



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

Denkleiers • Leading Minds • Dikgopolo tša Dihlalefi

TABLE OF CONTENTS

1. ABOUT THE CENTRE FOR CHILD LAW.....	3
2. THE CENTRE FOR CHILD LAW’S EXPRESSION OF SUPPORT.....	3
3. THE CENTRE FOR CHILD LAW’S SUBMISSIONS.....	3
3.1 Definitions and interpretations.....	4
3.2 Cultivation Offences.....	4
3.3 Cannabis offences.....	5
3.4 Smoking Consumption offences.....	5
3.5 Offences involving children.....	6
3.6 Expungement of criminal records of persons convicted of possession or use of cannabis.....	7
3.7 The Children’s Act 38 of 2005.....	7
3.8 The Prevention of and Treatment from Substance Abuse Act 70 of 2008.....	9
3.9 The Child Justice Act 75 of 2008.....	10
4. CONCLUSION.....	13

1. ABOUT THE CENTRE FOR CHILD LAW

The Centre for Child Law (“**CCL**”) is a public interest litigation organisation registered with the Legal Practice Counsel. The CCL contributes towards the establishment and promotion of the best interests of children in South African law, policy and practice through litigation, advocacy, research and education.

2. THE CENTRE FOR CHILD LAW’S EXPRESSION OF SUPPORT

The CCL welcomes and supports the measures put in place by the Department of Justice and Correctional Services (“**the Department**”) to regulate the use of cannabis for private purposes by adults, and, in particular, the duties placed on adults as it relates to children.

The CCL, however, wishes to make submissions in respect of the alternatives postulated to deal with the prohibited use, possession and/or cultivation of- or dealing in- cannabis by children. The submissions are rooted in constitutionally justifiable notion *“channelling a child through the criminal justice system as opposed to social systems – designed to protect children – can lead to exacerbated harm and risk”*.

3. THE SUBMISSIONS OF THE CENTRE FOR CHILD LAW

The CCL wishes to emphasise that there is an urgent need to put in place prevention, harm-reduction, and dependence treatment services. The CCL, consequently, makes submissions that will address the follows sections of the Bill and the listed legislative frameworks:

- a) Definitions and interpretations;
- b) Cultivation Offences;
- c) Cannabis offences;
- d) Consumption offences;
- e) Expungement of criminal records of persons convicted of possession or use of cannabis;
- f) The Children’s Act 38 of 2005; The Prevention of and Treatment from Substance Abuse Act 70 of 2008 and the Child Justice Act 75 of 2008.

It is important to emphasis, at the outset, that there exists an absolute need when fashioning responses to the use and/ or possession of cannabis to distinguish between children who are **addicted** to cannabis and those of whom may simply being **experimenting** with cannabis. The reason for this should be obvious. The former (those who are addicted) may well need to be channelled through the systems provided

for in the Children's Act 38 of 2005 ("**Children's Act**") and/or the Prevention of- and Treatment for- Substance Abuse Act 70 of 2008 ("**Substance Abuse Act**"). The latter may need no more than counselling.

3.1 Definitions and interpretation:

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) A guardian is defined by the Children's Act to mean "*a parent or other person who has guardianship of a child*". Guardianship, in turn, is one of the four recognised parental responsibilities and rights that are bestowed on parents. It may also be awarded to a person, by order of court, in terms of section 24 of the Children's Act. It may also, and lastly, pass to a nominated person on the death of the parents in terms of section 27 of the Children's Act.
- b) We live in a country with enormous economic disparity, where many do not draft wills and many others simply cannot afford the financially cumbersome process of applying to be awarded the responsibility and right of guardianship. There are also many other who simply see no need in doing so.
- c) The consequence of this is that there is a large cohort of children who are raised in alternative care settings (e.g. grandparents, aunts, uncles, foster parents etc.) by people who are not their guardians.
- d) Our **recommendation** is that instead of using the narrow term "guardian", the term "appropriate person" be used. The term "appropriate person" is (to be) defined in the Child Justice Act 75 of 2008 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 and further extends the possibility of holding such persons accountable should they contravene the provisions in this act.

3.2 Cultivation offences

The proposed clause 3 of the provides in respect of the term "*cultivation offences*":

"(9) Any person who is in possession in a public place of cannabis plant cultivation material or a cannabis plant that is not concealed from public view, is guilty of a D offence."

We broadly support the proposed prohibitions. We are, however, concerned that by using the words "any person" instead of "any adult" the provision criminalises the child without due consideration regarding the possibility of the child being used by adults to commit crimes.

3.3 Cannabis Offences:

The proposed clause 4 of the Bill provides in respect of the term “*cannabis offences*”:

- “(1) *Any person who is in possession in a public place of –*
 - (a) *A quantity that exceeds the prescribed quantity, contemplated in section 2(1)(c), but which is less than a trafficable quantity of cannabis, is guilty of a Class C offence*
 - (b) *A trafficable quantity of cannabis, is guilty of a Class B offence; or*
 - (c) *A commercial quantity of cannabis, is guilty of a Class A offence.*
- ...
- (5) *Any person who deals in cannabis, is guilty of a Class A offence.*
- (7) *Any person who is in possession in a public place of cannabis that is not concealed from public view, is guilty of a Class C offence.”*

We broadly support the proposed prohibitions. We are, however, concerned that by using the words “any person” instead of “any adult” the provision criminalises the child without due consideration regarding the possibility of the child being used by adults to commit a crime. It, consequently, would be appropriate (and necessary) to – and insofar as clauses 4(1) and 4(5) are concerned, to include a reference to section 92 of the Child Justice Act, insofar as the child may have been used by an adult. The prohibitions, particularly those contained in clauses 4(1)(a) and 4(7), should moreover be specifically linked with a social response to the incident as opposed to a punitive response. In this regard, our discussion about the use of section 9 of the Child Justice Act is particularly instructive.

3.4 Smoking and consumption offences:

The Bill provides for a range of “*consumption offences*”. In this regard, clause 5 provides that:

- “(1) *Any person who smokes or consumes cannabis in a public place, is guilty of a Class D offence.*
- (2) *Any person who smokes cannabis in a public or private place in the immediate presence of any non-consenting adult person, is guilty of a Class D offence.*
- (3) *Any person who smokes cannabis in a public or private place in the immediate presence of a child, is guilty of a Class C offence.*
- (4) *Any person who smokes cannabis in a private place-*
 - (a) *within a distance prescribed by regulation from a window of, ventilation inlet of, doorway to or entrance into another place; or*

(b) *forming part of any place where persons congregate within close proximity of one another and where the smoke is likely to cause a hindrance to any person at that place, is guilty of a Class D offence.*

(5) *Any person who smokes or consumes cannabis in a vehicle on a public road, is guilty of a Class D offence.”*

We do not support the proposed prohibitions in their current form. The prohibitions fail to distinguish between children and adults. It will be recalled that in *Centre for Child Law v Director of Public Prosecutions, Johannesburg* [2022] ZACC 35 (CC) the Constitutional Court made it emphatically clear that children should not be prosecuted for the use and/or possession of cannabis but rather referred to either a programme aimed at educating and deterring such behaviour or, and where necessary and appropriate, the care and protection system or a treatment centre. We again refer, in this regard, to our proposal of utilising section 9 of the Child Justice Act as a ‘gateway’ process in dealing with children who transgress the law *vis-a-viz* cannabis use and/or possession.

3.5 Offences involving children

The Bill, at clause 6, provides for offences involving children and provides for a host of persons who may be prosecuted for the specified offences. The CCL welcomes this clause and recommends that an additional clause 6(6) be added and as follows:

“6(6) A child cannot be prosecuted under sections 3, 4 and 5 and must be dealt with as follows:

(a) If the person referred to in sections 3(9), 4(1), 4(5), 4(7) and 5 is a child then it must be ascertained whether or not such child was used by an adult to commit the crime and if so, section 92 of the Child Justice Act must apply.

(b) If the person referred to in section 3, 4(1)(a), 4(7) or 5 is a child the he or she must be dealt with in terms of section 9 of the Child Justice Act.”

3.6 Expungement of criminal records of persons convicted of possession or use of cannabis

The Bill, at clause 8, provides for the expungement of criminal records for persons who were convicted of certain cannabis related offences. The provision seems to apply any “person”, which we assume includes children.

At present adults are not arrested, tried and imprisoned for possession of cannabis. It remains notionally possible for children to be arrested, charged and convicted of the

offences mentioned in clause 8(1) of the Bill and to subjected to residential diversion in a Child and Youth Care Centre.

Although children in residential diversion do not get a criminal record thereafter, it should be clear that those children should not be in a Child and Youth Care Centre in the first place, consequently measures like education on- and prevention of drug abuse programmes be developed and rehabilitation facilities made available for this purpose.

The drafters Bill did not include the automatic expungement of diversion record, thus falling short of the relevant aspects of the judgment of the S v LM case by the Constitutional Court.

CCL recommends that clause 8A be included and reads as follows:

“8A Where a court has convicted a child of a contravention of section 4(b) of the Drugs and Drug Trafficking Act for the use and/or possession of cannabis, the criminal record containing the conviction and sentence in question, of that child in respect of that offence may, on application, be expunged by the Director-General: Justice and Constitutional Development or the Director-General: Social Development or the Minister of Justice and Correctional Services, as the case may be, in accordance with section 87 of the Child Justice Act 75 of 2008.”

3.7 The Children’s Act 38 of 2005

- a) The preamble of the Children’s Act sets out clearly that the objectives of the piece of legislation includes giving effect to and protection of the rights of children enshrined in the Constitution. It is, therefore, the primary piece of legislation dealing with the numerous rights of the child and providing for his protection within society.
- b) Section 150(1)(d) of the Children’s Act provides that *“a child is in need of care and protection if, the child – is addicted to a dependency producing substance and is without any support to obtain treatment for such dependency”*. In terms of section 156(1)(j), a court can make an order that a child be admitted as an inpatient or outpatient to an appropriate facility if the child needs treatment for addiction.
- c) On the other hand, section 156(4) of the Children’s Act provides that even where a child that is not in need of care and protection, the child can still be subjected by an order of court to treatment, as long as the order does not include a placement.
- d) Section 53(2)(b) of the Children’s Act provides that anyone acting in the best interests of the child may approach the children’s court for an appropriate order.

The powers of the children's court are extensive, including the provision of prevention or early intervention services.

- e) Section 46(1)(f) of the Children's Act empowers the Children's Court to make supervisory orders placing the child under the supervision of a social worker. Section 46(1)(g)(i) further empowers the Children's Court to make an order subjecting the child, a parent or care-giver to early intervention services.
- f) According to section 46(1)(h), a children's court can make a child protection order, which can include a variety of social responses to protect the child, such as instructing a child to participate in a professional assessment.

The CCL submits that the Children's Act and particularly the above stipulated provisions, provide a child-centered approach and focuses on rehabilitation as opposed to punishment. Furthermore, the relevant provisions of the Children's Act do not subject the child to arrest, detention, imprisonment or, at best, diversion which still leaves a child with a criminal record.

As seen above, the Children Act empowers a children's court to make an order that entirely takes into account the best interest of the child and moves away from any form of intervention which has the potential to punish and stigmatise the child.

Ultimately, the CCL submits that a child who on reasonable grounds is believed to suffer from a cannabis addiction must be referred to the children's court for an appropriate intervention and/ or order, for example, that the child is in need of care and protection, thus subject such child to care and protection interventions, including a medical intervention.

Lastly, a police officer who deals with a case involving a child who suffers from a cannabis addiction, must within a reasonable period of time seek the intervention of a social worker who must, as reasonably as possible and no later than the next court day, bring the matter to the attention clerk of the children's court.

3.8 The Prevention of and Treatment from Substance Abuse Act

- a) In broad brush strokes, the objectives of the Substance Abuse Act is to combat substance abuse in a coordinated manner and *“provide prevention, early intervention, treatment, reintegration and after care services to deter the onset of and mitigate the impact of substance abuse”*.
- b) In light of the above, the Substance Abuse Act is a comprehensive piece of legislative framework tailored to holistically deal with the matters relating to substance abuse.

- c) Section 28 of the Substance Abuse Act provides for “*children abusing substances or affected by substance abuse*” and sub-section (1) makes reference to section 110 of the Children’s Act which provides for the reporting of a child in need of care and protection.
- d) According to section 110(2) of the Children’s Act, any person who on reasonable grounds believes that a child is in need of care and protection such to the department of social development, child protection unit or police official. The link between the respective provisions of the Children’s Act and the Substance Abuse, highlights that a child who uses or is affected by the use of cannabis indicates a need for care and protection.
- e) Section 28(2) of the Substance Abuse Act requires that children who are dependent on substances be treated in separate facility from adults. This provision provides guidance insofar as placement children using or affected by the abuse of substances is concerned.
- f) Section 28(3) of the Substance Abuse Act amplifies the abovementioned provision by referring to section 191 of the Children’s Act which makes provision for child and youth care centres. Section 191(2) of the Children’s Act provides that a child and youth care centre for must offer a therapeutic programme designed for the residential care, which may include “temporary safe care of children for the providing of counselling and other treatment”.
- g) Section 28(5) of the Substance Abuse refers to section 148 of the Children’s Act and sub-section (1) of the Children’s Act bestows a prerogative on a children’s court to order the department of social development to provide early intervention programmes in respect of a child. Such an order may not exceed a period of six months. Section 28(6) of the Substance Abuse Act refers to section 167 of the Children, which makes provision for alternative care.
- h) The above respective provisions provide for context in relation to the placement of a “*child in alternative care for substance abuse related offences*”. It is pivotal to emphasise that this provision should apply differently when placement in alternative care is in respect of a child found in possession of and/ or uses cannabis. This is to appreciate that possession and/ or use of cannabis by a child is not an offence.

The CCL submits the Substance Abuse Act provides for a child-centered approach and mechanisms reasonably sufficient to deal with matters involving the use and/ or possession of cannabis. Furthermore, the link and context between the Substance Abuse Act and the Children’s Act, outline that the addiction to cannabis by child is a social and medical phenomenon that requires care and protection interventions, including medical interventions.

3.9 The Child Justice Act

- a) The objectives of the Child Justice Act include the establishment of a criminal justice system for children who are in conflict with the law and accused of committing offence, in accordance with constitutional values, the assessment of the such children and the holding of preliminary inquiries in relation to the matters involving such children.
- b) Section 9 of the Child Justice Act makes provisions for the manner of dealing with a child under the age of 12 years (a child who lacks criminal capacity). This provision is pivotal in relation to a child found in possession of cannabis, because the act is not an offence. Therefore, such a child, regardless of being of an age of criminal capacity must be treated as if he or she lacks criminal capacity because possession of cannabis by a child, although not permitted to possess cannabis, is not a criminal offence punishable by law, and have consequences in the form of a social response.
- c) Section 9 of the Child Justice Act provides that:

“(1) Where a police official has reason to believe that a child suspected of having committed an offence is under the age of 12 years, he or she may not arrest the child, and must, in the prescribed manner, immediately hand the child over

(a) to his or her parents or an appropriate person or a guardian; or

(b) if no parent, appropriate person or a guardian is available or if it is not in the best interests of the child to be handed over to the parent, an appropriate person or a guardian, to a suitable child and youth care centre,

and must notify a probation officer.

(2) A probation officer who receives notification from a police official in terms of subsection (1), must assess the child in terms of the provisions of Chapter 5 which are applicable to children under the age of 12 years as soon as possible but not later than seven days after being notified.

(3)

(a) After assessing a child in terms of subsection (2), the probation officer may, in the prescribed manner –

(i) refer the child to the children's court on any of the grounds set out in section 50;

(ii) refer the child for counselling or therapy;

- (iii) *refer the child to an accredited programme designed specifically to suit the needs of children under the age of 12 years;*
 - (iv) *arrange support services for the child;*
 - (v) *arrange a meeting, which must be attended by the child, his or her parent or an appropriate person or a guardian, and which may be attended by any other person likely to provide information for the purposes of the meeting referred to in subsection (4); or*
 - (vi) *decide to take no action.*
- (b) *Any action taken under paragraph (a) does not imply that the child is criminally liable for the incident that led to the assessment.*
- (4) *The purpose of the meeting convened by a probation officer in terms of subsection (3) (a) (v) is to*
- (a) *assist the probation officer to establish more fully the circumstances surrounding the allegations against a child; and*
 - (b) *formulate a written plan appropriate to the child and relevant to the circumstances.*
- (5) *The written plan referred to in subsection (4) (b) must, at least -*
- (a) *specify the objectives to be achieved for the child and the period within which they should be achieved;*
 - (b) *contain details of the services and assistance to be provided for the child, as prescribed;*
 - (c) *specify the persons or organisations to provide the services and assistance, as prescribed; and*
 - (d) *state the responsibilities of the child and of the parent, appropriate person or a guardian.*
- (6) *The probation officer must record, with reasons, the outcome of the assessment and the decision made in terms of subsection (3) in the prescribed manner.*
- (7) *In the event of a child failing to comply with any obligation imposed in terms of this section, including compliance with the written plan referred to in subsection (4) (b), the probation officer must refer the matter to a children's court to be dealt with in terms of Chapter 9 of the Children's Act."*
- d) Section 97(6)(a) and (b) of the Child Justice Act, 2008 requires the Director-General: Social Development to keep a register of children in respect of whom a decision has been made and recorded by a probation officers in terms of section

9(6) with the particulars of the child, the offence, the decision and the child's compliance, if applicable. This ensures that children who cannot be held criminally responsible receive the necessary support and interventions to prevent them from entering the criminal justice system.

The CCL recommends the consideration be given to the use section 9 of the Child Justice Act in order to deal matter of the possession and/or use cannabis by children. This so because the provision in question provides a social or opposed to criminal response to matters involving children.

The CCL further recommends that section 9 of the Child Justice Act must be amended to include to children using/ possessing cannabis under the interventions. During the amendments to section 9 considerations may be given to broaden the referrals to probation officers to include referrals from schools (where children tested positive for cannabis use) and others. Since section 8A(14) of the SA School Act 84 of 1996 (Schools Act) provides that no criminal proceedings may be instituted by the school against a learner in respect of whom a test was conducted which proved to be positive.

The CCL submits that, will provide a social response to children using/ possessing cannabis with the monitoring on the way that these children are dealt with since the interventions for children using/ possessing cannabis (who are not addicted) will be recorded in the Register referred to in section 97(6)(a) and (b) of the Child Justice Act.

Lastly, the CCL submits that, children using/ possessing cannabis were all arrested by SAPS, assessed by the probation officer and more often than not were referred for diversion (because it is regarded as a Schedule 1 offence in the Child Justice Act) and there should therefore be no additional demand on resources since these children were always part of the process.

4 CONCLUSION

The submissions of the CCL highlighted and provided context in relation to available pieces of legislation that provide remedies in relation to matter involving the use and/ or possession of cannabis. The submissions clearly pointed provisions which guidelines and remedies as envisaged in the judgment of *Centre for Child Law v Director of Public Prosecutions, Johannesburg and Others* [2022] ZACC 35.

As indicated above, the care and protection system is an appropriate system to respond to the judgment at hand and deal with matters of cannabis use and/ or possession thereof by children.

The CCL expresses gratitude for the opportunity to make written submissions. It will, if necessary, make oral submissions or further written submissions, as the case may be.

Karabo Ozah

Director, Centre for Child Law

Tel: 012 420 4502

Email: Karabo.ozah@up.ac.za

Stanley Malematja

Attorney, Centre for Child Law

Tel: 012 420 4502

Email: Stanley.malematja@up.ac.za

Moyahabo Thoka

Candidate Attorney, Centre for Child Law

Tel: 012 420 6222/ 012 420 4502

Email: moyahabo.thoka@up.ac.za