



child**justice**  
**alliance**

Getting to know  
the **Child Justice Act**

Jacqui Gallinetti





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**Published by**

The Child Justice Alliance  
c/o The Children's Rights Project, Community Law Centre  
University of the Western Cape  
Private Bag X17  
Bellville, 7535

Copies of this publication can be obtained from: The Children's Rights Project, Community Law Centre, University of the Western Cape, Private Bag X17, Bellville, 7535. Tel: 021 959 2950, Fax: 021 959 2411, email: [jdemas@uwc.ac.za](mailto:jdemas@uwc.ac.za)

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ISBN No: 978-1-86808-699-3

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**Legal Disclaimer**

Information contained in this publication is for general information on the provisions of the Child Justice Act 75 of 2008. In particular, the information contained in this book does not constitute any form of specific legal advice but rather contains an overview of the Act for purposes of awareness.

**Acknowledgments**

The Child Justice Alliance wishes to thank the Open Society Foundation for South Africa for its generous financial support in producing this publication.

The Alliance would also like to thank Jacqui Gallinetti, for drafting the contents of this publication, and the members of the Child Justice Alliance Driver Group for their useful input and comments on earlier drafts.

**Editing**

Daksha Kassin and Lorenzo Wakefield

**Design and layout**

Out of the Blue Creative Communication Solutions, 021 947 3508,  
[www.outoftheblue.co.za](http://www.outoftheblue.co.za)

## Preface

This publication is intended to provide the reader with a simple overview of the contents of the Child Justice Act 75 of 2008 (the Act). It attempts to reduce the 'legalise' of the Act; remove constant cross-references to other sections; and bring themes together in a logical and user-friendly manner.

It is not intended to be a commentary on the provisions of the Act nor a comparison of the Act with the 2002 and 2007 versions of the Child Justice Bills that informed its final content. Nor is the publication intended to constitute a type of training material on the Act.

This publication should rather be used as an easy reference source when there is confusion about some of the provisions of the Act and what they actually are intended to mean. In addition, it sets out as best as possible the duties of the key role-players at the end of each section. It also provides a list of sources which the reader can refer to for further information if needed.



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## Terms and abbreviations

the Act	The Child Justice Act 75 of 2008
the Commission	The South African Law Reform Commission
Beijing Rules	The United Nations Standard Minimum Rules on the Administration of Juvenile Justice
ACRWC	African Charter on the Rights and Welfare of the Child
CRC	Criminal Record Centre
CUBAC	Children Used By Adults to Commit Crime
CPA	Criminal Procedure Act 51 of 1977
DPP	Director of Public Prosecutions
IMC	Inter-Ministerial Committee on Young People at Risk
ISCCJ	Inter-Sectoral Committee for Child Justice
NPA	National Prosecuting Authority
SAPS	South African Police Service
UNCRC	United Nations Convention on the Rights of the Child
UN JDL	United Nations Rules for the Protection of Juveniles Deprived of their Liberty



## Introduction

The Child Justice Act 75 of 2008 (the Act) has had a long and tumultuous history. The process which resulted in the Act being signed into law on 7 May 2009 began in late 1996 with the appointment of a Project Committee of the South African Law Commission (as it was then known but now known as the South African Law Reform Commission) to investigate juvenile justice. This Committee began work in 1997 and in 2000 finalised its Report on Juvenile Justice together with a draft Child Justice Bill. This draft Bill was submitted to the Department of Justice and in 2002 it was introduced to parliament as Bill 49 of 2002.

The law reform process that resulted in the Act consisted of varied consultations, research and debates.

Firstly, the Project Committee prepared an Issue Paper followed by a Discussion Paper, both of which were distributed widely in order to elicit comments. The subsequent responses were then collated into their Report on Juvenile Justice released in 2000. One of the major innovations regarding the consultative process undertaken by the South African Law Reform Commission (the Commission) was the fact that they undertook a consultation study with children. The purpose of this endeavour was to ensure that children's voices were also heard in the drafting of new laws that affected them. The Project Committee also commissioned a costing of the Bill in order to comply with fiscal requirements for new legislation and held workshops on issues such as age and criminal capacity.

Secondly, after the Commission finalised its work, civil society also embarked on a series of consultations and undertook various studies as part of its preparations for the Bill being debated in parliament. The Child Justice Alliance, a civil society network established in 2001 to garner support for the Bill, held workshops in all 9 provinces in 2001. It has also produced a range of research reports including two quantitative studies of the criminal justice system pertaining to children in South Africa (one dealing with the period 1995 – 2001 and the other dated 2007); an annotated bibliography of all child justice publications in South Africa and a baseline study of children in the criminal justice system in 3 magisterial districts. The Alliance also conducted a follow-up child consultation study on the draft Bill produced by the Commission.

Finally, after the Bill was introduced into parliament in 2002, it was the subject of extensive debates during 2003, and again (unusually but on account of the long delays in processing the Bill) in 2008. These debates have enriched the

child justice milieu as they have allowed all stakeholders and role-players including parliamentarians, academics, activists, members of the executive and practitioners to examine all the issues in great detail, listen to opposing views and reach compromises on controversial issues.

The product is a law that creates a new procedural framework for dealing with children who come into conflict with the law. It represents a rights-based approach to children accused of committing crimes. However, it also seeks to ensure children's accountability and respect for the fundamental freedoms of others, and through the use of diversion, alternative sentencing and restorative justice prevent crime and promote public safety.



# International and constitutional principles underpinning the new law

## International law

While there is a long history of developments in child justice before the United Nations Convention on the Rights of the Child (UNCRC), the UNCRC and related international instruments provide the seminal international framework within which children in conflict with the law should be managed. In addition there are a number of principles, minimum rules and standards which deal specifically with children in conflict with the law. Prominent in this regard are the United Nations Standard Minimum Rules on the Administration of Juvenile Justice (Beijing Rules) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UN JDL Rules), adopted in 1990.

By Resolution 45/113 of 14 December 1990, the United Nations General Assembly adopted the UN JDL Rules. Section 3 of the Fundamental Perspectives set out in the UN JDL Rules sets out the purpose thereof, namely:

*'[t]he Rules are intended to establish minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms, and with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society.'*

This is elaborated on further by section 5, which states: '[t]he Rules are designed to serve as convenient standards of reference and to provide encouragement and guidance to professionals involved in the management of the juvenile justice system'. Thus, the UN JDL Rules do not have the same force of law as the provisions of the South African Constitution or the international obligations that South Africa has incurred on account of its ratification of the UNCRC, which is an international treaty agreement. Rather, the UN JDL Rules should guide the application of the rights contained in both documents.

The deprivation of a child's liberty and the administration of juvenile justice are dealt with in article 37 and article 40 of the UNCRC respectively. Articles 40(1) – (4) provide a concise yet comprehensive framework within which States are obliged to fashion a child justice system. The provision covers issues such as:

- non-discrimination;
- the child's right to dignity and worth as well as the right to privacy;

- the need for children to respect the human rights and fundamental freedoms of others;
- the need to take the age of the child and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society into account;
- the presumption of innocence;
- the child's right to be informed of charges against him or her;
- the right to legal representation;
- the right to a speedy and fair trial by an impartial authority or judicial body;
- the right to have decisions subject to review or appeal;
- the need for the establishment of a specialised criminal justice system for children in conflict with the law;
- the establishment of a minimum age of criminal capacity; and
- the need for creating alternative dispositions to institutional care in a manner appropriate to children's well-being and proportionate both to their circumstances and the offence.

The wide range of issues and rights contained in the provision not only create procedural protections and safeguards for all children in conflict with the law, but also recognises that each child is an individual and should be treated and managed accordingly within the criminal justice system.

## The South African Constitution

The South African Constitution of 1996 has a dedicated section on children's rights. Section 28 constitutes a 'mini-charter' of children's rights and covers diverse issues such as civil and political rights, including the rights to a name and nationality (section 28(1)(a)); socio-economic rights, for instance the right to basic nutrition, shelter, basic health care services and social services (section 28(1)(c)); child justice (section 28(1)(g)); and it entrenches the best interests of the child principle (section 28(2)).

Section 28(2) requires that the best interests of the child be of paramount importance in every decision taken in relation to a child. Section 28(1)(g) sets out clear principles relating to the detention of children, including that detention should be a measure of last resort and used for the shortest appropriate period of time. Further, children should be kept separately from adults in detention and treated in a manner, and kept in conditions that take account of the child's age.

Of relevance to child justice is section 35 of the Constitution which deals with the rights of arrested and detained persons and although not limited to children, applies equally to them as it does to adults. Some of the rights contained in section 35 include the right to remain silent, the right to a fair and speedy trial, the right to a legal representative and if an accused cannot afford one, the right to be assigned one by the State if substantial injustice would otherwise result.

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# Preamble, objects, guiding principles, definitions and key role-players in the Act

## Preamble

The Preamble was added to the Act during the parliamentary debates in 2008. It serves the function of explaining the motivation for enacting this legislation – in particular making mention of the injustices of apartheid prior to 1994 and the new constitutional dispensation and its protection of children – as well as setting out what the Act seeks to achieve. This includes creating a separate criminal justice and procedural system for children; entrenching the principles of restorative justice in the criminal justice system; and promoting crime prevention initiatives.

## Objectives

The objectives set out in section 2 of the Act serve an important function in that they provide the context within which the Act as a whole must be read and interpreted. They represent the aim which the legislation seeks to achieve by providing a regulatory framework for children in conflict with the law.

Significantly, the first object is to protect the rights of children as provided for in the Constitution. In addition, a balance is created between protecting the accused child's rights as a child and an individual on one hand, and ensuring that the human rights and fundamental freedoms of the community are respected by children in trouble with the law, on the other. It must be borne in mind that the Act does not merely confer rights on accused and convicted children, but it also aims to hold them accountable for their actions to the victims, the families of the child and victims, and the community as a whole. Consequently, the concept of restorative justice is explicitly included as an objective.

In addition, emphasis is placed on the involvement of parents and families as well as the community in order to encourage the reintegration of children into the community after they have been dealt with in the criminal justice system. It is increasingly recognised that interventions in offending children's lives need to be supported when the child leaves the system.

Of particular importance is the reference to co-operation between all government departments and other organisations and agencies. It is submitted that, until now, there has been no legal requirement for such co-operation. Consequently, inter-departmental co-operation around issues of child justice has been limited. There

has also been minimal interaction with outside organisations and agencies, and such co-operation is important because many services linked to the child justice system are provided via public-private partnerships with civil society organisations. It is necessary that a holistic approach be fostered and that officials from the various departments and outside organisations start to regard all participants in the child justice process as colleagues, instead of just those in their own field or sphere of operation.

## Guiding principles

These principles are those which should be taken into account when applying the Act to a particular circumstance involving a particular child. The guiding principles of the Act, contained in section 3, include the important concepts of non-discrimination, participation and proportionality. Importantly they emphasise the inclusion of the family in decisions affecting children; the need for dealing with children in a manner appropriate to their age and intellectual development; and that children without families should have equal access to services. Of significance is the inclusion of the rights contained in the UNCRC and African Charter on the Rights and Welfare of the Child (ACRWC) as guiding principles for the application of the Act.

## Definitions

The Act introduces some of the following definitions to the child justice sphere:

- “**appropriate adult** means any member of a child’s family, including a sibling who is 16 years or older, or care-giver referred to in section 1 of the Children’s Act” – this category of role-players has been added to allow more options for people other than parents or guardians to assist the child during the proceedings and into whose care the child can be placed.
- “**child** means any person under the age of 18 and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4(2)” – this means that the Child Justice Act can apply to persons 18 or older but under 21 years if they had committed an offence when they were under the age of 18.
- “**child and youth care centre** means a child and youth care centre referred to in section 191 of the Children’s Act” – this is a single concept that includes the former places of safety, secure care facilities, schools of industries and reformatories.
- “**child justice court** means any court provided for in the Criminal Procedure Act, dealing with a bail application, plea, trial or sentencing of a child” – this means that even a High Court applying the provisions of the Child Justice Act is a child justice court.
- “**independent observer** for purposes of section 65(6), means a representative from a community or organisation, or community police forum, who is not in the full-time employ of the State and whose name appears on a prescribed list for this purpose, which is to be kept by the magistrate of every district” – this is a person who can assist the child in the child justice court in the absence of the child’s parent, guardian or appropriate adult.
- “**preliminary inquiry** is an informal pre-trial procedure which is inquisitorial in nature and may be held in a court or any other suitable place” – this is the child’s first appearance in court and must take place before a lower court.

- “**restorative justice** means an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation” – while there are many definitions of restorative justice, this is the restorative justice definition that applies to the restorative justice procedures in the Act.
- “**suitable person** means a person with standing in the community who has a special relationship with the child, identified by the probation officer to act in the best interests of the child” – in terms of the Act such persons can be appointed to monitor the child’s compliance with a diversion order.

## Key role-players

A child in conflict with the law will encounter the following key role-players:

- **Police official** who is defined as a member of the South African Police Service (SAPS) or of a municipal police service established in terms of the South African Police Service Act 68 of 1995.
- **Probation officer** who is defined as a person who has been appointed as a probation officer under section 2 of the Probation Services Act 116 of 1991. Currently probation officers are qualified social workers.
- **Prosecutor** is a person appointed in terms of the National Prosecuting Authority Act 32 of 1998 to investigate and prosecute crimes.
- **Inquiry magistrate** who is the judicial officer presiding at a preliminary inquiry.
- **Presiding officer** is the inquiry magistrate or judicial officer presiding at the child justice court.
- **Diversion service provider** means a service provider accredited to render diversion services.



## Scope and application of the Act

The Act is intended to apply to children who come into conflict with the law. This seems simple, but is a bit complex. On the one hand the upper age of a child is 18 years of age according to section 28(3) of the Constitution. Therefore once a child turns 18 years of age, he or she is an adult. However, the Act recognises that in certain instances it would be fair to apply the Act to persons older than 18 years. On the other hand, there is a minimum age of criminal capacity below which children are not considered to be criminally liable and they cannot be arrested or prosecuted.

So there are 3 categories of children and persons that the Act applies to:

1. Children below 10 years at the time of the commission of the offence – the reason for the Act applying to children who are not criminally liable is that section 9 sets out procedures that apply to children under 10 years of age who have committed a crime. These include referral to a children's court or counselling if necessary.
2. Children aged 10 years and older but younger than 18 years *at the time of arrest or when the summons or written notice was served on them* – these are the children who the Act specifically targets and who the Act aims to protect. The reason that it doesn't apply to children who are aged 10 years and older but younger than 18 years *at the time of the commission of the offence* is that the Act is not intended to apply, for example, to someone who committed an offence at 17 years of age but who was only arrested at 27 years of age. The procedures in the Act are intended to protect children who are actually in the criminal justice system.
3. Persons who are 18 years or older but under 21 years of age and who committed an offence when under 18 years of age – this provision recognises that 18 to 21 year olds are still young and can benefit from the procedures in the Act. However, the National Director of Public Prosecutions will issue directives on how this section is to be applied in practice.

### What are the procedures that apply to the various categories of children who come into conflict with the law?

- If a child who is alleged to have committed an offence is under the age of 10 years, he or she must be referred to a probation officer to be dealt with in terms of section 9.

- Every child who is 10 years or older (including persons between 18 and 21 years who are alleged to have committed an offence while under 18 years of age), who is alleged to have committed an offence and who is required to appear at a preliminary inquiry in respect of that offence must, before his or her first appearance at the preliminary inquiry, be assessed by a probation officer, unless assessment is dispensed with in terms of section 41(3) or 47(5) of the Act.
- A preliminary inquiry must be held in respect of each child after assessment except where he or she has been diverted in accordance with the provisions of Chapter 6 of the Act or where the matter involves a child who is 10 years or older but under the age of 14 years where criminal capacity is not likely to be proved; or where the case has been withdrawn.
- All of these children are eligible to be considered for diversion either before the preliminary inquiry (depending on the nature of the offence) or at the preliminary inquiry.
- If a child is not diverted at the preliminary inquiry the matter must be referred to a child justice court for plea and trial. However, before the case is concluded the child justice court may nevertheless consider diverting the child.

### **What kind of offences does the Act deal with?**

The Act applies to all criminal offences. However it divides them into three schedules depending on the seriousness of the offences. Schedule 1 contains the least serious offences and Schedule 3 the most serious offences. These schedules then have different implications for children charged in terms of one of them. For instance, children charged with Schedule 3 offences (the most serious) can only be diverted in exceptional circumstances.

If a child is charged with more than one offence and these are all dealt with in the same criminal proceedings, the most serious offence must guide the manner in which the child must be dealt with in terms of the Act.

See Appendix B for a list of offences contained in each schedule.



## Age and criminal capacity

On account of the fact that the Act creates specific procedures for children (or persons between 18 and 21 years) that are specifically tailored to their needs and rights, it is important that the Act is applied to children, and the correct category of children. Therefore there are a number of provisions that deal with the age of a child accused of an offence.

The main issues around the age of a child are:

- The minimum age for prosecution of a child or minimum age of criminal capacity;
- The age until which criminal incapacity is presumed but may be rebutted; and
- Determining the age of a child.

### Criminal capacity

The concept of an age of criminal responsibility relates to the age at which a child has the mental ability to distinguish between right and wrong and can understand or appreciate the consequences involved (cognitive mental function) and can act in accordance with such understanding or appreciation (conative mental function). It is the age at which children have the capacity to commit crimes and to accept responsibility for their actions. This renders them liable for prosecution.

The minimum age of criminal capacity is indicative of the lowest age at which a State or the international community is willing to hold children liable for their alleged criminal acts in a court of law.

However, the Act provides for interventions for children who commit criminal acts but are below the minimum age of criminal capacity. These interventions are civil law measures of welfare, educational or non-punitive measures rather than criminal sanctions.

In international law, article 40(3)(a) of the UNCRC requires States Parties to establish a minimum age of criminal capacity below which children will not be criminally responsible. The Beijing Rules guide this principle in so far as they state that the minimum age must not be fixed too low. However, neither of these instruments set an actual age.

The Committee on the Rights of the Child (the United Nations Committee responsible for monitoring the implementation of the UNCRC) has continuously

expressed its concern with regard to the vast international differences in setting a minimum age. It has called for a comprehensive juvenile justice policy reflecting a more unified approach to the question of minimum age (amongst other things) so as to lessen the disparities amongst the States Parties and to raise international standards. As a result, the Committee released General Comment No. 10 on Juvenile Justice, which was an important milestone and put an end to the issue as to what an appropriate minimum age of criminal capacity should be. It established a fixed minimum age of criminal capacity of not lower than 12 years old and recommended that States Parties should not set the limit at any younger age than this.

### South African law prior to the Child Justice Act

In South Africa the age of criminal capacity prior to the Child Justice Act was regulated by our common law. A child below the age of 7 years was **irrebuttably** presumed to be *doli incapax* (in other words lacking criminal capacity), a child between the ages of 7 and 14 years was **rebuttably** presumed to be *doli incapax* and a child older than 14 years was regarded as having full criminal capacity. This meant that if a child was under 7 years he or she could NEVER be held criminally liable. If the child was 7 years or older but under 14 years he or she was presumed to lack criminal capacity, but if the State proved he or she had criminal capacity, the child could be found guilty provided all the other elements of the offence were also proved. A child 14 years and older was seen as having full criminal capacity.

### The Child Justice Act 75 of 2008

The Child Justice Act has raised the minimum age of criminal capacity to 10 years of age. In terms section 7(1) of the Act, a child who (at the time of the alleged commission of the offence) is below the age of 10 years CANNOT be prosecuted.

The Act also states, in section 7(2), that a child who is 10 years or older but under the age of 14 years at the time of the alleged commission of the offence, is presumed not to have criminal capacity unless it is subsequently proved beyond a reasonable doubt that the child had such capacity at the time of the alleged commission of the offence.

Children who are 14 years and older continue to have full criminal capacity

Essentially, this means that the *doli capax* (child has criminal capacity) and *doli incapax* (child does not have criminal capacity) presumptions are retained while it is just the minimum age that has changed. The rationale for this can be found in the Commission's Report on Juvenile Justice where it is reasoned that the presumptions create a "protective mantle" to immediately cover children of specified ages as each child's level of maturity and development differs. This provides flexibility and protection for children aged between 10 and 14 years who differ in emotional and intellectual understanding during those developmental years.

Further protections for children aged 10 years or older but under the age of 14 years are contained in section 10. In terms of this section a prosecutor can only prosecute a child if he or she considers various factors, including:

- the educational level, cognitive ability, domestic and environmental circumstances and the age and maturity of the child;

- the nature and seriousness of the alleged offence;
- the probation officer's assessment report;
- the impact of the alleged offence on any victim;
- the interests of the community;
- the prospects of establishing criminal capacity;
- the appropriateness of diversion; and
- any other relevant factor.

This prevents prosecutors from prosecuting a child as an automatic process, hoping that he or she will prove criminal capacity further during the course of the matter. This section requires the prosecutor to consider the likelihood of success, based on the above factors, before deciding to prosecute.

### **Proof of criminal capacity in terms of the Child Justice Act**

This is dealt with in section 11. Criminal capacity must be proved beyond a reasonable doubt. The inquiry magistrate or the child justice court hearing the matter decides on whether criminal capacity has been proved or not.

In making a decision the inquiry magistrate or child justice court must, in terms of section 11(2), have regard to the probation officer's assessment report and any other information which may include an evaluation referred to in section 11(3). Section 40(1)(f) of the Act requires a probation officer in his or her assessment report to make a recommendation on 'the possible criminal capacity of the child if the child is 10 years or older but under the age of 14 years, as well as measures to be taken in order to prove criminal capacity'. Section 11(3) provides that an inquiry magistrate or child justice court may on his or her own accord, or on the request of the prosecutor or the child's legal representative, order an evaluation of the criminal capacity of the child. This is to be done by a suitably qualified person, and the evaluation must include an assessment of the cognitive, moral, emotional, psychological and social development of the child. This has to be done within 30 days whereas the probation officer's assessment is usually completed within only 48 hours.

#### **DUTY OF THE PROBATION OFFICER**

- Make recommendations in the assessment report on the possible criminal capacity of the child if the child is 10 years or older but under the age of 14 years as well as on measures to be taken in order to prove criminal capacity.

#### **DUTY OF THE LEGAL REPRESENTATIVE OR PROSECUTOR**

- May request an evaluation of the criminal capacity of the child.

## **DUTIES OF THE PRESIDING OFFICER**

- Must have regard to the probation officer's report on the issue of age and criminal capacity.
- Possibly order an evaluation of the child either of his or her own accord or if a prosecutor or the child's legal representative requests one.

## **Procedures relating to children under the age of 10 years**

Section 9 is an important addition to our criminal procedural system. Prior to the Act if a child under the age of criminal capacity was alleged to have committed an offence, there were no specific legal provisions governing the situation. More often than not a young child who gets involved in crime is a child at risk and some action should be taken. Recognising this, and the fact that the minimum age was being raised, the Act now sets out a procedure for action where a child under the minimum age of criminal capacity is accused of committing an offence.

The inclusion of this provision does not imply that the child is criminally liable for the incident that led to the assessment.

The main role-players in this regard are the police and probation officers, whose responsibilities are as follows:

### **DUTIES OF THE POLICE**

- Police suspecting that a child under 10 years of age has committed an offence may not arrest the child or issue a summons or written notice to appear at the preliminary inquiry.
- Must notify a probation officer that a child under the age of 10 years is alleged to have committed a crime.
- Must hand the child over to his or her parents, or a guardian or an appropriate adult.

### **DUTY OF THE PROBATION OFFICER**

- Must assess the child and can select from a range of different actions listed in section 9(3)(a), which includes referral to a children's court; counselling or therapy; accredited programme or even that no action should be taken.

If the child fails to comply with any obligation imposed in terms of section 9, the child will be referred to a children's court to be dealt with in terms of the Children's Act (No. 38 of 2005).

## **Review of minimum age of criminal capacity**

Section 8 provides that the Minister of Justice and Constitutional Development must, not later than five years after the commencement of this section in the Act, submit a report to parliament to determine whether or not the minimum age of criminal capacity should be raised.

The inclusion of this clause was a direct result of civil society submissions to parliament. The Commission's proposals in relation to the age of criminal capacity dated back to 2000 and since then medical science has advanced and international law on this issue has also developed. As a result, a number of submissions were made to parliament during the debates on the Act by civil society organisations advocating for a higher minimum age of criminal responsibility. The arguments based on international law focused on the release of General Comment No. 10 which set a minimum age of 12 years. The arguments regarding developments in medical science referred to the development of the human brain in advocating that the minimum age of criminal capacity be raised to 12 years.

Parliament was swayed by these arguments but not so much as to raise the minimum age of criminal capacity to 12 years. However, the legislature has allowed for a 5 year review to allow for research on (see sections 96(4) and (5)), amongst others:

- The statistics of children who are alleged to have committed an offence and the types of offences they are alleged to have committed for ages 10, 11, 12 and 13;
- sentences imposed on these children; and
- the number of matters concerning these children which did not go to trial on the grounds that the prosecutor was of the view that criminal capacity would not be proved.

If satisfied that the results of the research indicate that the minimum age should be raised, parliament can then raise the minimum age at that stage.

### **Determining the age of a child**

Many children accused of crimes in South Africa do not know their exact age. The Act proposes certain measures for determining a child's age.

These measures involve the following role-players:

- Police officials;
- Probation officers; and
- Presiding officers.

#### **DUTIES OF THE POLICE**

- If a child is probably below 10 years, then the police should follow the procedure in section 9, which involves taking the child to a probation officer.
- If a child is 10 years or older and under 14 years or is between 14 and 18 years, then the police must deal with the child in terms of the arrest, detention and release provisions of the Act. This means that the police can issue a summons or written notice for the child to appear in court or arrest the child. If the police detains the child prior to the first appearance, then they need to follow the provisions of section 27 which deal with the placement options prior to the child's first appearance at the preliminary inquiry.
- If however, a probation officer has estimated or a child justice court determined the age of the child, then the procedures for a child of that particular age apply.

## DUTIES OF THE PROBATION OFFICER

- In terms of section 13, if during an assessment of the child, the age of the child is uncertain, the probation officer must make an age estimation.
- In making the estimation, the probation officer can use certain information such as previous age determinations; statements by parents or the child; school documents; baptism or other religious certificates; or an estimation by medical practitioners.
- The probation officer must then submit his or her age estimation to the inquiry magistrate (magistrate who chairs the preliminary inquiry) on a prescribed form.
- If later, more information arises regarding the child's age, then the probation officer can change his or her estimation provided it is before the child is sentenced.

## DUTIES OF THE PRESIDING OFFICER

- In terms of section 14 of the Act, the inquiry magistrate at the preliminary inquiry or a judicial officer who presides in a child justice court can make an age determination. (Note, the term presiding officer includes an inquiry magistrate or a judicial officer at the child justice court.)
- This differs from an age estimation as this is where the presiding officer actually sets the child's age where it was uncertain. The age estimation is just an approximation of the age based on the information the probation officer collected. The presiding officer gets to decide on what the age of the child is.
- In determining a child's age, the presiding officer may consider the age estimation report by the probation officer or any other document or statement by a person; subpoena a person to produce this additional document if necessary; or call for a medical examination if necessary.
- Once the presiding officer has determined the child's age, he or she must enter it on the record of proceedings.

Note: If it is found that the age of a person (or child) is incorrect, procedures on how to correct this are found in section 16. These procedures apply to presiding officers.

## SOURCES AND READINGS

- Odongo, G 'Age and capacity' (chapter in unpublished LLD thesis entitled *The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context*, 2005, UWC). Copy of thesis available at Community Law Centre Documentation Centre.
- Child Justice Alliance: Fact sheet on 'Age and criminal capacity' available at [www.childjustice.org.za](http://www.childjustice.org.za)



## Methods of securing a child's attendance at the preliminary inquiry

When a child is suspected of committing an offence and is apprehended, there are three ways in which a child's presence in court at the preliminary inquiry can be secured:

- Written notice;
- Summons; or
- Arrest.

The manner in which these three methods are listed in the Act indicate that a written notice is the first or most preferable choice, and arrest the last or least preferable one.

### Written notice

Written notices apply to children charged with Schedule 1 offences. Written notices are dealt with in the Criminal Procedure Act 51 of 1977 (CPA), but those requirements have been adapted to fit the requirements of the Child Justice Act.

In terms of section 18, if a police official apprehends a child suspected of committing a Schedule 1 offence, he or she may hand the child a written notice to appear at the preliminary inquiry. The notice must specify the date, time and place of the preliminary inquiry and be handed to the child in the presence of his or her parent, appropriate adult or guardian. When this is done, both the child and parent, appropriate adult or guardian must acknowledge receipt of the notice by way of a signature or a mark.

The section stresses the importance of handing the notice to the child in the presence of his or her parent, guardian or appropriate adult. However the Act recognises that in some instances the parent, guardian or appropriate adult may not always be available. Therefore it doesn't prevent the police official from nonetheless handing the notice to the child alone, but states that this should only be done in exceptional circumstances. If this does happen though, the notice must still be handed to the parent, appropriate adult or guardian as soon as possible and they must also acknowledge receipt of the notice by way of a signature or mark.

### Summons

This method can be used for any type of offence and is not limited to a specific schedule. A summons is dealt with in section 54 of the CPA. This method of securing

a child's attendance at the preliminary inquiry is usually used after some time has elapsed since the alleged offence has been committed. In most instances it is used when a prosecutor has decided, after reading a 'decision' docket, to charge someone, or where a charge has previously been withdrawn and is now re-instated. The summons is then used to inform the child that he or she has been charged or re-charged and to inform him or her of when to appear in court for the preliminary inquiry.

Section 19 of the Act requires that the summons must specify the date, time and place of the preliminary inquiry. As with the written notice, the summons must be served on a child in the presence of his or her parent, an appropriate adult or a guardian, in which case both the child and parent, appropriate adult or guardian must acknowledge service by way of a signature or a mark. In addition, like with the written notice, the Act recognises that in some instances the parent, guardian or appropriate adult may not always be available. Therefore, it doesn't prevent the summons from being served on the child alone, but states that this should only be done in exceptional circumstances. If this does happen though, the summons must still be served on the parent, appropriate adult or guardian as soon as possible and they must also acknowledge receipt of the summons by way of a signature or a mark.

A police official will serve the summons on the child, parent, guardian or appropriate adult.

#### **DUTIES OF THE POLICE IN RESPECT OF A WRITTEN NOTICE OR SUMMONS**

When handing a written notice to, or serving a summons on the child, parent, appropriate adult or guardian, the police official must:

- Inform them of the nature of the allegations against the child;
- Inform them of the child's rights;
- Explain to them the immediate procedures to be followed in terms of this Act;
- Warn the child to appear at the preliminary inquiry on the date, time and place specified in the written notice or summons and to stay there until he or she is excused; and
- Warn the parent, appropriate adult or guardian to bring or ensure that the child is brought to the preliminary inquiry on the date, time and place specified in the written notice or summons and to stay there until they are excused.

Note: The police official must also immediately or within 24 hours notify a probation officer that a written notice has been handed to the child or a summons has been served on the child.

## **Arrest**

The third method of securing a child's attendance at court is to arrest the child.

However, very importantly, a child may NOT be arrested for a Schedule 1 offence unless there are compelling reasons justifying the arrest. This clearly indicates that the Act wishes to discourage the use of arrest, especially for minor offences.

The compelling reasons for which a child can be arrested for a Schedule 1 offence include the following circumstances:

- Where the police official has reason to believe that the child does not have a fixed residential address;

- Where the police official has reason to believe that the child will continue to commit offences, unless he or she is arrested;
- Where the police official has reason to believe that the child poses a danger to any person;
- Where the offence is in the process of being committed; or
- Where the offence is committed in circumstances set out in the SAPS national instructions on the Act.

When a child is arrested the police official who effects the arrest must:

- Inform the child of the nature of the allegations against him or her;
- Inform the child of his or her rights;
- Explain to the child the immediate procedures to be followed in terms of this Act; and
- Notify the child's parent, an appropriate adult or guardian of the arrest. However if the police official is unable to notify the child's parent, an appropriate adult or guardian of the arrest, he or she must submit a written report to the presiding officer at the preliminary inquiry explaining why he or she was not able to do so.

In addition, immediately or within 24 hours after the arrest, the police official must inform a probation officer of the child who has been arrested and if he or she fails to inform the probation officer, he or she must submit a written report to the inquiry magistrate at the preliminary inquiry giving reasons why this was not done.

A police official must take any child who has been arrested (and not released) to the relevant magistrate's court within 48 hours of the arrest. This must happen irrespective of whether the child has been assessed or not.

#### **DUTIES OF THE POLICE ON ARREST**

- Not to arrest children for Schedule 1 offences unless there are compelling reasons justifying the arrest.
- Inform the child of the nature of the allegations against him or her.
- Inform the child of his or her rights.
- Explain to the child the immediate procedures to be followed in terms of this Act.
- Notify the child's parent, guardian or appropriate adult of the child's arrest.
- Submit a report to court if the child's parent, guardian or appropriate adult is not notified of the arrest.
- Inform a probation officer of the arrest.
- Submit a report to court giving reasons if a probation officer was not notified.
- Ensure the child is taken to the relevant magistrate's court within 48 hours of the arrest.



## Pre-trial detention

The Constitution, in section 28(1)(g) is clear regarding the detention of children: it should be used as a measure of last resort and for the shortest appropriate period of time. International law also places strong emphasis on restricting the use of detention for children. Article 37(b) of the UNCRC has similar wording to that of section 28(1)(g) of the Constitution:

*'No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'.*

This position is further supported by Rule 1 of the UN JDL Rules.

The Child Justice Act deals with 2 situations regarding pre-trial detention:

- Release and detention **before** first appearance at the preliminary inquiry; and
- Release and detention **after** first appearance at the preliminary inquiry (and at any subsequent appearance in court).

According to the Act, the approach to release children in detention is that it is the preferable approach and should be used if possible, instead of detaining the child. However, if detention is to be used, the approach is that the following options regarding placement of the child must be considered:

- Placement in a child and youth care centre;
- Placement in a police cell (only prior to 1st appearance); or
- Placement in a prison.

Such consideration must be made with due regard to the principle that the least restrictive option possible in the circumstances should be used.

### Release and detention before the first appearance at the preliminary inquiry

#### *Release*

Section 21 of the Act sets out the approach for release of a child who has been arrested. When considering the release or detention of a child who has been arrested, preference must be given to releasing the child.

In terms of section 21(2)(a), a police official must, in respect of an offence referred to in Schedule 1, where appropriate, release a child on written notice into the care of a parent, an appropriate adult or guardian. However, in terms of section 22(1), the police official doesn't have to release the child when:

- the child's parent or an appropriate adult or guardian cannot be located or is not available and all reasonable efforts have been made to locate them; or
- there is a substantial risk that the child may be a danger to any other person or to himself or herself.

If the child is not released, the police official must provide the inquiry magistrate with a written report setting out the reasons which must relate to the factors listed above.

In terms of section 21(2)(b), a prosecutor may, in respect of an offence referred to in Schedule 1 or 2, authorise the release of a child on bail.

### ***Detention***

In terms of section 26(2)(a), if a decision is made to detain the child before his or her first appearance at a preliminary inquiry, the police official **MUST**, depending on the age of the child and the alleged offence committed by the child, consider placing the child in an appropriate child and youth care centre if available within a reasonable distance from the court. In terms of section 26(2)(b), if this is not appropriate or applicable, the child must be detained in a police cell or lock-up.

In terms of section 27(a) the police official **must** consider a **child and youth care centre** first in relation to:

- a child who is 10 years or older but under the age of 14 years who is charged with any offence; or
- a child who is 14 years or older and charged with a Schedule 1 or 2 offence.

However, if there is no centre available or no vacancy, then only can the child be held in a police cell or lock-up pending the first appearance.

If a child 14 years or older charged with a Schedule 3 offence is to be detained, he or she must be detained in a police cell or lock-up, pending the first appearance at the preliminary inquiry.

It should be noted that there is no possibility of a child being detained in a prison prior to the first appearance at the preliminary inquiry.

## **Release and detention after the first appearance at the preliminary inquiry**

### ***Release***

There are 3 options for releasing a child, who has not yet been released, at the preliminary inquiry or later in the child justice court.

In terms of section 21(3), a presiding officer may:

- In respect of any offence, release a child into the care of a parent, an appropriate adult or guardian;
- In respect of an offence referred to in Schedule 1 or 2, release a child on his or her own recognisance. (Note: a child charged with a Schedule 3 offence cannot be released on their own recognisance but can only be released into the care of a parent, guardian or appropriate adult); or

- If a child is not released from detention, in terms of the above 2 options, release the child on bail.

In terms of section 24(2)(a) and (b) a child can only be released into the care of a parent, guardian or appropriate adult or on his or her own recognisance as provided if it is in the interests of justice to release the child. Section 24(3) sets out the factors which indicate whether it would be in the interests of justice to release the child. These include:

- The best interests of the child;
- Whether the child has previous convictions;
- The fact that the child is 10 years or older but under the age of 14 years and is presumed to lack criminal capacity;
- The interests and safety of the community in which the child resides; and
- The seriousness of the offence.

If the presiding officer decides to release the child, he or she may release the child on certain conditions which can include reporting to the police, attending school, reside at a particular address, be placed under a specified person's supervision and so forth.

If the child is released into the care of his or her parent, guardian or appropriate adult, the presiding officer must warn the parent, guardian or appropriate adult to appear on the next appearance date and ensure that the child complies with any conditions set. If they fail to do so they can be found guilty of an offence and fined or imprisoned for period of up to 3 months.

If the child is released on his or her own recognisance, then the presiding officer must warn the child to appear on the next appearance date and comply with any conditions set.

If a child fails to appear on the date, time and place specified, or comply with any conditions that were set, the presiding officer may issue a warrant for the arrest of the child or cause a summons to be issued. When a child then appears before a presiding officer pursuant to this warrant of arrest or summons, the presiding officer must inquire into the reasons for the child's failure to appear or comply with the conditions and make a determination whether or not the failure is due to the child's fault.

If it is found that the failure is not due to the child's fault, the presiding officer may:

- Order the child's release on the same conditions; or
- Order the child's release on any other condition; and
- If necessary, make an appropriate order which will assist the child and his or her family to comply with the conditions initially imposed.

If it is found that the failure is due to the child's fault, the presiding officer may order the release of the child on different or further conditions or make an order that the child be detained.

Section 25 of the Act deals with bail and provides for a specific procedure. In terms of this section, an application for the release of a child on bail must be considered in three stages, namely:

- Whether the interests of justice permit the release of the child on bail; and

- If so, a separate inquiry must be held into the ability of the child and his or her parent, an appropriate adult or guardian to pay the amount of money being considered or any other appropriate amount; and
- If after the inquiry it is found that the child and his or her parent, an appropriate adult or guardian are unable to pay any amount of money, then the presiding officer must set appropriate conditions that do not include an amount of money for the release of the child on bail. On the other hand, if the child is able to pay an amount of money, the presiding officer must set conditions for the release of the child on bail and an amount which is appropriate in the circumstances

### ***Detention***

If after the child's first appearance at the preliminary inquiry and the child is not yet released and the court decides to continue detaining the child (or even if the child was released and now needs to be detained), section 26(3) provides that the presiding officer may place the child in a suitable child and youth care centre or prison, where applicable.

A reading of section 26(1) of the Act illustrates that placement in a child and youth care centre is the best option and prison should only be the last resort.

Section 29 deals with detention of a child in a **child and youth care centre** and provides that any child charged with any offence can be detained in these facilities. In deciding whether to place the child in a child and youth care the presiding officer, in terms of section 29(2) must take the following factors into account:

- The age and maturity of the child;
- The seriousness of the offence in question;
- The risk that the child may be a danger to himself, herself or to any other person or child in the child and youth care centre;
- The appropriateness of the level of security of the child and youth care centre when regard is had to the seriousness of the offence allegedly committed by the child; and
- The availability of accommodation in an appropriate child and youth care centre.

The presiding officer must also consider the recommendations contained in the probation officer's assessment report. If however, it is much later in the trial when the decision is made to detain the child and the information in the assessment report is possibly out of date, the presiding officer must obtain information from the person responsible for the management of the child and youth care centre. Such information obtained must indicate the availability of accommodation at the centre and the security, amenities and features of the centre.

Section 30 deals with detention of a child in **prison awaiting trial** and provides in section 30(1) that a presiding officer may only send children to prison awaiting trial if:

- The child is 14 years or older and charged with a Schedule 3 offence. However, in terms of section 30(5) a presiding officer can send a child 14 years or older charged with a Schedule 1 or 2 offence to prison awaiting trial if, in addition to all the factors listed in section 30(1) and subsection 3, there are substantial and compelling reasons to do so, and these reasons must be placed on the record;

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

As a further protection against young children being detained in prison awaiting trial, section 30(2) provides that a child who is 14 years or older but under the age of 16 years may only be detained in a prison if, in addition to the factors mentioned above, the Director of Public Prosecutions (DPP) or an authorised prosecutor issues a certificate which confirms that there is sufficient evidence to institute a prosecution against the child for an offence referred to in Schedule 3 and the child is charged with the offence.

In making the decision to detain a child in prison, the presiding officer must consider the recommendations contained in the probation officer's assessment report. Again, indicating the seriousness of this decision, section 30(3) requires a presiding officer to also consider any relevant evidence placed before him or her, including evidence in respect of:

- The best interests of the child;
- The child's state of health, previous convictions, previous diversions or charges pending against the child;
- The risk that the child may be a danger to himself, herself or to any other person or child in a child and youth care centre;
- Any danger that the child may pose to the safety of members of the public;
- Whether the child can be placed in a child and youth care centre which complies with the appropriate level of security;
- The risk of the child absconding from a child and youth care centre;
- The probable period of detention until the conclusion of the matter;
- Any impediment to the preparation of the child's defence or any delay in obtaining legal representation which may be brought about by the detention of the child;
- The seriousness of the offence in question; or
- Any other relevant factor.

In terms of section 32, if a child is in detention awaiting trial either in a child and youth care centre or prison, the presiding officer must at every court appearance:

- Determine whether or not the detention is or remains necessary and whether the placement is or remains appropriate;
- Enter the reasons for the detention or further detention on the record of the proceedings;
- Consider a reduction of the amount of bail, if applicable;
- Inquire whether or not the child is being treated properly and being kept in suitable conditions, if applicable;

- If not satisfied that the child is being treated properly and being kept in suitable conditions, order that an inspection or investigation be undertaken into the treatment and conditions and make an appropriate remedial order; and
- enter the reasons for any decision made in this regard on the record of the proceedings.

## Conditions of detention

### *Police cells*

Detention of children in police custody has been highly problematic in the past, with many abuses being perpetrated against children. Many police cells are not suitable for the detention of children. Therefore, section 28 of the Act deals with the protection of children detained in police custody.

It provides detailed protections for children held in police cells, which include that:

- Children must be kept separate from adults and boys separate from girls;
- Children are entitled to family visits, visits by legal representatives, social workers, religious workers, health workers, probation officers, assistant probation officer's and any other person who, in terms of any law, is entitled to visit; and
- Children must be cared for in a manner consistent with their special needs including the provision of immediate and appropriate health care and adequate food, water, blankets and bedding.

In addition, the Act provides for reporting procedures relating to when a child sustains injury or suffers severe psychological trauma. In this regard, duties are placed on the station commissioner who must ensure immediate medical treatment and report the incident to the National Commissioner of Police. Further, a register of all children detained at the police station must be kept which can be examined by any person according to a prescribed procedure.

### *In relation to court proceedings*

Section 33(2)(c) provides that when children are transported to and from court, they must be kept separate from adults but only as far as is reasonably possible. If they are not, then the police official must provide reasons to the presiding officer.

In terms of section 33(1) and (2), no child may be subjected to wearing leg-irons when they appear in court. Also, they must be kept separate from adults in the holding cells, and girls be kept separately from boys.

### **DUTIES OF THE POLICE**

- Issue a written notice in terms of section 18 if releasing a child.
- Ensure the provisions of section 28 are adhered to in relation to the conditions of detention of children in police cells.
- Ensure that the provisions of the Act are adhered to when releasing or detaining children.

## DUTIES OF THE PRESIDING OFFICER

- Ensure the provisions of the Act are adhered to when releasing or detaining children.
- When releasing children on their own recognisance, warn the child to appear on the next appearance date and to comply with the conditions of release as discussed above.
- When releasing children into the care of a parent, guardian or appropriate adult, warn them to appear on the next appearance date and ensure that the child complies with the conditions of release.

## SOURCES AND READINGS

- CSPRI submission to the Portfolio Committee on Justice and Constitutional Development on the Child Justice Bill (January 2008).
- Child Justice Alliance: Fact Sheet: 'Children awaiting trial' available at [www.childjustice.org.za](http://www.childjustice.org.za)
- Dissel, A and Nevill, C 'Children awaiting trial in prison', *Article 40*, Vol 8, No: 7, 2006.



## Pre-trial assessment

The desirability of pre-trial assessment was first advocated at the international conference on juvenile justice reform held in 1993. Assessment was pioneered provincially in the Western Cape mainly via the provincial Department of Social Development.

Following this, the Inter-Ministerial Committee on Young People at Risk (IMC) decided that pre-trial assessment would be based on the concept of developmental assessment. This places a focus on the child's strengths and abilities rather than the pathology attached to the offence or family environment from which the child had come.

The Probation Services Amendment Act 35 of 2002 eventually defined assessment as developmental assessment, in other words "an evaluation of a person, the family circumstances of the person, the nature and circumstances surrounding the alleged commission of an offence, its impact on the victim, the attitude of the alleged offender in relation to the offence and any other relevant factor". Further, an amendment to section 4(1) of the Probation Services Act 116 of 1991 ensures that the duty of performing assessments, the related issue of reception of accused persons and their referral form part of the core mandate of the probation service.

This meant that pre-trial assessment became part of South African law but only applicable to and binding on probation officers. There was no legislation requiring the criminal justice system to implement pre-trial assessment.

The Child Justice Act is now the regulatory framework making pre-trial assessment part of the criminal justice system in relation to children.

### Which children get assessed?

The Act, in terms of section 34, provides that every child who is alleged to have committed an offence, even those who are under the age of 10 years and who therefore have no criminal capacity, must be assessed unless the assessment is dispensed with. An assessment can be dispensed with in terms of section 41(3) by a prosecutor if it is in the best interests of the child. However, the reasons for this must be placed on the record of the case. In terms of section 47(5) the inquiry magistrate can also dispense with the assessment at the preliminary inquiry if it is in the best interests of the child to do so.

## The purpose of the assessment

Importantly, the Act sets out clear objectives for the assessment. This provides a guide for probation officers so that they know what the core issues are that the assessment must cover.

These purposes are to:

- Estimate the probable age of the child;
- Gather information relating to any previous conviction, previous diversion or pending charge in respect of the child;
- Formulate recommendations regarding the release or detention and placement of the child;
- Determine whether a child is in need of care and protection and should be transferred to the children's court;
- Determine measures to be taken if dealing with a child under 10 years;
- Establish the prospects of diversion;
- Express a view on whether expert evidence would be required in relation to the criminal capacity of a child who is 10 and older but below 14 years;
- Consider if the child was used by adults to commit crime; and
- Provide any other relevant information regarding the child which the probation officer may regard to be in the best interests of the child or which may further any of the objectives of the Act.

## When must an assessment take place?

Assessment, in the case of arrested children who remain in detention, must take place before they appear at the preliminary inquiry. In terms of 43(3)(b)(i), a preliminary inquiry must be held within 48 hours after the child's arrest and hence the assessment must take place within this time-frame. Longer time periods are applicable in the case of children who have been given a written notice to appear or been served with a summons and these time periods are specified in the documents themselves. Hence, the assessment must take place within these time periods specified.

In terms of section 34(3), children under the age of 10 years must be assessed within 7 days after the probation officer has been notified by a police official that an offence has been committed.

## Who must attend the assessment?

The child and his or her parent, guardian or appropriate adult must attend. Section 38(2) provides that a probation officer may exempt a parent, guardian or appropriate adult from attending, for example, if their employment is in jeopardy for being absent from work. In addition, the probation officer may actually exclude them from the assessment if he or she has disrupted, undermined or obstructed the assessment, or if it is in the best interests of the child or the administration of justice. This may happen if the parent is the one that caused the child to commit the crime, or is unduly influencing the child in the assessment.

In addition, the Act provides that a probation officer must make every effort to locate a parent, guardian or an appropriate adult in order to conclude the assessment of the child and may request a police official to assist in the location of that person. The probation officer may however conclude

the assessment of the child in the absence of a parent, appropriate adult or guardian if all reasonable efforts to locate that person have failed or if that person has been notified of the assessment and has failed to attend.

### Who may attend the assessment?

The idea is that the assessment should not be cumbersome with many parties participating. However, section 38(3) provides that a probation officer may permit the following persons to attend an assessment:

- A diversion service provider;
- A researcher; or
- Any other person whose presence is necessary or desirable for the assessment.

No specific mention is made of legal representatives, but they are not specifically excluded from attending.

Note: the information obtained from an assessment is confidential and may only be used for purposes authorised by the Act. The information is also inadmissible as evidence during any bail application, plea, trial or sentencing proceedings in which the child appears. Anyone that contravenes these provisions is guilty of an offence.

### Powers and duties of the probation officer at the assessment:

Section 39 sets out the powers and duties of the probation officer in relation to the assessment. They must:

- Explain the purpose of the assessment to the child;
- Inform the child of his or her rights;
- Explain to the child the immediate procedures to be followed in terms of this Act so that the child knows what is going on; and
- Ask whether the child intends to acknowledge responsibility for the offence.

In addition, the probation officer may also:

- Consult with any person or contact any person who has additional information relevant to the assessment, including a prosecutor, police official or diversion service provider, and consult with that person in private;
- Encourage the child's participation in the assessment;
- Where a child is accused with another child or other children of committing an offence, conduct the assessment of the children simultaneously if this will be in the best interests of all the children concerned.

### The assessment report

Upon completion of the assessment, an assessment report must be submitted to the prosecutor before the preliminary inquiry. This report must make recommendations regarding the following:

- Whether a child can be diverted including to what type of programme and to which service provider the child should be referred to;
- Whether the child can be released;

- If the child cannot be released, a recommendation regarding placement options;
- Whether the matter should be transferred to a children's court;
- The possible criminal capacity of the child if the child is 10 years or older but younger than 14 years;
- Measures to be taken if the child is under 10 years of age;
- An estimation of the child's age if it is uncertain; and
- If a more detailed assessment of the child is needed. For example, if the child is a danger to himself or others; where the child might be referred to a sexual offender's programme; if the social welfare history of the child calls for one; and if the child has a history of committing offences or absconding.

The assessment report must also indicate if the child is acknowledging responsibility for the offence. This is relevant to determine whether the child is eligible for diversion.

### **DUTIES OF THE POLICE**

- Inform the probation officer that a child has been arrested; served with a summons or written notice so that the probation officer can assess the child before the preliminary inquiry.
- Attend an assessment if requested to do so by a probation officer.
- Assist in the location of a parent, guardian or appropriate adult if requested to do so by the probation officer.

### **DUTY OF THE PROSECUTOR**

- Dispense with an assessment in terms of section 41(3) if in the best interests of the child.

### **DUTIES OF THE PROBATION OFFICER**

- Assess a child who has been arrested or served with a summons or written notice before the preliminary inquiry.
- Assess a child under the age of 10 years within 7 days after being notified by a police official.
- Keep information gathered from the assessment confidential.
- Exempt or exclude a parent, guardian or appropriate adult from attending an assessment in certain circumstances.
- Permit diversion service providers, researchers or other necessary persons to attend an assessment.
- Make every effort to locate a parent, guardian or appropriate adult.
- Request a police official to assist in locating a parent, guardian or appropriate adult.

## DUTIES OF THE PROBATION OFFICER (CONTINUED)

- Conclude the assessment of a child in the absence of a parent, appropriate adult or guardian if all reasonable efforts to locate that person have failed or if that person has been notified of the assessment and has failed to attend.
- Explain the purpose of the assessment to the child.
- Inform the child of his or her rights.
- Explain the immediate procedures that follow after the assessment to the child so that the child knows what is going on.
- Ask whether the child intends to acknowledge responsibility for the offence.
- Consult with any person or contact any person who has additional information relevant to the assessment and consult with that person in private.
- Encourage the child's participation in the assessment.
- Where a child is accused with another child or other children, the probation officer may conduct the assessment of the children simultaneously if this will be in the best interests of all the children concerned.
- Complete an assessment report in the prescribed manner with recommendations on the issues listed in section 40.
- Indicate in the report whether the child intends to admit responsibility for the commission of the offence.
- When recommending placement of a child in a child and youth care centre, ensure that the necessary information regarding the availability of space and security of the centre has been obtained from the person responsible for the management of the centre.
- Submit the assessment report to the prosecutor before the preliminary inquiry.

## SOURCES AND READINGS

- Sloth-Nielsen, J 'A short history of time - charting the contribution of social development service delivery to enhance child justice 1996 - 2006' *Social Work/Maatskaplike Werk*, Vol 43(4) pp 317 –329.
- Child Justice Alliance: Fact Sheet 'Assessment' available at [www.childjustice.org.za](http://www.childjustice.org.za)



## The preliminary inquiry

The Act creates a new procedure to facilitate the management of children in conflict with the law, namely, the preliminary inquiry. It is innovative and complies with the obligation set by the UNCRC in article 40(3) which states that:

*“States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law.”*

This procedure is aimed at preventing children from getting ‘lost’ in the system. The preliminary inquiry is basically the child’s first appearance in court. At present, there is no set procedure for what usually happens in a person’s first appearance in court save for their rights being explained to them. However, the preliminary inquiry now provides for a set of compulsory decisions to be taken regarding the child, so that from the outset of the case there is general consensus between the role-players about how the matter is to be managed. The assessment will serve to provide the information needed and the professionals at the preliminary inquiry would all carefully consider the child’s specific circumstances and the various options available.

This procedure aims to ensure that an individualised response is used in each case, that decisions are made on as much information as could possibly be obtained in such a short time, and that the child and the parent are included and participate in the discussions. Accordingly it has the following broad themes:

- Overseeing the assessment and the provision of social welfare information relating to the child;
- Enhancing the likelihood of diversion;
- Providing for the participation of the child, parents or family; and
- Deciding on the detention or release of the child.

What is important to remember is that many of the provisions in the Act cross-refer to the preliminary inquiry as there are overlaps in the processes in the Act. For example, the assessment report, diversion orders and decisions to release or detain the child whilst awaiting trial are issues that are considered at the preliminary inquiry.

Section 43 provides that the preliminary inquiry is an informal pre-trial procedure and may be held in a court or any other suitable place. So while this is essentially the first appearance of the child in a court, the aim is to make it as informal as possible.

## The purpose of the preliminary inquiry

The preliminary inquiry is a new procedure in criminal justice legislation. Therefore the Act significantly sets out what this procedure aims to achieve so that all role-players are clear about what needs to happen at the preliminary inquiry.

The purposes referred to in section 43 are to:

- Consider the assessment report and recommendations made by the probation officer;
- Establish from the prosecutor whether the matter can be diverted before the plea;
- Identify a suitable diversion option, if applicable;
- Decide whether the matter should be referred to the children's court on account of the child possibly being in need of care and protection;
- Make sure that all relevant information relating to the child is considered when decisions are made regarding diversion or release and detention;
- Ensure that the views of all present are taken into account;
- Encourage the participation of the child and his or her parent, an appropriate adult or a guardian in decisions concerning the child; and
- Determine the release or placement of a child.

This provides a clear mandate for the magistrate who chairs the preliminary inquiry to ensure all of the above issues are dealt with during the inquiry.

## Which children appear at the preliminary inquiry?

Every child who is accused of committing an offence must appear at a preliminary inquiry unless:

- the child has already been diverted by a prosecutor;
- the child is under 10 years of age; or
- the prosecutor (when receiving the case from the police) has decided to withdraw the charges against the child.

## Who attends the preliminary inquiry?

The preliminary inquiry is chaired by a magistrate who is neutral, but who can also be more active than is usual in a criminal matter. The magistrate, called the inquiry magistrate, gets more involved and can ask questions and require additional information necessary for him or her to make the required decisions.

The persons in addition to the inquiry magistrate and prosecutor who must attend the inquiry are:

- The child;
- The child's parent, an appropriate adult or a guardian; and
- The probation officer.

However the inquiry magistrate can excuse any person if it is in the best interests of child to proceed without them or they are undermining the nature and purposes of the inquiry. However, the reasons for such

exclusion must be recorded. On the other hand, the inquiry magistrate can also allow other persons to attend the inquiry if they have an interest in the matter or they can contribute to the outcome of the inquiry.

If a diversion order is likely to be made, a diversion service provider identified by the probation officer should be present.

Note: As with the assessment, section 45 provides that the information obtained through the preliminary inquiry is confidential and cannot be used in any bail application, plea, trial or sentencing proceedings. In addition, in terms of section 154 of the Criminal Procedure Act, no information that could reveal the information of the identity of the child can be published.

If the child's parent, guardian or appropriate adult fails to attend the preliminary inquiry, they can be found guilty of an offence and be fined or imprisoned for a period not exceeding 3 months.

If the child (who is not detained prior to the preliminary inquiry) fails to attend, the inquiry magistrate may issue a warrant for his or her arrest. When the child then appears in court, the inquiry magistrate must find out what the reasons for the child's non-appearance were in order to determine if it was the child's fault. If it wasn't the child's fault, the inquiry magistrate can release the child on the same or other conditions or make an order to assist the child to appear in court. If, on the other hand, it was the child's fault, then the court can still release the child on the same or other conditions or take a decision to detain the child in future.

### Time periods for the preliminary inquiry

Section 43(3)(b)(i) states that a preliminary inquiry must be held within 48 hours of a child's arrest. If the child has been handed a written notice or served with a summons, then it must be held within the time periods set out in the written notice or summons.

The general 48 hour rule emphasises the fact that the preliminary inquiry must deal with all the issues set out in the Act as quickly as possible so as to prevent any unnecessary delays in finalising the child's case.

Nevertheless, section 48 does allow for the preliminary inquiry to be postponed. However, in order to prevent unnecessary delays, tight time-frames are provided for such postponements.

A preliminary inquiry can be postponed:

- Firstly for 48 hours in order to either finalise a decision regarding diversion; establish the views of the victim on whether the child should be diverted; to find alternatives to detention; assess the child where no assessment has previously been undertaken or for the purposes of further investigation.
- Secondly, after the first postponement, one final postponement of 48 hours is permitted but only if this can facilitate diversion. If the preliminary inquiry has not been finalised by this time, the inquiry must be closed and the matter must proceed in the normal course, namely to plea and trial.
- Finally, there is provision for a longer postponement of 14 days where a more detailed assessment of the child is necessary. This would be in the case where for example:
  - a more detailed assessment of the child is needed if the child is a danger to himself or others;
  - the child could be referred to a sexual offender's programme;

- if the social welfare history of the child calls for one; or
- if the child has a history of committing offences or absconding.

### Orders made at the preliminary inquiry

In terms of section 49, there are essentially only two orders that are made at the preliminary inquiry.

The first is a diversion order which is made if the child is diverted in terms of section 52(5). However, if the child is 10 years or older but under 14 years of age, the inquiry magistrate must first be satisfied that the child has criminal capacity.

The second is an order that the matter be referred to the child justice court for plea and trial. If such an order is made the inquiry magistrate must refer the child to the Legal Aid Board for legal representation if the child does not already have a legal representative. If the child is in detention, the inquiry magistrate must inform the child of the charge against him or her and the date when he or she must next appear in the child justice court. The inquiry magistrate must also warn the child's parent, guardian or appropriate adult to be at the next appearance. If the child is not in detention, the inquiry magistrate can extend any condition of release and must warn the child, the child's parent, guardian or appropriate adult when to appear next at the child justice court.

## DUTIES OF THE INQUIRY MAGISTRATE AT THE PRELIMINARY INQUIRY

- Explain the purpose and inquisitorial nature of the preliminary inquiry to the child.
- Inform the child of the nature of the allegations against him or her.
- Inform the child of his or her rights.
- Explain to the child the immediate procedures to be followed in terms of this Act.
- Find out from the child if he or she admits responsibility for the offence.
- Consider the probation officer's report.
- Consider any documents or information relating to the determination of the child's age.
- Consider any documentation relating to a previous diversion, conviction (unless the child does not admit responsibility for the offence) or other pending charges.
- Consider the probation officer's report regarding detention of the child.
- Request any further documentation relevant to the preliminary inquiry.
- Take necessary steps to establish the truth of any statement or correctness of any submission made by any person present.
- Encourage the participation of the child, child's parent, guardian or appropriate adult which includes allowing them to ask questions and raise relevant issues.
- Hold a joint preliminary inquiry if more than one child is accused in the same case, provided it is in their best interests.
- If the prosecutor declines to divert the child, obtain confirmation from the prosecutor that there is sufficient evidence to proceed or that a further investigation will yield that evidence, and inform the child that the matter is being referred to the child justice court.
- Recuse him or herself from any other proceedings or trial if he or she has heard information prejudicial to the child.
- If it appears that the child is a child in need of care and protection in terms of the Children's Act; does not live at home or in alternative care; or alleged to have committed minor offences to get food or warmth, the inquiry magistrate could possibly stop proceedings and refer the matter to the children's court.

## SOURCES AND READINGS

- Sloth-Nielsen, J 'Paper weight or powertool: the proposed preliminary inquiry procedure' *Article 40*, Vol 6, No 2, 2004, pp 3-5.
- Sloth-Nielsen, J 'Justice officials as role players' in *Child Justice in Africa: A Guide to Good Practice*, 2004, pp 136-142.
- Child Justice Alliance: Fact sheet: 'The Preliminary Inquiry' available at [www.childjustice.org.za](http://www.childjustice.org.za)
- Sloth-Nielsen, J "The business of Child justice" in *Criminal Justice in a New South Africa: Essays in honour of Solly Leeman*, Juta, 2003.



## Diversion

The objects of the Act, as set out in section 2, include the use of diversion as a means to prevent children being exposed to the adverse effects of the formal justice system.

Diversion involves the referral of cases away from the formal criminal court procedures where there exists a suitable amount of evidence to prosecute.

In terms of the Act diversion is achieved in three ways. Firstly, by way of prosecutorial diversion for minor offences committed. Secondly, at the preliminary inquiry, through an order of the inquiry magistrate. Thirdly, during the trial in the child justice court, through an order of the court.

The Act now provides a regulatory framework to ensure consistency of practice and legal certainty with regard to diversion.

### Purposes of diversion

It is important to note that this is the first time diversion has been regulated in the criminal justice system. Therefore the Act seeks to make the purposes of diversion very clear for all role-players. Hence, section 51 states that the objectives of diversion are to:

- Deal with a child outside the criminal justice system in appropriate cases;
- Encourage the child to be accountable for the harm caused by him or her;
- Meet the particular needs of the individual child;
- Promote the reintegration of the child into his or her family and community;
- Provide an opportunity to those affected by the harm to express their views on its impact on them;
- Encourage the rendering to the victim of some symbolic benefit as compensation;
- Promote reconciliation between the child and the person or the community harmed;
- Prevent stigmatising the child and the adverse consequences flowing from being subject to the criminal justice system;
- Reduce the potential for re-offending;
- Prevent the child from having a criminal record; and
- Promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society.

## Diversion options

Diversion options are set out in 2 levels in the Act. These levels are linked to the schedules which contain lists of offences based on the seriousness of the offence.

Broadly speaking, Schedule 1 contains minor offences, Schedule 2 more serious offences and Schedule 3 the most serious offences. There are also maximum time limits for diversion set out in section 53(5) which are linked to both the level of the diversion option and the age of offender.

Level 1 applies to Schedule 1 offences, and if any time period is applicable, may not exceed –

- 12 months in the case of children under the age of 14 years, and
- 24 months for children 14 years of age or older.

Level 2 applies to Schedule 2 and Schedule 3 offences, and if any time period is applicable, may not exceed –

- 24 months in the case of children under the age of 14 years, and
- 48 months for children 14 years of age or older.

Level 1 diversion options range from informal orders to admission to formal interventions and programmes. They consist of:

- An oral or written apology;
- Formal caution, with or without conditions;
- Placement under a supervision and guidance order; reporting order; compulsory school attendance order; family time order; peer association order; good behaviour order; an order prohibiting the child from visiting, frequenting or appearing at specified places;
- Referral to counselling or therapy;
- Compulsory attendance of vocational, educational or therapeutic programmes;
- Symbolic restitution;
- Restitution of a specified object;
- Community service;
- Provision of some service or benefit by the child to a victim; and
- Payment of compensation.

The level 2 diversion options include the possibility of options available under level 1, but then supplement those with more intensive interventions in order to address the seriousness of the offence that the level 2 options cater for. In addition to the level 1 options, further level 2 options include:

- Compulsory attendance of vocational, educational or therapeutic programmes, which may include a period of temporary residence;
- Referral to intensive therapy, which may include a period of temporary residence; and
- Placement under the supervision of a probation officer on conditions which may include the restriction of the child's movement without prior written approval.

Section 53(7) provides for family group conferences, victim offender mediations or other restorative justice processes to be available as diversion programmes and are not restricted to a particular level.

### Selection of diversion options

In terms of section 54, the following factors must be considered when a diversion option is selected:

- The diversion option must be at the appropriate level;
- The child's cultural, religious and linguistic background;
- The child's educational level, cognitive ability and domestic and environmental circumstances;
- The proportionality of the option recommended or selected to the child's circumstances, the nature of the offence and the interests of society; and
- The child's age and developmental needs.

Importantly, section 54(2) provides that the various diversion options may be used in combination with each other. In addition, in terms of section 54(3) an individual diversion option meeting the objectives of diversion may be developed for a particular child. This allows for flexibility and creativity where a particular child's needs are not specifically catered for by the options available.

### Prosecutorial diversion

Section 41 provides that prosecutors have the authority to divert certain matters before the preliminary inquiry. However, this only applies if it involves a Schedule 1 offence and the diversion may only be to a level 1 diversion option. In addition, this may only occur if the prosecutor is satisfied that certain factors are present. These factors include that the child must acknowledge responsibility for the offence; there must be a *prima facie* case (enough evidence to institute a prosecution) against the child; the child must not be unduly influenced; and the child and his or her parent, guardian or appropriate adult must consent to the diversion. Furthermore, if it is a child who is 10 years or older but under the age of 14 years, the prosecutor must be satisfied that criminal capacity can be proved.

In order for this type of diversion to happen, the child must have been assessed. However the prosecutor can dispense with the assessment if it is in the best interests of child and the reasons for dispensing with the assessment must be recorded on the court record by the magistrate in chambers who will make the diversion an order of the court.

If the prosecutor thinks that the child is in need of care and protection, then prosecutorial diversion cannot occur. Instead, the child must be referred to a preliminary inquiry for the inquiry magistrate to consider referring the child to the children's court.

In making a decision to divert a child in terms of section 41, the prosecutor must take into account whether the child has a record of previous diversions.

If the prosecutor is faced with a child where he or she decides not to divert even though it is a Schedule 1 offence, for example, if there are many previous diversions, then he or she must make arrangements for the child to appear at the preliminary inquiry.

Section 42 provides that where a prosecutor has diverted a matter involving a child, then the child and (where possible) his or her parent, guardian or appropriate adult must appear before a magistrate in chambers to make the diversion option an order of the court. It must be noted that this is not a formal court appearance.

### **Diversion at the preliminary inquiry**

Section 52(1) provides that a matter may be considered for diversion at the preliminary inquiry (or later at trial before the child justice court) if:

- The child acknowledges responsibility for the offence;
- The child has not been unduly influenced to acknowledge responsibility;
- There is a *prima facie* case against the child;
- The child has consented to the diversion along with his or her parent, guardian or appropriate adult if available; and
- The prosecutor (in relation to Schedule 1 and 2 offences) or the DPP (in relation to Schedule 3 offences) indicates that the matter may be diverted.

Note: If diversion is recommended by the probation officer in his or her assessment report, then that recommendation is before the court. However it is merely a recommendation. The decision to divert is made by the prosecutor in terms of section 52!

Where the prosecutor or DPP decides to divert a matter, the requirements of section 52(2) and (3) must be met.

In terms of section 52(2), a prosecutor can divert a Schedule 1 or 2 offence if the views of the victim or any other person who has a direct interest in the affairs of the victim are considered (unless not reasonably possible to do so) and he or she has consulted with the police official responsible for the investigation of the matter.

Section 52(3) provides that the relevant DPP who has jurisdiction of the matter is the person who may divert a matter involving a Schedule 3 offence. This illustrates how cautious the legislature was when considering the diversion of a matter where a Schedule 3 offence was committed. However, such matters can only be diverted if exceptional circumstances exist (as determined by the National Prosecuting Authority (NPA)) and the DPP must indicate his decision to divert such matters in writing.

The DPP must also afford the victim the opportunity to express his or her views on whether the matter should be diverted; the nature and content of the diversion option being considered; and the possibility of including in the diversion option a condition relating to compensation or the rendering of a specific benefit or service. The DPP must then consider the views expressed and must consult with the police official responsible for the investigation of the matter.

The Act provides that a matter can be postponed in order to get the necessary written indication from the DPP to divert a matter involving a Schedule 3 offence. Once received, this written indication must be handed to the magistrate and becomes part of the record of the proceedings.

Section 52(5) provides that if a decision to divert has been taken in terms of section 52(2) or (3), the prosecutor must request the magistrate to make an order of diversion in respect of the child.

Finally, if a child is not diverted then he or she must be referred to the child justice court for plea and trial (or possible further diversion).

#### **DUTIES OF THE INQUIRY MAGISTRATE AT THE PRELIMINARY INQUIRY**

- At the start of the preliminary inquiry the magistrate must, in order to consider diversion, ascertain from the child whether or not he or she acknowledges responsibility for the alleged offence.
- If the child does not acknowledge responsibility, no questions regarding the alleged offence may be put to the child and no information regarding a previous diversion or conviction or charge pending against the child may be placed before the preliminary inquiry.
- If the child does acknowledge responsibility, the preliminary inquiry proceeds.
- If the prosecutor indicates that the matter may not be diverted, the inquiry magistrate must:
  - obtain from the prosecutor confirmation that, based on the facts of the case at his or her disposal and after consideration of other relevant factors, there is sufficient evidence or there is reason to believe that a further investigation is likely to result in the necessary evidence being obtained, for the matter to proceed;
  - enter the prosecutor's confirmation on the record of the proceedings; and
  - inform the child that the matter is being referred to the child justice court.
- The inquiry magistrate can also ask for more information and can dispense with the assessment if in the best interests of child.

#### **Postponement of preliminary inquiry in relation to diversion**

These time periods are based on the time periods for assessment and the preliminary inquiry.

As already mentioned the preliminary inquiry must take place within 48 hours after the arrest or within the time period specified on a summons or written notice. However, the preliminary inquiry can be postponed in certain circumstances.

Firstly, it can be postponed for 48 hours if diversion is being considered for a child who is in detention but an assessment is still required. It can also be postponed in order to establish the views of the victim regarding the diversion or to make arrangements in respect of a diversion option.

Secondly, it can be postponed for a further 48 hours in order to increase the prospects of diversion but no longer than this. If after this period, the preliminary inquiry is not concluded, then the preliminary inquiry must be closed and the prosecutor must refer the matter to the child justice court (but the child can still be diverted there if need be).

Finally, an inquiry magistrate may postpone the proceedings of a preliminary inquiry for a period not exceeding 14 days:

- If a probation officer has, in terms of section 40(1)(g), recommended that a further and more detailed assessment of the child be undertaken or makes a recommendation to that effect during the course of the preliminary inquiry and the inquiry magistrate is satisfied that there are reasons justifying such an assessment; or
- In order to obtain the written indication from the DPP having jurisdiction for the diversion of a matter involving a Schedule 3 offence.

### **Diversion at the child justice court**

The Act provides that a matter can be diverted at any time before the conclusion of a case. When a diversion order is made at the child justice court, the proceedings are postponed pending the child's compliance with the diversion order. The court must warn the child that any failure to comply with the diversion order may result in any acknowledgment of responsibility being recorded as an admission in the event of the trial being proceeded with.

After a probation officer has informed the court that a child has successfully complied with the diversion order AND the court is satisfied it has been complied with, then the court must make an order to stop the proceedings.

See the section on the child justice court for a discussion on diversion at the child justice court.

### **Monitoring compliance with a diversion order**

In terms of section 57, when making a diversion order, the magistrate (who in chambers makes the diversion an order of the court), inquiry magistrate or child justice court must designate a probation officer or other suitable person to monitor the child's compliance with the diversion order.

If a child fails to comply with the diversion order, the probation officer or other suitable person must notify the magistrate, inquiry magistrate or child justice court in writing of the failure.

If the child successfully completes the diversion, the probation officer or other suitable person must submit a report to the prosecutor who deals with the matter. This report will have to comply with certain requirements as stipulated in the regulations to the Act.

If the probation officer or other suitable person fails to monitor the diversion then there are specified consequences in terms of section 57(3). These include bringing the matter to the attention of the relevant person in authority or the Director-General: Social Development.

If the child fails to comply with the diversion order, section 58 provides that the magistrate, inquiry magistrate or child justice court can issue a summons or warrant of arrest for the child to bring the child before the court. When the child appears in court the magistrate, inquiry magistrate or child justice court must hold an inquiry into why the child failed to comply with the diversion and determine if it was due to the child's fault.

If it is found that the failure is not due to the child's fault, the magistrate, inquiry magistrate or child justice court may:

- continue with the same diversion option with or without altered conditions;
- add or apply any other diversion option; or
- make an appropriate order which will assist the child and his or her family to comply with the diversion option initially applied, with or without altered or additional conditions.

However, if it is found that the failure is due to the child's fault, the Act provides for the following three options. Firstly, where the matter was diverted by a prosecutor or at a preliminary inquiry, the prosecutor may decide to proceed with the prosecution against the child. Secondly, where the matter was diverted by the child justice court, the presiding officer may record the acknowledgement of responsibility made by the child as an admission referred to in section 220 of the Criminal Procedure Act and proceed with the trial. The third option is that the prosecutor or child justice court must, where the matter does not go to trial, decide on another diversion option which is more onerous than the diversion option originally decided on.

## **Diversion register**

Section 60 provides that the Director-General: Social Development must, in consultation with the Director-General: Justice and Constitutional Development and the National Commissioner of SAPS, establish and maintain a register of children in respect of whom a diversion order is made. This is the first time a formal register of diversions will be kept. One reason is that previous diversions have a bearing on decisions to divert and therefore a credible system for maintaining diversion records is now established.

The register must contain:

- The personal details of each child;
- The details of the offence in relation to which the diversion order was made;
- The diversion option or options as described in the diversion order; and
- Particulars of the child's compliance with the diversion order.

The Act stipulates that there are two purposes for the register. The first is for access by:

- Probation officers when assessing a child;
- Police officials when performing their functions in terms of the Act, for example securing the child's attendance in court and release or detention of the child;
- Presiding officers, members of the NPA or other court officials, when considering diversion at a preliminary inquiry and during proceedings at a child justice court.

The second purpose is to allow for research relating to the effectiveness of diversion and trends relating to diversion.

## Accreditation of diversion programmes and service providers

Section 56 introduces provisions that will provide for the accreditation of diversion programmes and diversion service providers.

The earlier drafts of the Child Justice Bill dealt with the accreditation of the programmes, but in 2008 the Portfolio Committee on Justice and Constitutional Development at parliament added to this section, by setting out a framework for the accreditation of diversion service providers as well.

In terms of the Act, a prosecutor, an inquiry magistrate or a child justice court may only refer a matter for diversion to a diversion programme and diversion service provider that has been accredited in terms of section 56 and has a valid certificate of accreditation.

However, because there will be a delay between the time the Act comes into operation and the accreditation system accrediting programmes and service providers, section 98(2) provides that every diversion programme and diversion service provider that exists at the time that the Act comes into operation (1 April 2010) may continue to operate until it has been informed of the decision in respect of its accreditation application.

The system for accreditation must contain:

- Criteria for the evaluation of diversion programmes to ensure they comply with the minimum standards;
- Criteria for the evaluation of the content to ensure that they reflect a meaningful and adequate response to the harm caused by the offences committed by children, to achieve the objectives of diversion;
- Mechanisms to monitor diversion programmes and service providers regarding their ability to deliver quality services that achieve the objectives of diversion and to promote compliance with orders; and
- Measures for the removal of diversion programmes and service providers from the system.

This system will have to be established by the Minister of Social Development (in consultation with other ministers). The Minister must also, in addition to setting up and establishing the accreditation system, create a policy framework to develop capacity to establish, maintain and develop programmes for diversion AND ensure the availability of resources to implement diversion systems.



## The child justice court

The child justice court is not a separate court. It is any court that deals with a child who is alleged to have committed an offence and applies the provisions of the Child Justice Act to the case regarding the child. Where the child is charged together with an adult, the court must apply the Criminal Procedure Act in dealing with the adult.

The child justice court is the forum that hears the plea and trial of the child. No person can be present during the proceedings in the child justice court unless his or her presence is necessary, in connection with the proceedings, or he or she has been granted permission to attend by the presiding officer. In addition, the identity of the child may not be published.

Section 65 provides that a child must be assisted by his or her parent, guardian or appropriate adult in a child justice court. However if they could not be traced or located, the presiding officer can dispense with this requirement if it is in the best interests of the child, or is not prejudicial to the administration of justice. If, however, they failed to attend after being warned to be there, they can be found guilty of an offence and fined or imprisoned for period of up to 3 months. The parent, guardian or appropriate adult can also apply to be exempted from attending the court proceedings (for instance if they would otherwise lose their job) and if granted, the presiding officer must exempt them in writing. If the child is not assisted by a parent, guardian or appropriate adult, then the presiding officer can, in exceptional circumstances, appoint an independent observer to assist the child.

### Postponements in the child justice court

Section 66 of the Act gives effect to the constitutional right to a speedy trial contained in section 35 of the Constitution, by providing that all trials must be concluded as speedily as possible with as few postponements as necessary.

If a child is detained in **prison**, the matter, prior to the commencement of the trial, cannot be postponed for longer than **14 days at a time**. If the child is detained in a **child and youth care centre**, the matter cannot be postponed for more than **30 days at a time**. Finally, if the child has been released, the matter cannot be postponed for more than **60 days at a time**.

## **Diversion during the trial proceedings at the child justice court**

Even if the child has not been diverted at the preliminary inquiry, he or she can still be diverted during his or her trial at the child justice court. If the child is diverted, the proceedings at the child justice court are postponed to allow for the child to comply with the diversion order. If the child successfully completes the diversion, and the court is satisfied that the diversion has indeed been successfully complied with, the proceedings before the child justice court may be stopped. This means that the child is not found guilty and the case cannot be re-instated in court.

If the child does not successfully comply with the diversion order, the case continues in the child justice court and any acknowledgement of responsibility may be recorded as an admission for the purposes of the trial.

### **DUTIES OF THE PARENT, GUARDIAN OR APPROPRIATE ADULT**

- Appear before the child justice court after being warned to do so, unless exempted.
- Assist the child during plea and trial proceedings before the child justice court.

### **DUTIES OF THE PRESIDING OFFICER AT THE CHILD JUSTICE COURT**

- Inform the child of the nature of the allegations against him or her.
- Inform the child of his or her rights.
- Explain to the child the further procedures to be followed.
- Ensure the best interests of the child are upheld including ensuring the proceedings are fair, not unduly hostile towards the child and are appropriate to the age and understanding of the child.
- If the child is a child in need of care and protection in terms of the Children's Act 38 of 2005, possibly refer the matter to the children's court.

Note: Reference is made to presiding officer in relation to the child justice court instead of a magistrate. This is because a High Court can sit as a child justice court and then the matter is heard by a judge. The term "presiding officer" is defined as "an inquiry magistrate or a judicial officer presiding at a child justice court". Hence the term includes both magistrates and judges.



## Sentencing

The legal principles of sentencing children are closely linked to those in relation to pre-trial detention. They relate to article 37 of the UNCRC and section 28(1)(g) of the Constitution, namely, that children should be detained only as a measure of last resort and for the shortest appropriate period of time. In addition they should be treated in a manner and be kept in conditions that take into account the child's age.

The Act provides that a court must, after convicting a child, pass sentence in accordance with the Act. The types of sentences provided for in the Act are divided into 2 basic categories - custodial and non-custodial sentences. The range of sentences includes:

- Community-based sentences, including the diversion options;
- Restorative justice sentences, such as family group conferences and victim-offender mediation, which result in a recommendation which may be confirmed or altered by the court;
- Correctional supervision as provided for in the Criminal Procedure Act 51 of 1977;
- Suspended sentences, with or without conditions, for a period not exceeding 5 years;
- Penalties *in lieu* of a fine or imprisonment, such as symbolic restitution or the payment of compensation; and
- Custodial sentences to a child and youth care centre or prison.

These are all similar to those sentences already available in South African law but are now positioned in a legal framework specifically for children which promotes alternative sentences.

### Objectives of sentencing in the Act

Section 69(1) of the Act sets out the objectives of sentencing which are to:

- Encourage the child to understand the implications of his or her actions and be accountable for the harm caused;
- Promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society;
- Promote the reintegration of the child into the family and community;

- Ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and
- Use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.

These objectives go further than the constitutional and international law requirements regarding detention, but are closely aligned with the objectives of the Act itself.

### **Probation officer's pre-sentence reports**

The courts have consistently held that pre-sentence reports by probation officers are necessary for sentencing purposes. The Act now confirms this by requiring, in section 71(1)(a), that a child justice court must request a pre-sentence report from the probation officer before imposing a sentence. Should the court decide to impose a sentence different from the one recommended in the pre-sentence report, the Act provides that the reasons for doing so must be recorded. The court can dispense with a pre-sentence report if the child is convicted of a minor offence referred to in Schedule 1, or the delay in obtaining one would cause undue hardship or prejudice the child.

However, if the child is to be sentenced to a child and youth care centre or prison, the case cannot be finalised without a pre-sentence report.

### **Correctional supervision**

Correctional supervision in terms of section 276(1)(h) or (i) of the Criminal Procedure Act may be imposed on a child of 14 years of age or older.

However, only correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act may be imposed on a child younger than 14 years of age. The reason for this is that correctional supervision in terms of section 276(1)(i) involves a period of imprisonment, and children under 14 years of age cannot be sentenced to prison.

### **Sentence to a child and youth care centre**

In terms of section 69(3), when considering the imposition of a sentence involving compulsory residence in a child and youth care centre, a child justice court must consider the following:

- Whether the offence is of such a serious nature that it indicates that the child has a tendency towards harmful activities;
- Whether the harm caused by the offence indicates that a residential sentence is appropriate;
- The extent to which the harm caused by the offence can be apportioned to the culpability of the child in causing or risking the harm;
- Whether the child is in need of a particular service provided at a child and youth care centre;
- The seriousness of the offence, with regard to the amount of harm done or risked through the offence and the culpability of the child in causing or risking the harm;
- The protection of the community;

- The severity of the impact of the offence on the victim;
- The previous failure of the child to respond to non-residential alternatives, if applicable; and
- The desirability of keeping the child out of prison.

The Act has in this way, created a sentencing framework for children. The above factors must be taken into account and therefore serve to guide the presiding officer when he or she considers imposing a sentence to a child and youth care centre. Although not specifically stated in the Act, these factors would also guide the probation officer when compiling sentencing recommendations for the pre-sentence report.

In terms of section 76, there are 2 types of sentences to a child and youth care centre. The first involves the sentencing of a child to compulsory residence in a child and youth care centre which provides a programme referred to in section 191(2)(j) of the Children's Act. A sentence like this may be imposed for a period not exceeding 5 years or for a period which may not exceed the date on which the child in question turns 21 years of age, whichever date is the earliest. This is essentially the same as the old sentence to a reform school.

The second is completely new and found in section 76(3) of the Act. It occurs when a child justice court that convicts a child of an offence referred to in Schedule 3 and which, if committed by an adult, would have justified a term of imprisonment exceeding 10 years. In such cases the court may, **if substantial and compelling reasons exist**, in addition to a child and youth care sentence, sentence the child to a period of imprisonment which is to be served after completion of the period of stay in the child and youth care centre. After completion of the time at the child and youth care centre, the child must be brought before the child justice court and the manager of the child and youth care centre must submit a report to the court on the child's progress regarding whether the objectives of sentencing have been achieved and the possibility of the child's reintegration into society.

The court has to then decide, if it is in the interests of justice, either to:

- Confirm the sentence and period of imprisonment originally imposed, upon which the child must immediately be transferred from the child and youth care centre to the specified prison;
- Substitute that sentence with any other sentence that the court considers to be appropriate in the circumstances; or
- Order the release of the child, with or without conditions.

## Sentence to prison

A sentence of imprisonment may only be imposed on a child who is 14 years and older at the time of being sentenced. Section 69(4) of the Act provides that when considering the imposition of a sentence involving imprisonment, the child justice court must take the following factors into account:

- The seriousness of the offence, with regard to the amount of harm done or risked through the offence and the culpability of the child in causing or risking the harm;
- The protection of the community;
- The severity of the impact of the offence on the victim;

- The previous failure of the child to respond to non-residential alternatives, if applicable; and
- The desirability of keeping the child out of prison.

Section 77(1)(a) provides that a child justice court may NOT impose a sentence of imprisonment on a child who is **under the age of 14 years at the time of being sentenced for the offence**.

Furthermore, when the court sentences a child who is **14 years or older at the time of being sentenced** for the offence, the court must only do so as a measure of last resort and for the shortest appropriate period of time. However, if a child is 14 years of age or older, section 77(3) states that the child can only be sentenced to imprisonment if the child is convicted of an offence referred to in:

- Schedule 3;
- Schedule 2, if substantial and compelling reasons exist for imposing a sentence of imprisonment; or
- Schedule 1, if the child has a record of relevant previous convictions and substantial and compelling reasons exist for imposing a sentence of imprisonment.

These children may be sentenced to imprisonment for a period not exceeding 25 years.

In terms of section 77(2) of the Act, minimum sentences apply to children aged 16 years or older. However, it should be noted that on 15 July 2009, the Constitutional Court in *Centre for Child Law v Minister of Justice and Constitutional Development and Others* (CCT 98/08) 2009 handed down a judgment declaring that minimum sentences are invalid for children aged 16 and 17 years old.

It must be noted that when a child is sentenced to direct imprisonment, the child justice court must subtract the number of days that a child may have spent awaiting trial in a child and youth care centre or prison (if any) from the term of imprisonment imposed.

#### **DUTY OF THE PROBATION OFFICER**

- Complete a pre-sentence report as soon as possible but not later than 6 weeks after it was requested.

#### **DUTY OF THE PROSECUTOR**

- Possibly consider the views of the victim and the impact the crime had on the victim and furnish a victim impact statement to the court.

## DUTIES OF THE PRESIDING OFFICER

- Request a pre-sentence report from a probation officer before imposing a sentence.
- When imposing a community-based sentence, fine or restorative justice sentence, request the probation officer to monitor the child's compliance and provide updates to the court and warn the child that failure to comply will result in him or her being brought back to court for an inquiry into the failure to comply.
- Before imposing a fine as a sentence, inquire into the ability of the child or his or her parents, an appropriate adult or a guardian to pay the fine, whether in full or in installments and consider whether the failure to pay the fine may cause the child to be imprisoned. The original presiding officer that imposed the sentences must hold the inquiry and if it is found that the child failed to comply with the sentence the court can confirm, amend or substitute the sentence with another one.

## SOURCES AND READINGS

- *S v J and Others* 2000 (2) SACR 310 (C).
- *S v Z en Vier Ander Sake* 1999 (1) SACR 427 (E).
- *S v Kwalase* 2000 (2) SACR135 (C).
- *DPP KwaZulu Natal v P* 2006(1) SACR 243 (SCA).
- *Brandt v S* [2005] 2 All SA 1 (SCA).
- *Centre for Child Law v Minister of Justice and Constitutional Development and Others* (CCT 98/08) 2009.



## Legal representation

Chapter 11 of the Act seeks to give effect to section 35 of the Constitution which accords certain rights to detained persons and persons accused of committing crimes. The relevant sections are section 35(2) and (3). Section 35(2) states that everyone who is detained, including every sentenced prisoner, has the right to “have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly”. Likewise section 35(3) accords every accused person the right to a fair trial which includes the right to “choose and be represented by a legal practitioner and to be informed of this right promptly” and to “have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly”.

Section 80(1) of the Act sets out the requirements that a legal representative must comply with in order to act on behalf of a child in criminal proceedings. These include:

- Allowing the child to give independent instructions;
- Explaining the child’s rights and responsibilities under any section of the Act;
- Promoting diversion where appropriate but not unduly influencing the child to acknowledge responsibility for the offence;
- Ensuring that all the proceedings under the Act are concluded without delay and dealt with in a manner where the best interests of the child are of paramount importance; and
- Upholding the highest standards of ethical behaviour and professional conduct.

However, because of concern regarding the quality of legal representation for children and to ensure effective representation, the Act, in section 80(2) also provides that a court can order remedial actions or sanctions if a legal representative fails to act in accordance with the requirements listed in section 80(1). This order must also be sent to the relevant controlling body of the legal representative, which is either the Law Society, the Bar Association or the Legal Aid Board (if the legal representative works for the Board).

In giving effect to section 35 of the Constitution, section 82 provides that where a child appears before a child justice court in terms of Chapter 9 of the Act, and is not represented by a legal representative of his or her own choice (at his or her own expense), the presiding officer must refer the child to the Legal Aid Board

for the matter to be evaluated by the Board. This means that the child should receive state funded legal representation, provided he or she meets the criteria for legal aid set by the Board.

In addition, because of the fact that people are entitled to waive their rights, section 83 provides that a child has the right to waive legal representation in certain instances but not for those which the State must provide legal representation at its own expense. However, the Act does recognise that a child may be insistent that he or she does not want legal representation. Therefore, the Act provides that if the child persists in declining representation, the court may appoint a legal representative to assist the child. In this instance the legal representative does not act on behalf of the child or take instructions from the child, but rather addresses the court on the merits of the case, notes an appeal (if necessary), cross-examines witnesses and generally ensures procedural fairness of the conduct of the proceedings. The legal representative merely provides technical expertise to the child, but the child still represents his or her own interests.

### **DUTIES OF THE LEGAL REPRESENTATIVE**

- Allow the child, as far as is reasonably possible, to give independent instructions concerning the case.
- Explain to the child, his or her rights and duties in relation to any proceedings under the Act in a manner appropriate to the age and intellectual development of the child.
- Promote diversion, where appropriate, but may not unduly influence the child to acknowledge responsibility.
- Ensure that the assessment, preliminary inquiry, trial or any other proceedings in which the child is involved, are concluded without delay and deal with the matter in a way that ensures that the best interests of the child are at all times of paramount importance.
- Uphold the highest standards of ethical behaviour and professional conduct.

### **DUTIES OF THE PRESIDING OFFICER**

- If a child is not represented by a legal representative of his or her own choice, at his or her own expense, the presiding officer must refer the child to the Legal Aid Board.
- If a child does not wish to have a legal representative or declines to give instructions to an appointed legal representative, the court must enter this on the record of the proceedings, and may appoint a legal representative to assist the child.
- If a legal representative acts contrary to the duties set out in section 80(1), the presiding officer must record his or her displeasure by way of an order which includes an appropriate remedial action or sanction and refer the matter to the appropriate professional body or Legal Aid Board.

### **SOURCES AND READINGS**

- Redpath, J and Sloth-Nielsen, J 'Realising children's rights to legal representation in South Africa: emerging good practice', African Child Policy Forum, 2007.
- Child Justice Alliance: Fact Sheet: '*Legal representation*' available at [www.childjustice.org.za](http://www.childjustice.org.za)



## Expungement of records

Chapter 13 of the Act deals with setting a time period after which criminal records can be expunged or deleted or 'done away with'. The Act determines the expungement of criminal records based on the nature of the offence that the child was convicted for. In this regard, it must be noted that only criminal records for Schedule 1 and 2 offences may be expunged. Hence, at the outset, it is important to note that criminal records for offences under Schedule 3 to the Act do not qualify for expungement. The Act also provides for the expungement of records of diversion orders and sentences under certain conditions.

### Process regarding the expungement of records

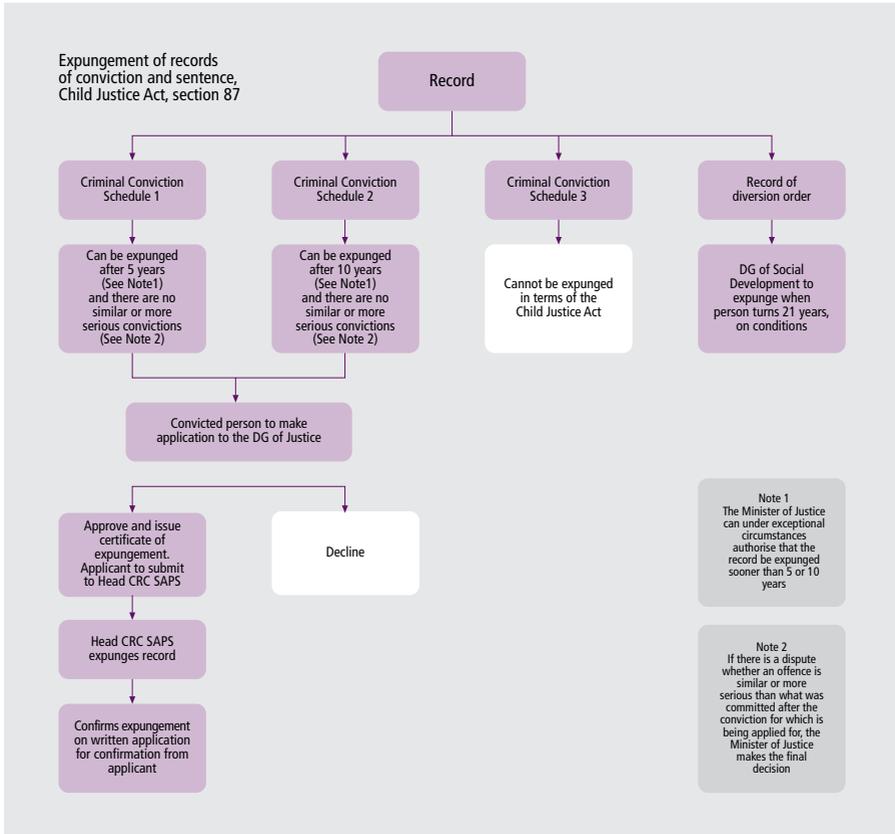
Where a court has convicted a child of an offence listed in Schedules 1 or 2, the conviction and sentence fall away as a previous conviction and the criminal record of the child must, subject to certain conditions, be expunged. Provided that the child is not convicted of a similar or more serious offence, the record can be expunged after 5 years has elapsed after the date of conviction in the case of Schedule 1 offences, or after 10 years in the case of Schedule 2 offences.

If these requirements are met (namely sufficient time has lapsed and no further convictions for similar or more serious offences), the first step would be to make an application to the Director-General: Justice and Constitutional Development to have the record expunged. If the Director-General is satisfied that the child meets the requirements, he or she must issue a certificate of expungement to the applicant. If there is a dispute about whether a subsequent offence (during the 5 or 10 year period) is 'similar or more serious', the Minister of Justice and Constitutional Development will have the final say. The same minister may also, under exceptional circumstances, issue a certificate of expungement prior to the period of 5 or 10 years lapsing, as applicable, and provided the child has complied with the other requirements. The legislation does not specify what constitutes such exceptional circumstances.

After the Director-General or the Minister of Justice has issued a certificate of expungement to the applicant, the applicant must then submit this certificate to the head of the Criminal Record Centre (CRC) at SAPS. The head of the CRC, or duly authorised person, will then accordingly expunge the record of conviction and sentence. At the written request of the applicant, the head of the CRC

must confirm that the record of conviction and sentence has been expunged. If a record of a child is expunged without due authorisation or in an intentionally or grossly negligent manner, the responsible official is liable to a fine and/or imprisonment of up to ten years.

The record of a diversion order is automatically expunged by the Director-General: Social Development when the child concerned reaches the age of 21 years, unless the child has been convicted of any other offence before that date or has failed to comply with the diversion order in question.



Source: Muntingh, L 'The expungement of criminal records under the Child Justice Bill', *Article 40*, Vol 10, No. 3, December 2008.



## General provisions

### Children used by adults to commit crime (CUBAC)

Children used by adults to commit crime (CUBAC) is dealt with in both the Children's Act and the Child Justice Act. Sections 141 and 305 of the Children's Amendment Act of 2007 makes it an offence to use children in the commission of offences listed in the Criminal Procedure Act. Recognising this, and the vulnerability of children who have been used in the commission of offences, the Child Justice Act also makes provision for children who have been victims of this type of criminal activity.

As mentioned, section 35 provides that one of the purposes of the assessment procedure is to determine whether the child has been used by an adult to commit an offence. Section 92 of the Act provides that if it comes to the attention of any court official or probation officer that a child has been used by an adult to commit a crime, then the adult must be reported to the SAPS for a consideration of a prosecution against the adult, as provided for under the Children's Act. In addition, the court official or probation officer must take into account the adult's involvement when determining the treatment of the child in the child justice system.

### One - Stop Child Justice Centres

Section 89 of the Act provides for the establishment of One-Stop Child Justice Centres. These are centres that will house centralised services for children in conflict with the law including a police station, assessment services, legal aid offices, offices for diversion service providers and a child justice court. It may also have offices for family finders and a children's court. However, their establishment is left at the discretion of the Minister of Justice, in consultation with the Ministers for Social Development, Safety and Security (now Police) and Correctional Services.

The objective of a One-Stop Child Justice Centre is to promote co-operation between governmental departments, as well as between government departments and the non-governmental sector and civil society, to ensure an integrated and holistic approach in the implementation of the Act.

On account of the fact that some One-Stop Child Justice Centres may have to accommodate children from more than one magisterial district, the Minister of Justice may, by notice in the Government Gazette define the area of jurisdiction

of a One-Stop Child Justice Centre. This may consist of any number of districts, sub-districts or any other magisterial areas of jurisdiction.

### **Intersectoral Committee for Child Justice**

Section 94 of the Act establishes the Intersectoral Committee for Child Justice (ISCCJ). This committee must consist of representatives from the following departments:

- Justice and Constitutional Development, who is the chairperson of the Committee;
- National Directorate of Public Prosecutions;
- South African Police Service;
- Correctional Services;
- Social Development;
- Education; and
- Health.

In addition, the ISCCJ may invite:

- Representatives from the non-governmental sector and civil society to its meetings with the view to fostering co-operation between government and civil society in the implementation of this Act; and
- Persons to its meetings, when necessary, for technical assistance, support or advice.

In terms of section 96 of the Act, the ISCCJ is responsible for developing a draft national policy framework, which must include guidelines for:

- The implementation of the priorities and strategies contained in the national policy framework;
- Measuring progress on the achievement of the national policy framework objectives;
- Ensuring that the different organs of state comply with the primary and supporting roles and responsibilities allocated to them in terms of the national policy framework and this Act;
- Monitoring the implementation of the national policy framework and this Act; and
- 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;
  - to provide quantitative and qualitative data relating to, among others, arrest or methods of securing attendance at criminal proceedings, assessment, preliminary inquiries, diversion, children awaiting trial and sentencing.

The ISCCJ is the national monitoring body responsible for child justice.



## Useful websites

For further information on the Act, recent developments in the child justice arena and the work of the Child Justice Alliance, please visit [www.childjustice.org.za](http://www.childjustice.org.za)

Other useful website include:

### South African websites

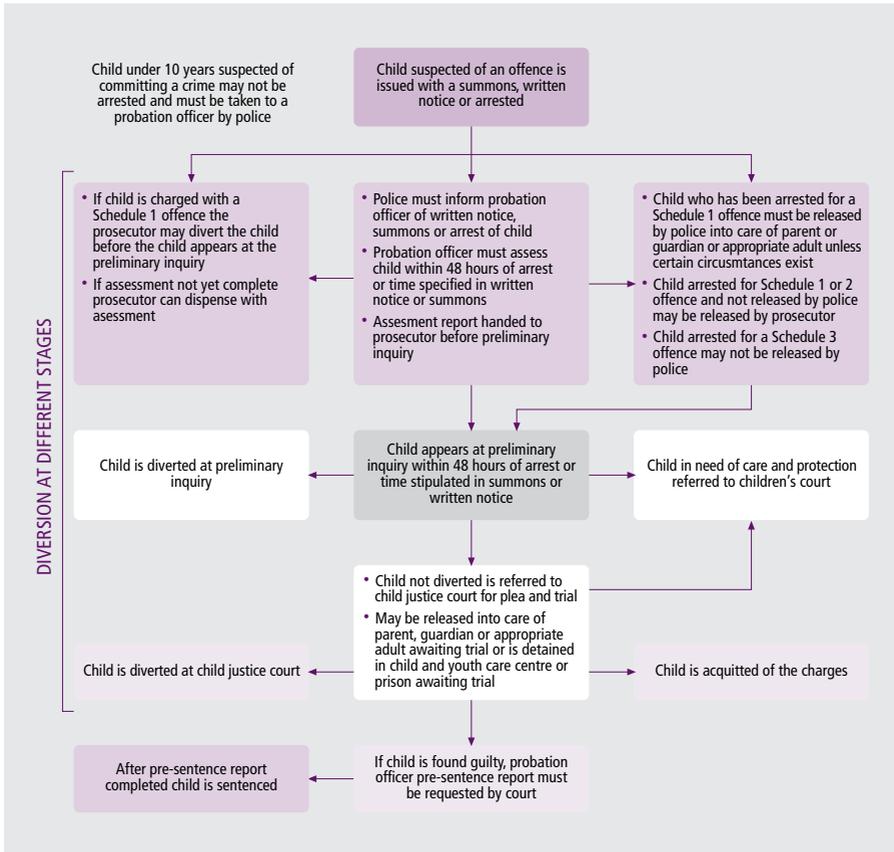
- [www.rjc.co.za](http://www.rjc.co.za)
- [www.khulisaservices.co.za](http://www.khulisaservices.co.za)
- [www.nicro.org.za](http://www.nicro.org.za)
- [www.communitylawcentre.org.za](http://www.communitylawcentre.org.za)
- [www.uct.ac.za/depts/criminology](http://www.uct.ac.za/depts/criminology)
- [www.osf.org.za](http://www.osf.org.za)
- [www.csvr.org.za](http://www.csvr.org.za)
- [www.issafrica.org](http://www.issafrica.org)
- [www.childlawsa.com](http://www.childlawsa.com)

### International websites

- [www.ohchr.org](http://www.ohchr.org)
- [www.unodc.org](http://www.unodc.org)
- [www.penalreform.org](http://www.penalreform.org)



# Appendix A: Map illustrating a child's passage through the criminal justice system





## Appendix B: Schedule of offences

### Schedule 1

- Theft (incl. receiving stolen goods) below value of R2 500.
- Fraud, extortion, forgery and uttering or offence referred to in the Prevention and Combating of Corrupt Activities Act 12 of 2004 below value of R1 500.
- Malicious injury to property with value below R1 500.
- Common assault.
- Perjury.
- Contempt of court.
- Blasphemy.
- Compounding.
- *Crimen iniuria*.
- Defamation.
- Trespass.
- Public indecency.
- Engaging sexual services of persons 18 years or older [section 11 of the Sexual Offences Act 32 of 2007].
- Bestiality [section 13 of the Sexual Offences Act 32 of 2007].
- Acts of consensual sexual penetration with certain children (statutory rape) and acts of consensual sexual violation with certain children (statutory sexual assault) [sections 15 and 16 of the Sexual Offences Act 32 of 2007].
- Possession of illicit dependence-producing drugs below value of R500, but excluding any statutory offence where the maximum penalty determined by that statute is imprisonment for a period of no longer than three months or a fine for that period, calculated in accordance with the Adjustment of Fines Act 101 of 1991.
- Any other statutory offence where the maximum penalty determined by that statute is imprisonment for a period of no longer than three months or a fine for that period, calculated in accordance with the Adjustment of Fines Act 101 of 1991.
- Any conspiracy, incitement or attempt to commit any offence referred to in Schedule 1.

### Schedule 2

- Theft (incl. receiving stolen goods) above value of R2 500.
- Fraud, extortion, forgery and uttering or offence referred to in the Prevention and Combating of Corrupt Activities Act 12 of 2004 above value of R1 500.
- Robbery, other than robbery with aggravating circumstances.
- Malicious injury to property above R1 500.
- Assault, involving the infliction of grievous bodily harm.
- Public violence.
- Culpable homicide.
- Arson.
- Housebreaking (common law or a statutory provision, with the intent to commit an offence).
- Administering poisonous or noxious substance.
- The abandonment of an infant with the intention to kill it (*Crimen expositio* infantis).
- Abduction.
- Sexual assault, compelled sexual assault or compelled self-sexual assault [sections 5, 6 and 7 of the Sexual Offences Act 32 of 2007 and grievous bodily harm was not inflicted].
- Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation [section 8 of the Sexual Offences Act 32 of 2007].
- Exposure or display of or causing exposure or display of child pornography or pornography [sections 10 or 19 of the Sexual Offences Act 32 of 2007].

## Schedule 2 (continued)

- Incest and sexual acts with a corpse [sections 12 and 14 of the Sexual Offences Act 32 of 2007].
- Exposure or display of or causing exposure or display of genital organs, anus or female breasts to any person ("flashing") [sections 9 or 22 of the Sexual Offences Act 32 of 2007].
- Violating a dead body or grave.
- Defeating or obstructing the course of justice.
- Any offence referred to in section 1 or 1A of the Intimidation Act 72 of 1982.
- Any offence relating to criminal gang activities referred to in Chapter 4 of the Prevention of Organised Crime Act 121 of 1998.
- Any contravention of section 2 of the Animals Protection Act 71 of 1962.
- Possession of illicit dependence-producing drugs above the value of R500 but below R5 000, but excluding any statutory offence where the maximum penalty determined by that statute is imprisonment for a period exceeding three months but below five years or a fine for that period, calculated in accordance with the Adjustment of Fines Act 101 of 1991.
- Any other statutory offence where the maximum penalty determined by that statute is imprisonment for a period exceeding three months but less than five years or a fine for that period, calculated in accordance with the Adjustment of Fines Act 101 of 1991.
- Any conspiracy, incitement or attempt to commit any offence referred to in Schedule 2.

## Schedule 3

- Treason.
- Sedition.
- Murder.
- Extortion, where there are aggravating circumstances present.
- Kidnapping.
- Robbery, where there are aggravating circumstances or it involves the taking of a motor vehicle.
- Rape or compelled rape [sections 3 and 4 of the Sexual Offences Act 32 of 2007].
- Sexual assault, compelled sexual assault or compelled self-sexual assault [sections 5, 6 and 7 of the Sexual Offences Act 32 of 2007] involving the infliction of grievous bodily harm.
- Sexual exploitation of children, sexual grooming of children and using children for or benefiting from child pornography [sections 17, 18 and 20 of the Sexual Offences Act 32 of 2007].
- Exposure or display of or causing exposure or display of child pornography or pornography to children [section 19 of the Sexual Offences Act 32 of 2007], if that exposure or display is intended to facilitate or promote
  - the sexual exploitation or sexual grooming of a child [sections 17 or 18 of the Sexual Offences Act 32 of 2007].
  - the use of a child for purposes of child pornography or in order to benefit in any manner from child pornography [section 20 of the Sexual Offences Act 32 of 2007].
- Compelling or causing children to witness sexual offences, sexual acts or self-masturbation [section 21 of the Sexual Offences Act 32 of 2007].
- Sexual exploitation of persons who are mentally disabled, sexual grooming of persons who are mentally disabled, exposure or display of or causing exposure or display of child pornography or pornography to persons who are mentally disabled or using persons who are mentally disabled for pornographic purposes or benefiting therefrom [sections 23, 24, 25, and 26 of the Sexual Offences Act 32 of 2007].
- Trafficking in persons for sexual purposes referred to in section 71(1) and involvement in trafficking in persons for sexual purposes referred to in section 71(2) of Sexual Offences Act 32 of 2007.
- Any offence referred to in Parts 1, 2 and 3 of Chapter 2 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004.
- Any offence relating to racketeering activities referred to in Chapter 2; or the proceeds of unlawful activities referred to in Chapter 3, of the Prevention of Organised Crime Act 121 of 1998.
- The crimes of genocide, crimes against humanity and war crimes referred to in the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 .
- Any offence under any law relating to the dealing in or smuggling of ammunition, firearms, explosives or armament; and the possession of firearms, explosives or armament.
- Any offence referred to in section 13(f) of the Drugs and Drug Trafficking Act 140 of 1992 .
- Any offence of a serious nature if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise, acting in the execution or furtherance of a common purpose or conspiracy.
- Any offence under any law relating to the illicit possession of dependence-producing drugs, other than an offence referred to in the following item of the Schedule, where the quantity involved exceeds R5 000 in value.
- Any other statutory offence where the maximum penalty determined by that statute is imprisonment for a period exceeding five years or a fine for that period, calculated in accordance with the Adjustment of Fines Act 101 of 1991.
- Any conspiracy, incitement or attempt to commit any offence referred to in Schedule 3.