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THE *CHILD JUSTICE ACT*: PROCEDURAL SENTENCING ISSUES

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1 Introduction

The *Child Justice Act* 75 of 2008 (hereafter referred to as "the Act") has not only changed the kind of sentences that may be imposed on a child offender and the principles in terms of which the appropriate sentence should be established,[1] but has also amended or clarified several procedural issues closely associated with sentencing.

In this contribution a number of these procedural issues are considered in some detail. These procedures are related to pre-sentence reports, to victim impact statements and also to the review of and appeals against decisions by child justice courts. In each instance the aim is to establish as precisely as possible whether the Act has changed the *status quo*, whether it does so effectively and, if it has, the extent to which it now requires a different approach.

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1 For a discussion of the international and constitutional background to the Act, with a specific focus on sentencing, see Terblanche 2012 *PELJ* 435-475. Some foundational issues that are addressed in some detail in that contribution include the role of s 28 of the *Constitution of the Republic of South Africa*, 1996, the theory of the best interests of the child as a paramount consideration, and some of the challenges that need to be overcome in interpreting the Act.

2 Pre-sentence reports

2.1 Obtaining pre-sentence reports

Whether or not a pre-sentence report should be obtained before a child offender is sentenced has been hotly debated for many years.[2] Advocates for child justice have generally supported an absolute requirement, but others were quick to point out the practical problems, such as a lack of resources.[3] The availability and quality of probation services for children remains a thorny issue and judicial officers often find fault with probation reports.[4] However, it has been noted that probation services have been greatly expanded in recent years, following increased official interest in diversion.[5]

Whether pre-sentence reports are necessary or not is now governed by section 71 of the Act. In short, pre-sentence reports are required in most instances, although section 71 appears to allow for exceptions. This is considered in what follows.

2.2 Pre-sentence reports are generally required

The general principle is stated in section 71(1)*(a),* which reads as follows:

> A child justice court imposing a sentence must, subject to paragraph *(b)*,[6] request a pre-sentence report prepared by a probation officer prior to the imposition of sentence.

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2 Before the Act came into operation, courts increasingly required pre-sentence reports for all young offenders (Terblanche *Guide to Sentencing* 320; *S v Peterson* 2001 1 SACR 16 (SCA) para 20; *S v Gagu* 2006 1 SACR 547 (SCA) para 13; *S v Kwalase* 2000 2 SACR 135 (C) 137*e-f*; *S v Phulwane* 2003 1 SACR 631 (T) para 9. However, there were some exceptions, such as *S v Manka* 2003 2 SACR 515 (O) 521 (the full bench of the Free State High Court decided that, when the crime is so serious that a long prison sentence is required for the protection of society, a pre-sentence report is of little use); *S v Cloete* 2003 2 SACR 490 (O). See also Prinsloo 2005 *Acta Criminologica* 1-3; Skelton "Decade of Case Law" 69-70.

3 See Gxubane 2008 *SA Crime Quarterly* 14; Kassan "First Baseline Study" 96 (pointing towards inconsistent practices); Badenhorst *Implementation of the Child Justice Act* 15-18, 37; Terblanche *Guide to Sentencing* 19.

4 See Gxubane 2008 *SA Crime Quarterly* 13; Prinsloo 2005 *Acta Criminologica* 14.

5 Gallinetti "Child Justice in South Africa" 642; Sloth-Nielsen "Short History of Time" 25.

6 Para *(b)* involves the exceptions to the basic principle: see 2.3 below.

Although the section reads that a court "imposing a sentence must" request a report, this is clearly something that has to be done *before* the sentence can be imposed. Another legislative quirk is the indication that the report should be "requested", whereas such a request should probably be seen as a court *order*, which cannot be refused. In fact, section 71(2) imposes the duty on the probation officer to complete the report "as soon as possible", but not later than within six weeks after the "request".[7]

The responsibility for requesting the pre-sentence report rests with the court and not, for example, with the prosecutor.[8] The court has to address the "request" to a probation officer. A "probation officer" is defined in the Act[9] as "any person who has been appointed as a probation officer under section 2 of the Probation Services Act" 116 of 1991.[10] In terms of this provision a probation officer is appointed by the Minister of Social Development.[11] A person may be appointed as a probation officer only if—

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7 There is no sanction for late submission of the report, but a court might be able to fall back on the general principles that apply when a functionary fails to comply with a court order. In *S v Z* 2004 1 SACR 400 (EC) paras 12, 13 the court ordered two departments in the Eastern Cape government to report on the transfer of young offenders who had been committed to reform schools, but not yet transferred. Subsequently, the Eastern Cape High Court ordered many of these children to be released from custody. This order was based on the powers in s 173 of the *Constitution*, which permit the higher courts to "protect and regulate their own process … in the interests of justice", and the common law powers of review (paras 27-28; see also s 24 of the *Supreme Court Act* 59 of 1959). Although magistrates' courts do not have these powers, they could send a case on review to the high court in terms of s 304 of the *Criminal Procedure Act* 51 of 1977 (hereafter the *Criminal Procedure Act*).

8 See also the NDPP *Directives* para Q.4.

9 Section 1.

10 See Terblanche *Guide to Sentencing* 338 fn 9. See also Minister of Police *National Instruction 2 of 2010,* where "probation officer" is defined in the same terms as in the Act.

11 See Ehlers *Child Justice* 29. The Act refers to "the Minister" (s 2(1)). The relevant Minister is assigned by the President under s 17(1) of the *Probation Services Act* 116 of 1991. The last such assignment which could be found was in Proc No R80, 1994 where the functions of the "Minister for National Health and Welfare" were assigned to the "Administrators of the various provinces with effect from 29 April 1994." However, it is submitted that s 33(3) of the *Social Assistance Act* 13 of 2004 is sufficiently wide so that it can be assumed that all functions associated with social development (including all welfare services) have been transferred to the Minister of Social Development.

> … he or she is a social worker in the employ of the State, a welfare organisation or a non-profit organisation and is registered as a social worker with the South African Council for Social Service Professions.[12]

Therefore, registration as a social worker at the Council, and employment at one of the above-mentioned institutions, is essential for appointment as a probation officer.

A probation officer who has been appointed as such by the Minister becomes an officer of every magistrate's court.[13] The phrase "an officer of the court" does not have a specific definition in terms of our law[14] and it is not frequently used, except to describe the role of prosecutors, attorneys and advocates.[15] The phrase generally indicates that the "officer" is expected to serve the court and not the interests of one of the parties,[16] and that the court can regulate the manner in which such "officers" perform their duties and functions.[17] In the case of probation officers it is submitted that, as they are described as officers of the court, they are expected to be independent in expressing their opinions, but that they should also subject themselves to the regulation of the court.

Section 71(1) is couched in what appear to be peremptory terms.[18] Why this should be so is not easily established. Experts such as forensic criminologists, psychologists

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12 Regulation 2 of the *Regulations under the Probation Services Act* as amended. See also Gxubane 2008 *SA Crime Quarterly* 13.

13 Section 2(2).

14 See Cilliers and Luiz 1995 *THRHR* 607, 612; *Gilbert v Bekker* 1984 3 SA 774 (W) 780 (a "nebulous concept"); *Weiner v Broekhuysen* 2001 2 SA 716 (C) 725.

15 The most frequent application of the phrase in our courts is in connection with attorneys and advocates: see, eg, *Receiver of Revenue, Port Elizabeth v Jeeva* 1996 2 SA 573 (A) 579D; *Gilbert v Bekker* 1984 3 SA 774 (W) 780. See also rule 39(21) of the *Uniform Rules of Court* to the *Supreme Court Act* 59 of 1959, originally published under GN R48 of 12 January 1965, as amended, in terms of which stenographers are deemed to be officers of the court.

16 See *Natal Law Society v N* 1985 4 SA 115 (N) 121-122, quoting from *Rondel v W* 1966 1 All ER 467 (QB) 479 ("… helping the Judge to do justice …") and *Society of Advocates of SA (Witwatersrand Division) v Fischer* 1966 1 SA 133 (T) 137C (it is the duty of an advocate "to further the administration of justice to the best of his ability"). One of the duties of an attorney as an "officer of the court" is to refer the court to case law adverse to his own case - Cilliers and Luiz 1995 *THRHR* 608.

17 See, eg, *Commissioner for Inland Revenue v Friedman* 1993 1 SA 353 (A) 372I ("answerable to the court for his conduct and administration"); *Gilbert v Bekker* 1984 3 SA 774 (W) 777B; Cilliers and Luiz 1995 *THRHR* 612.

18 See *S v RS* 2012 2 SACR 160 (WCC) para 28 ("[s]ection 71 makes it obligatory for the child justice court to request a presentence report prepared by a probation officer before it imposes any sentence").

or psychiatrists have in the past provided courts with pre-sentence reports[19] and there are no obvious reasons why they should now be excluded from doing so. However, in view of the peremptory wording[20] it is submitted that it would generally be advisable for the child justice court to comply with section 71(1) and to request a pre-sentence report from a probation officer. Such an approach would not prevent these other experts from also providing the court with a report on sentencing. Of course, such reports could also be obtained when the specific case falls within one of the exceptions permitted by section 71.

It only remains to note here that in terms of the *Probation Services Act* the "powers and duties" of probation officers specifically include

> … the investigation of the circumstances of a convicted person, the compiling of a pre-sentencing report, the recommendation of an appropriate sentence and the giving of evidence before the court.[21]

2.3 The exceptions: When a pre-sentence report is not required

2.3.1 Two exceptions are provided for

The exceptions to the general principle that pre-sentence reports must always be obtained are to be found in section 71(1)*(b)* of the Act, which reads as follows:

> A child justice court may dispense with a pre-sentence report where a child[22] is convicted of an offence referred to in Schedule 1 or where requiring the report would cause undue delay in the conclusion of the case, to the prejudice of the child, but *no child justice court* sentencing a child *may impose a sentence involving*

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19 With respect to the role of such experts on sentencing, see Terblanche *Guide to Sentencing* 21-22, 104.

20 See Gxubane 2008 *SA Crime Quarterly* 13, noting that an earlier version of the *Child Justice Bill* did make provision for other people to provide pre-sentence reports.

21 Section 4(1)*(k)* of the *Probation Services Act* 116 of 1991.

22 Reference to "child" in this section should, of course, be interpreted in terms of the definition of "child" in s 1. This definition results in a fairly complicated situation, but as a general rule it includes all children when the criminal proceedings were instituted while they were under the age of 18 years old, but also a limited number of child offenders where the cases were instituted later but in accordance with the relevant NDPP directive. Pre-sentence reports might therefore have to be obtained for offenders who are 18 years old or older when the report is actually compiled.

> *compulsory residence in a child and youth care centre … or imprisonment, unless a pre-sentence report has first been obtained*.[23]

The italicised part substantially qualifies the exceptions created by this provision. Its effect is clear: A child justice court must always obtain a pre-sentence report if the offender is sentenced to imprisonment or compulsory residence in a child and youth care centre,[24] whether such a sentence is suspended or not.[25] Otherwise, a pre-sentence report can be dispensed with in one of two situations, namely:

a) if the offence falls within the least serious group of offences covered in the Act (being contained in schedule 1[26]), or

b) when it will cause unnecessary delay, "to *the prejudice of the child* ...",[27] to get a report. The test is whether the offender will be prejudiced by the delay, and not whether the state, prosecution or the administration of justice will suffer prejudice.

It is difficult to think of examples in which a delay caused by obtaining a pre-sentence report would prejudice the child. Examples could include the following:

a) a sufficiently thorough pre-sentence report by an expert other than a probation officer is available to the court;

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23 Emphasis added.

24 Gallinetti *Getting to Know the Child Justice Act* 54. This requirement is in accordance with the requirements set in international instruments, eg rule 16.1 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the "Beijing Rules"; requiring "social inquiry reports" in all but minor cases): See SALRC *Juvenile Justice* 253. See also Badenhorst *Implementation of the Child Justice Act* 6; Prinsloo 2005 *Acta Criminologica* 6.

25 This is the case because suspension does not change the nature of the sentence that is suspended (See *S v Slabbert* 1998 1 SACR 646 (SCA) 648; Terblanche *Guide to Sentencing* 350-351; Du Toit *et al Commentary* 28-48D).

26 Some examples include the following: theft involving property of an amount not exceeding R2 500; fraud not exceeding an amount of R1 500; unlawful possession of certain drugs; consensual "statutory rape"; common assault, etc.

27 Emphasis added.

b) the court considers a fine to be an appropriate sentence and the child offender has the means to pay the fine immediately.[28]

Neither of these examples is likely to present itself on a regular basis.

2.3.2 Imprisonment?

As noted before, when imprisonment or compulsory residence in a care centre is imposed, these exceptions are not available. However, the reference to imprisonment is not as simple as it might appear at first, as there are at least six different forms of imprisonment under South African law.[29] The Act expressly permits two of these forms of imprisonment to be imposed on a child offender, namely "ordinary" (or determinate) imprisonment[30] and imprisonment in terms of section 276(1)*(i)* of the *Criminal Procedure Act*.[31] Both these sentences will certainly require a pre-sentence report.

Imprisonment may also be imposed as an alternative to a fine, and in this case the position is not clear. The *Criminal Procedure Act* permits ordinary criminal courts to impose a fine and to add alternative imprisonment at the same time.[32] However, the *Child Justice Act* is silent in this regard. The only connection with imprisonment in the Act, as far as fines are concerned, is that it requires of a child justice court, before it imposes a fine, to consider whether or not the failure to pay a fine is likely to result in the child offender being imprisoned.[33] It also requires the court to warn the offender that failure to pay the fine "will result in the child being brought back

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28 A court using this option will have to take into account several complicating factors, including that the offence will be fairly serious (sch 2 or 3 offences only); and that reintegration of the child offender into society remains a major objective of the child justice system.

29 See s 276 of the *Criminal Procedure Act* 51 of 1977; Terblanche *Guide to Sentencing* 217.

30 Section 77 of the Act.

31 Section 75*(a)* of the Act. It has been held, repeatedly, that this sentence amounts to nothing other than imprisonment, and that it is only different in the sense that the prisoner might qualify for release at an earlier stage than if sentenced to ordinary imprisonment (see, e g, *S v Slabbert* 1998 1 SACR 646 (SCA) 647*h-i*; *S v Stanley* 1996 2 SACR 570 (A) 575*f-g*; *S v Van der Westhuizen* 1995 1 SACR 601 (A) 603*i-j*).

32 Section 287(1) *Criminal Procedure Act* 51 of 1977. See Terblanche *Guide to Sentencing* 270-273; Du Toit *et al Commentary* 28-25 to 28-26A.

33 Section 74(1)*(b)*.

before the child justice court for an inquiry to be held in terms of section 79."[34] Section 79 provides for the procedure that is to be followed when any of the non-custodial sentences fail, and permits the court to amend the imposed sentence or to replace it with another (obviously lawful) sentence. If imprisonment may be imposed for the relevant offence, the replacement sentence can be imprisonment,[35] but this is not the same as alternative imprisonment. While alternative imprisonment is the standard way of enforcing the payment of fines in the case of adult offenders, it is submitted that a reading of the whole of section 74 of the Act indicates that a fine imposed by a child justice court should not be accompanied with alternative imprisonment. In section 79 the *Child Justice Act* has a different procedure to enforce the payment of fines, which is not available in the case of adult offenders: if the fine is not paid, that sentence should be reconsidered in accordance with section 79. Such an interpretation is supported by the general principles established by the Act, such as that imprisonment should always be the last resort,[36] and that the Act aims to provide measures specifically tailored for child offenders.[37]

2.3.3 The exceptions: closing comments

The practical effect of section 71 is that a pre-sentence report is compulsory in virtually every case.[38] Even though a community-based sentence does not require a pre-sentence report in the case of schedule-1 offences, it will be difficult for the presiding officer to find an appropriate combination of conditions and someone to monitor compliance without the assistance of a probation officer. The same situation applies, roughly, in the case of correctional supervision.[39] As far as other sentences

34 Section 74(3)*(b)*.
35 Section 74(1)*(b)*.
36 See the Preamble to the Act, as well as s 3*(i)*, read with s 28 of the *Constitution*.
37 As part of the guiding principles in s 3 of the Act, such as subs 3*(a)* (consequences should be proportionate); subs 3*(b)* (children are not to be treated more severely than adults).
38 *S v RS* 2012 2 SACR 160 (WCC) para 28; Gallinetti "Child Justice in South Africa" 660. See also NDPP *Directives* para Q.4.
39 A report by a correctional official or probation officer is required before a sentence of correctional supervision may be imposed (s 276(1)*(h)* read with s 276A(1) of the *Criminal Procedure Act*, as amended by item *(l)* of sch 4 of the *Child Justice Act*). Although correctional supervision may not be imposed without a prior report by a correctional official or probation officer (s 276A(1) of the *Criminal Procedure Act*), this is not exactly the same kind of report as envisaged by the *Child*

are concerned, it is only when a court imposes a fine that is within the immediate means of the child offender to pay that the report could be dispensed with, and then usually only in the case of a schedule-1 offence. These instances are further limited by the ideal that the vast majority of schedule-1 offences should be diverted.[40]

It is worth noting here that a pre-sentence report should not require much effort from the probation officer, as a child offender reaching the sentencing stage would already have been assessed by a probation officer earlier on in the child justice process.[41]

2.4 Deviating from the recommendation in the pre-sentence report

Section 71(4) of the Act reads as follows:[42]

> A child justice court may impose a sentence other than that recommended in the pre-sentence report and must, in that event, enter the reasons for the imposition of a different sentence on the record of the proceedings.

In effect this provision simply confirms the status quo. It should stand to reason that a court is not bound by the recommendation in a pre-sentence report. Imposing a sentence is a judicial function,[43] which cannot be "abdicated" to another authority.[44] It is a further general requirement that a court must give reasons for its decisions,

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Justice Act, and it would technically be possible to dispense with the pre-sentence report required by s 71 if the report required by the *Criminal Procedure Act* were provided.

40 See, in general, Gallinetti *Getting to Know the Child Justice Act* 43-46. See also the general tenor of NDPP *Directives* para G.

41 This is required by s 34(1) of the Act (See Tladi "Child Justice Legislation" 33; Skelton and Tshehla *Child Justice* 39, 62; Badenhorst *Implementation of the Child Justice Act* 27). Although s 41(3) provides for such assessment to be dispensed with if it is in the child's best interests to do so, this really should not happen with a child who is referred for trial and a possible sentence in a child justice court.

42 See also *S v RS* 2012 2 SACR 160 (WCC) para 28.

43 See *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 85 ("… sentencing is a judicial function and ... this function will be performed by the courts and only the courts"); *Sibiya v Director of Public Prosecutions, Johannesburg* 2006 1 SACR 220 (CC) para 41; *S v Dodo* 2001 1 SACR 594 (CC); *S v Dzukuda* 2000 2 SACR 443 (CC); *S v RO* 2010 2 SACR 248 (SCA) para 30.

44 See *S v R* 1993 1 SACR 209 (A) 221*c-d*; *S v Ndaba* 1993 1 SACR 637 (A) 642*a-c*; *S v Govender* 1995 2 SACR 458 (N) 461*d-j*.

including the sentencing decision.[45] In other words, even if the recommendation of the pre-sentence report is followed, in terms of the current legal position the presiding officer is expected to give reasons for the court's sentence. It is common sense then that there would be an even greater duty on the court to explain the sentence when it differs from what has been suggested in the pre-sentence report.[46]

3 Victim impact statements

In terms of section 70(2) of the Act the prosecutor may provide the child justice court with a victim impact statement,[47] in consideration of "the interests of a victim of the offence and the impact of the crime on the victim".

A victim impact statement is defined in section 70(1), which reads as follows:

> For purposes of this section, a victim impact statement means 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.

The definition consists of three main elements:

a) First, it is a "sworn statement". This means that it would typically be a written statement in the form of an affidavit.[48] However, it might be necessary for the victim to read the statement in court during the trial while under oath. This position is implicitly confirmed by section 70(3), in that it permits a victim impact statement to be produced as evidence if "the contents are not disputed". If the victim is unwilling to testify about a disputed victim impact

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45 Terblanche *Guide to Sentencing* 110. See also *S v Maake* 2011 1 SACR 263 (SCA) paras 19-22 (giving "reasons to substantiate conclusions" is not only salutary, but indeed obligatory).

46 For earlier indications that reasons should be given when there is a big difference between the proposed sentence and the one imposed, see for instance *S v Martin* 1996 2 SACR 378 (W) 381*i-j*; *S v Lewis* 1986 2 PH H96 (A).

47 For some of the earlier references to victim impact statements in South African research, see Snyman 1995 *Acta Criminologica* 30-34; SALRC *Restorative Justice* paras 2.29-2.32.

48 See SA Law Commission *Discussion paper: Sentencing* para 3.7.21.

statement, it should be the victim's decision whether or not to withdraw the statement.[49]

b) The statement must be made by the victim or "someone authorised by the victim". The provision does not indicate whether the term "victim" should be given a wide or narrow interpretation. Even the narrow dictionary meaning of victim is "a person harmed, injured, or killed as a result of a crime...".[50] Some form of harm to the person is, therefore, the least that is needed before that person could be called a victim.[51] A dependant of someone who has been killed or incapacitated because of a crime is certainly harmed by that crime and, in terms of the dictionary meaning, also a victim. Based on this definition, and read with the government's co-called Victim's Charter,[52] Van der Merwe concludes that victims include the "victim's family, dependants, and eyewitnesses to the crime".[53]

c) The third element of the definition limits the contents of the statement. This "limitation" is as important for what it includes as for what it does not include. The phrase "physical, psychological, social, financial or any other consequences of the offence" appears to include every conceivable consequence of the crime but, by being limited to *consequences* of the crime, it contains an important limitation: it does not leave room for the victim to give an opinion about the character of the criminal or about what an appropriate sentence (punishment) would be. It is "an opportunity for victims to express the impact the criminal event had on their lives and the families' lives".[54]

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49 Müller and Van der Merwe 2006 *SAJHR* 660.

50 Rhodes University *Oxford South African Concise Dictionary*, vide "victim".

51 See Müller and Van der Merwe 2006 *SAJHR* 655-656 for a comparative discussion on the meaning of "harm" in the context of victims.

52 Department of Justice and Constitutional Development *The Service Charter for Victims of Crime in South Africa* (2004) (*Victim's Charter*).

53 Van der Merwe 2007-2008 *T Jefferson L Rev* 394. See also Müller and Van der Merwe 2006 *SAJHR* 650-651 (with respect to an eyewitness as victim); Makiwane 2010 *Obiter* 611-612 (primary and secondary victims).

54 Van der Merwe 2007-2008 *T Jefferson L Rev* 394; Clarke, Davies and Booyens 2003 *Acta Criminologica* 44-46. It should also be noted that the *Victim's Charter* (para 2 item 3) promises

Although the judiciary in South Africa appears to be increasingly comfortable with the idea of victim impact statements, it is true that substantial criticism and unease remain.[55] Some of the concerns of opponents of victim impact statements include that the victim might want to prescribe to the court what an appropriate sentence would be; the statement might include evidence rejected by the court; and the statement might include irrelevant information which might result in an unfair trial for the offender.[56] However, it is submitted that most of these concerns should be addressed by the limitation to the *consequences* of the crime for the victim.

Prosecutors are encouraged in terms of the National Director of Public Prosecution's (NDPP) directives[57] to get a victim impact statement and are reminded that an undisputed statement is admissible "upon mere production". However, prosecutors should note the research findings that victims are easily disappointed when their expectations with respect to their participation are not met.[58] On the other hand, victims' greatest need is often no more than to participate by explaining to the court how the crime influenced their life and their families' lives,[59] and to know that the criminal justice system has dealt with the case fairly and carefully.[60]

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victims no more than that they "can participate … by *attending* the … sentencing proceedings …" (emphasis added).

55 See Van der Merwe 2007-2008 *T Jefferson L Rev* 395-397; Makiwane 2010 *Obiter* 613-615.

56 See Terblanche *Research on the Sentencing Framework Bill* 25-26; Clarke, Davies and Booyens 2003 *Acta Criminologica* 53-54. At the beginning of the victim impact statement movement victims were often allowed to express an opinion about the sentence (See Meintjes-van der Walt 1998-1999 *Tilburg Foreign L Rev* 154; Moolman 1997 *SACJ* 276, 279), but this practice is now widely disapproved of (see Pemberton 2009 *Acta Criminologica* 12). Müller and Van der Merwe 2006 *SAJHR* 656-657 notes this "thorny issue" and notes the following objections against such practice, namely (1) that criminal cases are not private matters, but engaged in in the name of the state; (2) victims might be distressed if their suggestions are not followed; and (3) victims are not (legally) qualified to recommend any specific sentence. The most powerful argument, in my view, against this practice is that the victim cannot be expected to have a balanced view of the crime and the criminal. Victims are bound to be biased, which is why the victim would not be permitted to try the criminal in the first place.

57 NDPP *Directives* para Q.3; see also Frank *Review of Victim Policy* 21.

58 For a summary of such findings, see Englebrecht *Victim Impact Statement* 219-228. See also Meintjes-van der Walt 1998-1999 *Tilburg Foreign L Rev* 154.

59 See Frank *Review of Victim Policy* 11-13. With respect to the rationale for the acceptance of victim impact statements see also Müller and Van der Merwe 2006 *SAJHR* 651-654. The advantages of victim impact statements are summarised by Clarke, Davies and Booyens 2003 *Acta Criminologica* 54-55.

60 McCoy and McManimon "Victim Satisfaction with Sentences" 214-215.

What should the position be if the prosecutor elects not to present a victim impact statement? In other words, would the child justice court be entitled to act unilaterally to obtain a victim impact statement? On the face of it section 70 appears to entrust only the prosecution with this entitlement. In some respects, the position could be said to be analogous to the prosecutor's discretion to prove previous convictions against the offender. This discretion is provided for in section 271(1) of the *Criminal Procedure Act*, of which the relevant part reads as follows: "The prosecution may … produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused."

Several cases have stressed that the discretion to prove previous convictions belongs to the prosecutor.[61] In most of these cases the conclusion was reached that it is irregular for the court to interfere with this discretion and to determine by itself if the offender has previous convictions. The wording in section 70(2) of the Act is virtually identical, and reads as follows: "The prosecutor may … where practicable, furnish the child justice court with a victim impact statement … ."

It is submitted that there is no meaningful difference between these provisions. The presence or absence of previous convictions is one of the most important determinants of an appropriate sentence.[62] The same cannot be said of the information in a victim impact statement. Therefore, based on the analogy of section 271(1), a child justice court will need very convincing reasons before any *mero motu* action to obtain a victim impact statement could be justified.

4 Appeal and review

4.1 Appeal against sentence

The same procedures regarding appeals against conviction and sentence that apply in the case of adult offenders generally also apply in the case of offenders tried and

61 See *S v Khambule* 1991 2 SACR 277 (W) 283c; *S v Njikaza* 2002 2 SACR 481 (C) and the other cases noted in Terblanche *Guide to Sentencing* 80 fn 12.

62 Terblanche *Guide to Sentencing* 81.

sentenced in terms of the Act. The Act makes it somewhat easier for some child offenders to appeal, as not all children need to apply for leave to appeal when such leave is required by the *Criminal Procedure Act*.[63] In terms of section 84(1) of the Act, these children who need not apply for leave to appeal are—

> a) children who were under 16 years old when they committed the offence, regardless of the sentence; or
>
> b) children who were 16 years or older when they committed the offence, who were sentenced to "any form of imprisonment that was not wholly suspended.[64]

As discussed above,[65] the meaning of "imprisonment" is not necessarily clear. Not every form of imprisonment mentioned in the *Criminal Procedure Act* is available to a child justice court. Although section 84(1) refers to "any form" of imprisonment, only determinate imprisonment and imprisonment imposed in terms of section 276(1)(i) of the *Criminal Procedure Act* can be imposed by child justice courts. Not even alternative imprisonment may be imposed.

The second proviso to section 84(1) reads as follows:

> Provided further that the provisions of section 302(1)*(b)* of [the Criminal Procedure] Act apply in respect of a child who duly notes an appeal against a conviction, sentence or order as provided for in section 302(1)*(a)* of that Act.

This simply means that the automatic review of proceedings, which is provided for in section 302 of the *Criminal Procedure Act*, is suspended when an appeal is duly noted by the child offender.[66] The relevant provisions are discussed below.

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63 See ss 309B and 316 of the *Criminal Procedure Act*. See also Skelton and Tshehla *Child Justice* 61; Du Toit *et al Commentary* 30-22. The court in *S v Fortuin* [2011] ZANCHC 28 (11 Nov 2011) para 11 noted that this provision broadens the right of appeal to these offenders. *S v Alam* 2011 2 SACR 533 (WCC) para 9 indicates that these are the only offenders who need not apply for leave to appeal.

64 See Du Toit *et al Commentary* 30-22.

65 See 2.3.2 above.

66 See Joubert *Criminal Procedure Handbook* 364.

4.2 Automatic review in certain cases

4.2.1 The provisions of section 85

In terms of section 85(1) of the Act the provisions of the *Criminal Procedure Act* with respect to automatic review[67] also apply in the case of child offenders sentenced in a child justice court. It is appropriate to quote section 85(1) in full and then to consider each of its individual parts:

The provisions of Chapter 30 of the *Criminal Procedure Act* dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child was, at the time of the commission of the alleged[68] offence—

> (a) under the age of 16 years; or
> (b) 16 years or older but under the age of 18 years, and has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191(2)(j) of the Children's Act,
> the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of the duration of the sentence.

4.2.2 Chapter 30 of the Criminal Procedure Act

The words "[t]he provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts …" refer to the *procedure* of automatic review of certain sentences. As noted in *S v CS*[69] it is essential to separate the powers contained in section 85 of the Act from the procedures in chapter 30 of

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67 The use of the phrase "automatic review" is somewhat controversial (see, eg, Joubert *Criminal Procedure Handbook* 362; Du Toit *et al Commentary* 30-6), but it is used here in accordance with general practice.

68 The use of the phrase "alleged offence" probably derives from legislative over-cautiousness, as by this stage a child justice court would inevitably have determined that the offender had actually committed "the alleged offence".

69 *S v CS* 2012 1 SACR 595 (ECP) para 15.

the *Criminal Procedure Act*. It is important to read the quoted part of section 85(1) as a single idea. The only kind of review of criminal proceedings dealt with by chapter 30 is that of proceedings in magistrates' courts that are ordinarily (or automatically) reviewable. Proceedings in regional courts are not reviewable, as section 302 of the *Criminal Procedure Act* is explicitly limited to magistrates' courts.[70] However, this does not mean that criminal proceedings in a regional court are not reviewable when it functions as a child justice court.

4.2.3 All children convicted in terms of the Act

The words "in respect of all children convicted in terms of this Act" means that there are no exceptions, except for the following two: (a) in the case of children of 16 and 17 only custodial sentences are reviewable,[71] and (b) no case is reviewable when the offender notes an appeal against the decision of the child justice court.[72] Apart from these exceptions, the cases of all children convicted in *and then sentenced* by a child justice court have to be submitted for automatic review.[73] As this affects "all children", there is no reason why child justice proceedings in a regional court should be excluded from such review.[74]

It also does not matter whether or not the child has been legally represented during the proceedings in the child justice court.[75] There have been conflicting judgments in this respect, which are discussed below.[76] One of the most important reasons why it

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70 The definition of a "magistrates' courts" expressly excludes regional courts: s 1 of the *Criminal Procedure Act.* See also Kriegler and Kruger *Hiemstra: Suid-Afrikaanse Strafproses* 5, 786; Joubert *Criminal Procedure Handbook* 33, 365.

71 See 4.2.4 below.

72 Section 85(2) of the Act.

73 The italicisation is intended to indicate that it is actually the sentencing that will cause the proceedings to be reviewable, despite the apparent focus of s 85(1) on the conviction. The conviction is an essential step on the way to the sentence, but ch 30 of the *Criminal Procedure Act* applies only after a sentence has been imposed.

74 See Joubert *Criminal Procedure Handbook* 365; also *S v CS* 2012 1 SACR 595 (ECP) para 26.

75 In the case of adult offenders, the proceedings would not be reviewable when the offenders have been assisted by a legal representative (s 302(3)*(a)* of the *Criminal Procedure Act*).

76 Most judgments held that legal representation does not affect reviewability: see *S v Ruiter* [2011] ZAWCHC 265 (14 Jun 2011) 265 para 3 (because the high court "is the upper guardian of all minors within its jurisdictional area"); *S v Fortuin* [2011] ZANCHC 28 (11 Nov 2011) 28 paras 49-52; *S v CS* 2012 1 SACR 595 (ECP) para 31; *S v Khuzwayo* [2012] ZAGPJHC 113 (31 May

should make no difference, apart from the wording of the Act, is that the assistance of a legal advisor is not a guarantee that the child offender will suffer no prejudice.[77]

4.2.4 Different sentences for different ages

The words "[p]rovided that if a child was, at the time of the commission of the alleged offence …" indicate that specific provisions apply, depending on the age of the child at the time of the commission of the offence.[78] If the child was under 16 years old at that time, then all matters have to be reviewed, regardless of the sentence.[79] If the child was 16 or 17 years old at the time of the offence, then only certain sentences are reviewable.[80]

4.2.5 Wholly suspended imprisonment

With respect to the phrase "has been sentenced to any form of imprisonment that was not wholly suspended", the discussion of this phrase under "appeals" above applies here as well.[81] In essence this means any complete or partial suspension of any form of imprisonment provided for in section 77 of the Act, in contrast to any conceivable form of imprisonment.

2012) 113 (presumably). Contra *S v Nakedi* [2012] ZANWHC 5 (2 Jan 2012) para 12; *S v Sekoere* [2012] ZAFSHC 114 (14 Jun 2012) para 18 – see discussion at 4.2.9 below.

77 See *S v Xaba* 2011 1 SACR 1 (KZP) para 7; *S v Sekoere* [2012] ZAFSHC 114 (14 Jun 2012) 114 para 16 (a court appointed legal representative might not be able to get instructions from the child offender).

78 *S v Fortuin* [2011] ZANCHC 28 (11 Nov 2011) para 18 notes that this wording qualifies the general application of ch 30, even though in this case the qualification amounts to the protection being expanded and not limited.

79 Para *(a)*. See *S v Fortuin* [2011] ZANCHC 28 (11 Nov 2011) paras 13-17; Skelton and Tshehla *Child Justice* 61-62; Du Toit *et al Commentary* 30-6A. *S v Fortuin* [2011] ZANCHC 28 (11 Nov 2011) 28 para 7 notes that such a distinction is in accordance with statements in the Preamble that children "in conflict with the law" should be afforded "special protection", at the same time taking account of the child's age. Contra *S v Sekoere* [2012] ZAFSHC 114 (14 Jun 2012) para 10.1 (only sentences of imprisonment and residence in a care centre are involved, a view not further elucidated). There is room for an argument that it could not have been the intention of the legislature that a sentence such as a small fine which is paid immediately should be subject to automatic review, since the phrase "irrespective of the duration of the sentence" could not be applied to sentences that would not literally involve any element of duration. However, our courts have not yet considered this argument.

80 Para *(b)*.

81 See 4.1 above.

4.2.6 Compulsory residence in a care centre

The words "or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191(2)*(j)* of the Children's Act" simply refer to the sentence of residence in a child and youth care centre provided for in section 76 of the Act.[82]

4.2.7 Section 304 of the Criminal Procedure Act

The words "subject to review in terms of section 304 of the Criminal Procedure Act" simply refer to the ordinary procedure that has to be followed during an automatic review.[83]

4.2.8 The duration of the sentence no longer of any relevance

The phrase "irrespective of the duration of the sentence" has been included into section 85, as the provisions of section 302 of the *Criminal Procedure Act* are directly related to the duration of the sentences imposed on adult offenders. As a result the duration of the sentence has no effect on the automatic reviewability of any matter dealt with by a child justice court.[84] Another consequence of this phrase is that the experience of the presiding officer is no longer of any relevance,[85] except perhaps when it comes to the imposition of fines. In this respect it has been held that, in order for child offenders aged 16 or 17 at the time of the offence not to be afforded less protection than adult offenders, the amounts of the fines referred to in section 302(1) must also be applied to such child offenders.[86]

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82 The Act includes the phrase "providing a programme provided for in s 191(2)*(j)* of the Children's Act" whenever mention is made of this sentence, and it has no special meaning.

83 *S v CS* 2012 1 SACR 595 (ECP) para 9.

84 *S v Fortuin* [2011] ZANCHC 28 (11 Nov 2011) para 13; *S v CS* 2012 1 SACR 595 (ECP) para 5; *S v Sekoere* [2012] ZAFSHC 114 (14 Jun 2012) para 9. Also Skelton and Tshehla *Child Justice* 61-62.

85 Different sentence durations result in automatic reviewability in the case of magistrates with more than seven years experience than for those with up to seven years' experience: see Kruger *Hiemstra's Criminal Procedure* 30-16 to 30-17 for the detail.

86 See *S v Fortuin* [2011] ZANCHC 28 (11 Nov 2011) para 8. *S v Sekoere* [2012] ZAFSHC 114 (14 Jun 2012) para 13 agrees that fines below these amounts are not reviewable.

4.2.9 Case law taking an opposite view

In *S v Nakedi*[87] the court took a different view to that discussed above, specifically with respect to the question of whether or not proceedings in a child justice court are reviewable when the offender had been legally represented. The court noted that section 85(1) makes chapter 30 of the *Criminal Procedure Act* expressly applicable to proceedings involving children,[88] but that the rest of section 85(1) raises the question of whether or not all sentences imposed on children are reviewable.[89] The court then held as follows:[90]

> This problem is solved by a reference to Item (p) of Schedule 4 read with Section 99(1) of the CJA, which in essence substitutes Section 302(1)(a)(i) of the CPA. The amendment is indicative of the fact that the remaining provisions of Section 302 are applicable, which includes referral for automatic review where the accused is not assisted by a legal adviser.

The court also held that a finding that cases of children who have been legally represented are automatically reviewable is inconsistent with the Act *and* the *Criminal Procedure Act*.[91] This view is supported in *S v Sekoere*,[92] where it was held that the Act amends only section 302(1)*(a)(i)* of the *Criminal Procedure Act*, "and does not impact on other provisions of section 302."

The main problem with this is that it fails to take into account the actual function of section 99, read with schedule 4 of the Act. When the different items in the schedule are considered one by one, this function is clear in almost every instance, namely to remove other legislation provisions that would result in technical inconsistencies with the Act. For example, the Act changes the law by repealing sections 290 and 291 of the *Criminal Procedure Act*,[93] which used to contain the special sentencing options

87 *S v Nakedi* [2012] ZANWHC 5 (2 Jan 2012).
88 Paragraph 10.
89 Paragraph 11.
90 Paragraph 12.
91 Paragraph 16.
92 *S v Sekoere* [2012] ZAFSHC 114 (14 Jun 2012) para 11.
93 Items *(m)* and *(n)* under "Criminal Procedure Act".

for juvenile offenders, including committal to a reform school.[94] This repeal required a technical change to section 302(1)*(a)(i)*, in order to replace the reference to a reform school with a reference to a child and youth care centre. Any amendment beyond this technical substitution could have affected the review proceedings for adult offenders, in terms of the *Criminal Procedure Act*, which is not the function of the Act. If these amendments are adjudged to result in inconsistencies between section 85 of the Act and section 302 of the *Criminal Procedure Act*,[95] then clearly, in the case of child justice proceedings, preference should be given to the provisions of the Act.[96]

Another problem with the judgment in *Nakedi* is that, although it apparently takes note of the paramountcy of the child's best interests,[97] it gives no inkling as to how its conclusion would benefit child offenders. Further, it does not explain why a conclusion that automatic review is compulsory also in cases where there was legal representation is inconsistent with the provisions of the Act. The court in *S v Sekoere*[98] attended to this problem and eventually decided that, if the legislature wanted to exclude "minors" from the working of section 302, it would have done so explicitly.[99]

It is submitted that the judgments finding in favour of the automatic review of most cases involving child offenders, as discussed above, have interpreted the Act correctly. Not only have they interpreted the Act as a whole,[100] instead of only focusing on section 99 thereof, but they have also indicated convincingly how their conclusion is in accordance with statements in the Preamble to the Act that children "in conflict with the law" should be afforded "special protection", at the same time

94 SeeTerblanche *Guide to Sentencing* 322-333.

95 See *S v CS* 2012 1 SACR 595 (ECP) para 20.

96 The Act specifically provides for the incorporation of some of the provisions of the *Criminal Procedure Act,* but also for the predominance of its own provisions, in s 4(3)*(a)* (The "Criminal Procedure Act applies with the necessary changes" to child justice proceedings, "except in so far as this Act provides for amended, additional or different provisions or procedures …" and s 63(1)*(b)*.

97 Paragraph 14.

98 *S v Sekoere* [2012] ZAFSHC 114 (14 Jun 2012) 16-18.

99 Note *S v CS* 2012 1 SACR 595 (ECP) para 27: If the legislature wanted to exclude cases where there is legal representation, it would have done so explicitly.

100 See *S v CS* 2012 1 SACR 595 (ECP) para 12.

taking account of the child's age.[101] It is also inescapable that sections 82 and 83 of the Act will have the effect that "a child appearing before a child justice court will in effect never be without legal representation",[102] a situation which would render the whole of section 85(1) meaningless if the cases of children who are legally represented are not automatically reviewable.

5 Closing comments

It was explained in the introduction that it was the aim of this contribution to consider the provisions of the *Child Justice Act* in connection with pre-sentence reports and victim impact statements, as well as the review of, and appeals against, sentence decisions by child justice courts. The intention with each of these topics was to establish whether the Act has changed the law effectively and whether it now requires a different approach.

With respect to pre-sentence reports, the conclusion is that the Act requires a pre-sentence report by a probation officer in every case, before sentence may be imposed in terms of the Act. Under the former position, judicial officers fairly regularly sentenced child offenders without the advantage of such a report, a situation that will clearly now be unacceptable. This conclusion does not mean that every report will be to the satisfaction of the sentencer, or that there will not be any delays in the finalisation of pre-sentence reports.

The Act has certainly changed, quite substantially, the law in connection with the submission of victim impact statements. The court does not appear to have any discretion over whether or not to receive such a statement when the prosecutor wishes to present it. Whether this change will provide any real relief to victims of crime or not remains to be seen.

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101 See *S v Fortuin* [2011] ZANCHC 28 (11 Nov 2011) para 7; *S v CS* 2012 1 SACR 595 (ECP) para 14.

102 *S v Fortuin* [2011] ZANCHC 28 (11 Nov 2011) para 49, with the complete argument at paras 32 to 53; *S v CS* 2012 1 SACR 595 (ECP) para 10.

The Act makes it somewhat easier for child offenders to appeal against the decisions of child justice courts, and its provisions in connection with the review "in the ordinary course" has created quite a stir in the high courts, with conflicting findings in several provincial divisions. Although I support the view that all cases should be reviewable in the case of child offenders under 16 years of age, and that it should make no difference to the question of reviewability whether or not the offender was legally represented or not, a final judgment in this respect from the Supreme Court of Appeal or the Constitutional Court would no doubt be welcome.

As long as judicial officers consider the Act as a whole when they interpret individual provisions, the Act should consistently improve the protection afforded to child offenders in our child justice system.

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List of abbreviations

CJA	Child Justice Act
NDPP	National Director of Public Prosecutions
SACJ	South African Journal of Criminal Justice
SAJHR	South African Journal of Human Rights
SALRC	South African Law Reform Commission
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
T Jefferson L Rev	Thomas Jefferson Law Review
Tilburg Foreign L Rev	Tilburg Foreign Law Review

THE *CHILD JUSTICE ACT*: PROCEDURAL SENTENCING ISSUES

SS Terblanche*

SUMMARY

In this contribution a number of procedural issues related to the sentencing of child offenders and emanating from the *Child Justice Act* 75 of 2008 are considered in some detail. As a general rule, the Act requires pre-sentence reports to be obtained from probation officers before sentencing any child offender, with only a limited number of exceptions. The article argues that the peremptory nature of the Act means that a probation report is always required, even if reports by other experts are also available. The exceptions are limited to instances other than those where the child offender is sentenced to any form of imprisonment or to residence in a care centre. The article addresses the question of whether or not the reference to imprisonment includes alternative imprisonment which is imposed only as an alternative to a fine. It suggests that alternative imprisonment should, generally, not be imposed on child offenders. When an exception is not prevented because of the sentence, a pre-sentence report may be dispensed with only when the offence is a schedule-1 offence (the least serious class of offences) or when obtaining a report would prejudice the child. It is argued that these exceptions are likely to occur rather rarely. A final aspect of the Act's provisions on pre-sentence reports is the requirement that reasons be given for a departure from the recommendations in a pre-sentence report. This requirement merely confirms the status quo.

The Act permits the prosecutor to provide the court with a victim impact statement. Such a statement is defined in the Act. It is a sworn statement by a victim or someone authorised by the victim explaining the consequences to the victim of the

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commission of the crime. The article also addresses the issue of whether or not the child justice court might *mero motu* obtain a victim impact statement when the prosecution does not do so.

Finally, the article addresses appeals against and reviews of the trial courts' sentences. It notes that appeal by the child offender is made somewhat easier, as some child offenders need not obtain leave to appeal. These include children under the age of 16, or older children sentenced to imprisonment. Again, the meaning of "imprisonment" is at least somewhat ambiguous. The provisions on automatic review have attracted considerable judicial attention already. The majority of these judgments confirmed the apparently clear wording of the Act, in terms of which the cases of all child offenders under the age of 16 should be reviewed regardless of whether they were legally represented or of the sentence imposed. In the case of child offenders aged 16 or 17, only custodial sentences are reviewable. The judgments which found this to be an incorrect interpretation are dealt with in some detail, with the conclusion that they were incorrectly decided.

KEYWORDS: child justice; pre-sentence report; victim impact statement; review of child justice proceedings; appeal against sentence; juvenile justice – South Africa; juvenile justice – sentences.