneficial for the following reasons:

[2] http://www.pmg.org.za/report/20110622-joint-meeting-implementation-child-justice-act (Accessed on 7 October 2014).

- Fewer children would enter the criminal justice system, as alleged perpetrators of crime, and could be dealt with in the child protection system, as legislated by the Children's Act 38 of 2005.
- Confusion would be avoided by having only one age of criminal capacity.
- Fewer criminal capacity assessments will be necessary, which will benefit both the human resource constraints and ensure that the criminal justice procedure runs faster, so as not to cause further stress and anxiety for children in the system.

Case studies on improvements:

1. Karabo is 9 years old and is caught shoplifting. The police are informed and upon their arrival, they take Karabo to her parents while informing the probation officer of the fact that Karabo committed an offence. The probation officer assesses Karabo and recommends a social intervention – thus Karabo has no criminal record and her wrongdoing is corrected in a positive manner.

2. Sam is 12 years old and charged with rape. He was not diagnosed with any mental or intellectual disability. Sam would therefore have criminal capacity, unless he proves that he has a mental or intellectual disability. However, if the current provisions stay the same, then Sam would have to be assessed by a psychologist or psychiatrist – thus increasing his time spent in the justice system, that might come to the same result had there been no assessment.

3. Elaine, who is 11 years old, is caught smoking dagga. The police officer returns her to her family and informs the probation officer of the offence. Should the current provisions on criminal capacity still apply, Elaine would have to be assessed and processed through the criminal justice system – with the various consequences that this holds for children. Should the *doli capax* rule be abolished and the minimum age of criminal capacity be increased to 12 years old, then Elaine will be processed through the social protection system – which contains more benefits than the criminal justice system for children, as it would address her criminal behaviour in a positive manner.

2.2 The overall child protection elements

Section 28(2) of the Constitution requires that the best interest of a child be of paramount importance when dealing with any matter in relation to children. The Child Justice Act re-affirms this commitment by introducing a criminal justice system for children that take their individual situation and circumstances into account. The objectives of the Act, as found within section 2, are to:

(a) protect the rights of children as provided for in the Constitution;

(b) promote the spirit of *Ubuntu* in the child justice system through –

(i) fostering children's sense of dignity and worth;

(ii) reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safe-guarding the interests of victims and the community;

(iii) supporting reconciliation by means of a restorative justice response; and

(iv) involving parents, families, victims and, where appropriate, other members of the community affected by the crime in procedures in terms of this Act in order to encourage the reintegration of children;

(c) provide for the special treatment of children in a child justice system designed to break the cycle of crime, which will contribute to safer communities, and encourage these children to become law-abiding and productive adults;

(d) prevent children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children and in accordance with the Constitution, including the use of diversion, and

(e) promote co-operation between government departments, and between government departments and the non-governmental sector and civil society, to ensure an integrated and holistic approach in the implementation of this Act.

Based on these objectives, one can certainly argue that the Child Justice Act was formulated with the intention of creating an overall protective environment for children. These objectives were given further relevance in various provisions of the Act – especially as it relates to ensuring that the most appropriate responses are in place for children.

The first mention of this "multi-purposed" approach to children in conflict with the law is in section 35(a) of the Act that states that the purpose of an assessment of a child is to establish whether a child may be in need of care and protection. Should a probation officer find that a child that is in conflict with the law, is also in need of care and protection, then such recommendation must be made in the assessment report. Section 43(1)(d) of the Act states that the purpose of a preliminary inquiry – which is the next step in the child justice procedure – is to establish whether the criminal matter should be referred to the Children's Court, as a child accused might be in need of care and protection. Section 50 of the Child Justice Act gives an inquiry magistrate the authority to do this, by stating:

If it appears to the inquiry magistrate during the course of a preliminary inquiry that:

(a) a child is in need of care and protection referred to in section 150(1) or (2) of the Children's Act, and it is desirable to deal with the child in terms of sections 155 and 156 of the Act; or

(b) the child does not live at his or her family home or in appropriate alternative care; or

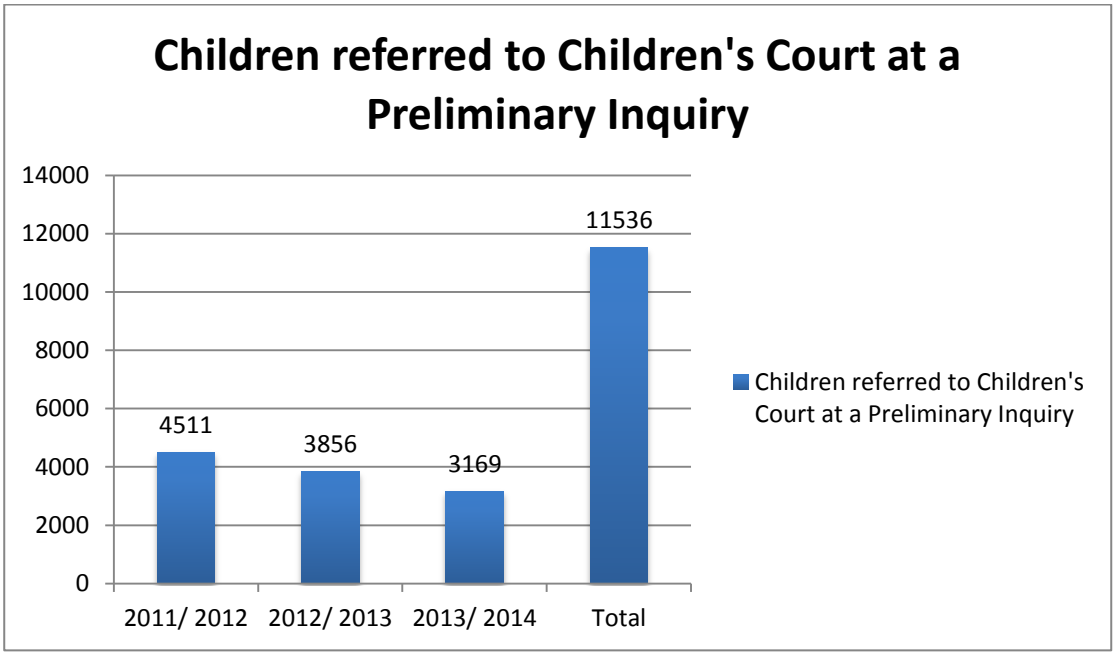
(c) the child is alleged to have committed a minor offence or offences aimed at meeting the child's basic need for food and warmth,

> *the inquiry magistrate may stop the proceedings and order that the child be brought before a children's court referred to in section 42 of that Act and that the child be dealt with under the said sections 155 and 156.*

The drafters of the Child Justice Act placed further mechanisms in the operation of the system to guarantee that the appropriate child protection system would find application. Section 64 of the Act states that a presiding officer – at a child justice court – may refer a child to the children's court, if during the course of the proceedings s/he is of the view that a child might be in need of care and protection.

It is important to note that once the matter is referred to a children's court in terms of the Children's Act, the charges against the child will be withdrawn and the child protection system will find application. This would apply regardless of the stage of the proceedings (whether at preliminary inquiry or child justice court) against such child.

The annual reports on the implementation of the Child Justice Act has not consistently reported on the number of children referred to the children's court, as matters for children in need of care and protection. In the first and second annual reports, there was no mention of this, while in the third annual report, the Department of Justice and Constitutional Development reported that 3 856 children were referred to a children's court at the preliminary inquiry phase of the child justice process (Department of Justice and Constitutional Development 2013 page 35). The fourth annual report (2013/ 2014) then goes further to mention the number of children referred to a children's court at a preliminary inquiry for 2011/ 2012, 2012/ 2013 and 2013/ 2014 (Department of Justice and Constitutional Development 2014 page 21). The total number of children referred to a children's court during these years can be explained by way of the following graph:



This graph explains that the number of children referred to a children's court during the preliminary inquiry phase of the child justice system has decreased over a three-year period. This is expected as fewer children are charged with committing offences over the same period. At the same time it should be noted that the 2013/ 2014 annual report does not mention the number of charges brought against children for this period. This is unacceptable and the Department of Justice and Correctional Services should be held accountable for such omission.

None of the annual reports mention the amount of children referred to a children's court at the child justice court phase of the procedure. The absence of the statistics for children referred to a children's court at a child justice court phase highlights any of the following two possibilities:

- That children are not referred to a children's court at the child justice court phase – which ultimately means that the intended further layer of protection for children is not implemented in child justice courts; or
- That the Department of Justice and Correctional Services and the Inter-Sectoral Committee on Child Justice do not collect these statistics, similar to what they have done in the past.

Both of these possibilities are unacceptable, as children should be able to benefit from a system that speaks to their needs, especially their protection needs. In relation to the collection of statistics, it would be important to note and then subsequently plan for proper responses to children that are in need of care and protection, who in many instances end up in the child justice system as children who committed offences. Addressing their criminal conduct would be insufficient without addressing their need for care and protection.

2.3 Independent oversight and ensuring accountability

The Child Justice Act entrenches important provisions in relation to parliamentary oversight. Section 96(3) of the Act stipulates that:

> *The Cabinet member responsible for the administration of justice must, after consultation with the Cabinet members responsible for safety and security, correctional services, social development and health –*
> *(a) within one year after the commencement of this Act, submit reports to Parliament, by each Department or institution referred to in section 94(2), on the implementation of this Act; and*
> *(b) every year thereafter submit those reports to Parliament.*

It could be argued that the purpose of these reports is to gauge the impact of the Child Justice Act and to ensure that all challenges are addressed in a manner that is sustainable. Oversight and inter-sectoral collaboration in implementation is also important for the effect this would have on service-delivery in the justice system.

Example:

The then Child Justice Bill was costed (Barberton & Stuart, 2001) to give an ideal overview of the economic implications of the Bill. Parliament has a duty to use this as a benchmark when voting on allocations towards the implementation of the Child Justice Act, as part of its oversight mandate. If there is insufficient access to legal aid for children, then the Portfolio Committee on Justice and Correctional Services has a duty to ensure that more funds are allocated to Legal Aid South Africa. If the number of probation officers is too low to meet the demands of the probation services mandate, then the Portfolio Committee on Social Development has a duty to ensure that sufficient budgetary allocations are made to meet this demand. This example thus illustrates the importance of oversight on the service delivery component of the child justice system.

Annual reports have been tabled in Parliament by the Department of Justice on a yearly basis, as required. The examination of these reports by the relevant portfolio committees is rather slow, and to a large extent, inconsistent.

Annual Report	Date Annual Report tabled	Date Annual Report considered	Committee considering Annual Report
2010/ 2011	April 2011	21 June 2011	Portfolio Committee on Justice and Constitutional Development and Portfolio Committee on Corrections

2011/ 2012	April 2012	12 September 2012	Portfolio Committee on Police
2012/ 2013	May 2013	23 October 2013	Select Committee on Security and Constitutional Development[3]
2013/ 2014	June 2014	Not yet considered	Not yet considered

As can be viewed from this table, the oversight function of Parliament started vigorously with the then Portfolio Committees on Justice and Constitutional Development, and Correctional Services conducting a joint meeting to consider the first annual report on the implementation of the Child Justice Act. The Portfolio Committee on Police did the second consideration, 5 months after the report was tabled and this was followed in 2013 by a consideration of the Select Committee on Security and Constitutional Development. The 2013/ 2014 annual report is yet to be considered, 8 months after being tabled (at the time of writing).

There is also no consistency in the manner in which Parliament conducts oversight on the implementation of the Act. Section 96 of the Act does not specifically state which Committee should consider the annual report. By implication it is presumed that this function should be executed by the Portfolio Committee on Justice and Correctional Services – as the report is tabled by the Minister of Justice and Correctional Services. Consistency is important to ensure that follow-up matters and challenges are addressed. As one can see from the table above, three different committees investigated the content of the annual reports. Despite the absence of a direct provision on which committee should consider the annual reports one committee should take primary responsibility to review the reports. The current practice that different committees review the report should be discouraged, as it will affect the quality

[3] It should be noted that this meeting was not strictly framed as a consideration of the 2012/ 2013 Annual Report on the Implementation of the Child Justice Act, even though, in the presentations it does come across as such. Therefore the status as to whether it was to consider the 2012/ 2013 Annual Report is not known.

of the engagements on the implementation of the Child Justice Act (Wakefield & Waterhouse 2014 pages 8 – 14).

A second *lacuna* identified in the monitoring and oversight function does not specifically relate to the Child Justice Act, but rather to the independent oversight and monitoring of children in child and youth care centres.

Section 191(2)(h) of the Children's Act 38 of 2005 states that "A child and youth care centre must offer a therapeutic programme designed for the residential care of children outside the family environment, which may include a programme designed for… the reception, development and secure care of children awaiting trial or sentence."

In the criminal justice system there are various bodies mandated with independent oversight and a complaints system with regards to persons who are incarcerated. The Civilian Secretariat for Police Act 2 of 2011 creates an oversight mandate for the Civilian Secretariat for Police to conduct visits to police cells. The provincial secretariats, currently under the structure of provincial departments of Community Safety, conduct these visits to ensure that police cells are conducive for persons and children accused of committing offences.

In relation to correctional centres, chapter 9 of the Correctional Services Act 111 of 1998 establishes the Judicial Inspectorate for Correctional Services. This independent body serves a similar function as the Civilian Secretariat for Police, but only in relation to correctional centres.

The provisions of the Children's Act in relation to the secure care for awaiting trial and sentenced children at child and youth care centres do not create an independent oversight body that would directly engage in child and youth care centres. The Department of Social Development has adopted norms and standards for child and youth care centres, but do not necessarily conduct oversight on these centres. Apart from a relatively small number of secure care centres contracted to private companies and NGOs, majority of secure centres for children awaiting-trial and sentenced are under control of provincial departments of social

development. Therefore a body, independent of the Department of Social Development, is required or an existing independent oversight body needs to be mandated with oversight functions over child and youth care centres. Similarly complaints mechanisms that protect children from further victimisation against abuse also need to be considered. However, it is not within the scope of this topical guide to enter into a discussion of this nature.

3. Conclusion and Recommendations

Various authors and experts in South Africa have written about the challenges experienced in the implementation of the Child Justice Act. These experts have also written about the improved justice system for children with the operationalisation of the Child Justice Act. It is true that the Child Justice Act certainly provides for a better system for children in conflict with the law. The fragmented approach applied before the implementation of the Act was not sustainable and was inconsistent in its application.

However, the challenges raised cannot go ignored. This topical guide only spoke to three issues. The reform of the criminal capacity provisions is vital to ensure South Africa's compliance with international law and section 28(2) on the best interest of children. In line with the arguments presented in this topical guide it is recommended that:

- Parliament increases the minimum age of criminal capacity and considers expert opinions on the review of the entire criminal capacity regime for children with constructive arguments presented for and against the *doli capax* rule.

- The Department of Justice and Correctional Services – as the chair of the Inter-Sectoral Committee on Child Justice – conduct research on the impact of the child justice system, as secondary and tertiary forms of crime prevention and ensure that stronger mechanisms are in place to ensure this.

- The Department of Justice and Correctional Services contract an independent research organisation to conduct a study on the vulnerability of children that enter the justice

system as alleged perpetrators, with a view to ensure that proper resilience mechanisms are in place for children in vulnerable situations.

- That the Department of Justice and Correctional Services report on the amount of children referred to a children's court at trial stage and not just at the preliminary inquiry stage of the child justice system. This would give one a complete overview of the amount of children found to be in need of care and protection that have allegedly committed offences.

- Parliament applies its oversight role in a consistent manner that would ensure that appropriate levels of accountability are in place. This should be done taking the best interest of children in conflict with the law into account.

- Lastly, Parliament should consider an amendment to the Children's Act that would create an independent oversight and monitoring function – together with an accessible complaints procedure – to either an existing body or a new body for children who are institutionalised in child and youth care centres.

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All care was taken to ensure that this guide is factually correct. Should you notice anything that is not correct, your assistance in providing PAN:Children with the correct information will be appreciated. Please send your comment with up to date information (with references) to children.pan@hsrc.ac.za .

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