

ACCESS TO JUSTICE FOR CHILDREN IN CONFLICT WITH THE LAW

CHILD JUSTICE ACT 75 OF 2008 (CJA)



CENTRE FOR
CHILD LAW



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INTRODUCTION

Children who are in conflict with the law and accused of committing offences must be dealt with in terms of the Child Justice Act 75 of 2008 which provides for a child specific approach to responding to these children. The CJA builds on section 28(1)(g) of the Constitution which provides that

“g. not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be

- i. kept separately from detained persons over the age of 18 years; and
- ii. treated in a manner, and kept in conditions, that take account of the child’s age; ...”

Furthermore, the CJA provides for the child justice system that ensures that the procedures followed when dealing with children in conflict with law and accused of committing offences safeguard their interests.



WHAT IS THE PURPOSE OF THE CHILD JUSTICE ACT 75 OF 2008 (CJA)?



The CJA is the primary legislative framework applicable to children in conflict with the law and accused of committing offences;



The CJA establishes a criminal justice system for children in conflict with the law and accused of committing offences, in accordance with the constitutional values international obligations;



The CJA makes provision for the minimum age of criminal capacity for children;



The CJA provides mechanisms for dealing with children who lack criminal capacity outside the criminal justice system;



The CJA provision for securing court attendance, release from detention, placement of children; holding a preliminary inquiry; providing for the assessment of children and diverting children away from the criminal justice system.



IMPORTANT DEFINITIONS IN THE CJA



Appropriate adult

means any member of a child's family, including a sibling who is 16 years or older, or care-giver referred to section 1 of the Children's Act;



Arrest

means the taking into custody of a child for an alleged offence with the purpose of ensuring that the child appears at a preliminary inquiry;



Assessment

means an assessment, of a child who is alleged to have committed an offence, by a probation officer in order to prepare an assessment report to recommend steps to be taken in respect of the child;



Child

means a person under the age of 18 years;



Child in conflict with the law

means a child suspected of having committed an offence;



Child justice court

means any court in which a criminal trial, in which a child is the accused, is conducted, or before which any bail application, plea, sentencing or proposal for diversion relating to s



Presiding officer

means an inquiry magistrate or a judicial official officer presiding at a child justice court;



Detention

includes confinement of a child prior to sentence in a police cell or lock-up, a child and youth care centre or correctional centre;



Guardian

means a guardian referred to in section 1 of the Children's Act;



Probation officer

means any person who has been appointed as a probation officer under section 2 of the Probation Services Act 116 of 1991;



Police cell or lock-up

means any place which is used for the reception, detention or confinement of child who is being detained by the Police, and includes all land, buildings and premises adjacent to any such place and used in connection therewith;



Police official

means a member of the South African Police Service or of a municipal police service established in terms of the South African Police Service Act, 1995.



GUIDING PRINCIPLES FOR DEALING WITH CHILDREN IN CONFLICT WITH THE LAW

A child in conflict with the law is entitled to have his or her best interests treated with the required paramountcy. The process followed and the outcome thereof must be cognisant of the best interests of the child.

When dealing with a child in conflict with the law the law, the following principles must be adhered to:

- Treat and address the child in a manner appropriate to his or her age, intellectual development, cultural values and beliefs.
- Consequences arising from the commission of the offence must be proportionate to the circumstances of the child, nature of the offence and the interests of society.
- A child is afforded effective participation in any proceedings, with the assistance of a parent, a guardian or an appropriate adult.
- Efforts must be taken to ensure a child who has no parents, guardian or appropriate adult receives the necessary assistance.
- A child is not treated more severely than an adult would have been treated in the same circumstances.



WHAT IS THE CHILD JUSTICE COURT?



Where matters involving children in conflict with the law or accused of having committed offences are heard in the Child Justice Court.



A Child Justice Court has a similar status with a Magistrate's Court.



A hearing in a Child Justice Court takes place in camera (not open to the public); with the Magistrate, the Prosecutor, the child, the child's parent or guardian or appropriate and a Legal Aid Attorney.



Child Justice Court is broken into two:

- District Child Justice Court
 - Deals with minor and serious offences.
- Regional Child Justice Court
 - Deals with more serious offences.



THE PROCESS IN THE CHILD JUSTICE COURT AND KEY ROLE PLAYERS

- In terms of the CJA, an informal process called a preliminary inquiry is held within 48 hours of a child's arrest in court or any other suitable place.
- Objectives of a preliminary inquiry includes:
 - To consider the assessment report of the Probation Officer.
 - Establish whether the matter can be diverted before plea.
 - Identify suitable diversion options.
 - Establish whether the matter should be referred to the Children's Court.





THE AGE OF CRIMINAL CAPACITY WHEN CAN A CHILD BE HELD CRIMINALLY LIABLE



According to the Constitution, a child is person below the age of 18 years.



When it comes to the age of criminal capacity, the CJA makes provision for three different age groups:

- A child under the age of 12 years: this child does not have criminal capacity, may not be arrested, thus cannot be prosecuted. This means that the child does not understand the difference between right and wrong and cannot act accordingly.
- A child who is 12 years or older but younger than 14 years: this child is presumed to lack criminal capacity, unless the State can prove that the child has criminal capacity. This means that the state must prove that the child understands the difference between right and wrong and can act accordingly.
- A child between 14 years and 17 years: this child is presumed to have criminal capacity and can be prosecuted. This means the child understands the difference between right and wrong and can act accordingly.



Police officer dealing with a child under 12 years must:

- Immediately hand over the child to a parent or guardian or appropriate adult; or
- Place the child in a suitable child and youth care centre provided there is no parent or guardian or appropriate

adult or if it is not best interest of the child to be handed over to the listed persons; and

- Must notify a probation officer.



Probation officer dealing with a child under 12 years:

- Must assess the child no later than 7 days of being notified.
- Refer the child to a children's court;
- Refer the child for counselling or therapy;
- Refer the child to an accredited programme;
- Arrange a family meeting; or
- Take no action at all.
- It is important to note that action taken by a Probation Officer does not mean that the child has criminal capacity.



Dealing with a child who is over 12 years but below 14 years:

- Before the child is requested to make a plea and trialed, the State must prove that the child had criminal capacity at the time of the commission of the alleged offence.
- If the State fails to prove criminal capacity, the child cannot be prosecuted. Therefore, the child must be treated as a child under the age of 12 years.



Who may request for an evaluation of the criminal capacity of the child?

- Presiding officer of the Child Justice Court.
- The legal representative of the child.
- The Prosecutor.



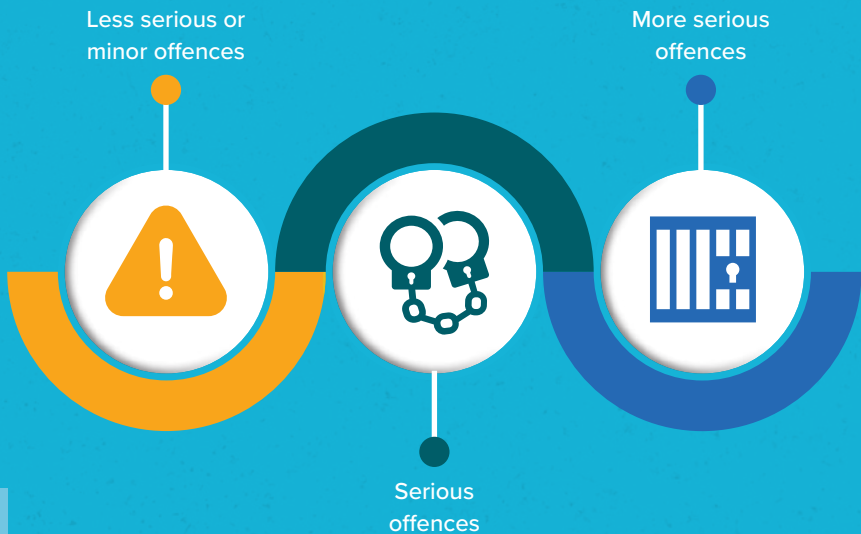
Who makes the evaluation of the criminal capacity of the child?

- A suitable qualified, i.e. a child psychologist.



TYPES OF OFFENCES

- The CJA makes provision for **three categories of offences**:
 - **Less serious or minor offences**; includes malicious injury to property where the damage caused does not exceed R1 500, trespass, receiving stolen goods knowing it to have been stolen and theft of property where the value does not exceed R2 500.
 - **Serious offences**; includes theft of property where the value exceeds R2 500, malicious injury to property where the damage exceeds R1 500, assault inflicting grievous bodily harm and robbery.
 - **More serious offences**; includes murder, robbery inflicting grievous bodily harm and kidnapping.





DIVERSION

Diversion means diversion of a matter involving a child, where the child is the accused, away from the formal criminal justice system towards a more constructive and positive outcome. Essentially, diversion provides a child accused a second chance and focuses on the root-cause of the criminal behaviour through appropriate diversion programmes.

The objectives of a diversion include:

- Prevent the child from having a criminal record.
- Encourage the child to take accountability.
- Promote the dignity and well-being of the child.

Diversion may be considered by:

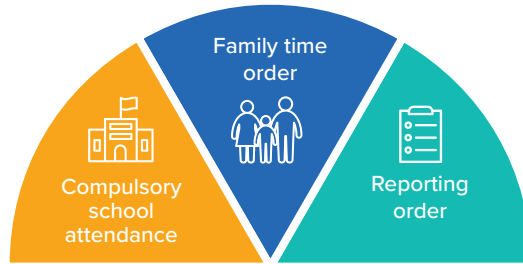
- The Prosecutor if the child is alleged to have committed a minor offence.
- The Presiding officer if the child is alleged to have committed a minor offence.

Diversion is considered if:

- The child acknowledges responsibility of the offence;
- The child has not been unduly influenced to acknowledge responsibility;
- There is a *prima facie* case against child.

Diversion levels

- **Level 1 diversion:**
Applicable to less serious or minor offence.
- **Examples of level 1 diversion:**



- **Level 2 diversion:**
Applicable to serious offence and more serious offences.
- **Examples of level 2 diversion:**
 - Residential diversion at a specific child and youth care centre.
 - Placement under the supervision of a Probation Officer.



SENTENCING



A Child Justice Court that has found a child guilty of an offence must impose a sentence.



In sentencing, imprisonment of a child must be a measure of last resort and only for the shortest appropriate period of time.

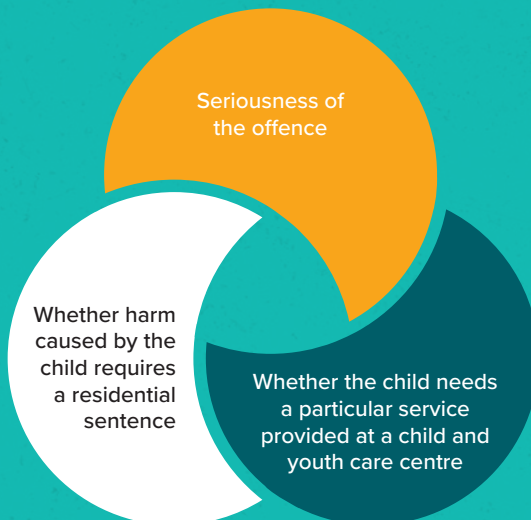


A fine may be imposed as a sentence.

- Affordability by the child or his or her parents or guardian is considered before such a sentence is imposed.



When sentencing a child to compulsory residence the following must be considered:





A Child Justice Court may sentence a child to compulsory residence in a child and youth care centre providing the following:



A sentence of imprisonment:

- A Child Justice Court may not sentence a child under the age 14 years to imprisonment.
- A Child Justice Court which convicts a child of an offence may, in addition to sentence to compulsory residence in a child and youth care, impose a sentence of imprisonment, provided that:
 - The child is convicted of a more serious offence; and
 - The offence committed by the child, if it was committed by an adult, would carry a term of imprisonment exceeding 10 years.

- What happens at the lapse of sentence of compulsory residence in a situation where the child has an additional sentence of imprisonment?

The head of the child and youth care centre must submit a report to the Child Justice Court providing his or her view on whether the child is rehabilitated.

The report of the head of the child and youth care centre must be thorough and comprehensive so as to enable the Child Justice Court to make an equitable decision in line with the objectives of the CJA.



The head of the child and youth care centre must make recommendations on whether the child may be reintegrated into society without serving the additional term of imprisonment.

After consideration of the report and any other relevant factors and if the interests of justice permit, a Child Justice Court may order the release of the child with or without conditions.



CONCLUSION

The Child Justice Act promotes a child centered approach that ensures that children are not brought into the criminal justice system where it is not appropriate. This much is clear from section 50 which provides that a child may be referred to the Children's Court where it appears, during the preliminary inquiry:



that a child may be in need of care and protection as provided in sections 150(1) or (2) of the Children's Act; and it is desirable to deal with the child in terms of sections 155 and 156 thereof; or



the child does not live in his or her family home or in appropriate alternative care; or



the child is alleged to have committed a minor offence or offences aimed at meeting the child's basic need for food and warmth

The above approach acknowledges that children may at times find themselves in conflict with the law due to circumstance out of their control and in such situations a prevention and early intervention approach is most suitable to ensure the risk of further offending is minimised. Overall, the CJA promotes a rehabilitative approach that may deter children in conflict to becoming adult offenders.

Access more information on the Child Justice Act 75 of 2008 and further assistance, contact the below organisations:

Legal Aid South Africa, National Office



011 877 2000

Centre for Child Law



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