

## LIFTING THE MORATORIUM ON SPECIALISED COURTS: IMPLICATIONS FOR CHILDREN AND THE CRIMINAL JUSTICE SYSTEM

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### **The advent of democracy and children's rights**

The advent of democracy in April 1994 engendered a strong sense of optimism for many child rights activists in South Africa, who, especially in the preceding two decades of services to children, had experienced ever increasing racial separation and segregation of services to children in education, health and welfare, accompanied by different resourcing for different racial groups and therefore different quantities and qualities of service provision to children in need.

Prior to 1994, some service providers who insisted on continued integration of services, were dealt with punitively, via the withdrawal or threat of withdrawal of funding and subsidies, which challenged service delivery to all children dealt with by that organisation, no matter what their race. (McKay, P)<sup>i</sup>

The signing (November 1993) and ratification (16<sup>th</sup> June 1995) of the United Nations Convention on the Rights of the Child<sup>ii</sup> by President Nelson Mandela, the signing and ratification of the African Charter on the Rights and Welfare of the Child<sup>iii</sup> in October 1997 and the need to ensure that every South African Child is treated equally in society and afforded equal opportunities for optimal development according to the provisions of the Bill of Human Rights in the National Constitution of South Africa, necessitated the reform of domestic legislation pertaining to children. This included reform of policy and legislation relating to children and their rights, protection and position in the civil and criminal courts.

### **Child witnesses and children in conflict with the law – does childhood justify specialised courts for children?**

Court is an adult construct and an adult environment that deals most frequently with adult issues. Children who appear in court are often intimidated by the environment itself, processes that are “geared” for adult issues and difficult to understand, and peopled by adults who are sometimes wearing “strange” clothes, and speaking a language that may be difficult to understand!

Research both nationally and internationally has highlighted the challenges faced by children when they enter the criminal and civil justice systems – particularly when they have to appear in court. Victimized and abused children have often noted that testifying in court can be difficult and even traumatic. As one child stated in a research project on children's experiences as witnesses in court in South Africa “going to court was worse than the abuse”<sup>iv</sup>.

Resolution 2005/20 of the United Nations General Assembly entitled “Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime” noted that children who are victims and witnesses are “particularly vulnerable and need special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent further hardship and trauma that may result from their participation in the criminal justice process”.

Although this statement relates to criminal court processes, Childline's experience with children who are party to Children's Court and High Court divorce, custody and access matters indicates that these processes are also potentially frightening and traumatic. In fact, as children, particularly younger children, seldom understand the differences between criminal and civil court proceedings, the impact on the child is similar for both court processes.

In noting the position of the child victim and child witness in the criminal process, Judge Bertelsman noted<sup>v</sup> "children are vulnerable, the younger the more so. This is especially true when the child is the complainant or witness in a criminal trial. Not only have our courts recognised this fact as empirically established, it is also supported by a veritable welter of scientific research and study..... At the very least the criminal procedure and the courts should administer the criminal justice system in such a fashion that children who are caught up in its workings are protected from further trauma and are treated with proper respect for their dignity and their unique status as younger human beings. It is a sad fact there there is much that is left to be desired in the present state of our criminal justice system and that in many instances, neither the courts nor their supporting institutions succeed in giving due recognition to the paramountcy of children's interests."

It is also relevant to note that children in conflict with the law may also feel intimidated, insecure and even traumatised by appearing in court as alleged offenders, or even the possibility of appearing in court.

### **What is a specialised court?**

A specialised court is one which has been adapted to a specific need, either the needs of one or both of the parties concerned in matters that come before the court or because of the type of matter that the court deals with such as its complexity, sensitivity or specific nature. Adaptation may relate to

- The physical environment of the court
- The specific nature of the matters dealt with by the court
- The need for specialised training of adjudicators, prosecutors and legal counsel
- Special characteristics of one or other of the parties involved in the matters before the Court, for example vulnerability
- The development of legislation that enables a procedures specific to the matters that court deals with or the specific characteristics of those who may require the intervention of the court.

Examples of courts with some aspect of specialisation include Divorce Courts, Sexual Offences Courts, Maintenance Courts, Family Violence Courts, Child Justice Courts, and Children's Courts. Many of the specialised courts in existence in the South African Justice System deal with matters that specifically relate to children and their well-being.

**Specialised courts have the potential to reduce the stress and trauma of child witnesses, child victims and children in conflict with the law, and to address the special needs of children and families.**

## **South Africa's Commitment to International Conventions and Treaties with reference to children in court**

When considering the issue of special courts for the adjudication of matters involving children, it is relevant to consider South Africa's commitment to those international treaties that have contributed to the shaping of the domestic legislation that determines the structure, functioning and processes in the courts in which children's matters are adjudicated.

### **The United Nations Convention on the Rights of the Child (UNCRC):**

#### **The Care and Protection of Children**

In relation to the care and protection of children from abuse and neglect, Article 19 of the Convention states that<sup>vi</sup>

19.1. State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents(s), legal guardians or any other person who has the care of the child.

19.2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to create the necessary support for the child, and for those who have care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow up of instances of child maltreatment described heretofore, and as appropriate for judicial involvement.

In order to assist governments in complying with the UNCRC, the Committee on the Rights of the Child has supported the development of several "General Comments" which unpack the meaning and give advice on the implementation of specific articles in the Convention.

General Comment 13 relates specifically to an explanation of and recommendations relating to the implementation of Article 19 as cited above and states with regard to judicial involvement:

"(a) At all times and in all cases, due process must be respected. In particular, the protection and the further development of the child and his or her best interests (and the best interests of other children where there is a risk of a perpetrator reoffending) must form the primary purpose of decision-making, with regard given to the least intrusive intervention as warranted by the circumstances. Furthermore, the Committee recommends the respect of the following guarantees: (a) Children and their parents should be promptly and adequately informed by the justice system or other competent authorities (such as the police, immigration, or educational, social or health-care services);

(b) Child victims of violence should be treated in a child-friendly and sensitive manner throughout the justice process, taking into account their personal situation, needs, age, gender, disability and level of maturity and fully respecting their physical, mental and moral integrity;

(c) Judicial involvement should be preventive where possible, proactively encouraging positive behaviour as well as prohibiting negative

behaviour. Judicial involvement should be an element of a coordinated and integrated approach across sectors, supporting and facilitating other professionals to work with children, caregivers, families and communities, and facilitating access to the full range of child caregiving and protection services available;

(d) In all proceedings involving children victims of violence, the celerity principle must be applied, while respecting the rule of law.

Judicial involvement may consist of the following:

(a) Differentiated and mediated responses such as family group conferencing, alternative dispute-resolution mechanisms, restorative justice and kith and kin agreements (where processes are human-rights respecting, accountable and managed by trained facilitators);

(b) When appropriate, juvenile or family specialized courts and criminal procedures should be established for child victims of violence. This could include the establishment of specialized units within the police, the judiciary and the prosecutor's office with the possibility of providing accommodations in the judicial process to ensure equal and fair participation of children with disabilities. All professionals working with and for children and involved in such cases should receive specific interdisciplinary training on the rights and needs of children of different age groups, as well as on proceedings that are adapted to them. While implementing a multidisciplinary approach, professional rules on confidentiality should be respected. The decision to separate a child from his or her parent(s) or family environment must be made only when it is in the child's best interests (art. 9 and art. 20, para. 1). However, in cases of violence where perpetrators are primary caregivers, within the child rights safeguards listed above, and depending on the severity and other factors, intervention measures focusing on social and educational treatment and a restorative approach are often preferable to a purely punitive judicial involvement. Effective remedies should be available, including compensation to victims and access to redress mechanisms and appeal or independent complaint mechanisms."

It is clear from this lengthy quotation that the committee envisages a specialised court system – that not only consists of specialised processes, and specialised ways of approaching children's care and protection proceedings, but also includes specially trained personnel within that specialised court system, including the judicial officer.

### **Children in Conflict with the Law**

The United Nations Convention on the Rights of the Child has several articles and sub-articles that relate to the protection of the rights, care and protection of children in conflict with the law.

Article 37 notes the need of alleged and convicted child offenders to be treated "with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of his or her age."

Taking account the last phrase, it appears that the intention is that judicial officers will have some knowledge of the developmental needs of children, and that court structures and processes should be adapted to take these into account.

Article 37(d) of the UNCRC states that “every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.”

Further, Subsection 40 (3) states that “State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions **specifically applicable** (author’s emphasis) to children alleged as, accused of, or recognised as having infringed the penal law.” Again the Convention reinforces the need for specialisation when dealing with children’s issues during judicial processes.

The African Charter on the Rights and Welfare of the African Child, although it does not specify specialised courts for children in conflict with the law, does state in Article 17 that “every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child’s sense of dignity and worth and which reinforces the child’s respect for human rights and fundamental freedoms of others.”

The Convention, General Comment 13 and African Charter all focus on the need for specialised courts and processes that can accommodate the special needs of children.

### **Family Courts**

It is of note that during the first decade of democracy in South Africa, the need for specialised courts for specific purposes was recognised by government. Apart from recognising the need for the development of specialised sexual offences courts, and specialised service delivery centres (the Thuthuzela Centres) in order to assist the functioning of these courts, specialised family courts were proposed in a draft policy developed in 1996. It was planned that the family court would encompass all matters relating to families and children, including Divorce, Maintenance, Domestic Violence, Children’s and Child Justice Courts. It was envisaged that the Family Courts would be housed in separate buildings, or separate sections of existing buildings, would be child and family friendly and would share information and court files across subsections of the family court in order to prevent repeated appearances of children, repeated examination and cross examination of the evidence of children, in order to minimise stress and the secondary traumatisation of children. Oversight Committees would be established to monitor the functioning of the court, and evaluate its continued operation and effectiveness.

Pilot projects were established, one in Durban Regional Court. However this project failed to continue after the initial year, the reasons for which were not discussed with participants but appeared related to the fact that after 2000, government policy changed from that of recognising the need for specialised police units and specialised courts, to generic policing and court structures.

### **The first decade of democracy – Law reform for children**

In recognition of the need to reform domestic legislation to conform to commitments to international conventions and treaties relating to children, and in response to expressed concerns by professionals working in the field of child protection at the inadequate and often harmful response to children who were the victims of abuse and neglect, in 1997/8, the South African Law Reform Commission (SALRC) established three specialised committees to develop law reform proposals,

inter alia, relating to the special needs of children who required the intervention and the protection of the court. The members of the three committees were appointed by the then Minister of Justice and Constitutional Development and tasked to examine the existing laws that dealt with children and make proposals for

- the development of a new law relating to the development, care and protection of children, commissioned by the Department of Social Development.
- the development of a Child Justice System for children in conflict with the law, commissioned by the Department of Justice and Constitutional Development
- the development of law reform proposals relating to sexual offences on and by children, commissioned by the Department of Justice and Constitutional Development. The mandate of this committee was later expanded to include all sexual offences on both adults and children.

The three committees, although each had their own mandate, members and chairpersons, and despite the fact that their work was commissioned by two different government sectors, attempted to coordinate their law reform processes to ensure that the three pieces of legislation would not have conflicting provisions but would complement and support a comprehensive and specialised system of provision for children and families, including special courts to deal with children's matters.

The consultation process

The three SALRC Project Committees embarked on several processes of consultation with a wide range of experts in the field of child protection and children in conflict with the law, including prosecutors, commissioners of child welfare, other judicial officers, social workers, child and youth care workers, lawyers, parents and caregivers of children, and even children themselves. Consultations took place in urban and rural areas in order to ensure that the specific needs of children in various geographical areas, across which resources and structures differ widely, were identified and solutions sought for challenges that were identified. Issue and discussion papers were written in order to stimulate debate and thinking and these formed the base for the discussions that were held. Research was commissioned on specific children's issues to inform decision making and comparative legislation from both developed and developing countries was examined.

After analysing the outcomes of the consultations and responses to the issue and discussion papers, all three committees made extensive proposals and drafted legislation specific to their mandate.

Their work culminated in the development of

- the Children's Bill
- the Sexual Offences Bill
- The Child Justice Bill

In all three pieces of draft legislation the committees supported the concept of specialised courts for children – whether they be the victims of violence or neglect and appearing in the criminal courts as victims giving evidence, or children in conflict with the law, or children who are the focus of care proceedings in the children's courts.

The call for specialisation was prompted by the need for court personnel and structures to

- Understand the evolving developmental capacities of children and respond to these appropriately
- To fulfil the mandate in the UNCRC to enable the participation of children in processes and decisions affecting their lives, including court processes
- Adapt their environments, often daunting to adults, but particularly to children, to enable and facilitate child protection and participation.

Recommendations from the Project Committees included a number of special measures relating to courts:

#### 1. the Review of the Child Care Act

Recommendations relating to specialised courts included

- Children's Courts be integrated into the Child and Family Courts, once these are established. These courts must be capable of providing holistic resolution of a broad range of child and related familial problems to prevent children and families moving between different courts.
- The child and family courts should have two levels – one to deal with the simpler matters and a more senior level to deal with complex matters
- The basic mode of functioning in the Child and Family Court should be inquisitorial rather than adversarial
- Where appropriate the intermediary system of leading a child's evidence can be used (see p?? paragraph ??)
- Improved selection and training of court adjudicators
- Procedural flexibility
- The use of alternate forums for less complex cases – eg family group conferencing
- The use of law forums such as tribal forums for certain matters
- Staff with appropriate language skills and cultural understanding
- Adjudicators in the Child and Family Courts have experience and training, and knowledge of child development, family relationships and psychology, cultural practices that impact on child rearing, welfare resources, and service provision
- Adjudicators are selected for their motivation and ability to interact with children and dysfunctional families
- Children may be allowed to communicate and express themselves
- That the role of the Family Advocates Office be extended to enable them to assist in the Child and Family Court where appropriate.
- Children may be represented in this court by their own legal representation
- There should be provision for appeals against decisions against the Child and Family Court , and that the right of appeal extend to a social work agency which is involved in the matter before the Court.

The vision of the SALRC Project Committee was originally that the Child and Family Courts should replace the existing children's courts and take over their existing functions and have additional capabilities, be centres of excellence specialising in providing legally binding care, protection and parental responsibilities orders on behalf of children.

However once the recommendations of the SALRC Project Committee on the Review of the Children's Act and the draft Children's Bill was handed to the Department of Social Development, the Department developed their own version of the Bill and many of the original recommendations were not taken forward into the final Children's Act. In particular the proposed Child and Family Court did not materialise into the final version of the Children's Act No 38 of 2005, and the Children's Court remains the Court that deals with the protection and care proceedings of children. The result of these changes, according to Gallinetti<sup>vii</sup> is that the Children's Court has "increased powers limited to certain issues and provisions mainly in relation to the protection of children, but the system itself is no longer geared to towards a specialist child-friendly court that provided access to justice across the board as envisaged by the SALRC."

Gallinetti notes that the possible reason for this change was the move by the Department of Justice and Constitutional Development to rationalise courts and avoid the development of a number of court structures, as well as budget and cost considerations, as staff training, new appointments and the provision of legal representation at state expense would have cost implications.

### **Children's Courts as provided for by the Children's Act no 38 of 2005**

Chapter 4 of the Children's Act deals with Children's Court and the adjudication of matters relating to the care and protection of children. The Children's Court is a civil public law court. In other words it deals with children's matters that are not criminal, but have state involvement. In comparison to the Children's Courts established via the Child Care Act No 74 of 1983, under the Children's Act, the Children's Court now have increased powers and jurisdiction and can make a far broader range of orders.

The Act provides for

- Children to participate in the proceedings
- A more relaxed and less formal atmosphere – the Act requires that Children's Court hearings must be held in a room which is
  - i. furnished and designed in a manner aimed at putting children at ease
  - ii. conducive to the informality of the proceedings without compromising the prestige of the court
  - iii. not ordinarily used for criminal trials
  - iv. accessible to disabled persons and persons with special needs.
- A non-adversarial approach which protects the child from being caught between two opposing and conflicting viewpoints.
- A wide range of orders that have the potential to provide comprehensive care and protection for children, but that also may enhance the children's capacities and opportunities to develop and fulfil their potential.
- Appropriate questioning techniques for children with special attention to children with
  - i. intellectual or psychiatric difficulties or with hearing or other physical disabilities which complicate communication,
  - ii. traumatised children
  - iii. very young children

What is an intermediary?  
The Criminal Procedure Act as Amended (CPA) provides for the use of an intermediary for a child, or an adult with the mental age of a child, to give evidence in court with the assistance of a person who has the ability to put the child at ease and communicate with the child in a child friendly and child appropriate manner. The intermediary may change a question that has been asked into child friendly language but must

- suitably qualified and trained interpreters
- legal representation of children
- the use of an intermediary when a child is giving evidence and is intimidated if giving evidence in the courtroom itself (insert box)
- allowing a child to give evidence in an informally arranged room or in a place which is situated where any person whose presence may upset the child is outside of the sight and hearing of the child
- allowing a child to be excused from a Children's Court hearing if this is in the best interests of the child.
- The appointment of Clerks of the Children's Courts to assist in the Children's Court

Of concern is

- The absence of specialised judicial officers: in the new Act every magistrate can act as a judicial officer in the Children's Court, doing away with the more specialised concept of a Commissioner of Child Welfare. Although this broadens the number of presiding officers who can hear matters relating to the care and protection of children, this lack of special training on child development, child welfare and even the Children's Act itself has, according to a consultant in the Child Welfare System, "created a shambles" in the child protection system.
- The absence of a requirement for training for both the presiding officers in the Children's Courts, as well for the Clerks of the Children's Courts.

In conclusion when looking at specialisation in the Children's Courts, the physical setting and the court process and procedure are indeed focussed on the special needs of children. However the absence of special training and education of court officials such as the presiding officer and the Clerk of the Court, makes the specialisation of this court partial and limited.

## **2. The Criminal Law (Sexual Offences and Related Matters) Amendment Act (SOA) no 32 of 2007**

The review of the Sexual Offences Legislation began with a SALRC Project entitled "A Review of Legislation dealing with Sexual Offences On and By Children. However in 1999 (an election year in which the women's vote was seen as particularly important) the mandate of the Project Committee dealing with this Review was expanded to include sexual offences committed against and by adults. The expansion of the task of the Project Committee resulted in the expansion of the committee to include experts working in the field of gender based violence and a dilution of the focus on children.

Also problematic was the varying commitment of research capacity to this particular project committee by the SALRC, which resulted in uneven attention to the issues to be addressed and extended the time period of the review.

During the consultations with multiple role-players dealing with sexual offences, women's groups, child protection workers and children themselves, a considerable input was received on the

vulnerability of victims of sexual offences, particularly children. The extent to which this vulnerability impacts on their ability to testify appropriately and effectively and therefore on conviction rates was continuously emphasised.

The position of specialised sexual offences courts has changed several times over the past decade. The South African Government commitment to specialised sexual offences courts was seen as an important step forward in dealing with the high incidence of sexual assault and the low conviction rate in the criminal courts. Although initially denied by some politicians namely\*\*\*\*\*, the preamble to the SOA states<sup>viii</sup>

.... “the omission of sexual offences in the Republic is of grave concern, as it has a particularly disadvantageous impact on vulnerable persons, the society as a whole and one the economy;

.... Women and children, being particularly vulnerable, are more likely to become victims of sexual offences, including participating in adult prostitution and sexual exploitation of children

.... The prevalence of the commission of sexual offences in our society is primarily a social phenomenon, which is reflective of deep-seated, systematic dysfunctionality in our society and legal mechanisms to address this phenomenon are limited and reactive in nature.....

### 3. The Child Justice Act

Domestic Violence Court – protections for children

Family Courts????

The Sexual Offences Courts –

The issue of therapy before trial – the british guidelines

The issues of equality and the spread of services

The SALRC Project Committee supported recommendations that the “work carried out by the Children’s Courts should in future become part of the work carried out by Family Courts”<sup>ix</sup> and it was envisioned that an improved court system for children in need of care or placement decisions would be integrated into proposed family court legislation. This would also enable certain decisions that traditionally fell within the jurisdiction of the High Court to be heard in the family court, for example Care (Custody) and Contact (Access) hearings

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- <sup>i</sup> Personal Communication, with MPP, KZN Priscilla McKay, May 2012
- <sup>ii</sup> United Nations Convention on the Rights of the Child, General Assembly resolution 44/25, 1989.
- <sup>iii</sup> African Charter on the Rights and Welfare of the Child, OAU Doc (1990)
- <sup>iv</sup> Naidoo, B 1996, Children's experiences of Testifying in Court, presentation at the 1996 Congress on Child Abuse and Neglect, Dublin
- <sup>v</sup> Bertelsman in S vs Phaswane, CC 7/07, and S vs Makoena CC 192/07, p20.
- <sup>vi</sup> The United Nations Convention on the Rights of the Child
- <sup>vii</sup> Davel, CJ and Skelton, A. M; Commentary on Children's Act, p 4, Chapter 4 The Children's Act, Jacqui Gallinetti, published by Juta, Claremont, 2007.
- <sup>viii</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
- <sup>ix</sup> South African Law Reform Commission, Discussion Paper 103, Project 110, Review of the Children's Act, Volume 2 p 1140.