

# IS THE ACT WORKING FOR CHILDREN?

## The first year of implementation of the Child Justice Act<sup>1</sup>

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*The Child Justice Act 75 of 2008 mandates the Minister of Justice and Constitutional Development to report annually on the implementation of the Child Justice Act to the Parliamentary Portfolio Committee on Justice and Constitutional Development. On 1 April 2011 a year had passed since the implementation of the Child Justice Act. This article interrogates the annual report presented to parliament on the first year of implementation of the Act, and concludes that it is not possible to accurately assess whether the Child Justice Act was implemented fully during the year, as the statistics provided in the annual report by different departments are unclear and incomparable. The article also reflects those aspects of the Act that have been implemented.*

The Child Justice Act (referred to hereafter as the Act)<sup>2</sup> came into operation on 1 April 2010 after an official launch at the Walter Sisulu Child and Youth Care Centre in Soweto. The objectives of the Act are to protect the rights of children; promote the spirit of *ubuntu* in the child justice system; provide special treatment for children in the justice system with the aim of breaking the cycle of crime; as well as to promote the co-operation between government departments and civil society.<sup>3</sup> In order to achieve these objectives, the Act sets out a different procedure for children that come into contact with the criminal justice system, compared to the procedure in place for adults, as found in the Criminal Procedure Act.<sup>4</sup>

The implementation of the Act is dependent on the close collaboration between the following departments and government institutions:

- Department of Justice and Constitutional Development (DJCD)
- Legal Aid South Africa
- National Prosecuting Authority (NPA)
- South African Police Service (SAPS)
- Department of Correctional Services
- Department of Social Development
- Department of Basic Education
- Department of Health

### REPORTING TO PARLIAMENT<sup>5</sup>

Parliament has an important oversight function with regard to the Act, which is to assess whether the responsible departments implement the Act correctly. Section 96(3) of the Act stipulates that

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the Minister of Justice and Constitutional Development must, within one year after the implementation of the Act and every year thereafter, submit reports to Parliament on the implementation of the Act. In order to comply with this provision, DJCD submitted and presented the first report on the implementation of the Act to the Portfolio Committees on Justice and Constitutional Development, and Correctional Services, on 22 June 2011. This article interrogates this report in an attempt to understand whether the Act is working after one year in operation.

## KEY ISSUES FOR IMPLEMENTATION

### Budgets

While the annual report covers a wide range of topics, including the number of new staff appointments and the number of officials trained, it does not provide a clear assessment of the problems caused due to insufficient funds being allocated for the implementation of the Act. This was discussed during the parliamentary hearing.<sup>6</sup> A costing report on the implementation of the Child Justice Bill found that it would require approximately R606,7m per annum.<sup>7</sup> Yet an amount of only R30m was allocated to the justice cluster for the implementation of the Act, despite indications that a budget of at least R52m would be needed to implement the Act.<sup>8</sup> The shortfall could thus be one of the reasons why the first year of implementation of the Act has not gone smoothly.

### Training of officials

According to the report, 111 new Child Justice Court clerks were appointed during 2010-11;<sup>9</sup> however, the report does not reflect the number of new probation officers. This information would have been helpful in assessing progress, since probation officers have an important role in ensuring that the objectives of the Act are met. The report also notes that, in total, 19 842 officials were trained to understand and implement the Act,<sup>10</sup> and that during this period

75 435 children were charged with committing offences.

The annual report also recorded that that 15 891 SAPS members had been trained on the Act.<sup>11</sup> The SAPS representative at the parliamentary hearing assured members of parliament that 'at every single police station there are police members trained on the Act'. The Portfolio Committee members, however, raised concerns about the extent of the training, based on their experience of conducting constituency visits to police stations. During these visits some members had come across instances where SAPS officials at the Community Service Centres were not trained in the provisions of the Act or the SAPS National Instruction on the Act.

In her analysis of the implementation of the Act, Charmain Badenhorst found that SAPS training is being rolled out in three phases, of which phase one constitutes a one-day information session, phase two is based on two days of in-service training, while phase three comprises a one-week training course.<sup>12</sup> As of 30 July 2010 only 6 279 out of 150 319 SAPS members had been trained in the Act, and only 151 members had received phase three training.<sup>13</sup> One can thus conclude that there are currently an insufficient number of police members who have received detailed training on the provisions of the Act and the National Instruction.

The training of SAPS members is, however, not the only aspect of the implementation process. Also important is the content of SAPS training materials. In this regard the report falls short, since it fails to provide details of the content and nature of training, again making the implementation process difficult to assess.

### Arrest and detention of children

To prevent children from being exposed to the adverse consequences of the formal criminal justice system, section 2(d) of the Act requires that children's constitutional rights be afforded protection. The Constitution of South Africa

requires that children should not be detained, and if they are, it should only be as a measure of last resort.<sup>15</sup> During 2008, an average of 10 000 children were arrested per month; while for the period of April 2010 to June 2010 this had declined to an average of 6 495 children arrested each month.<sup>16</sup> According to the annual report, an average of 6 286 children were charged each month during the first year of implementation. Not all of these children were arrested. There was therefore a marked decline in the number of children arrested for committing offences.

The number of children awaiting trial in prison, and the number of children sentenced to prison also decreased.<sup>17</sup> This was identified as one of the primary successes during the first year of the implementation of the Act.<sup>18</sup> Yet, this may not be solely a consequence of the implementation of the Act, since, as Muntingh has pointed out, there has been a steady decrease in the prison population over the past five years.<sup>19</sup> Nevertheless, there was an immediate sharp decline in 2010/11 in the number of children in prison, which suggests that the Act had a positive impact on the number of children who are incarcerated.<sup>20</sup>

## SHORTCOMINGS OF THE ANNUAL REPORT

While the annual report provides a number of statistics, insufficient data are provided to properly assess whether the objectives of the Act are being met. This section provides a discussion of the statistics and their shortcomings.

The annual report states that 75 435 children were charged by the SAPS during the first year of implementation of the Act.<sup>21</sup> The annual report also notes that the Department of Social Development (DSD) assessed 32 494 children during the same period.<sup>22</sup> This implies that some 42 941 children were not assessed. In terms of the Act, every child who is charged with committing an offence has to be assessed (even a child below the age of ten years), unless a prosecutor dispenses with the assessment in order to divert a child who committed a schedule 1 offence (minor offence) out of the court-based criminal justice

process.<sup>23</sup> The prosecutor can only dispense with such an assessment if s/he is of the view that it is in the best interest of the child.<sup>24</sup> It is reasonable to presume that a decision not to assess a child would be a rare occurrence, as it would be unlikely that it is in the best interest of a child not to be assessed. If the figures provided in the annual report are correct, 42 941 children should have been diverted without an assessment. The report however states that the NPA only diverted 15 588 children, of whom 2 444 were diverted by the prosecutor before a preliminary inquiry took place.<sup>25</sup> This seems to suggest that approximately 40 497 children 'fell through the cracks' before a preliminary inquiry. Whether this is a statistical anomaly, or a key indicator of the failure of the implementation of the Act, is unclear.

Additional inconsistencies in the numbers suggest further problems. Of the 32 494 children assessed by DSD, 14 471 appeared at a preliminary inquiry during this reporting period.<sup>26</sup> In terms of the Act, all children who have been assessed should appear at a preliminary inquiry, except children diverted by the prosecutor for schedule 1 offences and children below the age of ten years who do not have criminal capacity. It would thus be reasonable to presume that children who did not appear at the preliminary inquiry have been diverted for a schedule 1 offence by the prosecutor or were sent for a section 9 referral (for those children who do not possess criminal capacity).<sup>27</sup> As noted above, the annual report stipulates that 2 444 children were diverted before the preliminary inquiry for schedule 1 offences, while 795 received section 9 referrals. Once again, these figures do not balance in relation to the number of children who were assessed, but did not attend a preliminary inquiry. This suggests that 14 784 children were not accounted for in the annual report.

These are two examples of many instances in which the statistics provided in the annual report appear to raise more questions than they answer. This may be due to the fact that different departments (e.g. SAPS and NPA) collect data and report on it in different ways. The next section considers how and why this problem has arisen.

## ANALYSIS OF STATISTICS

While the annual report offers statistics, no analysis of these figures is provided. This is a shortcoming that becomes clear in the following example. The Act recommends particular procedures that depend on a child's age and the crime that s/he allegedly committed. If a child who is 11 years old commits a schedule 1 offence, s/he may be diverted by a prosecutor before the preliminary inquiry, subject to the prosecutor being satisfied that the child has criminal capacity. However, a 16-year old child who committed a schedule 3 offence cannot be diverted before a preliminary inquiry. Therefore, such a child would have to attend a preliminary inquiry, at which point it is possible to divert him or her, subject to permission from the Director of Public Prosecutions.

The annual report fails to provide details of the crimes or ages of the children who were diverted. It only mentions at what stage of the procedure a child was diverted. Yet, this information is essential to enable a determination of whether the diversion ordered would achieve the objectives of diversion as found within section 51 of the Act.<sup>28</sup>

Another example relates to the offences allegedly committed by children who were either arrested, given a written notice to appear in court, or summoned. The annual report only distinguishes between boys and girls, but does not provide an overview of the ages or the offences these children committed. Such an overview would not only assist with a future criminal capacity review (as required in terms of section 96(4) of the Act), but would also provide parliament with better information to effectively oversee and assess the implementation of the Act.

## THE IMPORTANCE OF STATISTICS

Getting the statistical reporting correct is important for a number of reasons. Firstly, when parliament monitors the implementation of the Act, the Portfolio Committees need to be sure

that children do not fall between the gaps of the system. This would happen when children are not processed through the entire child justice system, as envisaged by the Act. For example, every child charged with committing an offence has to be assessed by a probation officer, unless the prosecutor decides that it is not in the best interest of the child to be assessed. But if children are not assessed and not provided with an alternative by the prosecutor, they could fall through a gap of the system. The same would apply when children are assessed and not brought before a preliminary inquiry, or diverted.

When children fall between the gaps and are not held responsible for their actions, it is feared that the recidivism rate of children might increase, as they thus escape accountability for their actions. One of the objectives of the Act is to prevent future re-offending.

Secondly, accurate statistics are important in order to review the minimum age of criminal capacity. Such a review is required to take place within five years after the implementation of the Act.<sup>29</sup> Currently Section 7 of the Act stipulates that the minimum age of criminal capacity is ten years. The United Nations Convention on the Rights of the Child does not stipulate a minimum age for criminal capacity.<sup>30</sup> However, it does recommend in 'General Comment Number 10 on Children's Rights' in juvenile justice that the minimum age of criminal capacity should be set at 12 years.<sup>31</sup> Thus the minimum age in South Africa is currently not in line with the recommendation by the United Nations Committee on the Rights of the Child, and needs to be assessed. This can only happen if there are sufficient case data on which to base such an assessment. Section 96(4) of the Act requires that parliament consider a number of statistics when reviewing the age of criminal capacity. This includes the number of children between 10 and 14 years who allegedly committed an offence, the sentences imposed on them, and the number of children whose cases did not end up in trial, because the prosecutor decided that these children did not possess criminal capacity. This information is not in the annual report.

## SOLVING THE NUMBERS PROBLEM

The primary reason for the inconsistencies in the statistics relates to the fact that the Inter-Sectoral Committee on Child Justice (ISCCJ)<sup>32</sup> does not (yet) possess an integrated management system, which is required in terms of section 96(1)(e) of the Act. The key aim of an integrated management system is to ensure that all the departments communicate effectively through a central location or server so as to track children through the child justice system. Since the establishment of this system is a legislative requirement, failure to do so amounts to a failure to implement the Act, and gives rise to the kind of problems discussed above.

It is current practice that the responsible departments collect statistics physically (by way of registers) and report them using Microsoft Excel sheets. Each department does this as and when children come into contact with the child justice system in their department. For example, the DJCD starts recording the details of children once they appear before a preliminary inquiry, while the Department of Social Development only keeps records of children who have been assessed. This creates room for inaccuracies and discrepancies to creep into the reporting process. Departments are aware of the problem, as it is an issue that has been on the agenda of the ISCCJ for some time. It appears that the only long-term solution to solve this problem would be to prioritise the implementation of an integrated management system.

In the meantime, in the absence of an integrated management system, greater collaboration between departments and government institutions at provincial and magisterial district levels could go some way to addressing the problem. The provincial Child Justice Forums should consider the creation of case review panels at magisterial district level to track every child through the child justice system. These case review panels should consist of dedicated staff of each department and government institution, together with the necessary service providers. Such case review

panels would be better equipped (than the current system of collecting statistics) to record every child that enters the system, and to report findings to the provincial Child Justice Forums. The provincial forums could then provide the data to the ISCCJ. This would ensure a higher level of accuracy in the statistics and perhaps also offer more detail about the treatment of children in the justice system.

## CONCLUSION

To return to the question posed in the title of this article: 'Is the Act working for children?' The answer is ambiguous. On the basis of the data provided in the annual report it is impossible to reach a definitive conclusion. While a year may be too short a time to expect full implementation of the Act, a great deal can be done to improve on reporting. The one objective of the Act that appears to be achieved is the promotion of detention as a last resort.

With regard to oversight, the Act mandates Parliament to monitor and oversee the implementation of the Act by the responsible departments.<sup>33</sup> Based on the response of Parliament to the first annual report it would appear that Portfolio Committees are taking this responsibility seriously. However, querying a bad report is not enough. The impact of their oversight will have to be seen in improvements of the implementation of the Act. Ensuring that sufficient funds are made available to the DJCD may be parliament's first obligation.



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## NOTES

1. The author wishes to thank Prof Jacqui Gallinetti and Dr Chandré Gould for useful comments on previous drafts. The author also wishes to acknowledge the financial support from the European Union funded this article. The views expressed in this article are solely those of the author and do not reflect the official views of the European Union.
2. Act 75 of 2008.
3. The objects of the Act are stipulated in section 2.
4. It is not within the scope of this article to explain the details of the new child justice procedure. See: J

- Gallinetti, *Getting to know the Child Justice Act*, 2009, 65, for a diagram of the child justice system. <http://www.childjustice.org.za/publications/Child%20ustice%20Act.pdf>. (Accessed 19 October 2011).
5. For a more comprehensive account of the proceedings in parliament, please download the minutes at <http://www.pmg.org.za/report/20110622-joint-meeting-implementation-child-justice-act>. (Accessed 26 September 2011).
  6. See <http://www.pmg.org.za/report/20110622-joint-meeting-implementation-child-justice-act>. (Accessed 26 September 2011).
  7. C Barberton and S Wilson, *Recosting the Child Justice Bill*, 2001, page 21. This report can be downloaded at [http://www.childjustice.org.za/downloads/Recosting\\_Report.pdf](http://www.childjustice.org.za/downloads/Recosting_Report.pdf). (Accessed 19 October 2011).
  8. See <http://www.pmg.org.za/report/20110622-joint-meeting-implementation-child-justice-act>. (Accessed 26 September 2011).
  9. Inter-sectoral Committee on Child Justice, *Annual Report on the Implementation of the Child Justice Act, 2008* (Act No 75 of 2008), 2011, 21.
  10. *Ibid*, 24.
  11. *Ibid*.
  12. See C Badenhorst, Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good intentions, questionable outcomes, *OSF Criminal Justice Initiative Occasional Paper Series* 10, 2011, 15, <http://www.childjustice.org.za/publications/ImplementationCJA.pdf>. (Accessed 26 September 2011).
  13. *Ibid*.
  14. Act 108 of 1996.
  15. See section 28(1)(g).
  16. Badenhorst, Overview of the Implementation of the Child Justice Act, 16.
  17. C Ballard, The situation of children in prison after the implementation of the Child Justice Act: Has Anything Changed? *Article 40*, 13(1) (2011), 2, 3 and 4.
  18. S Waterhouse, Parliament reviews the implementation of the Child Justice Act, 13(2) *Article 40* (2011) 4.
  19. L Muntingh, Punishment and Deterrence: Don't expect prisons to reduce crime, *SACQ* 26, 2008, 3.
  20. Badenhorst, Overview of the Implementation of the Child Justice Act, 34.
  21. Inter-sectoral Committee on Child Justice, *Annual Report*, 46.
  22. *Ibid*, 25.
  23. See sections 34(1) and 41(3) of the Act. The Act divides offences into three schedules, of which schedule 1 consists of minor offences.
  24. A probation officer is better placed to decide whether a child should be diverted, based on the information divulged at an assessment. Therefore prosecutors would rather wait for such assessment and then divert in schedule 1 offences. An example of where it would not be in the best interest of the child to wait for an assessment, would be where the delay in ensuring that a child be assessed would take extremely long, which would amount to the charges still pending against a child for a long time.
  25. Inter-sectoral Committee on Child Justice, *Annual Report*, 33.
  26. *Ibid*, 27.
  27. In terms of section 9 of the Act, if a child is below the age of 10 years, the probation officer has to assess the child and make a referral of counselling, therapy or programme for such child to attend.
  28. Section 51 stipulates that the objectives of diversion are to: '(a) deal with a child outside the formal criminal justice system in appropriate cases; (b) encourage the child to be accountable for the harm caused by him or her; (c) meet the particular needs of the individual child; (d) promote the reintegration of the child into his or her family and community; (e) provide an opportunity to those affected by the harm to express their views on its impact on them; (f) encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm; (g) promote reconciliation between the child and the person or community affected by the harm caused by the child; (h) prevent stigmatising the child and prevent the adverse consequences flowing from being subject to the criminal justice system; (i) reduce the potential for re-offending; (j) prevent the child from having a criminal record; and (k) 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.'
  29. This is a function of parliament mandated by section 8 of the Act. See also A Skelton and C Badenhorst, *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a review*, Child Justice Alliance, 2011, 21-26.
  30. See L Wakefield, The CRC in South Africa 15 years on: does the new Child Justice Act 75 of 2008 comply with international children's rights instruments? *Northern Ireland Legal Quarterly* 62(2) (2011), 171-3.
  31. United Nations Committee on the Rights of the Child General Comment No 10: Children's Rights in juvenile justice (2007) para. 32.
  32. The ISSCJ is a statutory body created in terms of section 94 with a purpose of ensuring inter-departmental collaboration on the implementation of the Act. Considering this body includes directors-general and national heads of the NPA and SAPS, an 'operational' ISSCJ was created to ensure that the departments communicate with each other. A mandate for this body was set up in the National Policy Framework to the Act. The operational ISSCJ meets monthly, instead of twice a year as required by section 95 of the Act, and also consists of NGOs.
  33. Section 96(3) of the Act.