Article 40

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

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Article 40(2)(a)

"To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed."

Launch and Implementation of the Child Justice Act

by Charmain Badenhorst

Background and the official launch

With South Africa's ratification of the United Nations Convention on the Rights of the Child (CRC), various obligations relating to the protection of children and their rights have been incurred. These obligations included the establishment of laws, procedures, and institutions to address the issue of children in conflict with the law. After more than a decade of drafting, deliberating, advocating and lobbying the Child Justice Act 75 of 2008 (the Act) was finally signed into law by the then President of South Africa, Kgalema Motlanthe and published in the Government Gazette during May 2009. The implementation date was set for 1 April 2010.

On 1 April 2010, a day that has been widely described as historical and victorious in the protection of the rights of children in South Africa, the implementation of the Act was officially launched at the Walter Sisulu Child and Youth Care Centre in Soweto. The launch was attended by, amongst others, various Ministers (from Social Development; Justice and Constitutional Development; Women, Children and Persons with Disabilities), Deputy Ministers, Directors-General, Members of the Judiciary and Magistrates, delegates for the National Prosecuting Authority and the representatives from civil society.

The Child Justice Alliance was invited to participate at this event. It utilised the opportunity to pledge the Alliance's continued support to and collaboration with government in the implementation and monitoring of the Act. With that the Alliance emphasised its commitment to ensure that children in conflict with the law are treated equally and with respect, that their rights are adequately protected and that their best interests are regarded as of paramount importance in all matters concerning them, as demanded by the Constitution and international law.

continued on page 2

EDITORIAL

This edition of Article 40 celebrates the launch and implementation of the Child Justice Act on 1 April 2010. This marks a historic day for child justice and children's rights in South Africa and reflects the long-term efforts by government and civil society to improve the manner in which children are dealt with when they find themselves in conflict with the law.

Charmain Badenhorst's article provides a detailed outline of the background and implementation of the Act. This article focuses on the implementation progress and challenges at national level; and emphasises the need for consistent monitoring by government departments, in collaboration with civil society, dealing with child justice.

In addition, Nkatha Murungi reports on the Northern Cape High Court's review of Magistrates Court directives, to enter the names of minor offenders convicted for committing sexual offences, on the Sexual Offences Register. Murungi's article displays how this case is probably the first to test the consistency of the register with the rights of minor offenders and highlights the challenge to balance the best interests of the child with the interests of society.

In the regards to recent regional developments, Julia Sloth-Nielsen discusses juvenile justice reform in Zanzibar. She writes on how the process of law reform commenced and the progress made in relation to the 2010 Zanzibar draft Children's Bill, which contains a chapter dedicated on children in conflict with the law.

At an international level, The Committee of Ministers of the Council of Europe recently adopted and published guidelines for European States to take into account when dealing with children in the justice system. Lorenzo Wakefield elaborates on this recent development by detailing the legal principles, purpose and procedures related to the guidelines as well as how it complies with international child rights standards and obligations.

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continued from page 1

Guiding principles and aims of the Act

Very often when a child comes into conflict with the law it points to a fundamental failure to fulfil that child's rights

to adequate care and protection at an earlier point in his or her life. Community-based protection and child justice systems that place children's best interests at their core are therefore essential.

The Act aims to establish a criminal justice system for children that expands and entrench the principles of restorative justice, while ensuring their responsibility and accountability for crimes committed. It recognises the need to be proactive in crime prevention by placing an increased emphasis on the effective rehabilitation and reintegration of children in order to minimise the potential for re-offending; and balances the interests of children and those of society, with due regard to the rights of victims. The Act also creates special mechanisms, processes or procedures for children in conflict with the law by:

- raising the minimum age of criminal capacity for children;
- ensuring that the individual needs and circumstances of children in conflict with the law are assessed;
- providing for special processes or procedures, such as securing attendance at court, the release or detention, and placement of children;
- creating an informal, inquisitorial, pre-trial procedure, designed to facilitate the the best interests of children by allowing for the diversion of matters involving children away from formal criminal proceedings in appropriate cases;
- providing for the adjudication of matters involving children which are not diverted in child justice courts; and
- providing for a wide range of appropriate sentencing options specifically suited to the needs of children.

By providing a legislative framework for diverting matters involving children in conflict with the law away from the criminal justice system, the Act also ensures that these children are held accountable and responsible for their actions without criminalising their conduct.

Implementation progress

The Act's Regulations and the National Prosecuting Authority Directives were approved by the Portfolio Committee for Justice and Constitutional Development on 23 March 2010 and were published in the Government Gazette on 31 March 2010.

The Act's National Policy Framework (NPF) was approved by the Portfolio Committee on 26 May 2010 and has been published for public comments on 13 August 2010. The deadline for submitting public comments on the NPF was 1 October 2010. The Policy Framework for the Accreditation and Quality Assurance of Diversion Services in South Africa was also approved on 26 May 2010 by the Portfolio Committee. An invitation for applications

The Child Justice Alliance developed a Child Justice Act Monitoring Implementation Tool (CJAMIT) that will enable the collection of information on the implementation of the Act from a practitioner's perspective. This tool can be down loaded at www.childjustice.org.za

for the accreditation of diversion programmes and diversion service providers was published in the Government Gazette on 20 August 2010.

The South African Police Services' National Instruction 2/2010 on Children in Conflict with the Law was published in the Government Gazette during September 2010.

In a presentation, at the quarterly meeting before the Portfolio Committee on 11 August 2010, the Department of Justice and Constitutional Development and the National Prosecuting Authority reported that a total of 3321cases were diverted in terms of the Act from 1 April 2010 to 30 June 2010. The majority of these diverted children (3170) were between the ages of 14 to 17 years and were charged with Schedule 1 offences (1518). It was stated during the meeting that the National Prosecuting Authority performed below their diversion target and the administrative nature of the steps set out in the Act was offered as an explanation. It is also interesting to note that the figures in the table provided below by the National Prosecuting Authority do not balance. The total number of scheduled offences are not the same as the total number of children that were diverted.

Details of the diverted cases furnished during the presentation by the National Prosecuting Authority can be summarised as follows:

Forum	No. of Accused	10 – 13 years	14 – 17 years	Schedule 1	Schedule 2	Schedule 3
District Court	3122	151	2971	1449	876	318
Regional Court	199	0	199	19	39	68
Total	3321	151	3170	1468	915	386

More details on the implementation progress should emerge from the reports on the first quarterly meetings of the Department of Social Development and The South African Police Service.

The Child Justice Alliance developed a Child Justice Act Monitoring Implementation Tool (CJAMIT) that will enable the collection of information on the implementation of the Act from a practitioner's perspective. The collected information will be used in the following three important ways:

- To identify problems with the implementation of the Act that can immediately be communicated to the relevant government departments and the Inter-Sectoral Committee on Child Justice (ISCCJ) in order to address the problem. The information collected can therefore be used as an early-warning system and enable an emergency response if needed. In this way, challenges to the implementation of the Act that are encountered by role-players at local level can be communicated to the correct functionaries to ensure a rapid response.
- To identify the successes and positive outcomes. This will also be reported to the relevant government departments and the ISCCJ by the Child Justice Alliance.
- In any further monitoring research on the Act embarked on in future by the Alliance.

Conclusion

The Act has been in the making for more than a decade and the process followed to ensure the successful enactment thereof is an excellent example of what can be achieved through collaboration between civil society, both as individual organisations and as a collective (through the Child Justice Alliance) and government. However, true success in protecting the rights of children in conflict with the law, depends on the successful implementation of the Act and continued collaboration between civil society and government to achieve this.

Although information on the implementation progress is still limited, concerted efforts should be made to effectively monitor the implementation of the Act and to immediately address shortcomings as they arise.

These efforts should not only be for the benefit of record keeping and reporting, but specially and exclusively for the benefit of children in conflict with the law throughout South Africa.

Whom to protect?

Offender versus Victim - Entry of minor offenders' names into the Sexual Offences Register: Reminiscing the import of the decision of the High Court in S v RB and S v DK and Another

by Nkatha Murungi

Earlier this year, the Northern Cape High Court, gave its verdict in the review of two decisions of the Regional Magistrate's Court in the S v RB and DK and Another cases. The Magistrate's Court had convicted the accused persons of the offences of statutory rape and assault with the intent to cause grievous bodily harm, respectively. The accused persons in both cases were minors. The Magistrates Court conditionally postponed sentencing in both cases for five years. In addition, the Magistrates Court gave directives in respect of the entry of the names of the accused in both cases in the National Register for Sex Offenders (the register). The register is established in terms of section 42 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act). It contains information on persons who have been convicted of sexual offences against children or persons with mental disabilities, or persons who have committed such an offence but have been found mentally unfit to stand trial.

With respect to the accused in S v RB the magistrate ordered that his name not be entered in the register, while in the case of S v DK, he ordered that the names of the two accused should be included in the register. Entertaining doubt on the propriety of the two decisions, the magistrate referred the two cases to the High Court for review with two main questions. Firstly, would the prohibition of publication of a minor's identity in section 154(3) of the Criminal Procedure Act 51 of 1977 be breached if the details of the minor were to be entered in the register? Secondly, does the postponement of passing of sentence, as in the present case (and in terms of section 297 of the Criminal Procedure Act) constitute an 'imposition of sentence' for the purposes of section 50 of the Sexual Offences Act?

Whereas both questions are relevant to the rights of children in the process of justice, this article only focuses on the first.

Relevant issues guiding determination by the court

In terms of section 154(3) of the Criminal Procedure Act, the identity of a minor accused may not be revealed in any manner whatsoever unless it is in the opinion of the presiding officer that such publication would be 'just and equitable in the interests of any particular person'. In terms of section 50 of the Sexual Offences Act the name of a person who is convicted of a sexual offence against a child or a person who has a mental disability must be included in the register. The latter provision does not make any exception with respect to minor offenders. The Court acknowledged an obvious conflict in the provisions.

To resolve the conflict, it considered inter alia the ascertainable intention of the legislature in adopting the provisions of the Sexual Offences Act, the applicable legal principles in the resolution of such conflict, and the overall benefit of the provision as against the pre-eminence of the best interests of the child in all matters. The Court was of the view that in literal terms, 'on a proper interpretation of the Criminal Law (Sexual Offences and Related Matters) Amendments Act 32 of 2007, the names and particulars of sexual offenders who are minors must be included in the register of sexual offenders established in terms of article 42 of the Act'.

It further concluded that the inclusion of the particulars in the register obviously revealed the identity of a minor accused and would certainly amount to a publication of such particulars as envisaged in section 154(3) of the Criminal Procedure Act and is therefore inappropriate. Hence, 'an interpretation of the provisions of the Act which would prevent the particulars of a minor accused from being included in the register would be to the detriment of the public at large (including other children) and would clearly frustrate the objective of the legislature'. The Court argued that since the Sexual Offences Act was the more recent law, and one with general provisions, it must be deemed to make an exception as opposed to amending the specific provisions of the Criminal Procedure Act. In effect, the decision of the Court implies that section 50 of the Sexual Offences Act exempts minors who are convicted of a sexual offence from the protection of publication.

Balancing the interests: Is the rationale of the court justified?

The best interest of the child is a fundamental principle of the rights of children. It may therefore be applied in the determination of whether any actions by private or public actors are appropriate in the advancement of the rights of a child. The principle is also applicable in resolution of conflicts between different rights of children. The Court in the present review was of the opinion that the entry of the name of a minor convicted of a sexual offence into the register 'would amount to publication of such particulars' and would obviously affect such minor accused negatively. The Court juxtaposed such negative effect against the importance of the register and came to the conclusion that the limitations on the rights of the minor accused by the register were justifiable in the circumstances.

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continued on page 6

continued from page 5

It appears that a similar view was implicit in the reasoning of the South African Law Commission (as it was know then) in its consideration of the issue of sexual offences against children. While discussing the process and procedural law in respect of managing sexual offences against children, the Commission was of the opinion that protecting the public and especially children is possibly the most important factor in sentencing sexual offenders. In its opinion, the greater the harm resulting from the commission of an offence, the more important it was to protect the public from any further predatory acts by the offender.

Persons whose particulars have been included in the register may not be employed to work with children in any circumstance. They may not hold any position that places them in a position of authority, supervision or care of a child or where they gain access to a child or places where children are present or congregate. They may also not be granted a licence 'to or approve the management or operation of an entity, business concern or trade in relation to the supervision over or care of a child or a person who has a mental disability'. They may not be appointed as foster parents, kinship caregivers, temporary safe caregivers, adoptive parents or curators. A person who is sentenced without the option of a fine of imprisonment, periodical imprisonment or correctional supervision for a period exceeding 18 months or one with multiple convictions may not have their details removed from the register. In effect, the entry of a name of a convicted offender in the register, whether an adult or child could have long-term effects for the life of such person.

In terms of section 28(2) of the Constitution, the best of the interests of the child are to be accorded paramount importance. The negative effect of the entry of a minor's details into the register is not contested. It would appear that the supremacy of the best interests of the child would give it some leverage over the other rights considered such as the right to privacy. The current case however involved more than mere determination of the best interest of a child in the context of criminal justice. It required balancing of the interest of the convicted child against those of potential victims of the offender. In the present review, the Court did not give guidance on how to deal with such instances of clashing principles, preferring rather to deal only with the matter at hand.

Arguably, in view of the possibility of removal from the register, and seeing that the benefit of protection extends to more children than the individual offender, the verdict may be justifiable. A similar opinion was held by the Court in the present review. The view assumes that the severity of the sentence given to the offender is reciprocal to their criminal disposition to sexual abuse of children. For instance, a repeat offender, or one who is sentenced to more than 18 months in prison is treated as the most likely to offend in future. In line with that thinking, such a 'grave' offender is not afforded the chance to have their details removed from the register. This approach has nevertheless been faulted by the Commission which was of the opinion that it is not safe to assume that the harm is the greatest where the sexual act is particularly forceful or deviant.

Conclusion

This case is probably the first to test the consistency of the register with the rights of minor offenders. The potential gains of the register in the protection of children against potential sexual abuse cannot be denied. However, in view of the constitutional commitment to the best interests of the child, the legislative intent as was established in this case (to exempt child sex offenders from the general protection of their privacy), must now ignite intellectual debate on its consistency with the Constitution. The case at hand is a clear test of balancing the principle of the best interests of the child with respect to the rights of child victims and offenders. It is also a test on the whether the acclaimed importance of the best interests of the child principle can hold against societies' other interests, such as security. •

Persons whose particulars have been included in the register may not be employed to work with children in any circumstance.

Draft Zero and onwards:

Juvenile Justice reform in Zanzibar

by Julia Sloth-Nielsen

Zanzibar, comprising the islands of Unguja and Pemba off the coast of Tanzania, has a reputation as an exotic holiday destination due to its beautiful beaches and coral reefs. Also known as the spice islands, and for a rich historical heritage - under the Sultan of Oman, as a slave trading post, and as home to British explorer David Livingstone - Zanzibar now forms part of the United Republic of Tanzania. Yet it enjoys separate legislative powers in respect of certain non union matters, child welfare and juvenile justice being two such areas.

With 'mainland' Tanzania having embarked on a lengthy and drawn out process of harmonisation of child law with international instruments, culminating in the Law of the Child of 2009, Zanzibar has followed its own path.

Law reform process

The process of law reform commenced in December 2008 with a high level workshop held to identify areas of concern, to chart a way forward and to secure governmental approval for the development of a comprehensive Children's Act. Juvenile justice was identified from then already as a key area for the new legislation, as an area in which significant deficits in law, policy and practice existed.

During 2009, the Zanzibar law reform process was kick-started with widespread consultation around a document, called 'Draft Zero' drafted by South African consultants. The text was pulled together from various sources, including regional statutes – the South African Child Justice Act 75 of 2008, the Namibian Child Care and Protection Bill 2009 (as it then was) , the Lesotho Child Care and Protection Bill 2005 (as it then was), and from existing legislation and policy documents in Zanzibar.

continued on page 8

continued from page 7

Children in conflict with the law formed a discrete group with whom targeted individual interviews were scheduled. Both children in detention and children who had not been detained were involved in supplementing the consultation study with qualitative information drawn from their experiences.

Particularly useful to the process was a 2007 Draft Report on the Review of the Children and Young Persons Decree, Chapter 58 of the Laws of Zanzibar, commissioned by the High Court judiciary in Zanzibar. It focused exclusively on juvenile justice as an issue, yet had not been taken through the Parliamentary process at the time.

Draft Zero proved to be a practical and concrete way of launching a myriad of debates in the sphere of child protection, child welfare and juvenile justice. As an Islamic jurisdiction, there were inevitably issues that arose where international children's rights and Islamic law were in potential conflict, such as around the position of children born out of wedlock, inheritance and corporal punishment. Moreover, the capacities of government and civil society structures to implement the broad sweep proposals were uppermost: as a country beset by severe poverty and inferior governmental resources, it was a question of finding the balance between reform guided by international standards and best practice, and optimum use of existing structures, human resources and drawing on available societal strengths.

While child law reform for development over the next decades bears these hallmarks in most African jurisdictions, insofar as economic resources are inevitably scarce, this is all the more so in Zanzibar. There has been a long period of infrastructural neglect. Zanzibar is somewhat isolated from the economic mainstream in Tanzania and the population is both very young and extremely poor: 50% of the island's estimated 1.1 million citizens are children.

Yet a close knit and family oriented social structure provides cause for optimism in the field of juvenile justice reform. Whilst there are, of course, children in conflict with the law, this is not a widespread phenomenon requiring drastic social and other interventions. In fact, a magistrate on Pemba island (population 500 000) estimated seeing no more than a couple of children a year in his court.

Nevertheless, the usual deficits found in African juvenile justice systems prevail. Of these include a lack of a rights based approach; inadequate access to legal representation for children the criminal justice system; absence of diversionary procedures in law and practice; non-separation of children deprived of their liberty from adults in the main detention facility (a prison, but called the Offender Re-education centre, situated in the capital Stonetown); a complete absence of alternative sentencing options, coupled to (or in addition to) a paucity of facilities for the care and/or rehabilitation of children who cannot be accommodated in or returned to a family environment.

These considerations materially affected the law reform proposals that are now in the final stages of discussion. Several rounds of workshops with stakeholders have taken place, which the government has been consulted about (and largely approves). The final text and introduction to Parliament is awaited.

Child participation in the process

Children have participated in the law reform process in an ambitious and far reaching survey which saw 514 children (nigh on 50% of the total child population of the territory) aged from 8 to 23 years provide unique insights through a sophisticated 'combination research model' of focus group discussions and targeted individual interviews with vulnerable and at risk groups of children. Using the existing structures of local Children's Councils, which have been established in 100 districts throughout the isles at Shehia level (i.e. village or community level), the extraordinarily inclusive nature of the law reform consultation saw 40% of the child respondents being drawn deliberately from outside the membership of the Children's Councils. Child facilitators aged from 14 years were amongst the team who saw the child consultation exercise to fruition.

Children in conflict with the law formed a discrete group with whom targeted individual interviews were scheduled. Both children in detention and children who had not been detained were involved in supplementing the consultation study with qualitative information drawn from their experiences. A starting point was the proposed minimum age for criminal responsibility at 12, where 65% of children agreed that a child below this age is not criminally responsible for acts committed to infringe penal law. Some children proposed the Islamic principle of attainment of puberty as a dividing line, but these responses did not reflect majority opinion.

Conditions in detention are very poor. Children reported receiving no

or little food or water, and being housed in dirty and degrading cells. Reportedly, detainment of children with adults is routine and girls are not separated from boys either. Lack of contact with families whilst in detention remains a central problem.

One child, who served a two month prison sentence for stealing a coconut, explained graphically the impact of the justice system that took no account of youthful immaturity and does not facilitate reintegration and restorative justice:

'I concluded that it was the end of my life'

The formal criminal justice system operates alongside informal and community based responses. Hence in many cases - including cases of child abuse and victimisation of children – the matter will not come to the attention of the formal structures of the justice system.

The 2010 draft Children's Bill

The 2010 Zanzibar draft Children's Bill contains an entire chapter (chapter 5) dedicated on children in conflict with the law. The Bill's provisions include the following aspects:

- New provisions on arrest with the aim to ensure that children are only arrested for serious offences or where they are caught in the act or if compelling reasons exist for the arrest of a child who has committed a less serious offence. In order to strengthen the due process rights of a child, it is required that a child be brought to court within 48 hours after arrest.
- Diversion by way of police cautioning.
- Provision on release from pre-trial custody or where this is not possible, detention in a children's remand home or place of safety.
- The introduction of assessment for any child who has been arrested for the alleged commission of an offence, to be effected by a probation officer or a district social welfare officer.
- Diversion by the prosecutor and at court (a Children's and Family Court to be established in terms of the new law).
- A requirement that the court shall obtain such information as to the child's general conduct, home surroundings, school record and medical history as may enable it to deal with the case in the best interests of the child and may put to him or her any question arising out of such information.
- By introducing restrictions on sentencing (including a prohibition on court-imposed corporal punishment), such as limiting a sentence of deprivation of liberty in an Offender Re-education Institution (prison) to a child only if he or she has attained the age of sixteen years and has committed an offence listed in Schedule 2 (a list of serious offences), or has committed repeatedly an offence listed in Schedule 1, as a last resort.

Substantial compliance with international standards and African best practice is attained through the proposed new provisions. Chapter 11 of the Bill regulates the establishment and operation of approved schools for children with behavioural problems which might include children coming through the criminal justice system. However, these institutions need to be established and developed.

The need to distinguish petty offending from more serious behaviours warranting intervention remains acute and it is welcomed that alternatives to prison are provided for. At the same time there is a risk that institutionalisation in another form (approved schools) will take the place of prison for petty offenders. Hence it is noticeable that the Bill in current form provides a remarkable array of non-custodial alternatives, which can assist a court in avoiding institutional options.

In contrast to South Africa, for instance, there are no civil society or welfare organisations directly concerned with services or programmes for children in conflict with the law. Hence the diversion provisions rely rather on local peacemaking possibilities than on referrals to formalised programme providers.

Conclusion

The Zanzibar Children's Bill 2010 illustrates the possibilities for law making to protect and provide for children in a resource scarce environment. Much more crucial are ingredients such as willing governments and structures/personnel committed to realising children's rights over time. This became evident in the period after draft zero was introduced, and the very prognosis for Parliamentary acceptance is very good.

Setting the trend?
Or not brave enough?

The Council of Europe Guidelines on Child Friendly Justice

by Lorenzo Wakefield

The Committee of Ministers of the Council of Europe adopted guidelines for European States to take into account when dealing with children in the justice system. These guidelines were adopted and published on 25 June 2010, thus making it a relatively new development in Europe.

The process of creating such guidelines started in 2007 with the Council of Europe's Resolution No.2 on child friendly justice. In this resolution the Council of Europe acknowledged that alternatives to the custody of children should be developed and that the deprivation of a child's liberty should be absolutely necessary and as a measure of last resort. The resolution also underlined the importance of detaining children separately from adults.

The resolution called on European States to respect the best interest of the child in all matters relating to child justice and agreed that there exist an important need for measures to be taken on child friendly justice. The Council of Europe then set out to examine child friendly justice before, during and after a trial of a child; investigate the extent of child participation; assess the manner in which children are communicated with in the justice system; gather information on current child friendly procedures; and lastly (and most importantly) to prepare guidelines for European States on child friendly justice.

The guidelines on child friendly justice

The guidelines start off by acknowledging that progress has been made towards implementing child friendly justice in Europe. It goes further to call on European States to ratify all Council of Europe conventions on the rights of the child. After that it request of States to implement these guidelines in both legislation and policy. All of these are important requests for European States to take into account when domesticating the provisions of both the Council of Europe conventions on the rights of the child and the guidelines on child friendly justice.

The guidelines set out the following three purposes for which it was drafted:

- to deal with the place and role, views, rights and needs of children in court proceedings;
- to apply in all ways in which children are brought into contact with competent bodies and services in implementing the law; and
- to ensure that all the rights of children are respected taking into account the level of maturity of children.

The following five fundamental principles are emphasised in the guidelines document: participation, best interests of the child, dignity, protection from discrimination and rule of law. Just like the United Nations Committee on the Rights of the Child's general comments, these fundamental principles are to act as a tool of interpretation which European States would have to take into account when adopting legislation for the full protection of children's rights within various laws.

The guidelines then divide child friendly justice into the three phases of the justice system before trial, during trial and post trial.

Child friendly justice before trial

The guidelines rightly acknowledge that alternatives to court procedures should be encouraged, as this would be in the best interest of the child. Thus, mediation, diversion and alternative dispute resolutions should be encouraged. Yet the guidelines fail to mention that a child's right to remain silent and the presumption of innocence should not be violated during these proceedings.

According to the guidelines "the minimum age of criminal responsibility shall not be too low and shall be determined by law". Indeed a noble attempt to include such a provision, yet at the same time, "too low" an age is not defined and can be interpreted to mean any age between 6 and 16 years for example. The Council of Europe should have taken a bold step, like the United Nations Committee on the Rights of the Child who recommended that States Parties to the Convention on the Rights of the Child should set a minimum of criminal responsibility at 12 years.

Paragraph C of the guidelines deals with children and the police. According to section 5 of this paragraph the 'police shall ensure that no child in their custody is detained together with adults'. Once again, a notable guideline, yet nowhere in this section does it stipulate that children should also not be transported to and from court with adults.

Child friendly justice during trial

For child friendly justice during trials the guidelines provide for positive advances to ensure that compliance with the United Nations Convention on the Rights of the Child has been met. Firstly, it stipulates that children should have the right to legal counsel and if this cannot be afforded, then free legal aid should be provided. It goes further and requires that the legal representatives for children should be trained in both knowledge of children's rights and in how to work with children.

The guidelines places an important emphasis on a child's right to be heard. Apart from requiring the judges to respect a child's view, the guidelines require that due weight has to be given to a child's views. Therefore, judges should not simply approach a child's view with caution by itself.

According to the guidelines European States are required to adopt legislation and create policy around ensuring that proceedings against children (and even children who are victims) are conducted in a child friendly manner. This would also include the provision that a child's parent/guardian should be present at a trial against the child. Yet, it also stipulates that a parent/guardian do not have to be at trial, if a "motivated decision" has been taken to excuse him/her. A practical example of such a decision could be where the parent/guardian used the child to commit an offence or where a parent/ guardian's employment might be in jeopardy for staying absent.

The guidelines require that court sessions should be adapted to a child's pace and attention span. In other words, court sessions should not be too long and complicated for children not to understand the nature of the trial against him/her.

"A child's statements and evidence should never be presumed invalid or untrustworthy by reason only the child's age." The use of robust terminology like "never" seems to suggest that the Council of Europe takes a strong view against the practice of approaching a child's views with caution, just because s/he might be of a certain age.

Child friendly justice after trial

The guidelines highlight the importance of various elements, especially once a child has been convicted of committing an offence and been granted a custodial sentence. In terms of sentencing, it requires that an individual approach should be followed, bearing in mind the principle of proportionality. In other words, legislation or policy should not set out a uniform and rigid approach to sentencing of children, but rather one that requires a presiding officer to apply his/her discretion, taking all circumstances of the child into account.

It requires that children who were sentenced to a custodial setting (be it a youth care centre or prison), the right to education should still be granted. In other words, European States are required to adopt measures that would not violate a child's right to education; just because s/he might have been sentenced to prison or a youth care centre.

Another remarkable achievement created by the guidelines is that it

A child's statements and evidence should never be presumed invalid or untrustworthy by reason only the child's age.

requires of European States to promote the reintegration of children who were convicted of committing offences. Many States (not just within Europe) are of the view that once a trial is completed against a child and a conviction secured, that the process of justice is completed. The reintegration of children is thus neglected or not taken into account, leaving such children psychologically and socially at risk of stigmatisation. This in itself is a cause of recidivism. In order to ensure that the criminal justice system against children also contains a crime prevention model, reintegration is a necessary element for children who were convicted.

Conclusion

In the title to this article I asked two questions. Firstly, whether the guidelines created by the Council of Europe were setting a trend, and secondly, whether the Council of Europe was brave enough to request European States to comply with all obligations in terms of international law. Certainly to test this against best practices and international obligations would require a more detailed analysis, taking each and every provision of the guidelines into account. This article sadly did not have the scope to take on such an exercise.

However, in limiting the discussion to the above areas of the guidelines, one can certainly conclude that even though there are a few areas where the guidelines could have broken further ground, like stipulating a minimum age of criminal responsibility for example, it did set an acceptable standard for European States to take into account. This in itself is remarkably progressive and compliant with international child rights standards and obligations created by the United Nations Convention on the Rights of Child and supporting declarations and rules. •

NOTICE-BOARD

Fundamental Rights Conference: Ensuring justice and protection for all children

On 7 and 8 December 2010, the European Union Agency, together with the Belgian Presidency of the Council of the European Union will be hosting a conference in Brussels, Belgium, on ensuring justice and protection for children, especially those in vulnerable situations. The conference will seek to explore avenues for State authorities to protect vulnerable children against violations of their rights.

The following objectives of the conference are listed on its website:

- *Developing practical proposals to address challenges faced by particularly vulnerable children in the European Union;*
- *Sharing 'good practice' on child-friendly approaches applied by State authorities; and*
- *Strengthening impact of policies and strategies related to the rights of the child in the European Union.*

For further information please feel free to visit: http://fra.europa.eu/fundamentalrightsconference/index.html.

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