

# Article

# 40

The Dynamics of Youth Justice & the Convention on the Rights of the Child in South Africa

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**Section 28(2) of  
the South African  
Constitution:**

*“A child’s best interests are of paramount importance in every matter concerning the child.”*

## *Juveniles in prison*

*by Judge JJ Fagan, Inspecting Judge of Prisons*

Ideally children under 18 years of age should not be in prison at all, but section 28(1)(g) of South Africa’s Bill of Rights confirms the possibility of them being kept in prison when it states: “Every child has the right ... not to be detained except as a measure of last resort and for the shortest appropriate period of time ...”

In reality, for children under 18 years, the situation is as follows:

- 1 746 are held in 32 places of safety run by the Department of Social Development.
- 402 sentenced children are held in reformatories (youth care centres) run by the Department of Education, three of which are in the Western Cape and one in Mpumalanga. Former Minister Kader Asmal stated in November last year that the Department of Education will

establish reformatories in Kwa-Zulu Natal, the Free State and the Eastern Cape by converting former industrial schools, while the Northern Cape is presently establishing its own reformatory.

- Most of the approximately 4 000 children awaiting trial and having been sentenced, are held in prisons, including 13 Youth Development Centres all over the country. With the exception of Baviaanspoort, Emthonjeni and Barberton, all are overcrowded with Pollsmoor being the worst – 2 090 children are held there but the ►

# EDITORIAL

*As the insert on our cover page states – a child's best interest is of paramount importance in every matter. This includes children in trouble with the law. It was with this in mind that 16 June 2004 was celebrated by a symposium on child justice held in Cape Town by the Association of Regional Court Magistrates of South Africa, The University of the Western Cape and the Community Law Centre.*

*The symposium was a resounding success. As a result, we have decided to publish a selection of the papers that were delivered on that day. All the presentations were informative and relevant to the child justice system as it stands today and hopefully when the new Child Justice Bill is passed.*

*Judge Fagan deals with the issue of children in prison and provides insightful and thought-provoking information. Prof. Schwikkard examines the testimonial competence of child offenders and illustrates how little attention is given to this critical issue. Julia Sloth-Nielsen provides a tour of the proposed preliminary inquiry, and Godfrey Odongo continues with our African focus in his article on child justice reform in Africa.*

*Finally, we are very pleased to publish some of the presentations made by various school children at the symposium. They are part of the Association of Regional Court Magistrates of South Africa/Toastmasters International Youth Leadership Project and injected some lively topics into the day's discussions.*

• Photographs courtesy of Katherina Pechel.



capacity is for 1 111 only. There are very few females in prison – about 2% (97) of children are female. Roughly half of all children held in prison are awaiting trial and half have been sentenced. Sentences range from a few months to life imprisonment.

Conditions are terrible in many of the prisons where children are held. In April last year in Johannesburg Medium A prison, in cells supposed to hold 38 prisoners there were 101 juveniles. There are about three or four such cells, each with one toilet

only. By 10:00 there is no water to flush the toilet or to use for drinking. While conditions may vary, many children are subjected to gangs, are sodomised, become infected with HIV/Aids, suffer from scabies, and have no access to education or rehabilitation.

The cause of these miserable conditions is the gross overcrowding in South Africa's prisons. There are 73 000 prisoners too many in our prisons. South Africa is one of the worst countries in the world regarding the use of imprisonment. There are nearly 188 000 prisoners in a population of 46 million (mid-2003 estimate) which amounts to over four out of every 1 000 South Africans in prison. Sixty five per cent of all countries have incarceration rates of 1,5 or less per 1 000 people. The cost of incarceration is enormous – about R19,5 million per day – and it is not effectively curbing crime. On the contrary, we are creating criminals because of the conditions children are subjected to in prisons.

*Ideally children  
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There is only one answer – South Africa has to reduce its prison population drastically. Of the nearly 188 000 people in prison, approximately 53 880 are awaiting trial and 134 020 have been sentenced.

Why are so many prisoners awaiting trial?

- Unnecessary arrests – more than 16 500 cases are withdrawn each month.
- Unaffordable bail fixed at district court level. A person accused of stealing three mangos has had bail set at R500, for example, while another's bail was set at R1 000 for allegedly crossing a railway line.
- Unnecessary remands, with accused going to court many times.

But the good news is that the number of prisoners awaiting trial is coming down, and we can thank the magistrates for that. President Mbeki has bound the State to do more for social upliftment by providing jobs, education, water and electricity, which will help reduce crime. The solution is also in our hands, as part of the judicial system. We do not need more prisons. We have to reduce the number of incarcerations. •

# *Paperweight or powertool: a critical appraisal of the potential of the proposed preliminary inquiry procedure*

*by Julia Sloth-Nielsen*

## **History**

The preliminary inquiry (PI) was developed by the Project Committee of the South African Law Commission that drafted the Child Justice Bill. It followed the ad hoc development of diversion in the 1990s that was heavily dependant on prosecutorial goodwill, corridor negotiations by legal representatives and the marketing of diversion by Nicro.

In addition, Article 40(3)(b) of the Convention on the Rights of the Child requires “laws, procedures ... and measures aimed at dealing with children without resorting to judicial proceedings”. This has been interpreted as meaning that diversion cannot rest solely on the whims of individual prosecutors.

Thus the Project Committee was faced with two questions: who decides on diversion, and how?

The difficulty with the “who” was that prosecutors rotate from court to court, move on from the Department of Justice, and often see juvenile ►

# preliminary inquiry procedure

courts as a mere starting point career-wise. In addition, it was thought that prosecutors also “let too many cases through”, in other words they allow a case to remain on the roll for a long time despite insufficient evidence to prosecute.

So, in deciding on the “who”, the Project Committee drew on four main factors:

- Influences from models of interventionist judiciaries, e.g. New Zealand.
- The existing South African format for inquests in which judicial officers play (generally) a more activist role.
- The linkage between diversion and immediate release from pre-trial custody, as positive diversion decisions (at present) always entail immediate release from custody, i.e. a judicial determination as opposed to a prosecutorial one
- The need to determine the age of the accused at the outset in order to establish whether the Criminal Procedure Act or the Child Justice Act will govern proceedings and the fact that this is a judicial function.

The conclusion drawn was that the “gatekeeper” to diversion should ideally be the judicial officer.

As far as the “how” was concerned, decisions were influenced by the following:


- Informality of proceedings to make them more child-friendly.
- The rapid appraisal of the situation to avoid cases that are eventually diverted from clogging up court rolls.
- “Joint” decision-making by stakeholders (including probation officers), rather than depending on the lone voice of one prosecutor.
- Maximisation of available information on which decisions can be based.
- Realisation of the necessity to create incentives and benefits for the criminal justice system, for example case management and the finalisations of cases as soon as possible.

The result was the proposal of a mandatory pre-trial inquisitorial investigation, assessment and discussion of the child, the case and the circumstances to see whether diversion was possible and, if so, which specific diversion option the child should undertake; whether release was possible and whether the accused was under 18 years of age.


## ***How the provisions in the Bill stand at present***

Subsequent to the parliamentary debate on the Child Justice Bill there have been some changes to the original proposal. These changes have in fact strengthened the procedure in a number of ways. The PI remains the procedural centrepiece of the new child justice system. Its purpose now is specifically stated as being “to divert matters away from formal court procedures”. In addition, the PI and diversion are now provided for in the same chapter in order to emphasise this. The informality of proceedings and their inquisitorial nature are specifically provided for in clause 42 of the Bill.

In terms of the present draft of the Bill before Parliament, children



*... the Project Committee was faced with two questions: who decides on diversion and how?*



charged with specified serious offences will proceed to court without a PI as they are excluded from the possibility of diversion. Children charged with petty offences who have already been diverted by a prosecutor are also exempt from attending a PI. All other child-accused will experience a PI, as the procedure will be mandatory in their cases.

The role-players have been confirmed as the inquiry magistrate, prosecutor, child, legal representative, parents (or an appropriate adult) and probation officer (but the latter two parties may be exempted from attending). If the probation officer does not attend, the assessment report must be available for the inquiry.

At the PI, after the explanation of the allegation, rights and purpose of the inquiry, the first duty of the presiding officer is to establish whether the child accepts responsibility for the offence. If not, no questions regarding the offence may be put, no information on previous diversions or convictions are allowed and the matter proceeds to trial. If so, all information must be placed before the PI, the child's age must be determined, the views of all present considered and the voice of the child and his or her parents heard. The magistrate must be satisfied that there is a prima facie case against the child. Finally, it must be ascertained by the prosecutor whether the matter may be diverted.

If the prosecutor agrees to a diversion, the magistrate must order diversion according to the range of available options that are appropriate for the child. Strict control has been built in regarding the execution of diversion as the magistrate must identify a probation officer or other person to monitor compliance. Upon notification of a failure to comply with the diversion order, the child must reappear before the inquiry magistrate for an investigation into the reasons for non-compliance.

Where the inquiry magistrate has heard information during the PI prejudicial to the determination of the case, he or she may not preside at any potential subsequent trial. In addition, no information furnished at the PI may be used against the child in subsequent criminal proceedings. The Bill confirms that the effect of a diversion order is that the child may not be prosecuted on the same set of facts unless he or she fails to comply with the diversion order and is then remanded for trial.

### ***Paperweight or powertool?***

The outcome of this process will depend on the balance struck between factors listed as possible benefits and risks to avoid the PI remaining mere words on paper. It is also expected that there will be uneven results in the implementation of the PI depending on the effort and willingness to see the procedure work in practice. ●

#### ***Benefits of the preliminary inquiry procedure***

- Increases access to diversion.
- Saves court time (as evidenced by the Afrec study and Mangaung One Stop Child Justice Centre experience).
- Cost savings resulting from diminished demand for detention.
- Provides an opportunity to oversee the work of the probation officer at the assessment.
- Promotes innovation in finding diversion options.
- Promotes a teamwork approach.

#### ***Risks of the preliminary inquiry procedure***

- Whether the necessary information is available.
- The intended rapid appraisal turns into a mini-trial where case conferences take too long and become embroiled in detail.
- The rapid appraisal could be too rapid – it becomes just another hoop to jump through to get to the trial.
- Access to diversion could be hampered by prosecutorial zeal as the decision to divert still rests with the prosecutor.
- Difficulties could arise in small towns with only one magistrate.
- Liaison with service providers (e.g. Nicro) might lead to delays.

# Voices of the youth



*Here is a selection  
of the speeches delivered by  
the children of Toastmasters International  
and the Association of Regional Court  
Magistrates of South Africa  
at the symposium on child justice  
held in Cape Town on 16 June 2004.*

***Mlungiseleli Lucky Dibela of Joe Slovo High School, Khayelitsha***

### ***“We are dead alive”***

Are you dead or alive? If you are alive, where are those powers? A few years ago the people of South Africa were struggling because of apartheid. Then blacks were oppressed, the same as coloureds. We were judged by our skin colour and also killed because of it. During this apartheid era many people were killed, some were left homeless and many children lost their parents. But the people decided to stand up to apartheid and say “it is enough”. The youth played a big role in bringing an end to apartheid.


After that a new challenge began. This was a tough one because it’s against HIV and Aids. Even now HIV/Aids is a big problem in the world. Africa is one of the continents that have a high rate of infection with HIV/Aids. Many people have died as a result of this epidemic.

Where is Nkosi Johnson, DJ Khauzela, Sibongile Mazeka? All dead because of this chronic disease.

What have you done about it? Nothing!


It seems we forget that it is us who defeated apartheid. That means if we can get together and fight Aids as the youth we can defeat it. So let’s get together – black, white and coloured, and fight HIV/Aids. I know we are powerful and we can bring an end to HIV/Aids and show the world that the youth of South Africa is still alive.

Let’s reveal the spirit of the youth of 1976.



*Where is Nkosi  
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Sibongile Mazeka?  
All dead because of  
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disease.*

*What have you  
done about it?  
Nothing!*



***Nokuthula Dlakulu of the Centre of  
Science and Technology,  
Khayelitsha***

### ***“Ubuntu”***

Think of a systematic structure that brings unity, integrity, responsibility, respect and cooperation with our fellow men. Think of a spirit that characterises people’s allegiances and relations to one another. What a wonderful world! What a simple reminder that we can get along best by thinking of others.

Ladies and gentlemen, today I greet you with this information which is summarised in one word – known in Zulu and Xhosa as “ubuntu”, in English as “humanity towards others”, and in Afrikaans as “gemeenskap”.

Let’s look back at the past – June 1976 was one of those times when young people thought they could fight for their right to education, but instead they were dehumanised. Those children were killed like flies by people with empty souls who had no heart or feelings. They gave themselves the audacity to deprive innocent ones from their rights on top of the pain that South Africa was going through – their dignity being degraded by the indignity of apartheid.

Hector Petersen, 13 years of age, asked for a right and was given death; a child who had to live and see sad days in South Africa before being shot in cold blood. Ladies and gentlemen, can you imagine those days?

In those most private moments, do you consider a future for yourself, for your children, for your people? Let us look at the pain South Africa went through and is still going through and tell ourselves that crime, apartheid, HIV/Aids won’t help South Africa. Let us bring back pure personalities and see the importance of African communities.

Our voice is our imprint on our world, our distinctive note, our pattern, our touch – one to another.

“A person can only be a person through the help of others.”

“Umntu ngumtu ngabanye abantu.”

“Jy kan slegs jou menslikheid toon deur ander mense.”

So how do you see South Africa? And do you pay attention to what South Africa needs? From now on, notice the endless colours and curves and rhythms of nature, the eyes of a friend – how well do we notice and how well can we spread ubuntu in South Africa?

***Nomawonga Appolis of Thembaletu High School,  
George***

### ***“Fighting crime together”***

When a child is born, there is so much pride, commitment and hope in the little precious being. As the child grows older, our focus is on him or her, but as the years go by, the child may start doing bad things which are wrong, like shoplifting. Then the violent spirit grows inside the child. One day we will hear that there has been a housebreaking, rape or even murder. By then the child is no longer that precious gift he was before – people start seeing him as a criminal.

In some cases it is not always the child’s choice to do these things. There may be some reasons like problems at home, alcohol and drug abuse, jealousy, lack of parental control, stealing out of necessity – but still these reasons do not give him or her the right to do crime.

Some people have no reasons for doing crime, but they just want to prove to their friends that they can also do it. But by proving a point there is always a person who gets hurt. By proving a point you may go to jail. And when you are there, there are no more points to prove, believe me.

Violence is a serious problem in our country and I believe that we have to work together as young South Africans to get rid of it. As young South Africans, we are the treasures of this country – without us there is no future. Violence must not get in our way of making this country a better place.

We are the future of this beautiful and beloved country. We dream of becoming the presidents of tomorrow, accountants, economists, magistrates – but we won’t until we get rid of this violent spirit.

South Africans, I wish that we can build a country of love, peace, togetherness – so that we can fight crime-doers. Because we do not want to become the victims of crime! ●

# *Child Justice law reform developments in Africa and international standards on the rights of the child*

*by Odongo O Godfrey\**

## **Introduction**

With the exception of Somalia, which remains a signatory, all African States have ratified the United Nations Convention on the Rights of the Child (1989) (CRC). The majority of these states have submitted their initial reports to the UN Committee on the Rights of the Child, the body responsible for monitoring the compliance of states with the CRC. Furthermore, the 1990 OAU African Charter on the Rights and Welfare of the Child (African Children's Charter) offers complementary and in some instances higher international standards on the rights of the child.

## **Examples of child law reform initiatives**

For a number of African countries, ratification of the CRC and the African Children's Charter provided a climate within which to re-examine child laws, particularly statutes pertaining to childcare and child protection. Thus statutory child law reform examples from Africa include those of Ghana, Kenya, Namibia, South Africa and Uganda. In all these countries, reform of child welfare has been linked to juvenile justice. On the one hand, this is in keeping with the remit of Article 4 of the CRC that broadly calls for legislative measures. On the other hand, the compre-

hensive nature of the reform to include juvenile justice can be said to be in keeping with the provisions of Article 40(3) specifically calling for separate laws, procedures, authorities and institutions.





One of the pioneering law reform projects is that of Uganda. The relevant Ministry inaugurated the Ugandan Child Law Review Committee in 1990 to study and make recommendations aimed at the revision of child laws in Uganda with a view to coming up with composite legislation in this regard. The recommendations and the draft bill of this committee formed the basis of new legislation, the Children's Statute of Uganda which covers both the issues of child welfare and juvenile justice.

Soon after Kenya's ratification of the CRC in July 1990, the Attorney General at the behest of the civil society requested the Law Reform Commission to review the existing laws concerning the welfare of children and make recommendations for improvement so as to give effect to the CRC. After a long process of reform that saw the rejection of the original draft bill twice by various child rights advocates and organisations on the grounds of its insufficiency, the parliament eventually passed the Children's Act of 2001. Like the Ugandan Statute, the Kenyan Act serves as umbrella legislation on the twin matters of childcare and child protection on the one hand, and juvenile justice on the other.

In Ghana, the National Commission on Children appointed a multi-sectoral Child Law Reform Advisory Committee in 1995 to look into, review and make recommendations to the government for appropriate changes in law. Eventually, this reform process led to the passing of the Children's Act of 1998, dealing mainly with issues of child welfare but excluding juvenile justice. As regards juvenile justice in Ghana, a separate and dedicated bill to this end has been drafted and now awaits introduction into Parliament.

The Namibian child law reform process dates back to 1992, culminating in the Child Care and Protection Bill of 1996 that made provision for aspects of childcare and protection. After seven years since the drafting of the Bill, it was passed into law in 2003 as the Child Care and Protection Act. The search for juvenile justice legislation that seeks to comply with international standards remains high on the reform agenda, with the recent redrafting of the Namibian Child Justice Bill modelled substantially on the South African Child Justice Bill.

The inclusion of a clause on the rights of the child in the Namibian Constitution (1990) (Article 15) also seemed instructive to the law reform process in that country. In Kenya's case, the Draft Constitution (2004) includes the rights of the child in its Clause 37. This inclusion seemed to have been made possible not only by the prominence of the rights of the child in international standards such as the CRC, but also by the high profile that was accorded to the new Children's Act. In all these constitutions, the rights of the child in the juvenile justice sphere are included among other rights of the child.

Interest in child law and juvenile justice reform remains high on the agenda in a number of other African countries including Nigeria, Malawi and Mozambique. However, for the countries where new legislation has been passed or remains in the offing, the comprehensive nature of the reform processes stand out prominently. This is illustrated by the link between reforms in child welfare legislation alongside reforms in juvenile justice.

### ***Link between child welfare and juvenile justice***

The fundamental link between childcare and child protection laws and legal provisions on juvenile justice cannot be ignored, primarily for two reasons. Firstly, the link is apparent in view of a holistic reading of the CRC. Thus while the CRC does not explicitly mention preventative action on child offences, it is undeniable that the implementation of the treaty as a whole is the best and most fundamental manner in which to approach prevention. Such an approach takes into account the whole corpus of childcare and child protection. Indeed, this is the approach taken by the Riyadh Guidelines on the prevention of child offences.

Secondly, the link assumes a practical relevance when juxtaposed with the reality of children who come into contact with criminal justice authorities in the region. A common denominator that can be ascribed to this group of children is that a good proportion belong to the category of children who may not be criminal offenders per se, but could be defined as those in need of care and welfare, amongst other reasons due to factors such as endemic poverty and the high prevalence of HIV/Aids on the continent. Recent estimates suggest that Kenya and South Africa (two of the countries that have undertaken reforms of child care and juvenile justice laws) have the highest number of street and homeless children in Eastern and Southern Africa with conservative estimates putting the number at 250 000 in each of two countries as at mid-2002. It is thus noteworthy that the reform products evince a comprehensive net covering both issues.

The emphasis on reforming both systems – child welfare on the one hand and juvenile justice on the other – has been highlighted above. Therefore it is important that provisions linking the two systems stand ►



*In the aftermath of colonialism and apartheid (in the case of some countries), most African countries were left virtually without a real system to manage young people in trouble with the law.*

# developments in law reform

at the apex of this comprehensive reach of the reform processes. For example, Kenya's composite legislation makes detailed provision for children classified as being "in need of care and protection" – a category that includes child orphans orphaned by HIV/Aids, street children and "juvenile delinquents" who would otherwise have been charged with status offences such as vagrancy, truancy and "being beyond parental control". For this group of children, legal protection is envisaged, either directly by the government's children's department or indirectly through the tracing of parents or through private institutional care. The Act envisages a coordinated role between various players including the police and juvenile courts.

A novel procedure introduced in the envisaged child justice system of South Africa is that of the preliminary inquiry (PI) that must be held in respect of every child prior to the taking of a plea. While the primary purpose of the PI would be that of making the decision on whether a matter involving a child accused of committing a crime may be diverted, other secondary but yet equally pertinent objectives underlie the procedure. These include establishing whether the matter should be transferred to the child welfare courts to be dealt with as a matter of childcare and child protection rather than a criminal one. Section 70(2)(d) of the Namibian draft child justice bill is in similar vein.

While the above provisions may have previously existed in the various repealed laws, their inclusion in the context of a system specifically designed to manage children in conflict with the law in a coherent way and within a child rights orientation is nevertheless of significance. This approaches the issue from the obligatory child rights perspective and also makes the process of dealing with such children more determinable and efficient.

## ***Common themes in juvenile justice developments***

Common themes that have emerged from the reform of childcare and protection legislation in Africa have been aptly discussed elsewhere. A relevant question would be whether similar or new themes have emerged in the sphere of juvenile justice reforms.

## ***Revisiting inherited legislation and establishing juvenile justice systems***

In the aftermath of colonialism and apartheid (in the case of some countries), most African countries were left virtually without a real system to manage young people in trouble with the law. In most, if not all cases, these countries did not have separate bodies of legislation to deal with young offenders. Children charged with crimes have therefore been dealt with in the same way as adult offenders. On the other hand, where special provisions to deal with children in conflict with the law existed, such provisions have often been found scattered through different pieces of legislation. Examples in point are Namibia, Kenya and South Africa.

Juvenile justice in Western countries was and remains based on welfare-justice models. Suffice to say that this characterisation was done and is often done outside a child rights' framework. The fact of inherited legislation has meant that the welfare-justice models that influenced colonial legislation have also impacted in a big way on the juvenile

justice laws of African countries. In some cases, for example that of Namibia, this body of law has developed to encompass the major features of what would be called a “justice model” informed by a theory of “just deserts” by which children are deemed to appreciate what criminality is all about and thus are subject to punishment in the same way as adults. On the other hand, even in those jurisdictions where there has been a semblance of the welfare model with its perceived benign notions, the ideal of separating children from the adult criminal justice system has always been a blurred one.

All the new legislation seeks to devise systems which deviate from inherited laws and address juvenile justice in a comprehensive manner from the moment of arrest through to issues of diversion or trial and eventual disposition of the cases. The statutory recognition of children’s/juvenile/child justice courts vested with both civil and criminal jurisdiction (Kenya and Uganda) or vested with separate jurisdiction to deal only with criminal charges against children (South Africa, Namibia and Ghana) is a prominent feature of the new systems. In the process, transfer of children accused of crimes to the adult system is not envisaged in both the South African and Namibian draft Bills while in the cases of Ghana, Kenya and Uganda, the transfer of child offenders to the adult system is limited to instances of capital offences (for which the

death penalty is prohibited in all the examples) and where child offenders are jointly accused with adults.

### *Substantive incorporation of international standards in the new juvenile justice systems*

In devising “proper” juvenile justice systems as pointed out above, it is also apparent that core international standards relating to the sphere of juvenile justice have indeed been incorporated in the pieces of legislation.

#### *Diversion*

Binding provisions in the CRC 60 have now confirmed the desirability of diversion as a legal obligation of states in international law. Measures aimed at promoting alternative responses to judicial proceedings for children in trouble with the law feature prominently in all these law reform endeavours. The South African and Namibian Child Justice Bills both contain explicit and detailed provisions recommending the principle of removing children from the formal criminal procedure as early as possible. Both Bills provide for an array of diversion options and include family group conferences and victim-offender mediation that are both based on restorative justice precepts as further options. Minimum standards applicable to these diversion options are also included. The Ghanaian Draft Juvenile Justice Bill makes express provision for diversion as a principle (leaving the design of appropriate programmes to practice) but seems to weigh in favour of the use of diversion as one of the sentencing options. Victim-offender mediation in “minor criminal matters involving children” is also part of Ghanaian juvenile justice law.

While the Ugandan and Kenyan examples are without express reference to diversion programmes as such, there is indeed some basis for arguing that diversion as a concept has been included in both the new laws. This is more so with the Ugandan Statute where provision is made for local/village resolution of disputes concerning children. With regard to criminal disputes, informal local courts (called Resistance Committee Courts) staffed with elected members of the public within the local authorities, are given exclusive jurisdiction to try particular offences committed by children. The disposition powers of such local courts are made flexible to include a wide range of orders (but excluding detention). In the words of one observer commenting on the Ugandan process:

“In sum, it can be said that the prominent role allocated to the village courts ensure that issues of juvenile justice are approached from the local context as a first step, that children’s issues are addressed in their own communities and contexts and that such justice is accessible and affordable with children being diverted from the formal criminal justice arena.”

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

The age of criminal capacity hitherto obtaining in Ghana, South Africa and Uganda before the law reform processes have all been adjusted upwards. Thus an earlier law reform process saw the minimum age of criminal capacity being raised from seven years to 12 years with the ►

*Interest in child law and juvenile justice reform remains high on the agenda in a number of other African countries including Nigeria, Malawi and Mozambique.*

abolition of the common law presumption of incapacity between the ages of seven and 12. The South African Bill proposes an increase of the minimum age of capacity from seven to 10 years while retaining the rebuttable presumption of incapacity for children between the ages of 10 and 14 years.

In light of the above jurisprudence of the Committee on the Rights of the Child it is however something of a letdown that, despite the law reform processes in Kenya and Namibia, the common law position in both countries remains in force. The minimum age of criminal capacity in both countries is eight. While in the Kenyan example the law reform process was silent on the debates on this issue, the Namibian first draft Bill provided an amendment of this common law rule pertaining to criminal capacity. The proposed structure of this first draft was that a child who had not attained the age of 10 years could not be prosecuted. This proposal retained the presumption against capacity, thus children of 10 years of age or more, but less than 14 years at the time the offence is committed would only be prosecuted if it could be shown by the prosecution that they had capacity to appreciate the difference between right and wrong and act in accordance with that appreciation. However, following a meeting of Ministers on 8 May 2003, the government resolved that the common law as it stands should stay. Thus it has been remarked that the proposed new Namibian juvenile justice system “will be built on internationally recognised standards” with the exception of the provision on the minimum age of criminal capacity.

The experience of the South African and Ugandan law reform processes reveals that the debate on raising the minimum age goes beyond the rhetoric of child rights. Therefore, the comparative example of other countries’ legislation and research into the ages and offences of children committing crimes were all factors that were considered before arriving at the decision to fix the minimum age of criminal capacity. Importantly, research into the age at which it was reasonable to expect children to fully understand the consequences of their actions and to have the maturity to resist the pressure of peers and adults, was crucial to the Ugandan Child Law Review Committee. This latter research is of value to the standard laid down by the Beijing Rules to the effect that, in setting the minimum age of criminal capacity, the facts of a child’s emotional, mental and intellectual maturity must be borne in mind. At least, it emerges that the decision on the minimum age must take cognisance of the findings of medical and psycho-social research while rejecting the influence of “tradition” or “public demand”. •

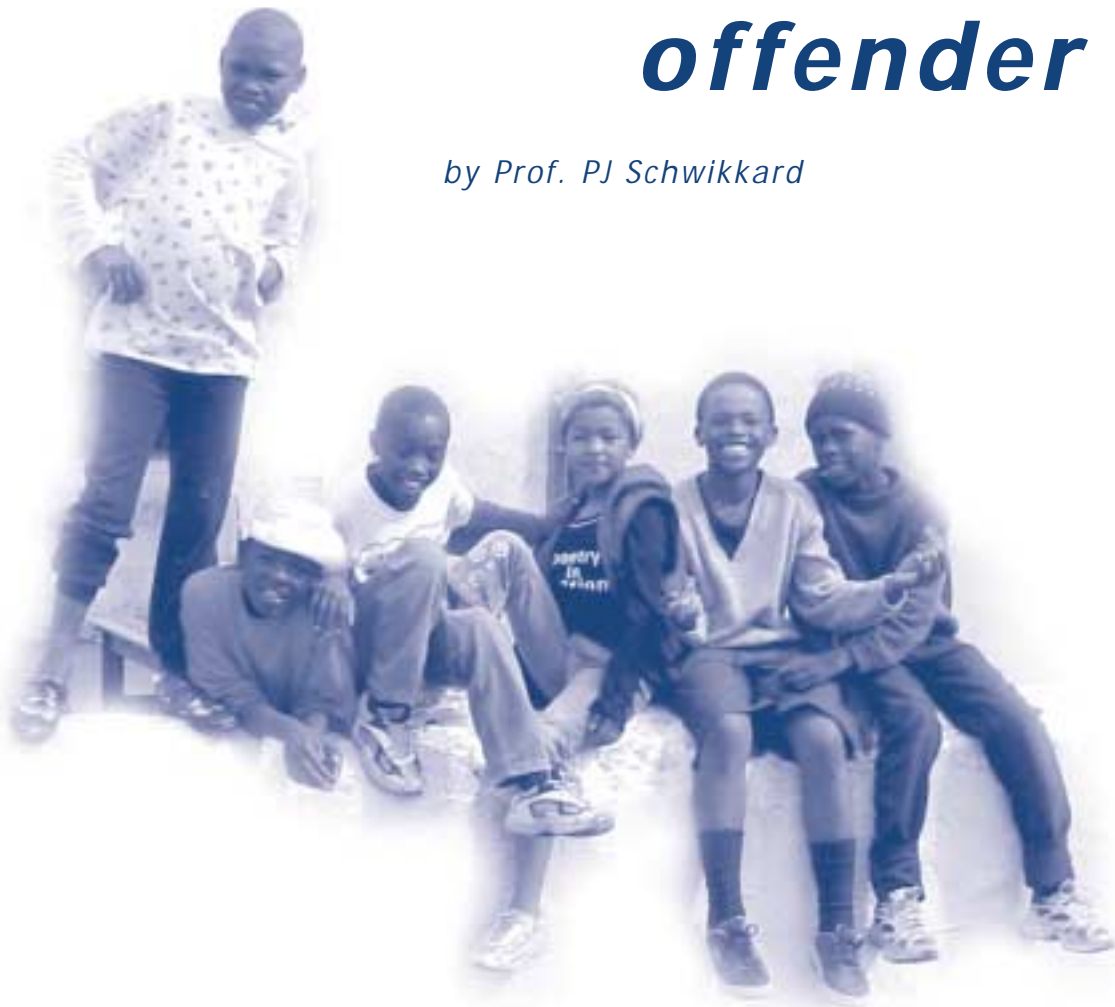
*\* This is an extract of the paper delivered at the symposium on child justice held in Cape Town on 16 June 2004. For a copy of the entire article, contact the author at [gondongo@uwc.ac.za](mailto:gondongo@uwc.ac.za)*



*All the new legislation seeks to devise systems which deviate from inherited laws and address juvenile justice in a comprehensive manner from the moment of arrest through to issues of diversion or trial and eventual disposition of the cases.*

# *The testimonial competence of the child offender*

*by Prof. PJ Schwikkard*



*Prof. PJ Schwikkard from  
the University of Cape Town  
examines the testimonial competence  
of child offenders –  
one of the critical issues  
in child justice.*

**G**enerally, when talking about the testimonial competence of juveniles the focus is inevitably on the juvenile witness who is not the juvenile offender, i.e. the focus is on the child as a prosecution witness.

The question arises as to why the testimonial competence and cautionary rules are not an issue in relation to the child offender. The answer should be that these rules cannot and should not be applied to the child offender. However, the fact that they are applied to ►

other child witnesses, be they called for the prosecution or the defence, reflects an approach to children's evidence and certain beliefs about it that will inevitably remain unarticulated in the mind of the person trying the facts when evaluating the child offender's evidence.

### **Testimonial competence**

There is no specified age for testimonial competence in South African law. A child will be deemed competent if: "in the opinion of the court, they can understand what it means to tell the truth ... In each case the judge or magistrate must satisfy him- or herself that the child understands what it means to speak the truth. If the child does not have the intelligence to distinguish between what is true and false, and to recognise the danger and wickedness of lying, he or she cannot be admonished to tell the truth – he or she is an incompetent witness" (H v Z at 375-376).

The application of this test to witnesses who are not offenders has been subject to much criticism on the basis that presiding officers do not have the necessary skills or training to be able to make the required assessment. It is also argued that it discriminates against children in that it may constitute an insurmountable barrier to testifying – a barrier not based on rationality. After all, we presume that adults can comprehend the duty to tell the truth – even if they are convicted of perjury or convicted of crimes involving an element of dishonesty. Wigmore was of the view that the best way to ensure that relevant evidence is not excluded from the court is to allow the child to testify and then to decide whether he or she is telling the truth or not.

I have not encountered a reported case where the testimonial competence of a juvenile offender is an issue. Is this because we presume that a child who has criminal capacity is automatically competent to testify? The test for criminal capacity (which seems to essentially remain the same in the proposed Child Justice Bill) according to Burchell and Milton (at 231) is: "Did the child in question in the circumstances have the capacity to appreciate the wrongfulness of his or her conduct and, if the child did, then did the child have the capacity (or ability) to act in accordance with such appreciation?" As to what "wrongful" in this context means, Burchell and Milton (at 231) state: "The language used in the judgments sometimes appear to favour a moral test ... and on other occasions seems to indicate a legal standard". They argue that: "the application of a moral test is difficult because a child who has fallen into bad ways or been brought up in a delinquent environment may well regard a crime, like theft, as morally right even though he may know it to be legally wrong".

So can we automatically assume that a child who has criminal capacity is a competent witness? I think not. First, when we are dealing with children under the age of seven years, the absence of capacity cannot be equated with an absence of testimonial competence. The irrebuttable presumption that children under the age of seven years lack criminal capacity is a statement of policy, not the result of an individual factual inquiry. Consequently, a child under the age of seven years who lacks criminal capacity may still understand what it means to tell the truth. So the assumption that child offenders have testimonial competence cannot be based on the finding that they have criminal capacity.

*In each case the judge or magistrate must satisfy him- or herself that the child understands what it means to speak the truth. If the child does not ... distinguish between what is true and false ... he or she is an incompetent witness.*

However, there is a very good reason for assuming that children who are deemed criminally responsible are also presumed to be testimonially competent – it would be untenable to have a child deemed fit for trial but insufficiently competent to speak in his or her own defence. It is also an express acknowledgement that a child's testimony – irrespective of whether he or she can articulate an appreciation of what it means to tell the truth – has value. As with all adult witnesses we determine whether they appreciate what it means to tell the truth by testing their evidence in light of all other evidence and through cross-examination.

### **The cautionary rule**

But does the child offender's evidence remain tainted by the skepticism that the legal system has towards children's testimony in general? This skepticism is clearly set out in the cautionary rule applicable to the child witness. Again the available literature analyses the cautionary rule in relation to the child witness who is not the offender. This rule provides that a presiding officer must be aware of the inherent dangers in assessing a child's evidence. As a consequence, a court

# Testimonial competence

will seek corroboration in order to assist it in determining whether the witness is credible. However, corroboration is not essential for the requirements of the cautionary rule to be met.

Guidance as to what constitutes the inherent dangers of a child's evidence is set out in *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A). In this case the court stated: "The question which the trial court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness ... depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated."

Although *Woji* must be welcomed in that it recognises the individuality of children, it is clearly still based on the premise that children are inherently more unreliable than adults as witnesses. However, in the last few decades there has been a much increased interest in cognitive psychology and child development. This has led to a body of social science research which requires us to rethink our approach to the reliability of children's testimony – it would appear that children's ability to give reliable evidence has been greatly underestimated. This conclusion has been strengthened by research on the reliability of adult testimony, which has shown that adults' memories may be poor and susceptible to suggestion and misinformation. Thus it would seem that the gulf between the testimonial abilities of children and adults has been seriously exaggerated. Children do lie and forget things, but they do not appear to do so to a greater degree than adults. They may for example lie for different reasons than adults, but when they do lie, they tend to be far less practised liars than adults and are consequently more easily exposed.

I have been unable to find any authority on whether the cautionary rule applies to child offenders, but logic dictates that if presiding officers are instructed to treat children as inherently unreliable witnesses, it must colour their assessment of the child offender's testimony. In *S v Jackson* 1998 1 SACR 470 (SCA), the court held that the application of the cautionary rule in sexual offence cases effectively imposed a heavier burden on the prosecution than in other cases. The converse must be true if we apply the cautionary rule to an offender – of course in theory the accused does not have to prove anything – however, once the prosecution has established a prima facie case, there is an evidentiary burden on the accused to raise a reasonable doubt. This burden becomes harder to discharge if the accused is viewed as being inherently more likely to lie than an adult.

Even if the cautionary rule is not expressly applied to the child offender, if one believes that the cautionary rule is justified in relation to a child witness then logic dictates that it must be applied to a child offender. If we are going to increase the child's evidentiary burden in raising a reasonable doubt, then we must have clear and compelling reasons to do so. Social science evidence does not support the present position taken by our law in relation to the cautionary rule.

I have raised these issues in order to probe whether the existing legal skepticism towards children's evidence influences the way in which a child offender's testimony is evaluated – even if that skepticism is never expressly articulated in relation to the child offender. •

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## Upcoming events

- The Penal Sciences 2004, 7th International Congress is being held in Havana, Cuba, from 23 – 26 November 2004. For more details contact Lic. Miguel Angels Garcia Alzugary at [drelaciones@fgr.get.tur.cu](mailto:drelaciones@fgr.get.tur.cu)
- The 2004 Mental Research Institute International Conference, entitled "Working with troubled Youth – Interventions in schools, social services and juvenile justice settings" is being held on 23 – 24 July 2004 in California, USA. For more information contact [mri@mri.org](mailto:mri@mri.org) or visit the web site [www.mri.org/trconference](http://www.mri.org/trconference)



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