

A new role for crime victims? An evaluation of restorative justice procedures in the Child Justice Act 2008

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OPSOMMING

'n Nuwe rol vir Slagoffers? 'n Ondersoek na Herstellende Geregtigheidsprosedures in die Wet op Kinderberegting 2008

Hierdie artikel ontleed die herstellende geregtigheidsprosedures in die Wet op Kinderberegting 75 van 2008. Die oogmerk hiermee is om te evalueer in welke mate slagoffers ingesluit is en of, in lyn met vorige akademiese opinie, hulle werklik 'n sentrale posisie in so 'n benadering tot die strafregstelsel beklee. Vervolgens word voordele vir slagoffers wat 'n groter rol speel ondersoek, sowel as kritiek daarteen. Alhoewel bevind word dat slagoffers van kinderoortreders nie sentraal staan in hierdie nuwe regsparadigma nie, word aanbevelings gemaak vir die optimale uitleg en toepassing van herstellende geregtigheidsprosedures in die Wet op Kinderberegting. Op so 'n wyse kan die terapeutiese uitkomst wat vir slagoffers in die wet beoog word, verwesenlik word.

1 Introduction

Since April 2010,¹ restorative justice has been entrenched as the basis for the approach in all criminal proceedings involving child offenders. Apart from focusing on the best interest of the child offender, the Child Justice Act² (CJA) indicates that this approach to justice also strives to involve, *inter alia*, the victim and to identify and address harms caused by the commission of the crime. Unlike the Criminal Procedure Act,³ (CPA) the CJA explicitly provides for victims' recognition during all stages of the child offenders journey through the justice system.

Within the South African context, restorative justice was earlier described as a new way of doing justice, either as an alternative or within the criminal justice system, *and* that, while offenders are held accountable, the victim is always central.⁴ Such a lofty description, coupled with the victim-orientated objectives of the CJA,⁵ raised the

1 The Child Justice Act 75 of 2008 (CJA) came into operation on this date.

2 75 of 2008. See s 1.

3 51 of 1977 (CPA). Except for a few instances where victims' participation and views are recognised, such as s 105A(b)(iii) CPA (referring to the consultation of victims during plea bargaining) and s 299A CPA (referring to the rights of victims to make presentations at the parole hearing), they are perceived as mere witnesses for the prosecution.

4 Skelton & Batley "Restorative justice: a contemporary South African review" 2008 *Acta Criminologica* 37 49.

5 See s 2(b)(ii), (iv) CJA.

expectation of victims. The aim of this article is to analyse the provisions in the CJA in order to determine the precise way in which victims have been incorporated and whether they indeed occupy a central position within the child criminal justice system. In addition, the advantages of victims' envisaged involvement *via* restorative justice processes, as well as criticism against these practices, are evaluated. Suggestions are made to optimally interpret and apply the CJA, aimed at realising the therapeutic outcomes for victims envisaged by the Act.

2 Child Justice Act 75 of 2008

2.1 Definitions

Being the underlying philosophy of the CJA,⁶ the particular *definition* of "restorative justice" adopted in the legislation is of importance, and reads as follows:

[A]n approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation.

Within the above definition it is clear that the involvement of the victim forms part of the bigger picture, allowing also for family and community involvement. The next component of the definition deals with the identification of issues such as harms and needs (of the victim, amongst others) and addressing those issues via various methods. These methods refer to three components, namely, making restitution,⁷ protecting victims through the prevention of re-offending and lastly, promoting reconciliation. In aiming to address harms, which would include the victim's psychological harm, the CJA signals a general therapeutic perspective.⁸ However, within the child justice system the first attempt will be to address the offender's harm and the victim's recovery will, most likely receive secondary focus. Addressing the more concrete or pecuniary needs flowing from crime, such as compensation, might also, as indicated below, be problematic.

6 Preamble CJA. See Skelton *Theory and Practice of Restorative Justice* (LLD theses 2005 UP) for a study that focusses on the child offender within the CJA.

7 Other meanings include "giving back, reparation and compensation" (*Collins English Dictionary* (2003)).

8 A therapeutic "lens" (a mindfulness that the law and its application should strive to positively affect the well-being of the people involved) forms the underlying impetus behind the implementation of restorative justice procedures (see <http://www.innovatingjustice.com/innovations/integrating-the-healing-approach-to-criminal-law> (accessed 2013-10-10)). See also Daicoff "Growing pains: the integration vs specialization question for therapeutic jurisprudence and other comprehensive law areas" 2008 *T Jefferson LR* 551 570.

Victims of crime are not defined in the CJA, therefore it is suggested that the broad approach advocated in the *Service Charter for Victims of Crime in South Africa 2007* (hereafter *Victims' Charter*),⁹ is accepted in all child justice matters. A victim is described as follows:

[A] person who has suffered harm, including physical or mental injury; emotional suffering, economic loss; or substantial impairment of his or her fundamental rights, through acts or omissions that are in violation of our criminal law. The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim.¹⁰

The definition encompasses different types of harm suffered by victims and acknowledges not only direct victims but also indirect ones. Victims of child offenders may range from small children themselves, to peers, adults, and elderly people. Unlike some forms of victim participation such as parole presentations,¹¹ no category of crime victims is excluded from participation in child justice matters. Yet, as indicated below, restorative justice processes are often not applicable in serious crimes, and victims' participation in such matters may be restricted to giving impact evidence in court whereby the after effects of the crime is explained for sentencing purposes.¹² In serious matters parallel restorative justice processes, which run alongside the mainstream justice process, are, however, not excluded. An opportunity for dialogue may thus be created between the victim and offender while the latter serves imprisonment.¹³

2.2 Ubuntu

One of the *objects* of the CJA linked to victim involvement and -interest is the promotion of the spirit of *ubuntu* in the child justice system.¹⁴ This concept underscores the recognition and furtherance of the dignity and wholeness of all people.¹⁵ By holding child offenders accountable for the crimes committed, the human rights and fundamental freedoms of

9 Available at <http://www.justice.gov.za/VC/docs/vc/2007%20Service%20charter%20ENG.pdf> (accessed 2011-05-20).

10 Department of Justice *Minimum standards on services for victims of crime* (2007) 1 available at http://www.justice.gov.za/VC/docs/vcms/2007%20MIN%20STAND%20ENG_V2.pdf (accessed 2011-05-20). The definition of victims of crime in the CJA is in line with the United Nations *Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power* (GA/Res/40/30).

11 S 299A CPA. See Van der Merwe "Justice 'outside' the law in *The secret in their eyes: victim and offender rights in the post-sentencing phase*" in *Beyond the law: Multidisciplinary perspectives on human rights* (ed Viljoen) (2012) 239-248 for a critical analysis of victim participation in parole procedures.

12 See the discussion below in par 2.5 on victim impact statements as legislated by s 70 CJA.

13 The need for confrontation and explanation may be expressed by either the offender or victim(s) – see discussion in text to note 99.

14 S 2(b) CJA.

15 Mokgoro "*Ubuntu and the law in South Africa*" 1 at <http://www.ajol.info/index.php/pej/article/viewFile/43567/27090> (accessed 2011-11-30).

victims are upheld.¹⁶ It also signifies respect towards victims of crime. Further, it has been held that accommodating victims more effectively in the (child) criminal justice system reaffirms the democratic value of human dignity and that “it enables us ... to vindicate our collective sense of humanity and humaneness”.¹⁷ Apart from acknowledging the victim’s dignity, victim involvement is promoted in the specific context of encouraging the reintegration of child offenders¹⁸ who are often found to have been some sort of victim themselves.¹⁹ Lastly, the promotion of *ubuntu* is envisaged through possible reconciliation by means of restorative justice procedures available to victims.²⁰

Ultimately, by breaking child offenders’ cycles of crime, victims will indirectly benefit from living in safer communities.²¹ The interests of victims and the community may then in the long run, as envisaged by the CJA, be safe-guarded.

2.3 Diversion

Though the process of *diversion* is not an entirely new concept within the child justice context,²² it is now formally introduced as one of the central features of the CJA. It is an alternative way of dealing with a child offender who takes responsibility for his or her actions.²³ The legal consequences of a successful diversion order are not only the avoidance of a criminal record²⁴ but also no possible risk of future prosecution on the same facts,²⁵ either by the state or instituted privately.²⁶ The decision to divert is made by the prosecutor or Director of Public Prosecutions (DPP), and based on certain requirements.²⁷ The information obtained during the preliminary inquiry is of import in this

16 S 2(b)(ii) CJA.

17 *S v Matyityi* 2011 1 SACR 40 (SCA) par 16. The case dealt with adult offenders but the *ratio* is equally applicable to the child justice system where victim recognition is legislated.

18 S 2(b)(iv) CJA.

19 Hargoven “Restorative approaches to justice: ‘compulsory compassion’ or victim empowerment?” 2007 *Acta Criminologica* 113 118.

20 S 2(b)(iii) CJA. In *S v Makwanyane* 1995 6 BCLR 665 (CC) par 308 Mokgoro J emphasised that the spirit of *ubuntu* signifies a shift from confrontation to conciliation. See further a discussion on the general meaning of *ubuntu* in Church “Sustainable development and the culture of *ubuntu*” 2012 *De Jure* 511 523-529.

21 S 2(c) CJA.

22 See Gallinetti “Child Justice in South Africa: the Rights of Children Accused of Crime” in *Child Law in South Africa* (ed Boezaart) (2009) 656 for a discussion of the history of diversion since the 1990’s.

23 Other requirements for diversion to be considered entail that the child has *not been unduly influenced* to acknowledge responsibility, that a *prima facie case* exists against the child, and that the child has *consented* to the diversion along with his or her parent, guardian or appropriate adult if available.

24 S 59(1)(b) CJA.

25 S 59(1)(a) CJA.

26 S 7 CPA. Also S9 and 59(2) CJA.

27 S 52(2), (3) CJA as discussed below.

regard, but the information provided by the victim during this stage is, unlike that obtained from the child offender, not considered as privileged. This resulted in prosecutors being instructed to object to victims being called to such proceedings.²⁸ The involvement of victims at preliminary investigations may, however, be unlikely in most cases since the inquiry usually takes place within 48 hours of the crime being committed, leaving too little time for the victim to be prepared for the encounter. But unprepared involvement is not excluded, especially in smaller communities.

Before a prosecutor can indicate to the inquiry magistrate that a diversion order is suitable in a Schedule 1 or 2 offence,²⁹ the views of the victim or any other person who has direct interest in the affairs of the victim has to be considered, unless it is not reasonably possible to do so.³⁰ For the most serious offences listed in Schedule 3 the DPP has to afford victims the opportunity to express their views, and only after its consideration,³¹ may authorise diversion in writing.³² They may comment on the possibility and nature of diversion, and any condition relating to compensation or the rendering of a specific benefit or service.³³ The prosecution is, however, not bound by the victim's viewpoint.³⁴ Once again, the DPP's duty to obtain the victim's views is linked to it being reasonable to consult the victim. It is submitted that the process of victim consultation should be followed as a matter of principle unless it is proved that they are untraceable. This consultation would also provide a valuable opportunity for exchange of information and answering any questions from the victim.

The CJA³⁵ instructs the DPP to allow the diversion of a child offender in the most serious offences, as per Schedule 3, only in those cases where *exceptional circumstances* exist. This concept is further explored in the Directives accompanying the Act. Apart from factors focusing on circumstances relevant to the child offender,³⁶ other factors take into account the victim's attitude and circumstances. The first factor referring to the victim is where he or she wants to avoid giving testimony in court and, instead, prefers diversion.³⁷ Secondly, the decision to divert may be

28 Directive H(5) s 97(4) CJA GN R 252 GG 33067 2010-03-31.

29 S 52 (2) CJA. Note that minor offences (in terms of Sch 1 CJA) may be diverted by the prosecutor before a preliminary inquiry is held.

30 S 52(2) CJA.

31 S 52(3)(b)(i) CJA.; Directive O(3)(C) CJA GN R 252 GG 33067 2010-03-31.

32 S 52(3)(a) CJA.

33 S 52(3)(b)(i) CJA.

34 Directive F(9) s 97(4) CJA GN R 252 GG 33067 2010-03-31. Prosecutors are, however, reminded that the avenue of private prosecution falls away in the event of successful diversion.

35 S 52(3)(a) CJA.

36 The presence of the following factors: Young age; low developmental level; hardship suffered, for example being the head in a child headed household; compelling mitigating circumstances, such as diminished responsibility; and undue influence.

37 Directive J(2)(d) s 97(4) CJA GN R 252 GG 33067 2010-03-31.

influenced by a witness for the prosecution who is fragile or unwilling to testify, and lastly, when proceeding within the trial would be potentially damaging to a child witness/victim.³⁸ The power to decide whether a Schedule 3 matter may be diverted or not, may not be delegated. In addition, the DPP's consent must be in writing and in consultation with the investigation officer. Based on the above, it appears that victims, while taking their own well-being into account may influence the increased use of non-adversarial procedures in child justice matters.

The range of options available as possible diversion orders further allows for specific involvement of the victim.³⁹ The possibility of ordering an oral or written apology to the victim⁴⁰ is legislated for the first time. It applies to lesser Schedule 1 offences, such as theft and fraud involving amounts below R2 500, malicious injury to property involving amounts below R1 500, common assault, trespassing, and statutory rape or sexual assault. The following orders apply to any type of offence (listed in either Schedule 1, 2 or 3): Restitution of a specified object to the victim(s) where the object concerned can be returned or restored,⁴¹ some service or benefit by the child to a victim,⁴² and payment of compensation.⁴³ It is suggested that an apology could be of value to victims of any type of offence and should not be restricted to lesser offences.⁴⁴

Minimum standards have been set to guide the selection and creation of diversion options.⁴⁵ Firstly, they should be balanced according to the circumstances of the child, the nature of the offence and the interests of society.⁴⁶ One of the five pointers in the latter regard refers to being

38 Directives J(2)(g), (h) s 97(4) CJA GN R 252 GG 33067 2010-03-31.

39 S 54 CJA – one factor to be considered for selection of the particular diversion option(s) is the proportionality of the option to the child's circumstances, the nature of the offence and the interests of society.

40 S 53(3)(a) CJA.

41 S 53(3)(m) CJA.

42 S 53(3)(o) CJA. Payment of compensation (not to victim, but) to a specified person, persons, group of persons or community, charity or welfare organisation or institution where the child or his or her family is able to afford this.

43 S 53(3)(p) CJA.

44 See for example *S v Maluleke* 2008 1 SACR 49 (T) par 24 where the deceased's mother welcomed the apology order that was made as a condition to a suspended sentence in the case of murder. See also *News24* (2009-02-04) available at <http://www.news24.com/SouthAfrica/News/Najwa-earned-a-packet-20090204> (accessed 2013-10-01) where the offender apologised in court to the father of the deceased who viewed it as "decency at last".

45 S 55 CJA.

46 These are the factors of the traditional sentencing triad and have, as laid out in *S v Zinn* 1969 2 SA 537 (A) 540G, become trite since 1969. They reflect the practice of the time during the determination of an appropriate sentence. See, however, the development of this approach in s 69 CJA, as discussed below. See also Müller & Van der Merwe "Squaring the triad: The story of the victim in sentencing" 2004 6 *Sexual Offences Bulletin* 17.

sensitive to the circumstances of the victim.⁴⁷ Further, where reasonably possible, diversion programmes should be devised, not only to impart useful skills to the child offender⁴⁸ but also to include a restorative justice element which aims at healing relationships, including the relationship with the victim.⁴⁹ Lastly, they should include an element which seeks to ensure that the *child understands the impact* of his or her behaviour on others, including the victims of the offence, and once again the inclusion of compensation or restitution is a possibility.⁵⁰ The focus on the healing of relationships and the child's understanding of the impact of the crime underscores the therapeutic perspective of the CJA towards victims.

An accreditation system is further required for diversion programmes and, to achieve the objectives of diversion, one of the criteria for the evaluation of the content of such programmes is to ensure that they reflect a meaningful and adequate response to the harm caused by offences committed by children.⁵¹ Monitoring of any court order with regards to diversion or other sentence is of importance and progress reports must be compiled regarding restorative justice sentences.⁵² Any positive outcome not only for the child but also for the victim is of relevance for this report.⁵³ It may create a greater workload for those role players involved, but will contribute to further acknowledgement of victims and their input with regards to diversion as well as sentence options and conditions.

2 4 Interactions

In addition to the stipulated diversion options, other measures may be implemented across all levels.⁵⁴ These include family group conferences,⁵⁵ victim-offender mediation,⁵⁶ or any other restorative justice option.⁵⁷ It should always be appropriate to the case and could substitute any of the diversion options or be in combination with any of them. Victims should always understand what these processes entail and that their decision to participate is voluntary.

47 S 55(1)(e) CJA. The other pointers focus on the child offender and are the following:

- (a) may not be exploitative, harmful or hazardous to the child's physical or mental health;
- (b) must be appropriate to the age and maturity of the child;
- (c) may not interfere with the child's schooling;
- (d) may not be structured in a manner that completely excludes certain children due to a lack of resources, financial or otherwise.

48 S 55(2)(a) CJA.

49 S 55(2)(b) CJA.

50 S 55(2)(c) CJA.

51 S 56(2)(ii) CJA. .

52 S 73(4)(a) CJA.

53 Reg 42(2)(d) Regulations relating to Child Justice GN R 251 GG 33067 2010-03-31.

54 S 53(7) CJA.

55 S 61 CJA.

56 S 62 CJA.

57 S 53(7) CJA.

Probation officers provide an important link between the prosecution and victims since they are tasked with setting up family conferences. When the victim does not turn up for any of these procedures the danger exists that indifference or consent to diversion may, by implication, be (wrongly) accepted. Mere notification of the victim is insufficient as he or she also needs to be prepared by the probation officer. The question is whether the probation officer is really trained for this and whether he or she can focus on both the offender and the victim in diversion procedures. There is no other support for the victim in this regard and it is likely that the probation officer would consider the child offender as the main client. In the instance of low victim participation it is probably, in part, due to the lack of appropriate preparation. Proper preparation in all instances, especially in serious cases seems essential.

The aim of these informal interactions is to develop a plan on how the child will redress the effects of the offence.⁵⁸ In order to address this any of the Level 1 diversion options,⁵⁹ such as an apology, symbolic restitution or compulsory family time, or any other suitable measure may be agreed upon.⁶⁰ A mechanism must further be decided upon as to how the probation officer will monitor the child offender's execution of these measures.⁶¹ As argued below,⁶² the envisaged aim for victim-offender interactions is too ambitious and does not take into account the reality or limits of the child offender.

It is also possible for the court to order a family group conference or other interaction during the sentencing process and any recommendation emanating from it will be considered by the court. The child justice court may impose a sentence by confirming, amending or substituting these recommendations.⁶³ Given the inherent adversarial nature of criminal trials and the sentencing discretion belonging to the court, it is unlikely that the courts will often utilise this option, especially in serious matters.⁶⁴

2 5 Victim Impact Statements

Though having been debated since 1997⁶⁵ and proposed in earlier draft

58 Ss 61(1)(a), 62(1)(a) CJA.

59 S 53(3) CJA.

60 S 61(6)(a) CJA.

61 S 61(6)(b)(vii) CJA. Other guidelines focus on the child offender per se (s 61(6)(b)) CJA).

62 Par 4.

63 S 73(2) CJA.

64 In *DPP, North Gauteng v Thabethe* 2011 2 SACR 567 (SCA) par 20, the trial court was criticised for implementing this procedure following the child victim's non-custodial recommendation in an adult rape case.

65 South African Law Reform Commission Issue Paper 7 *Sentencing: Restorative Justice (Compensation for Victims of Crime and Victim Empowerment)* Project 82 (1997).

legislation,⁶⁶ the use of *victim impact statements* during the sentencing process has only finally been legislated in the CJA. A victim impact statement is defined as:

[A] sworn statement by the victim or someone authorised by the victim to make a statement on behalf of the victim which reflects the physical, psychological, social, financial or any other consequences of the offence for the victim.⁶⁷

Whether to submit a victim impact report during the sentencing process of a child offender remains, as in adult trials,⁶⁸ optional. Issues of practicality may influence the prosecutor's decision in this regard such as a change in the contact details of the victim or the victim him or herself not being interested.⁶⁹ A victim impact statement must be under oath and if the contents are not disputed, it is admissible as evidence on its production.⁷⁰ The CJA fails to provide guidance as to the format of an impact statement but it may certainly vary. It may be made verbally, in writing, or by audio or video recording.⁷¹ In view of the broad approach to the definition of victims advocated above, and the fact that the effect of crime extends much wider than the direct victim, it is submitted that the impact on immediate family such as the spouse, parents, siblings or children may also be included. Overly sentimental or irrelevant evidence will, however, certainly be objected to by the defence.

It is not clear to what extent the legislative recognition of impact statements influences this practice in child justice matters. Despite prosecutors being encouraged to obtain victim impact statements,⁷² the utilisation often depends on the views and attitudes of role-players. Recent judgments, such as *S v Matyityi*⁷³ underscore this practice as part of an increasing awareness of crime victims' interest and dignity. Apart from acknowledging victims and the personal dimension of harm suffered, these statements are useful during the sentencing process. Firstly, child offenders who did not get diversion, but had a trial, may now have the opportunity to gain (some)⁷⁴ insight into the harm caused by his or her offence.⁷⁵ The in-court dialogue may contribute to his or her understanding of the impact of the crime. Secondly, for the imposition of the sentences of compulsory residence and imprisonment the severity

66 South African Law Reform Commission *Report on Sentencing (A New Sentencing Framework)* Project 82 (2000) (s 47); S 17(1)(b) Criminal Law (Sexual Offences) Amendment Bill 2003.

67 S 70(1) CJA.

68 S 274 CPA provides for the introduction of any relevant information before sentence.

69 S 70(2) CJA.

70 S 70(3) CJA.

71 Guidance can be taken from Directive 4 *Directives regarding complainant participation in Correctional Supervision and Parole Boards*, 2006 GN R 248 GG 28646 2006-04-07.

72 Directive Q 3 CJA GN R 252 GG 33067 2010-03-31.

73 2011 1 SACR 40 (SCA) par 16.

74 See text to note 109 below.

75 S 69(1)(a) CJA.

and degree of harm should be considered.⁷⁶ The child justice court is instructed, when deciding on imposing imprisonment, to consider as one of the factors the severity of the impact of the offence on the victim.⁷⁷ This means that victim impact statements must be presented in all serious crimes such as murder, rape and robbery committed by children. When the victim is reluctant to make such a statement someone may be authorised to do it on his or her behalf. It could be a family member, teacher, or friend. A professional impact assessment by a behavioural scientist such as a psychologist, criminologist or social worker may also be submitted.

The legislative platform for the use of impact statements during sentencing entrenches the focus on victims' harm in criminal matters. However, the victims' roles in this regard is sometimes perceived as one of a mere "expressor" of additional information and emotions,⁷⁸ with no clarity on whether, and how this input may influence the court's sentencing decision. As, highlighted above, the information and emotion provided by victims, nevertheless, assist the court in its understanding of the crime in all its dimensions.⁷⁹ Victims, themselves, also often encounter therapeutic benefits during this process.⁸⁰

3 Benefits for Victims Participating in Restorative Justice Procedures

As stated above, family group conferences and victim-offender mediation are important restorative justice procedures advocated by the CJA.⁸¹ It appears that the nature of victim-offender encounters in the child justice context is predominantly within family group conferences and not that of victim-offender mediation *per se*.⁸² The aim of both these procedures is, under the guidance of a probation officer, firstly, to arrange and facilitate informal meetings between the child offender, the victim, their families and other support persons⁸³ and, secondly, as mentioned above, to develop a plan to address the effects of the offence.

76 Compulsory residence and imprisonment (ss 69(3)(b), 69(4)(a), (c) CJA respectively).

77 S 69(4)(c) CJA.

78 Edwards "An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making" 2004 *British J Criminology* 967-979.

79 See also Müller & Van der Merwe "Recognising the victim in the sentencing phase: the use of victim impact statements in court" 2006 *SAJHR* 647-662-663.

80 Roberts "Victim impact statements and the sentencing process: Recent developments and research finding" 2003 *Crim LQ* 365-371-372.

81 See ss 61, 62 CJA respectively.

82 Personal communication Hamandi & Pilusa (Probation officers at Child Justice Courts in Atteridgeville and Mamelodi, Pretoria) (2011-08-26). A family-group conference in this context usually comprises of one sitting.

83 S 61(3)(b) CJA provides for a wider attendance to family group conferences, such the prosecutor, police, community members and anybody authorised by the family group conference facilitator.

These effects should include not only those relevant to the offender's life and that of his or her family, but also the consequences experienced by the victim. These are highlighted in section 70, namely, the physical, psychological, financial and social after-effects of the offence. Victims who appear traumatised should be referred to other existing avenues for counselling and empowerment. This is on the assumption that there is a service provider in the vicinity and that the victim can get there. The plan alluded to in the CJA⁸⁴ for addressing the effects of the offence allows for a wide range of options. Steps may include any level one diversion option⁸⁵ or other appropriate actions, taking into account the child offender, his family and local circumstances, and within the legislative restorative justice framework. The victim will evidently receive direct benefit from the option allowing for an apology.⁸⁶ For optimum benefit the human process should, however, always be allowed to naturally evolve.⁸⁷ Neither an apology nor forgiveness is ever guaranteed and it should not be forced either.⁸⁸ Other options of direct benefit to the victim are restitution, performance of some service and the payment of compensation. Where victims are the parents of the child offender, as highlighted below, they may further benefit from diversion orders such as family time or good behaviour.⁸⁹ Indirectly, they and other family members will also benefit from any of the orders involving counselling, therapy or education, as the child may change in a positive way.⁹⁰

It is of importance that both procedures require the consent of the victim and offender. Both should therefore be properly briefed in order to make informed decisions. Victims who are willing to participate and are well prepared may take the lead in mediation sessions. Adult victims may also be more interested to be involved in the decision-making process about the child offender's future and how the diversion plan or sentence will achieve better outcomes.

Participation in victim-offender mediation may have significant positive psychological or emotional consequences for the victim, in particular where respect is shown to the victim.⁹¹ It lessens feelings of

84 S 61(6) CJA read with s 62(2) CJA.

85 As set out in s 53(3) CJA.

86 A child victim of assault to do grievous bodily harm at school was initially enraged and demanded punishment. However, a public apology read out at school was perceived as genuine and made her feel empowered again. The child offender's letter of apology was towards the victim, the school, the community and the offender himself (Hamandi & Pilusa *op cit*).

87 Rossner "Emotions and Interaction Ritual: A Micro Analysis of Restorative Justice" 2011 *British J Criminology* 95 analysed a video recording of a conference and indicated the gradual emergence of successful interactions.

88 Skelton & Batley 2008 *Acta Criminologica* 37 39.

89 S 53(3)(f), (h) CJA.

90 S 53(3)(j), (k) CJA.

91 Spies "Restorative Justice: A Way to Support the Healing Process of a Child Exposed to Incest" 2009 *Acta Criminologica* 15 22 highlights that, particularly in the case of sexual offences against children, respect will contribute to the child's healing: "Time does not cure the effects of sexual abuse on children but rather the way their healing process was facilitated".

violent revenge and thereby reduces the desire for revenge.⁹² The victims' anger towards his or her offender is reduced and post-traumatic stress disorder (PTSD) symptoms are lessened, indicating that the long-term negative impact on his or her well-being would be minimised.⁹³ In general, victims who choose to participate in victim-offender mediation are more satisfied with the justice process.⁹⁴ Hargovan,⁹⁵ however, highlights that such a finding is of little value to the more complex question whether victims really benefit from a shift from punitive to restorative justice. It is submitted that the above findings show significant impact on victims' well-being and is indicative of some victims who benefit from the shift.

Victim-offender mediation can either take place in a full diversion or non-custodial context or form part of a parallel process, particularly in serious matters. In the United States, in the case of violent crimes, victim-offender mediation is often used in the latter context, aimed at giving victims a sense of vindication, rather than for designing non-custodial sentences.⁹⁶ The greater the psychological impact of the crime on the victim the greater is the need for healing.⁹⁷ Recently, based on his right to a healing interaction with the offender, a victim, ten years after the commission of the crime, brought an application to stay the execution of the death penalty against his offender.⁹⁸ Another recent example signalling victims' need for healing interactions with their offenders comes from the fact that all 81 survivors of a 1996 right-wing bombing incident voted unanimously to get the offender (aged-18 at the time) transferred to a prison closer to them.⁹⁹ This would enable them to interact with the offender, at any time the need would arise, without high cost and time implications. It is contended that victim-offender

Though victim-offender mediation is only part of the child's healing process, it can play a significant role in addressing the following needs of a victim of child abuse: To regain self-power and self-acceptance; to let go of guilt feelings and to confirm that the victim was not responsible for the abuse; to establish his or her innocence as a child; to regain the right to make decisions; to regain trust in others; and, to establish personal boundaries.

92 Pretoria News (2013-03-25) 3.

93 Ruge & Scott "Restorative Justice's Impact on Participant" 2009 available at <http://www.publicsafety.gc.ca/res/cor/rep/2009-03-rjp-eng.aspx> *Psychological and Physical Health* 2009-03 (accessed 2012-09-18).

94 *Rethinking Crime and Punishment* (2011-06-15) available at <http://www.scoop.co.nz/stories/PO1106/S00181/restorative-justice-works-for-both-victims-and-offenders.htm> (accessed 2012-09-18).

95 *2007Acta Criminologica* 113 118.

96 Umbreit *et al* "Victim-offender dialogue in violent cases: A multi-site study in the United States" *2007Acta Juridica* 22 23.

97 McElrea "Twenty years of restorative justice in New Zealand – Reflections of a judicial participant" 2011 *J Commonwealth Crim L* 44 49 found that "the greater the harm the greater the need for healing and the greater the potential for restorative justice (encounters)".

98 Pretoria News (2011-07-14) 21.

99 www.times.live.co.za (2011-07-03) available at <http://www.khulumani.net/khulumani/in-the-news/item/498-stefaans-coetzee-is-the-face-of-restorative-justice.html> (accessed 2013-08-20).

encounters in serious matters can only become a possibility after considerable time has lapsed.¹⁰⁰ Meeting the offender and linking their pain to the person who caused it can assist victims to make more sense of an incident.¹⁰¹ The offender is also the only one that can answer questions such as “What happened?” and “Why did it happen to me?”¹⁰² In a homicide matter involving teen dating violence the parents of the deceased were provided a space to ask questions that would not necessarily be asked in a trial – as to what really happened and what had they missed in the relationship, since the offender had been known to them.¹⁰³ When part of a parallel process, victim-offender mediation could be set up in the format of plea negotiation, where a privileged situation is created conducive for the truth to come out.¹⁰⁴

Sometimes the victim may also be the parent of the child offender.¹⁰⁵ In these instances a lack of parental skills may be picked up during the family group conference and such a person could be sent to attend a parenting skills program. A separate session conducted with such a parent-victim can be utilised to address underlying personal issues or family dynamics.

4 Criticism and Challenges

The first point of criticism against victim participation in restorative justice processes arises from scepticism about an apology to the victim as a way of dealing with criminal matters. The perception sometimes exists as to it simply being a way to get away with the crime.¹⁰⁶ Members of the public should thus be educated to understand that restorative

100 In *DPP, North Gauteng v Thabethe* supra victim-offender mediation before sentencing became a possibility between a rape victim and her step-father more than two years after the incident.

101 During 2011, one of the survivors of a right-wing bomb attack in 1996, travelled from Worcester to Pretoria to meet the offender. She recounts, that, apart from having forgiven him for her own sake, it helps her to know the face behind the pain in her legs (www.timeslive.co.za op cit).

102 Hargovan 2007 *Acta Criminologica* 113 119.

103 Baliga “Victims confront offenders, face to face” 2010-07-28 available at <http://www.npr.org/2011/07/28/138791912/victims-confront-offenders-face-to-face> (accessed 2011-07-29); Kershen “Restorative justice can reach the parts that criminal justice can’t” 2010-09-17 available at <http://www.guardian.co.uk/commentisfree/2010/sep/17/restorative-justice-cuts-crime> (accessed 2011-01-08).

104 *Ibid.*

105 Within the South African context a significant percentage of cases referred for diversion involve victims who are also parents (in the broader sense) of the child offender. Over the first 15 months from the implementation of the CJA, parents were victims in about 70% of cases in two urban magistrates’ districts (Hamandi & Pilusa *op cit*). Malicious injury to property is one example of crimes directed against parents. For example, the child offender becomes angry with the mother when she refuses to buy the desired new shoes and a door or window will be broken. Other frequent offences include theft from the home or assault.

106 Kershen *op cit* 5, 8.

justice is more than a mere saying sorry, but in the context of victim-offender mediation or family group conferences it rather affords the victim the opportunity to confront the child offender with the real and human cost of his or her criminal actions. Another concern deals with the possible secondary victimisation of the victim in the case where the offender pretends to be serious about the apology, but in truth only “goes through the motions for self-serving purposes”.¹⁰⁷ Though the legislative incorporation of restorative justice processes and the possibility of an apology as a diversion option are important developments, neither the process nor the apology itself is a simple “magic bullet” or “panacea” applicable to all child offenders and their victims.¹⁰⁸ The individuals involved will always determine the interactions and shape the outcomes.

An important further point of concern is that research shows that child offenders often lack sufficient maturity to engage in empathic processes.¹⁰⁹ This raises questions about the meaningfulness of mediation encounters between victims and child offenders and whether the process would really impart some understanding of the impact their offences had on the victims, as envisaged by the CJA. Attaining this insight will not only make the victim being felt heard, but certainly contribute to curb re-offending, thereby indirectly benefiting victims in general. Research indicates further that victim participation in is low in matters involving young offenders. In only 9% of cases evaluated for the study in another jurisdiction, victim-offender mediation took place.¹¹⁰ In an effort to address the situation probation officers may involve other victims from similar crimes to participate in interactions or panel discussions with child offenders.¹¹¹ This appears to be beneficial and assist child offenders in processing and understanding the consequences of their actions to victims.

In the case of sexual offences by child offenders against other children, the suitability of restorative justice processes is contentious. The intimate (and often violent) nature of these offences influences the willingness of victims to participate. Victims might further be in the offender’s peer group, attending the same school or even be friends. Lack of insight and the offender’s attitude would make victim-offender mediation undesirable.¹¹² The younger the child victim, the more unlikely any

107 *Idem* 10, 14.

108 *Idem* 11.

109 King et al *Non-Adversarial Justice* (2009) 58.

110 Davies et al *Criminal Justice: An Introduction to the Criminal Justice System in England and Wales* (2010) 87.

111 A victim impact panel is a group of victims who speak to an offender about the impact that a crime has had on their lives. The panel does not pass judgment on the offender, but provides a chance for the offender to consider the pain and suffering that has been caused by their actions (Lord “A How to Guide for Victim Impact Panels: A Creative Sentencing Opportunity” 2001 available at http://www.nhtsa.dot.gov/PEOPLE/INJURY/alcohol/VIP/VIP_index.html (accessed 2012-10-11)).

112 In *S v N* 2008 2 SACR 135 (SCA) par 26 the child offender, aged 17-years, displayed blatant disregard towards the victim (a close female friend, also

informal interaction with the offender will be. As highlighted earlier, when sufficient time passes, such an encounter might become a reality, particularly where the parties belong to the same familial structure.¹¹³ Skelton¹¹⁴ points out that many sexual offences committed by child offenders are not of a violent nature: “Children sometimes have wrong perceptions about sex and act inappropriately, and in those situations restorative justice can work.”

Inadequately trained facilitators/probation officers may cause victim-offender mediation or a family-group conference to fail. Poor facilitation may thus lead to parties abusing each other. In addition, grossly disproportionate conditions may be set and even recommended to the court.¹¹⁵ Davies *et al*¹¹⁶ highlights another valid concern, namely that role-players working with the child offender¹¹⁷ may find it difficult to accept their role in relation to the victim as well.

As far as challenges are concerned, the CJA introduces and promotes new therapeutic values (in its objective to identify harm and to promote healing) and processes allowing for victim participation. King¹¹⁸ highlights that such values and processes create new professional roles where role players are expected to be more involved. Secondly, it requires new skills such as intra- and interpersonal communication skills which demands awareness of a person’s own emotions as well as those of other participants. A new function of court personnel in cases dealing with child offenders and their victims is thus envisaged. In handling these matters emotional literacy is expected from professional role players involved. The question remains to what extent the role-players qualify in this regard.¹¹⁹ Some form of training might be essential in many instances in order to foster awareness, sensitivity and enhance personal skills such as empathy, respect and active listening.¹²⁰

112 aged 17) after the incident and victim-offender mediation was not even considered.

113 *DPP, North Gauteng v Thabethe supra*.

114 Personal communication Director Centre for Child Law UP 2012-10-09.

115 King *et al* 58.

116 87.

117 As it was stated by one probation officer “My job is to help the child offender getting out of trouble” (Hamandi & Pilusa *op cit*.)

King “Restorative justice, therapeutic jurisprudence and the rise of emotionally intelligent justice” 2008 *Melbourne ULR* 1096.

119 Daicoff 2008 *T Jefferson L Rev* 551 570 highlights that the ‘lawyer personality’ *per se* tends to shun interpersonal relationships and emotions in deciding legal matters in favour of logic, analysis, rights, duties and obligations.

120 Daicoff 2008 *T Jefferson L Rev* 551 571. See also Goldberg *Judging for the 21st century: a problem-solving approach* (National Judicial Institute Canada) (2005) 5 available at <http://www.nji.ca/nji/Public/documents/judgingfor21stcenturyDe.pdf> (accessed 2008-01-14) who describes judicial officers interested in pursuing a more therapeutic approach as follows: “[They] should be interested in the party as a person, open to communicate and willing to listen to the party (over and above communication with counsel); be perceptive to nuance or sensitive to special needs (such as limited

Lastly, in an effort to obtain redress for the physical and financial harm experienced by the victim, the issue of compensation frequently arises during restorative justice procedures, specifically with regard to money for medical cost spent or needed.¹²¹ It appears to be an empty promise made in the CJA as children are seldom in a position to pay any compensation or often come from very poor families. However, despite the perception that children will not benefit if parents, who can, simply pay for loss or damage caused by their children,¹²² victims may receive justice if families take collective responsibility to pay the compensation. The child can always do household chores to “pay back” to their parents who took responsibility for paying compensation. It is suggested that the options of symbolic restitution or a benefit or service to the victim *and* parents, are always investigated. In addition, if the child is old enough to work, some effort should be made to earn part-time money in order to pay at least a portion of the damage or loss.

5 Conclusion

The CJA endeavours to address the needs of two very different groups in the South African society who are both inherently vulnerable and historically neglected, namely, child offenders and crime victims. It is not surprising that the main focus of the CJA is on child offenders, as the legislation is primarily designed for them. As elsewhere, the outcome in child justice matters in South Africa is not contingent on securing the engagement or agreement of victims.¹²³ Victims are, however, expected to play a role in the process of reforming and reintegrating child

language skills, emotional disturbance and cultural issues); be pro-active, look wider than purely punitive measures, empower others and accept information from other disciplines.”

121 Two cases serve as examples: The *first matter* involved the victim (the mother’s boyfriend) and offender having an argument after he refused to give permission for her to go out. The child then poured boiling water over him before running away. He sustained serious injuries on his stomach. The victim was ambivalent about the idea of diversion and adamant about payment of his medical cost. After six life skills sessions ... the offender apologized to the victim, then the mother (against general practice, in an effort to facilitate diversion) reimbursed the victim for his medical cost and he finally agreed to diversion.

Another instance involved an assault where the victim’s front tooth was broken. She insisted on being paid the money to get the tooth fixed. The offender was from a very poor family. He completed an anger management program which culminated in an apology. No compensation materialized (Hamandi & Pilusa *op cit.* Hora *Smart Justice* (2010) 42 available at http://www.thinkers.sa.gov.au/lib/pdf/Hora/smartjustice_LO.pdf (accessed 2012-09-26) refers to Southern Australia where victims prefer shorter sentences with restitution to longer prison sentences without any restitution).

122 In about 30% of the cases parents do indeed pay compensation on the child’s behalf. Though some children may earn money by, for example, washing cars, there is no general culture of doing part-time work while at high school in the so-called townships (Hamandi & Pilusa *op cit.*).

123 Haines *et al* “The Swansea Bureau: A model of diversion from the Youth Justice System” 2013 *Int J Law Crime & Justice* 1 7 available at <http://>

offenders into society. Though the main objective in the CJA is the management of children at risk, victims are given opportunities to participate and by doing that they may simultaneously benefit in some way or another. For those who thus choose to participate in encounters with offenders or give impact statements during sentencing, there will more often than not be some therapeutic dimension in the outcome.

The possibility of ordering an apology to the victim, as well as the use of victim impact statements during sentencing, have been legislated for the first time. Core restorative justice procedures, such as family group conferences and victim offender mediation, are further described in a way to provide detailed guidance for those officials involved. The extent to which these mechanisms may be used depends on role-players' attitudes and skills, and victims' willingness and preparation to participate. The promise of compensation, however, seems to be less secure within the South African context. Nevertheless, the provisions in the CJA are a step in the right direction of recognising crime victims' dignity and their potential role in the justice system.

123 www.justice.gov.uk/downloads/youth-justice/effective-practice-library/swan-sea-bureau-evaluation.pdf (accessed 2013-09-26).