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BRIEFING NOTES: IMPLEMENTATION OF CHILD JUSTICE ACT NO. 75 OF 2008 – REVIEW OF AGE OF CRIMINAL CAPACITY AND NATIONAL POLICY FRAMEWORK

1. INTRODUCTION

The Child Justice Act No 75 of 2008 (CJA) was enacted in 2009 and came into operation in 2010.

In terms of **Section 8** of the CJA *the Minister of Justice and Constitutional Development must, not later than five years after the commencement of this section submit a report to Parliament to determine whether or not the minimum age of criminal capacity should be raised.*

In terms of **section 93** of the CJA the **National Policy Framework** on child justice must be reviewed within three years of its publication in the *Gazette*; and at least once every five years thereafter.¹ The policy framework published in the *Government Gazette* in 2010.

This paper provides a brief overview of the key provisions of the CJA relating to the requirement that Parliament review the age of criminal capacity and the national policy framework on child justice. The Minister has published two **Annual Implementation Reports** in 2011 and 2012 respectively. The paper discusses the most important challenges that need to be addressed as raised in the annual implementation reports, the extent to which they were addressed; and new challenges identified. It also briefly sets out the amendments to the CJA proposed in the **Judicial Matters Amendment Bill [B7B-2013]**, which has been referred to the Select Committee, as well as a synopsis of previous engagements the Select Committee had with departments on the CJA.

The information in this briefing document is largely extracted from an in-depth group project paper currently being compiled by Parliament's Research Unit which will be made available to Members of Parliament once published.²

2. MINIMUM AGE OF CRIMINAL CAPACITY – INTERNATIONAL TRENDS

2.1 SOUTH AFRICA

Members have consistently raised the issue of the difference in ages assigned by various pieces of legislation (for example the CJA, Sexual Offences Act, the Correctional Services Act and the Children's Act, and the Termination of Pregnancy Act) at which children are considered to have decision-making capacity.

In South Africa the minimum age of criminal capacity is 10 years of age, whereas the median age of criminal responsibility worldwide is 12 years of age in line with UN recommendations.³ *In 2008 Parliament did not set the minimum age at 12 due to a lack of*

¹ By 1st August 2013; and 1st August 2018.

² Members are also referred to the briefing document by Ms. Anthea van der Burg which deals with some of the issues emanating from the Second Implementation Report for consideration by the Select Committee.

³ Don Cipriani (2009), *Children's Rights and the Minimum Age of Criminal Responsibility*



reliable or accurate statistics on the number of children between the ages of 10 and 13 who had been alleged of committing offences and the types of offences they were alleged to have committed.⁴

• CJA: CRIMINAL CAPACITY OF CHILDREN UNDER THE AGE OF 14

Part 2 of the CJA deals with the criminal capacity of children under the age of 14.

Section 7: The minimum age of criminal capacity of children is set at 10 years of age. Children under the age of 10 are deemed not to have criminal capacity and must be dealt with in terms of s9 of the CJA.

Section 9 provides that the child may not be arrested and must be handed over to his or her parents, guardian, an appropriate adult or to a child and youth care centre if the aforementioned are not available. A probation officer must assess the child and compile a report which can include a recommendation that the child be referred to a children's court, referral for counselling or therapy, support services, or arrange a meeting with the parent(s) or guardian.

Section 8 of the CJA provides that the Minister of Justice must re-evaluate the issue of criminal capacity within 5 years after the commencement of the Act. **A report must be submitted to Parliament by the Intersectoral Committee for Child Justice (ISCCJ) with statistics** of children aged 10 to 13 who allegedly committed offences and the types of offences they have allegedly committed, and the sentences imposed on these children if they were convicted.⁵ Information should also be provided on the number of cases where expert evidence on the criminal capacity of the child was led and the outcome of those matters.⁶ Information is also needed on the number of children who did not go to trial because the prosecutor was of the view that they did not have the necessary criminal capacity.⁷

An analysis of the statistics is required along with a recommendation on whether the age of criminal capacity should remain at 10 or be raised.

However, the two Annual Intersectoral Reports contain very little information to assist in the review on the age of criminal capacity:

- SAPS cannot currently provide statistics for children under the age of 10 years involved in crime.
- SAPS do not currently provide statistics on the types of offences for which the children in the various age groups were charged.
- SAPS keeps statistics on charges rather than arrests, referrals etc and one child may be charged with more than one offence. The exact number of children charged by the police in each age category is therefore difficult to determine.
- The statistics for 2010/11 and 2011/12 show a **significant and unexplained declining rate** of children who are charged but are not reflected in the assessment statistics.

⁴ Skelton and Badenhorst (2011)

⁵ Skelton A and Badenhorst C, 'The Criminal Capacity of Children in South Africa', Child Justice Alliance (2011)

⁶ Ibid

⁷ Ibid



- **No information is provided on the age breakdown** of children awaiting trial, or sentenced to imprisonment or correctional supervision; or the offences for which they were convicted.

2.2 INTERNATIONAL STANDARDS ON MINIMUM AGE OF CRIMINAL CAPACITY

United Nations Convention on the Rights of the Child. State parties to the Convention must establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.⁸

United Nations Standard Minimum Rules for the Administration of Juvenile Justice: the beginning of that age shall not be fixed too low an age level, bearing in mind emotional, mental and intellectual maturity.⁹

International Committee on the Rights of the Child: “a minimum age of criminal responsibility below the age of 12 years is not internationally acceptable”.¹⁰ State parties should not lower their age of criminal responsibility to 12 where this has already been set higher. States are strongly encouraged to introduce a higher minimum age of criminal responsibility (e.g. 14 or 16 years of age).¹¹

❖ COMPARATIVE EXAMPLES OF MINIMUM AGE OF CRIMINAL RESPONSIBILITY

Selective list of countries that increased their minimum age of criminal responsibility as per the UN Convention recommendations:

Country	Minimum age of criminal responsibility
Ireland ¹²	12 years of age and (<i>doli incapax</i> 12-14)
Uganda ¹³	12 years of age. The police shall under justifiable circumstances caution and release the child; detain him/her separate from adults; and place in safe custody.
Australia ¹⁴	10 years of age and (<i>doli incapax</i> 10-14)
New Zealand ¹⁵	14 years of age (except for murder / manslaughter where 10 years of age applies, with <i>doli incapax</i> presumption)
Sierra Leone ¹⁶	14 years of age

⁸ Article 40(3) (a) - United Nations Convention on the Rights of the Child

⁹ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985)

¹⁰ United Nations Convention on the Rights of the Child (General Comment No.10, 2007)

¹¹ Ibid

¹² Children’s Act, 2001. Raised minimum age from 7 to 12, Retained *doli incapax* (not criminally responsible) between 12 and 14.

¹³ Uganda Children Act, 1996. Minimum age raised from 7 to 12 years. *Doli incapax* was repealed.

¹⁴ Crimes Amendment Act, 1995. Minimum age was raised from 8 years to 10 years.

¹⁵ Children, Young Persons and their Families Act, 1989.

¹⁶ Children Rights Act, 2007 and Children and Young Person’s Act, 1945. Minimum age raised from 10 to 14 years.



Ghana	12 years of age - abolished <i>doli incapax</i>
Brazil ¹⁷	18 years of age

Civil society organisations propose that is desirable to:

- **raise the age of criminal capacity to at least 12 or 13 years old.**
- **eliminate one age category for assessment** (leaving **only two distinctions** - below the age of 12 or 13 (do not have criminal capacity) and above 12 or 13 (have criminal capacity)).

These proposals have practical implications for all role-players including the police, the departments of Social Development and Health, and the courts.

3. NATIONAL POLICY FRAMEWORK (NPF)

The NPF is intended to ensure a uniform, co-ordinated and co-operative approach by all government departments, organs of state and institutions in dealing with matters relating to child justice; guide the implementation and administration of the CJA; promote co-operation and communication with the non-governmental sector and civil society in order to ensure effective partnerships for the strengthening of the child justice system; and enhance service delivery as envisaged by the CJA.

3.1 The policy identifies 10 key priorities of the CJA, namely:¹⁸

- ❖ Building capacity in the sector
- ❖ Ensuring assessment of children
- ❖ Preliminary inquiries
- ❖ Sentencing
- ❖ Provision of Diversion and Alternative Sentencing services
- ❖ Establishment of youth and child care centres
- ❖ Establishment of one stop child justice centres
- ❖ Resources and budget
- ❖ Public education and communication
- ❖ Development of the necessary Information Technology (IT) and Integrated Justice System (IJS) systems to support information management.

3.2 The NPF proposes that **civil society and NGOs must provide information and assistance through their experience and research activities to monitor the implementation of the CJA.**

3.3 Regulations, Directives and Registers

Other policy directives to stakeholders working with children in conflict with the law include:

¹⁷ International Committee on the Rights of the Child General Comment No.10 (Forty-fourth session , Geneva, 15 January – 2 February 2007

¹⁸National Policy Framework (2010)



- **CJA Regulations** were approved by Parliament and published in *Government Gazette* on 31 March 2010.
- **National Prosecuting Authority Directives** in terms of section 97(4) of the Act were approved by Parliament and were published on 31 March 2010. These directives include: Withdrawal of cases; Criminal capacity; The decision to prosecute a child who is 10 years or older but under the age of 14 years; Basic principles relating to diversion; Diversion of matters in respect of minor offences before a preliminary inquiry; Diversion of matters at a preliminary inquiry; Diversion of matters at a trial; Diversion of matters in respect of serious offences; The assessment; Categories of child offenders; Directives in respect of persons who were children at the time of commission of a crime but are 18 years and older, but under 21 years; Error regarding the age of a child or adult discovered after the matter is diverted; Categories of offences; The trial in a child justice court (section 63); Sentencing; Children used by adults to commit offences; Monitoring; and Failure to comply with any duty imposed by the Act or Directives.
- The final **National Instruction on Children in Conflict with the Law** was approved by Parliament and published in the *Government Gazette* on 2 September 2010. The purpose of the National Instruction is to ensure that members of the SAPS treat children in CICL law appropriately and in accordance with the provisions of the CJA and the Constitution.
- The Department of Social Development established a **manual register** to record the number of children under 10 suspected of committing an offence. An electronic register is reportedly being developed that would provide a notification from SAPS on the registration of new cases.
- A notice published on 1 April 2010 identifies the following categories or classes of persons as suitable to conduct criminal capacity evaluations:
 - A medical practitioner who is registered as such under the Health Professions Act, 1974 and against whose name the specialty psychiatry is also registered;
 - A registered clinical psychologist under the Health Professions Act, 1974.
- The **Diversion Accreditation Framework** was tabled in Parliament in June 2010 and *gazetted* in August 2010 which invited applications for the accreditation of diversion programmes and diversion service providers.
 - A list of **Accredited Diversion Programme and Service Providers** for each province was published in January 2012.

3.4 INTERSECTORAL CO-ORDINATING STRUCTURES

The **Intersectoral Committee for Child Justice (ISCCJ)** is chaired by the Director General of the Department of Justice and Constitutional Development and consists of the National Commissioner of the South African Police Service, the National Director of Public Prosecutions, and Director General's of the Departments of Social Development, Correctional



Services, Health and Basic Education, and Women, Children and People with Disabilities. The ISCCJ must meet at least twice a year; and performs a high level strategic function.

A **National Operational Intersectoral Committee on Child Justice** was set up by the ISCCJ to deal with the more practical technical and operational issues around the CJAs implementation. This committee is chaired by an official from the Department of Justice and consists of senior representatives from the national departments represented on the ISCCJ, from provincial child justice fora and NGO's as well as senior representatives from Legal Aid South Africa, the Department of Home Affairs and the Chief Magistrates Forum. This body meets once a month to focus on co-ordinating and monitoring activities, identifying problem areas, receiving progress reports and reporting to the ISCCJ. In addition, **Provincial child justice fora** were established and these are now functioning (with various degrees of success) in all nine provinces.

4. AMENDMENTS TO THE CJA PROPOSED BY JUDICIAL MATTERS AMENDMENT BILL [B7-2013]

The **Judicial Matters Amendment Bill** which has been referred to the Select Committee proposes a number of amendments to the following sections of the CJA.

- Sections 11 and 97 – **Assessment of Criminal Capacity** – to provide that while psychiatrists and clinical psychologists are competent to conduct the evaluations of children's criminal capacity **it is the inquiry magistrate or child justice court which must consider the cognitive, moral, emotional, psychological and social development of a child on the basis of all evidence placed before the court, including the report of a person appointed to evaluate the criminal capacity of the child.** The amendments also provide that the Minister may determine different tariffs for the different categories of persons who do the assessments.
- Section 28 – **Protection of Children in Police Custody** – to provide that a report on a complaint about any injury to a child from a station commander should be submitted to the Provincial Commissioner rather than the National Commissioner with a copy to then be submitted to the National Commissioner.
- Section 43 – **Preliminary Inquiries** – to provide for all preliminary inquiries to take place at the District Courts to facilitate the establishment of a trained and dedicated pool of functionaries to deal with these inquiries at a central point.
- Section 56 – **Powers of Minister of Social Development** – to allow the Minister to delegate his or her powers to provincial levels in respect of the issuing of certificates of accreditation to diversion service providers.
- Section 75 – **Correctional Supervision** – to bring the Act in line with the Criminal Procedure Act and the provisions relating to correctional supervision.
- Section 85 – **Automatic Review** – to bring the Act in line with a number of special review cases have come before the courts which have emphasised the need to ensure there is a high degree of scrutiny over sentences imposed on child offenders and that matters emanating from regional courts should be subject to automatic review.
- Section 87 – **Expungement** – to provide that the Minister or DG may revoke a certificate of expungement which was erroneously issued.



5. SC SECURITY AND CONSTITUTIONAL DEVELOPMENT MONITORING OF CJA

5.1 MEETINGS

On 11 Mar 2010 the DOJCD introduced and tabled the **regulations** drafted under the CJA before the Select Committee on Security and Constitutional Development ("the Select Committee").¹⁹ In its briefing the Department assured the Select Committee that all relevant departments were ready to implement the CJA by 1 April 2010. The Committee noted the requirement that the age determination for criminal capacity must be reviewed after five years by Parliament. It also noted that the South African Police Service (SAPS) would issue interim instructions pending the finalisation of its National Instructions which were later presented to the Select Committee on 1 September 2010.

5.2 KEY CONCERNS AND QUESTIONS BY SC MEMBERS

The following were the key concerns and questions raised by Members of the Select Committee:

- How was the age of criminal capacity for young children determined and what was the burden of proof in relation to criminal capacity?
- What was the referral process for diverting these children away from the criminal justice system?
- Whether the accommodation provided at children's and youth care centres was appropriate; and whether enough was being done to protect young children?
- What was the impact of removing children from their families in certain instances?
- Clarity was sought regarding the referral of certain cases to the Independent Complaints Directorate (now called the Independent Police Investigative Directorate) tasked with investigating complaints against the Police.
- Members questioned the availability of resources.

Shortly after the operationalisation of the CJA, during the briefing by the **Department of Correctional Services (DCS)** on its budget for the 2010/11 financial year on 19 May 2010, the Select Committee interacted with the DCS regarding certain aspects in its budget vote in the light of the commencement of the CJA.²⁰

Members of the Select Committee raised concerns about the large number of sentenced and unsentenced children and juveniles in prison and what education, rehabilitation and diversion programmes were available to them. Members also sought information on whether the youth were accommodated separately from adults.

5.3 WRITTEN RESPONSES BY DEPARTMENT

¹⁹ PMG (2012). Meeting of the Select Committee on Security and Constitutional Development. Child Justice Bill Regulations. Website. <http://www.pmg.org.za/report/20100312-tabling-regulations-implement-child-justice-bill>. Accessed 14 January 2012.

²⁰ Parliament of South Africa (2012). Select Committee on Security and Constitutional Development. Annual Report of Activities. January to November 2010. at p2



In a written submission dated 26 May 2010, the DCS provided the requested statistics and further information regarding youth in prison, the Department's approach to education, and the number and state of its education and training facilities. According to the Department, the average number of sentenced and unsentenced children had decreased steadily during 2009/10.²¹

Prior to the operationalisation of the CJA, the DOJCD briefed the Portfolio Committee on Justice on the regulations and readiness to implement the CJA when it came into operation in April 2010 (including a costing). The Department, however, only briefed the Select Committee on Security and Constitutional Development on 1 September 2010, five months after the commencement of the CJA. The meeting was a joint meeting with the Departments of Social Development and Police as key role players in the implementation of the CJA.²² The focus of the meeting was on the **CJA, National Policy Framework and National Instructions** of the Departments of Justice and Constitutional Development, Social Development and the South African Police Services. Each Department outlined the work they had done since the implementation of the CJA. All the departments involved in different aspects of child justice had encountered some challenges in respect of the implementation of the CJA although these were not insurmountable.

The DOJCD had tabled the statistics of children awaiting trial and the numbers imprisoned in June 2010 which indicated that since the CJA's implementation on 1 April 2010, the number of child arrests had declined markedly in the ensuing five months. The principles of the diversion system were outlined. Child and youth care facilities had been established for awaiting trial and sentenced children. The CJA required the Intersectoral Child Justice Committee to develop a National Policy Framework and this had been completed and tabled in Parliament in June 2010. This Committee had also held meetings regarding the implementation and monitoring of the CJA. The DOJCD outlined its communication strategy and training programmes for its officials, as well as magistrates and judges. Training was being conducted through the Justice College and had been escalated to the training of trainers. The Department was moving towards an electronic system and integrated case management.

The implementation of the CJA had not been without challenges. A major challenge had been that of funding. Another problem related to long periods spent awaiting trial, especially trials to be conducted in the Regional Court. Lack of funding was hindering the rollout of One Stop Justice Centres and there were insufficient numbers of probation officers. There were also problems relating to the responsibilities of the Department of Health which was required to assist with the evaluation of criminal capacity in children aged 10 to 14, and with educational programmes at the Department of Correctional Services.

The Department of Social Development (DSD) outlined its responsibilities in terms of the CJA and described the national structure that would support the CJA, build capacity levels, support provincial teams and monitor the implementation of the National Policy Framework which was to be reviewed in 2010. Each province would have three committees comprising representatives of Non Government Organisations (NGOs), government departments and

²¹ Department of Correctional Services (2010). Follow up matters from 19 May 2010 engagement, p9.

²² Child Justice Act National Policy Framework & National Instructions: Departments of Justice & Social Development and South African Police Services briefings



academic institutions. The functions of these committees were set out, as well as the eligibility criteria for organisations, programme delivery and the accreditation process was described. The DSD were to make resources available for the implementation of diversion programmes, and had conducted internal briefing sessions and provincial stakeholder workshops. It had published notices in the Government Gazette to invite applications for the accreditation of Diversion Programmes and Diversion Service Providers.²³ An implementation plan had been developed and quality diversion services were being provided in conjunction with other stakeholders. The DSD had also finalised norms and standards for child and youth care facilities for awaiting trial and sentenced children. The Department of Basic Education (DBE) was in the process of handing over reform schools and schools of Industry to the DSD.

The South African Police Services noted that a National Instruction had been developed and distributed to all police stations. Training had been provided in three phases. Communication networks had been established. A framework for monitoring and evaluation had been set up. Monitoring and evaluation initiatives included records on the numbers of children charged, the fact that arrest was to be the last resort, and site visits. The SAPS National Instruction was outlined with regard to the different age-groups of children, as well as the guidelines it contained concerning how children who had been used by adults to commit crime should be treated by the police. The SAPS was also required to liaise with other role players and submit reports on crimes involving children, and attempt to find the ring-leaders, who were often adults. Information sessions were targeted at provincial heads and specific commanders and officials in key units. Referral information was also provided to SAPS members. The Department reported that there had already been a few high-profile cases which had shown the efficacy of the system.

Members raised several questions about the funding of child justice programmes and were concerned about the lack of funding available. They commented that donor funding should be used with caution. Members asked several questions also about the impact of the Child Justice Act, the numbers of children in detention, outstanding cases, training of officials and the need for booklets to be available in all languages. Questions were also asked about the highly publicised case in Tshwane concerning the removal of children by the Metropolitan Police. Members felt that places of safety should receive more funding. Questions were asked about privately-run facilities, the requirements for accreditation, and the extent to which magistrates would be guided by pre-trial assessments. The Committee felt that an oversight visit would be useful, especially since some areas were experiencing problems with the courts.²⁴

²³ Government Gazette No. 33469. Notice 809 of 2010. Department of Social Development.

²⁴ Parliament of South Africa (2012). Meeting of the Select Committee on Security and Constitutional Development. Briefings by the Departments of Justice and Constitutional Development, Social Development and Police on the Child Justice Act National Policy Framework and National Instructions. 1 September 2010.



5.4 RECOMMENDATIONS

The following recommendations are for the Select Committee's consideration:

Oversight : The Committee may schedule oversight visits to affected Youth Care and Secure Care facilities – those that are to be closed and those that have received children from facilities that had been closed, as well as to correctional facilities housing children. The Select Committee should liaise with the relevant Portfolio Committees to reduce the potential for duplication of visits and thus to ensure wider coverage of facilities and centres by Parliament.

Oversight over provincial implementation: The Select Committee is best suited to ensure scrutiny over the provincial statistics to identify problems or successes in particular provinces in implementation of the CJA. The SC should urge the Department of Justice to ensure that a provincial breakdown of all relevant statistics is included in the annual intersectoral implementation reports. A key role of the SC would therefore be to assist in the identification of provincial specific barriers to implementation in order to recommend corrective action. In addition, the Committee is well placed to identify provincial 'good practice' and to encourage sharing of 'good practice' across the provinces.

PROPOSED QUESTIONS FOR ENGAGEMENT WITH STAKEHOLDER DEPARTMENTS AND CIVIL SOCIETY ORGANISATIONS – *a separate document with proposed questions will be provided to SC Members at the meeting.*