



CENTRE FOR
CHILD LAW

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The Context

There can be no debate that Cannabis for Private Purposes Bill must align with the South African Legal Framework. In this regard the following is of importance:

- The Constitution of the Republic of South Africa:
 - Sec. 28(1)(d): The right to be protected from maltreatment, neglect, abuse or degradation.
 - Sec. 28(1)(f): The right not to be required or permitted to perform work or provide services that ... are inappropriate for a person of that child's age.
 - Sec. 28(2): A child's best interests are of paramount importance in every matter concerning the child.
- The Children's Act 38 of 2005:
 - Sec. 7: Best interest of the child standard.
 - Sec. 150(1)(b), (d), (f) and (g): Child in need of care and protection
- The Child Justice Act 75 of 2008:
 - Sec. 3: Guiding Principles.



S v LM (Currently awaiting Constitutional Court Confirmation)

- Its origins:
 - A special needs school in Johannesburg together with the NPA implemented a localised programme called the “*Drug Child Programme*”. The programme would subject learners to random drug testing. A positive test result would result in “*prosecution*” and “*diversion*”.
 - The 4 young boys at the heart of the matter all tested positive and were referred. They did not comply with their onerous diversion programmes, were brought back to court and ordered to undergo a period of compulsory residence for an indeterminate period at Secure Care Centre.
 - The matter came before the High Court on urgent special review.
- The issue *vis-à-vis* possession of cannabis:
 - A central issue was whether (or not) the use or possession of cannabis by a child is constitutionally defensible. The parties (including the government respondents) agreed it was not. **Importantly and acknowledged by all parties the issue was about criminalisation and not legalisation [para 27].**



S v LM (cont.)

- The findings *vis-a-viz* possession and/or use:
 - One, the legalisation of cannabis for use by adults constitutes a status offence and consequently is unconstitutional.
 - Two, the continued criminalisation of cannabis in respect of children violated their right to equality and their right to have their best interests considered of paramount importance. Importantly, and in this regard, is the acceptance that criminal justice system “*is not an effective and appropriate manner*” to protect children from use and abuse of substances harmful to them [para 59].
 - Three, there are several less restrictive means available to prevent children from using cannabis [para 69]. The Children’s Act and the Prevention of- and Treatment for- Substance Abuse Act 70 of 2008 are two such measures.



The Submissions of the Centre for Child Law

- The primary concern of the CCL is that the Bill fails to address the plight of children who find themselves in a cycle of “drug abuse” and who may contravene its provisions.
- The Bill must, as mentioned at the outset, be aligned with both the Constitution as well as the existing protective measures.
- The Bill, in its present form, does not do so. I explain:



The Definitions

The Bill, at clause 1, defines the word “*guardian*” as follows:

“guardian” means a guardian referred to in section 1 of the Children’s Act.”

A guardian is defined, in terms of the Children’s Act, to mean a parent or other person who has guardianship of a child. Guardianship, in turn, is a parental responsibility and right that is bestowed on parents, or other persons who have applied to the High Court in terms of section 24 of the Children’s Act.

The term does not reflect the lived realities of most children in South Africa who do not reside with guardians.

We suggest that instead of using the term “*guardian*” we suggest using the term “*appropriate person*”. The term “*appropriate person*” is (to be) defined in the Child Justice Act 75 of 2008 (“**CJA**”) as meaning “*any member of a child’s family, including a sibling who is 16 years or older, or care-giver referred to in section 1 of the Children’s Act*”. The term is, evidently, far more inclusive and encompassing of the type of family structures we have in South Africa.



The Cultivation Offences

The Bill, at clause 3, provides for a range of “*cultivation offences*”. The problem with these offences are, at least, two-fold:

- One, there seems to be an anomaly created by clause 3(2) of the Bill.
- Two, the prohibitions apply to “any person”, which evidently includes children.



The Cannabis Offences

The Bill, at clause 4, provides for a range of “*cannabis offences*”. The problem with these offences are that they, much like the cultivation offences, they apply to “*any person*” (which includes children). The CCL has no objection *per se* but it would be appropriate and necessary that:

- It makes reference to the CJA, generally, and section 92 of the CJA, specifically (insofar as the child may have been used by an adult).
- It makes special provision for children accused of, in particular, an offence in terms of clause 4(7) of the Bill.



The Consumption Offences

The Bill, at clause 5, provides for a range of “*consumption offences*”. The problem with these offences are that they, much like the cultivation and cannabis offences, they apply to “*any person*” (which includes children). The problem with these offences are that they fail to make special provision for children.

The CCL recommends that children rather than being prosecuted be referred either to the care and protection system, where warranted, and in terms of the Children’s Act or the be referred to a treatment centre in accordance with the provisions of the Prevention of- and Treatment for- Substance Abuse Act.



Offences involving Children

The Bill, at clause 6, seeks to protect children from being exposed to cannabis. The objectives are laudable but we remain concerned that:

- The use of the term “*guardian*” fails to appreciate the family dynamics of many South Africans. It would follow that if a child is living with his or her older sibling, aunt or grandparent that they would all be guilty of class A offence (in terms of clause 6(4) of the Bill). This, with respect, is irrational.
- The exception in sub-clause (b) runs contrary to the duty placed on adults in clause 3(2)(a) of the Bill. This is, similarly, discussed elsewhere.
- The Bill, aside from criminalising the “*guardian*”, does little to properly assist the child and/or capacitate the parent. This is, respectfully, a major shortcoming.



Questions

