

Realising the Child's Best Interests: Lessons from the *Child Justice Act* to Improve the *South African Schools Act*

M Reyneke*



Author

Mariëtte Reyneke

Affiliation

University of the Free State, South Africa

Email reynekej@ufs.ac.za

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Abstract

Although the contexts of school discipline and child justice differ considerably there are a number of contact points and points that overlap. Since the *South African Schools Act* 84 of 1996 came into operation in 1996, the Constitutional Court has made several pronouncements on the best-interests-of-the-child concept which are not reflected in the provisions regarding school discipline. The *Child Justice Act* 75 of 2008 came into operation in 2010. This Act provides valuable guidance on how to deal with transgressing children. It is therefore proposed that the *Schools Act* should draw on the provisions of the *Child Justice Act* to refine the *Schools Act* with regard to serious matters of school discipline and to ensure its proper alignment with the constitutional imperatives regarding the best-interests-of-the-child right.

Keywords

School discipline; child justice; the best interests of the child; children's rights; education law; restorative justice.

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1 Introduction

To aver that sections 8 and 9 of the *South African Schools Act*¹ (hereafter the *Schools Act*) dealing with school discipline should take a few lessons from the *Child Justice Act*² might seem a bit far-fetched at first sight. It is conceded at the outset that the circumstances, aims and scope of school discipline and the circumstances and severity of criminal offences by children are not entirely compatible, but it is argued that there are valuable principles captured in the *Child Justice Act*³ which should be incorporated in one or another form in the legislation related to school discipline.

Yet, despite the concessions made there are several contact points and even points that overlap when one deals with school discipline and children in conflict with the law. Reality dictates that minor transgressions in schools can eventually escalate into serious crime, and that some forms of misconduct in schools constitute actual criminal offences, such as theft or the assault of fellow learners.⁴

One of the best examples of the link between school discipline policies and juvenile justice is the effect of the zero-tolerance policies followed in some states in the United States of America (USA). In essence, zero-tolerance policies are very strict, inflexible, and retributive in nature and cannot be regarded as child-friendly.⁵ There is evidence that zero-tolerance school discipline policies play a major part in the increased number of learners that enter the juvenile justice system and disproportionately affect learners from marginalised groups.⁶ In fact, the impact of these policies has reached such undesirable proportions in the USA that the effect thereof is referred to as

* Mariëtte Reyneke. B.Com Law, LLB, LLM, PhD (Tilburg University). Senior lecturer, Department of Procedural law and Law of Evidence, University of the Free State. Email: reynekej@ufs.ac.za. This research is partly sponsored by the NRF Thuthuka programme.

¹ *South African Schools Act* 84 of 1996.

² *Child Justice Act* 75 of 2008.

³ *Child Justice Act* 75 of 2008.

⁴ Correspondent *The Mercury* 3. A boy was found guilty of theft and sentenced to R2 000 or four months' imprisonment, suspended for five years. He was convicted of stealing a pair of school shoes. His single mother was unable to afford a pair of school shoes and the school refused to give him permission to wear his "takkies" to school. Thus, to avoid disciplinary action at school, he stole the shoes and ended up with a criminal record and the humiliation of the criminal process. Also see De Wet 2003b SAJE 113-121; De Wet 2003a SAJE 85-93; De Wet 2003c SAJE 168-175.

⁵ American Psychological Association Zero Tolerance Task Force 2008 *American Psychologist* 852-862.

⁶ Bloomenthal 2011 *NYU Rev L & Soc Change* 312; Gonzalez 2011 *JJLP* 12-13; Ofer 2011 *NY L Sch L Rev* 1374-1375, 1401.

the "school to prison pipeline".⁷ Currently, public outcry in some of the states of the USA is forcing policy makers to reconsider the legislation and policies that govern school discipline.⁸

The *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*) aims to provide a single, coherent, value-based legal framework. This coherence should therefore be reflected in all enabling legislation dealing with the realisation of the best-interests-of-the-child right. Consequently it is important to ensure that there is proper alignment between legislation and the relevant constitutional imperatives.

It is therefore appropriate to investigate the *Schools Act*⁹ and the *Child Justice Act*¹⁰ to determine whether these two acts are properly aligned and whether there is any room for improvement to ensure that the best interests of children are served in both the school discipline and child justice system. Furthermore, one would want to ensure that the legal framework contributes to limiting the number of children who filter through from the education system to the juvenile justice system.

The *Schools Act* was drafted in 1996. Since then the Constitutional Court has delivered several ground-breaking judgements on the best-interests-of-the-child concept which have not been captured in any of the discipline-related amendments of the *Schools Act*. The *Child Justice Act* came into operation in 2010 and reflects the new constitutional imperatives regarding children's rights as well as international standards regarding the regulation of children in conflict with the law. Consequently, the current legislative framework creates the impression that children should first come into conflict with the law before legislation explicitly focuses on the best interests of the children who misbehave or act in a socially unacceptable way.

It is argued in this article that the child-centeredness of legislation is indicative of its compliance with the imperatives of the paramountcy of the best-interests-of-the-child concept. This article aims to prove that sections

⁷ Aull 2012 *Ohio St J on Disp Resol* 179-180; Bloomenthal 2011 *NYU Rev L & Soc Change* 303-304; Gonzalez 2011 *JJLP* 11; Ofer 2011 *NY L Sch L Rev* 1377.

⁸ The Dignity in Schools Campaign focuses on ending the school-to-prison pipeline created by the zero-tolerance policy. It aims to convince the New York City Department of Education to implement restorative practices. See Dignity in Schools 2016 <http://www.dignityinschools.org>. Educators are also in favour of the implementation of restorative justice and dignity in New York City schools and established an organisation called Teachers Unite. Teachers Unite 2016 <http://www.teachersunite.net/>.

⁹ *South African Schools Act* 84 of 1996.

¹⁰ *Child Justice Act* 75 of 2008.

8 and 9 of the *Schools Act*,¹¹ dealing with school discipline and formal disciplinary hearings, are not child-centred and are not in line with the constitutional developments regarding the best-interests-of-the-child concept.

2 The best interests of the child

The best-interests-of-the-child concept is not only a common law principle included in the *Constitution*, but is an enforceable constitutional right too.¹² The best-interests-of-the-child concept and the best interest right of the child are a multi-faceted notion which give rise to several issues. These include questions such as: which child or children are implicated? Which interests of the child are at stake? What does "best interests" entail? What does the "paramountcy" of the best interests of the child entail? What does "every matter concerning a child" entail and how does it manifest in the context of school discipline and criminal justice? These questions are indeed heavily encumbered and cannot be addressed in full within the confines of an article. However, since the best interests of the child are of paramount importance in every matter concerning the child one, would expect at the very least a child-centred approach in both the *Schools Act*¹³ and the *Child Justice Act*.¹⁴

2.1 Child centeredness

Section 28(2) of the *Constitution* and the ensuing interpretations of this provision by the Constitutional Court highlight the need for a child-centred approach in all matters pertaining to children.¹⁵ The best interests of the child standard is applicable to the implementation of all legislation applicable to a child, children, a specific group of children or children in general, as well as to any proceedings, actions and decisions instituted or taken by an organ of state concerning children.¹⁶ In the school discipline context and child

¹¹ *South African Schools Act* 84 of 1996.

¹² *S v M* 2008 3 SA 232 (CC).

¹³ *South African Schools Act* 84 of 1996.

¹⁴ *Child Justice Act* 75 of 2008.

¹⁵ See also *S v M* 2008 3 SA 232 (CC). The Constitutional Court found that the best-interests-of-the-child standard constitutes both a constitutional right and a principle.

¹⁶ Couzens 2010 *THRHR* 274, 281; Visser 2007 *THRHR* 460; Reyneke *Best Interests of the Child* 220-224. Ss 6 and 7 of the *Children's Act* 38 of 2005. S 6 refers to the application of the general principals to children. S 7 refers only to individual children and not to groups of children or to children in general. The *Child Justice Act* 75 of 2008 refers to the best interests of children in the preamble, but the sections refer to the best interests of the child. Also see ss 35(i) and 65(2) of the *Child Justice Act* 75 of 2008. Ss 39(1) and (5) of the latter Act refer to the simultaneous assessment of a group of children if that is in the best interests of all the (individual) children concerned.

justice context this would mean that the transgressing child, the child victim of the transgression, any child bystanders and/or child in the community at large who is affected by the transgression should be afforded the benefits of their best-interests right as far as possible.

In contrast to this explicit child-centred requirement of the *Constitution*, the *Schools Act*¹⁷ does not have an explicit child focus. The hypothesis that the *Schools Act* does not focus sufficiently on the best interests of the child is based *inter alia* on the lack of reference to children in the legislation, the lack of focus on the needs of children of different age groups, the lack of focus on the different needs of different children, and the lack of child-friendly processes. These issues will be discussed in more detail in what follows.

2.1.1 References to children as an indicator of child-centeredness

The constitutional imperative of distinguishing between adults and children was emphasised by the Constitutional Court in *Centre for Child Law v Minister for Justice and Constitutional Development*,¹⁸ where it held that:

(a) [t]he children's rights provision [section 28 of the Constitution] creates a stark but beneficial distinction between adults and children. It draws a distinction between adults and children below the age of 18 and requires that those under 18 be treated differently from adults when authority is exercised over them.¹⁹

The *Schools Act*²⁰ does not make a distinction between education for adults and that for children. Instead, the Act applies to all school education for learners from grade R to grade 12. The definition of a "learner" is given as any person who receives education or is obliged to receive education in terms of the Act.²¹ In fact, the word "child" is not even defined in the *Schools Act* and is used only twice in the Act.²² The legislation also does not refer to the best interests of the child, except for section 8A, which deals with searches and seizures. This provision was added only in 2007. The argument that there is a lack of focus on the best interests of the child in the

¹⁷ *South African Schools Act* 84 of 1996.

¹⁸ *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 6 SA 632 (CC).

¹⁹ *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 6 SA 632 (CC) para 14(d).

²⁰ *South African Schools Act* 84 of 1996.

²¹ Section 1 of the *South African Schools Act* 84 of 1996.

²² See s 3(3) of the *South African Schools Act* 84 of 1996 – the MEC must ensure that there are enough places available in schools in a particular province to ensure that children of compulsory school-going age (7 to 15 years) can attend a school; Also see s 8A(10)(a), which deals with random searches and seizures and drug testing, and provides that parents must be informed that their child was subjected to a drug test.

school discipline context is further strengthened by the absence in section 8 of the *Schools Act* of any real indications that the legislator recognises the particular vulnerabilities of transgressing children as learners, as opposed to the position of adult learners. The legislation also fails to distinguish between the needs and interests of transgressing learners, the victims of transgressions and the broader school community.

In contrast, the *Child Justice Act*²³ has an explicit focus on children under the age of 18 years. This is clear from the preamble of the act, the definition of the word child, and the numerous references in different sections of the act to the best interests of the child as the guiding principle in different procedures applicable to children in conflict with the law.²⁴

2.1.2 Age differentiation as an indicator of child centeredness

The best interests of the child provision is applicable to all children under 18 years of age. It also goes without saying that the needs and interests of a transgressing 7 year-old learner and a transgressing 17-year old learner would in all likelihood be substantially different. These sentiments are captured in the *Child Justice Act*, which has an explicit focus on the developmental abilities and needs of children of different ages who transgress. Although criminal capacity should not and could not play a decisive role in school discipline, the regulatory developments regarding the criminal capacity of children should at least have sensitised the legislator and educational authorities to the need to re-evaluate the appropriateness of the one-size-fits-all-learners-and-children approach of sections 8 and 9 of the *Schools Act*. It is apposite to note that the criminal capacity of children was raised from the common law 7 years of age to 10 years of age, and that children older than 10 years of age and under 14 years are presumed to lack criminal capacity.²⁵ Furthermore, the legislator is required to re-evaluate the increased age of criminal capacity within five years of the commencement of the act to determine whether the age of criminal capacity should not be increased even further.²⁶

Unlike the *Child Justice Act*, the *Schools Act* does not make a distinction between different age groups of learners. The age of learners is referred to only with regard to the admission of learners to school and the compulsory

²³ *Child Justice Act* 75 of 2008.

²⁴ *Child Justice Act* 75 of 2008: ss 9(1)(b); 24(3)(a); 30(3)(a); 35(i); 38(2)(b); 39(5); 41(3); 44(3) and (4)(a); 47(5)(a) and (8)(a); 63(4); 65(2); 80(1)(d).

²⁵ Section 7 of the *Children's Act* 38 of 2008.

²⁶ Section 8 of *Children's Act* 38 of 2008.

school-going age of learners.²⁷ In what follows, the impact of the lack of age differentiation on the realisation of the child's best interest will be illustrated with reference to over-aged learners and learners of compulsory school-going age.

2.1.2.1 Over-aged learners

Although one might argue that the *Schools Act* implicitly focuses on children under 18 years of age, because that is the traditional school-going age of learners, the reality is rather different. In 2010 more than 12,1 million learners were enrolled in schools, including 858 093 (7,1%) learners over the age of 18 years. This figure has increased steadily since 2008, when there were 687 608 (5,72%) such learners, and 2009, when there were 718 347 (5,96%) such learners.²⁸ This trend continued from 2011 to 2013. In 2011 there were 891 361 (7,38%) learners above 18 years. The number increased to 924 206 (7,5%) in 2012 and escalated to 2 438 862 (20%) in 2013.²⁹ It is also alarming to note that some of the overage learners were several years above the age-grade norm.³⁰ In 2010 there were 627 838 learners between 19 and 20 years of age in ordinary schools, 179 028 were between 21 and 22 years of age, 36 463 were between 23 and 24 years of age, and 14 764 were above 25 years of age.³¹ In 2013 there were 1 469 593 learners between 19 and 20 years of age in ordinary schools, 693 131 were between 21 and 22 years of age, 218 762 were between 23 and 24 years of age, and 17 850 were above 25 years of age.³² In most of the age groups the number of over-aged learners had more than doubled.

These figures indicate that there is a substantial number of learners who are above 18 years of age and are therefore not entitled to the advantage of the best interests of the child provision. Yet the *Schools Act* makes no distinction between the age groups of learners within the context of school discipline.

The number of underage learners is also worrying. These include learners as young as four years. A startling 460 993 learners under the age of seven

²⁷ Section 3(1) of the *South African Schools Act* 84 of 1996.

²⁸ DBE 2008-2009 *Annual Surveys* 47-48; DBE 2009-2010 *Annual Surveys* 34.

²⁹ Minister of Basic Education *Internal Question Paper*.

³⁰ Refers to a specific statistical age norm for every grade. The age-grade norm is determined by way of the following calculation: grade number plus 6. For example: Grade 1 + 6 = age 7 years implies that a child in grade 1 should be 7 years of age; or Grade 12 + 6 = age 18 years. Thus children should ordinarily finish school at the age of 18 years.

³¹ DBE 2009-2010 *Annual Surveys* 34.

³² DBE 2009-2010 *Annual Surveys* 34.

years were in grade 1 in 2010. Consequently, by way of illustration, learners aged 4 years, 14 years and 24 years are subjected to the same disciplinary regime in terms of sections 8 and 9 of the *Schools Act*.

The *Schools Act* also does not make provision for the reality of huge age differences between learners in the same class. In 2010, 1 131 161 learners were in schools while they were six years of age and younger.³³ Furthermore, the repetition rate in South African schools is alarmingly high compared with international trends. In 2009 9% of learners were repeating the grade they were in. This is higher than the average of 5% for developing countries and 1% for developed countries.³⁴ Despite the provisions regarding age-grade norms and the admission of learners three years above the age-grade norm only with the permission of the HoD,³⁵ research reveals that from grade 1 fewer than 50% of learners are adhering to the age-grade norms, and the ratio shows a steady decline until grade 11.³⁶ The potential maximum age differential between the oldest and youngest learners in a class is disturbing. Taking into account that figures of less than 1% are excluded, the difference can be eight years as early as grade 1.³⁷ This figure increases to 13 years by grade 10, which implies that it would be possible to have an adult in a class together with a child at the beginning of puberty if the age differential were, for instance, 8 to 13 years.³⁸

2.1.2.2 The distinction between learners of compulsory school-going age and children above compulsory school-going age

If a learner of compulsory school-going age (15 years) is expelled from school, the HoD of the Department of Basic Education is obliged to arrange an alternative placement for the learner.³⁹ The HoD's obligation to ensure an alternative placement is applicable to learners of compulsory school-going age only. This raises a question regarding the position of learners between 15 and 18 years of age. While the *Constitution* provides that the best interests of every child under 18 years are of paramount importance, there is apparently a lacuna in the legislation regarding the interests of children between 15 and 18 years who pose disciplinary problems.⁴⁰ This lacuna in ensuring the best interests of children is exacerbated by the lack

³³ DBE 2009-2010 Annual Surveys 34.

³⁴ DBE Macro Indicator Trends 33.

³⁵ Regulations 3 and 30 in GN 2433 in GG 19377 of 19 October 1998.

³⁶ Reyneke *Best Interests of the Child* 110.

³⁷ DBE 2009-2010 Annual Surveys 19.

³⁸ Reyneke *Best Interests of the Child* 108-111.

³⁹ Section 9(5) of the *South African Schools Act* 84 of 1996.

⁴⁰ Sections 28(2) and (3) of the *Constitution*.

of legislative or regulative criteria to facilitate the alternative placement of expelled learners. Currently it is left to the discretion of the HoD to ensure that the alternative placement is in the best interests of the learner.⁴¹

Further, if one assumes that the right to basic education coincides with the compulsory school-going age, one could argue that the right to further education of the learner is applicable to learners between 15 and 18 years. The right to further education is subjected to the provision that it must be made progressively available. The state can therefore, on account of a lack of specialised facilities and a lack of capacity to deal with learners who pose disciplinary problems, lawfully limit the right to further education of such learners. This is in sharp contrast to the provisions of section 28(2), which provide that the best interests of every child under the age of 18 are of paramount importance. One should thus consider whether these children's rights to further education are unduly limited or not, taking the best-interests-of-the-child right into account.

2.1.3 Explicit best-interests-of-the-child provisions as indicators of child-centeredness

The best interests of the child are an unambiguous focus of the *Child Justice Act* and it is evident in numerous sections of the Act that all procedures are aimed at promoting the best interests of the child. Furthermore, all role players (police officers, prosecutors, probation officers, inquiry magistrates and child justice courts) are explicitly instructed by the legislator throughout the Act to ensure the primacy of the best interests of the child.⁴² These

⁴¹ Section 9(5) of the *South African Schools Act* 84 of 1996.

⁴² Section 9(1)(b) of the *Children's Act* 38 of 2008 – the police must immediately hand over a child under 10 years old to a parent or guardian if it is in the best interests of the child; s 24(3)(a) - the presiding officer must consider the best interests of the child before the child is released into the care of a parent or guardian or appropriate adult; s 30(3)(a) - a child can be detained only if the presiding officer has considered the probation officer's report, a list of specified factors and the best interests of the child; s 35 - lists the purpose of the assessment of a child, which list explicitly refers to the best interest of the child; s 38(2) - the child's parents must attend the assessments of the child by the probation officer, unless that is not in the best interests of the child; s 39(5) - if a child is a co-accused with other children they can be assessed simultaneously if it is in the best interests of all the children; s 41 - a prosecutor can divert a child before a preliminary inquiry on a Schedule 1 offence without an assessment by a probation officer if it is in the best interests of the child; s 44(3) - the inquiry magistrate can exclude any person, bar those listed in section 81, from a preliminary inquiry if it is in the best interests of the child; s 44(4)(a) - a preliminary enquiry can continue in the absence of a parent, guardian appropriate other adult or probation officer if it is in the best interests of the child; s 47(5)(a) - the inquiry magistrate can dispense with an assessment report at a preliminary inquiry if it is in the best interests of the child; s 47(8)(a) - if children are co-accused, a joint preliminary inquiry can be held if it is in the best interests of all the children concerned; s 63(4) - a

provisions also provide the different role players with specific factors to be taken into account in determining the best interests of the child.

In the school discipline context the school governing body (SGB) is responsible for conducting a formal disciplinary hearing, and all educators are responsible for maintaining discipline in their classrooms and on the school grounds.⁴³ Yet none of them are cautioned in the *Schools Act* to discipline learners within the parameters of the best-interests-of-the-child standard. In fact, there is no indication of what would constitute the best interests of the child, and it is left to the discretion of the SGB and educators to determine the ambit of this constitutional right. This poses a real challenge to the realisation of the child's best interests rights, since most SGB members and educators do not have legal training, do not have access to legal sources, and do not have the capacity to stay abreast of the latest developments with regard to the composite best-interests-of-the-child concept.⁴⁴

2.1.4 References to considering the best interests of all children involved in formal proceedings as indicators of child-centeredness

The *Schools Act* provides in section 20(1)(a) that one of the functions of the SGB is to promote the best interests of the "school",⁴⁵ while the *Constitution* prescribes that the best interests of the child are of paramount importance in every matter concerning the child.⁴⁶ This clearly creates a possible conflict between the interests of the school with all its learners on the one hand, and the best interests of an individual child or group of children who are subjected to a formal disciplinary hearing on the other hand. Another possible tension that may arise as far as discipline is concerned is that where the misconduct of a learner or learners infringes on the rights for instance of the majority of the learners or the image of the school.

The SGB has an obligation to ensure that every child's interests are considered as being of paramount importance in any disciplinary matter. This would therefore include the interests of the offender, the child victim,

child justice court must ensure the best interests of the child; s 65(2) - a child justice court can dispense with the requirement that a child must be assisted by a parent, guardian or appropriate adult if it is in the best interests of the child; s 80(1)(d) - a legal representative of a child must ensure that the best interests of the child are of paramount importance throughout the process.

⁴³ Section 9 of the *South African Schools Act* 84 of 1996.

⁴⁴ Karlsson 2002 *Comparative Education* 332; Van Wyk 2004 *SAJE* 50-54; Mashau *et al* 2008 *SAJE* 415.

⁴⁵ Section 20(1)(a) of the *South African Schools Act* 84 of 1996.

⁴⁶ Section 28(2) of the *Constitution*.

and third parties to misconduct, as well as the school's best interest. Balancing the competing needs and interests of these different children would be a daunting task. Yet neither the need to balance different interests nor the factors to be taken into account in such a limitation process is explicitly highlighted in the *Schools Act*. This lacuna creates the breeding ground for an unbalanced focus on the transgressor only.

In this regard, the court in *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 4 SA 222 (CC) referred to *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development*⁴⁷ and added:

What must be stressed here is that every child is unique and has his or her own individual dignity, special needs and interests. And a child has a right to be treated with dignity and compassion. This means that the child must 'be treated in a caring and sensitive manner. This requires taking into account [the child's] personal situation, and immediate needs, age, gender, disability and level of maturity'. In short, 'every child should be treated as an individual with his or her own individual needs, wishes and feelings'.⁴⁸

The court continued and, in referring to the *S v M*⁴⁹ judgment, held:

A truly principled child-centred approach requires a close and individualized examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.⁵⁰

The need to independently assess the needs of all children in matters concerning them was further emphasised by the Constitutional Court in *S v M*,⁵¹ where the court considered the best interests of the children (who were not even before the court) in the sentencing of their mother. The court held:

The word paramount is emphatic. Coupled with the far-reaching phrase 'in every matter concerning the child', and taken literally, it would cover virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them.

⁴⁷ *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 4 SA 222 (CC) para 113.

⁴⁸ *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 6 SA 632 (CC) para 47. In *Welkom High School v Head, Department of Education, Free State Province* 2011 4 SA 531 (FB), the court followed the same line of argument and found that excluding a pregnant learner without taking individual circumstances into account was unacceptable.

⁴⁹ *S v M* 2008 3 SA 232 (CC) para 24.

⁵⁰ *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 6 SA 632 (CC) para 48.

⁵¹ *S v M* 2008 3 SA 232 (CC) para 25.

Yet the *Schools Act* is silent on the procedures to be followed in instances where there are child victims or other children involved as third parties, or where there are more than one learner involved in a formal disciplinary hearing. In contrast the *Child Justice Act* indicates that a joint preliminary inquiry for co-accused children is admissible only if the proceedings "will be in the best interests of *all* children concerned".⁵² The same prescription is applicable to the simultaneous assessment of co-accused children by a probation officer.⁵³ These provisions provide a clear signal that every child's best interests must be considered individually.

Furthermore, the *Child Justice Act* has explicit provisions related to an adult co-accused, instructing the courts to apply the *Child Justice Act* to the child and the *Criminal Procedure Act* to the adult.⁵⁴ Adults who use children in the commission of crime can be prosecuted in this regard.⁵⁵ This is in sharp contrast to the *Schools Act* and its lack of distinction between adult and child learners in schools.

The lack of focus on the best interests of all the children concerned in a disciplinary matter is exacerbated by the application of a retributive approach to misconduct. In addition the implementation of an adversarial process to deal with misconduct inevitably leads to a focus on the transgressor.⁵⁶ The primary aim is to find the transgressor guilty and to punish him or her appropriately. However, misconduct impacts on the best interests of victims of and third parties to, misconduct. A narrow focus on the transgressor therefore constitutes an undue dilution of the constitutional obligation to respect, protect, promote and fulfil the best interests of all the children concerned in a matter. The overemphasis on the interests of the transgressor, often at the expense of the victims of and third parties to misconduct, is evident from legal prescriptions and practice.⁵⁷

Although a broad application of the best-interests principle is accepted, there is no clarity on exactly what the ambit and reach of the phrase "concerning children" are as far as indirect actions are concerned. This is due not only to the wide range of issues that may impact on children, but also to the difficulty in determining the proximity between the child's interests and the issue at hand. The Constitutional Court warns on the one hand that

⁵² Section 8(a) of the *Child Justice Act* 75 of 2008.

⁵³ Section 39(5) of *Child Justice Act* 75 of 2008.

⁵⁴ Section 63(2) of *Child Justice Act* 75 of 2008.

⁵⁵ Section 92 of *Child Justice Act* 75 of 2008.

⁵⁶ Hopkins 2002 *SFL* 145.

⁵⁷ Sections 8 and 9 of the *South African Schools Act* 84 of 1996.

the best-interest-of-the-child concept should not be spread too thin and lose effectiveness,⁵⁸ but also emphasises that it is obligatory to consider the best interests of all children individually.⁵⁹ In the school discipline context the point of departure should be that the best interests of all the children in the school are of paramount importance. However, the proximity between the specific transgression and its direct or indirect influence on a particular child or group of children needs to be considered in the weight attached to the interests of the different parties. This proximity dilemma highlights the need to provide decision makers in the school discipline context with proper guidelines to assist them in the determination of the best interests of all children involved in disciplinary matters. Currently such guidelines are absent from the *Schools Act* and the provisions regarding the best interests of the child contained in the *Children's Act* are not entirely suitable for the school discipline context.⁶⁰ Specific guidelines on what constitutes the best interest of the child in the school discipline context would greatly assist decision makers when they have to balance or limit⁶¹ the competing best-interests-of-the-child rights of different individual children and/or groups of children. It has already been pointed out above that the *Child Justice Act* makes several references to factors to be taken into account in determining the best interest of the child.

2.1.5 Recognition of the diverse needs and interests of children as indicators of child-centeredness

Defining and determining the paramountcy and the different interests of children are very complex processes which are subject to the particular context and the specific circumstances of an actual case.⁶² It is not intended to address these complexities or all the dimensions of the best-interests-of-the-child concept in any detail here, but merely to briefly illustrate the intricacy of the concept.

Eekelaar⁶³ highlights the different interests of children that should be taken into account as being physical, emotional and intellectual care interests, developmental interests and autonomy interests. Zermatten⁶⁴ indicates that

⁵⁸ *S v M* 2008 3 SA 232 (CC) para 25.

⁵⁹ *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 6 SA 632 (CC) paras 47-48.

⁶⁰ Section 7 of the *Children's Act* 38 of 2005.

⁶¹ Section 36 of the *Constitution*.

⁶² Erasmus 2010 *SA Public Law* 128, 131-132; Heaton 1990 *THRHR* 96; Ferreira 2010 *THRHR* 208.

⁶³ In Freeman *Commentary* 27.

⁶⁴ Zermatten 2003 http://www.childsrights.net/html/documents/wr/2003-3_en.pdf 7.

the phrase "best interests" means that the "ultimate goal is the 'wellbeing' of the child". However, the wellbeing and the best interests of the child encompass more than their primary interests, captured in their constitutional rights. These rights merely serve as the point of departure for determining the best interests of the child.⁶⁵ The interests of children can be something more or something less than what another specific human right may afford the child, but are not quantifiable in exact terms.⁶⁶

Apart from the fact that the child's short, medium and long term best interests should be considered, which poses huge challenges in itself,⁶⁷ it should also be kept in mind that the circumstances and needs of different children will vary. There are numerous factors that might impact on the different interests of children, such as family life, culture, religion, availability of financial means, living conditions, the level of development of the country, and political stability in the country.⁶⁸ The best interests of children in general and of individual children should therefore be determined on a case-by-case basis. There can never be a one-size-fits-all approach to determining the best interests of a child or of children.

In this regard the Constitutional Court held in *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development*⁶⁹ that children's rights:

do not apply *indifferently* to children by category. A child's interests are not capable of legislative determination by group.⁷⁰

It must be noted that the court did not prohibit the application of children's rights to a category of children, but the *indifferent* application of children's rights. Children's rights must be applied by taking the individual circumstances of every child or group of children into account. Thus the court emphasised that legislative provisions setting predetermined formulas

⁶⁵ Alston 1994 *IJLF* 11-12.

⁶⁶ Reyneke *Best Interests of the Child* 227.

⁶⁷ Heaton 1990 *THRHR* 96; Van Bueren "United Nations Convention on the Rights of the Child"; Bekink and Bekink 2004 *De Jure* 37. An example of this dilemma can be found in *Sonderup v Tondelli* 2001 1 SA 1171 (CC), where the Supreme Court of Appeal had to determine if the short-term best interests of a child can be overridden by the long-term best interests of the child. The court found that to make an order to send an abducted child in a custody matter back to his or her original jurisdiction might not be in the child's best short-term interests, but would be in the child's long-term best interests. The court therefore had to decide if the child's short-term best interests could be limited.

⁶⁸ Lopatka 1996 *Transnat'l L & Contemp Probs* 253, 256.

⁶⁹ *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 4 SA 222 (CC).

⁷⁰ 2009 6 SA 632 (CC) para 113. [My emphasis]

or a one-size-fits-all approach could not be haphazardly applied to groups of children because of the risk of infringing on the best interests of individual children in the process. The need for individualisation is further strengthened by the factors which should be kept in mind when the best-interests-rights of different children or groups of children are balanced in terms of section 36 of the *Constitution*.

An explicit general reference to the best interests of the child is absent from sections 8 and 9 of the *Schools Act* and the only explicit reference to the interests of other parties involved in disciplinary proceedings is to be found in section 8(5)(a) of the *Schools Act*, which deals with their due-process interests. The provision distinguishes between the transgressor and "other parties", but does not distinguish between the interests of adult "other parties" such as educators and children as "other parties". One would expect there to be a difference between the levels of safe-guarding the interests of children as opposed to the interests of adults. The lack of child-centeredness or of a mere sensitivity to the different needs and abilities of children in different age groups is actually highlighted by the one-size-fits-all-learners-and-children approach of sections 8 and 9 of the *Schools Act*.

Despite the fact that the interests of all parties involved in a disciplinary matter are very diverse and complex, the *Schools Act* focuses on only one dimension, namely their "due process" interests.⁷¹ "Due process" here refers to procedural due process, which deals with the application of fair procedures. Substantive due process refers to the appropriateness and fairness of rules.⁷² This section thus only ensures that a fair process is followed and that the rules must be fair. It does not oblige the SGB to ensure that all the other interests of all the learners in the school are also safeguarded and treated as of paramount importance during the disciplinary proceedings.

Case law also illustrates that some of the HoDs have a very narrow view of what children need and often equate this with the right to education.⁷³ Departmental policies and the refusal of HoDs to confirm expulsions are indicative of an assumption that as long as a child is in a school, attending classes, his or her educational needs and interests are being met, and that if a child is not in a school attending classes, the child's right to education is

⁷¹ Section (5)(a) of the *South African Schools Act* 84 of 1996.

⁷² Joubert and Prinsloo *Law of Education* 130.

⁷³ *Queens College Boys High School v Member of the Executive Council, Department of Education, Eastern Cape Government* (ECPD) (unreported) case number 454/08 of 26 September 2008.

being infringed. This approach of HoDs fails to recognise that the above-mentioned other needs of children should often also be addressed before they will be in a position to engage meaningfully with academic content.⁷⁴

2.1.6 *Child-friendly proceedings as indicators of child-centeredness*

Most South African schools employ a retributive approach to discipline.⁷⁵ Some schools have also implemented positive disciplinary measures, but once a learner commits an act of serious misconduct, formal disciplinary proceedings will normally follow, which are adversarial in nature. An adversarial process is not always in the best interests of the child and several measures have been put in place in the criminal justice system to ensure that criminal proceedings involving children are more child-friendly. These proceedings include *in camera* proceedings.

2.1.6.1 *In camera* proceedings as indicators of child-centeredness

In terms of the *Child Justice Act* children should be tried in a child justice court. These proceedings must be conducted *in camera*. No person may be present during the trial unless his or her presence is required in terms of the proceedings, or the presiding officer has granted permission for another person to be present.⁷⁶ If a child is charged with an adult, the child will be tried with the adult, but the provisions of the *Child Justice Act* will be applicable to the child.⁷⁷ Although co-accuseds are normally tried together, the trials of co-accuseds can also be separated.⁷⁸

The *Criminal Procedure Act*⁷⁹ also safeguards the interests of child witnesses and provides the court with discretion to rule that the child witness could testify in camera. The court can also hold that any person under the age of 18 years is not allowed to attend the hearing as a general member of public whose presence is not required by the proceedings. Children can thus be protected against unsuitable or harmful information revealed during a trial.⁸⁰

There are no provisions in the *Schools Act* that prescribes that a formal disciplinary hearing should or could be held *in camera* or that learners under

⁷⁴ Section 7(2) of the *Constitution*.

⁷⁵ Wolhuter and Van Staden 2008 TG 396; SAHRC 2008 <http://tinyurl.com/j7kdlzy>; Burton *Merchants, Skollies and Stones* 28-30.

⁷⁶ Section 63(5) of the *Child Justice Act* 75 of 2008.

⁷⁷ Section 63(2) of the *Child Justice Act* 75 of 2008.

⁷⁸ Sections 155-157 of the *Criminal Procedure Act* 51 of 1977.

⁷⁹ Section 153(5) of the *Criminal Procedure Act* 51 of 1977.

⁸⁰ Section 153(6) of the *Criminal Procedure Act* 51 of 1977.

the age of 18 years can be excluded from attending it, if they want to be observers. Since there is nothing in the legislation that prohibits anyone from attending a formal disciplinary hearing, learners under 18 years of age could argue that the formal disciplinary hearing is a matter that concerns them and that it is in their best interests to attend the hearing. No guidelines are provided to assist the disciplinary hearing committee to balance the best interests rights of the children who are accused of misconduct and observers who claim that it would be in their best interests to attend a hearing in a matter that concerns them, albeit not directly. This may include bystanders of bullying, or other children who have an interest in the matter.

2.1.6.2 Appointments of intermediaries as indicators of child-centeredness

Research pertaining to the impact of the criminal justice system on child witnesses and child victims of crime indicates that being a witness and/or a victim in an adversarial system is very traumatic for a child. In addition, children find it difficult to state their case.⁸¹ Different factors such as language development, suggestibility, age, the child's developmental stage, the child's personality, and the trauma caused during the incident play a role in the quality of the evidence provided by a child. Expert knowledge is thus necessary to elicit, understand and interpret the evidence of a child, especially that of younger children exposed to traumatic experiences.⁸² It is for reasons such as these that special measures⁸³ such as the appointment of an intermediary were put in place in the criminal justice system to support and assist the child during a trial and to prevent secondary victimisation as far as possible.

Section 8(7) of the *Schools Act* provides that, if a child under the age of 18 years will be exposed to undue mental stress or suffering while testifying at disciplinary proceedings, the SGB "may, if practicable, appoint a competent person" to act as an intermediary.

⁸¹ Clark, Davis and Booyens 2003 *Acta Criminologica* 43-44; Hollely 2002 *CARSA* 14-15; Müller 2003 *CARSA* 2-9; Cassim 2003 *CILSA* 70-72.

⁸² Louw 2005a *CARSA* 19-28; Louw 2005b *CARSA* 18-27; Louw 2004a *CARSA* 3-15; Louw 2004b *CARSA* 16-24.

⁸³ Section 170A(1) of the *Criminal Procedure Act* 51 of 1977: evidence through an intermediary; s 153: *in camera* proceedings; s 158(5): use of closed-circuit television or similar electronic media; s 164(1): oath and affirmation; also see Cassim 2003 *CILSA* 70-72; Hollely 2002 *CARSA* 14-15; Davis and Saffy 2004 *Acta Criminologica* 17-23 on the effectiveness of court-support and court-preparation measures.

It is clear from case law⁸⁴ and criminal law regulations⁸⁵ that the appointment of intermediaries is a complex issue with several constitutional implications, and that the issue should therefore be properly regulated. Yet there are no regulations with regard to the appointment, qualifications, experience, duties or training of intermediaries in the context of school disciplinary proceedings. Even more alarming is the fact that properly trained legal experts adjudicate the appointment of intermediaries in the criminal justice system, while these decisions are left to lay people in the school disciplinary context, without any guidance from the legislator. The best interests of children are therefore clearly at risk.

Another alarming aspect of the provision is that an intermediary may be appointed "if practical". This opens the door for discrimination against learners in, for instance, rural areas where there are fewer professional people available. Teachers and former teachers can act as intermediaries in terms of the criminal law regulation. Thus professionals will be available, but the impracticability lies in the fact that they will probably not be appropriately trained to act as intermediaries. Apart from the lack of training, there are also no guidelines to assist educators on what is expected from them in such a situation. The absence of a closed-circuit television (CCTV) system or a one-way mirror can also make it futile to use an intermediary.⁸⁶ No child should be exposed to undue mental stress and suffering while testifying.⁸⁷ Nevertheless, the legislation or regulations do not make any provision as to how to ensure that this is practicable within the context of school discipline.

To appoint an intermediary can prolong any hearing significantly. Those responsible for conducting the hearing are mostly SGB members and other volunteers with other personal responsibilities. They thus have a personal interest in not prolonging the proceedings, which can seriously jeopardise the administrative fairness of the decision. Another point of contention is

⁸⁴ *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 4 SA 222 (CC); *Klink v Regional Court Magistrate* 1996 3 BCLR 402 (SE); *S v Mathebula* 1996 4 All SA 168 (T); *S v Nagel* 1998 JOL 4098 (T); *Stefaans v S* 1999 1 All SA 191 (C); *S v Francke* 1999 JOL 4451 (C); *S v T* 2000 2 SACR 658 (CK); *S v Hartnick* 2001 JOL 8576 (C); *S v Malatji* 2005 JOL 15716 (T); *Motaung v S* 2005 JOL 16071 (SE); *Dayimani v S* 2006 JOL 17745 (E); *Van Rooyen v S* 2006 JOL 16675 (W); *S v Mokoena* 2008 5 SA 578 (T); *Ndokwane v S* 2011 JOL 27316 (KZP).

⁸⁵ GN R1374 in GG 15024 of 30 July 1993.

⁸⁶ Reyneke and Kruger 2006 JJS 87-89.

⁸⁷ *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 4 SA 222 (CC) paras 86-132.

whether they have the necessary training and knowledge to determine whether the child would be exposed to undue mental stress and suffering.

2.1.6.3 Processes to speed up the finalisation of the case

One of the general principles of the *Children's Act* is that any proceedings concerning the child must be finalised as soon as possible and any undue delays should be prevented.⁸⁸ Both the *Schools Act* and the *Child Justice Act* include several provisions to ensure the speedy finalisation of matters concerning children in disciplinary proceedings or criminal proceedings.

However, mechanisms to ensure proper compliance with the legislative provisions are skewed in favour of the HoD and the MEC in the *Schools Act*. On the other hand the *Child Justice Act* makes provision for independent monitoring by the court to ensure that all the role players in the process keep to the time limits set by the legislator. Those who do not comply with the provisions are held accountable for their non-compliance.

2.1.6.4 The availability and accessibility of appeal proceedings as indicators of child centeredness

If the HoD decides to expel a learner, the learner or parent of the learner can appeal to the MEC.⁸⁹ The SGB, on the other hand, may take the decision of only the HoD not to expel on review to the courts, since the legislation does not provide for the possibility of the SGB's appealing to the MEC.

To take decisions on review to the courts is much more expensive than appealing to the MEC. This limits the SGB's ability to ensure that the decisions of the HoD are correct and in the best interests of all the learners at the school. In addition, on appeal the correctness of a decision can be determined, while on review the court can determine only whether the HoD has made a reasonable decision, not whether the decision is the most appropriate in the circumstances. Thus the outcome of a case may be that a reasonable decision was made despite the fact that the HoD's decision was not in the best interests of the transgressor or in the best interests of the other learners.

⁸⁸ Section 6(3)(b) of the *Children's Act* 38 of 2005.

⁸⁹ Section 9(4) of the *South African Schools Act* 84 of 1996.

2.1.7 A focus on rehabilitation and reintegration of the child as an indicator of child centeredness

In *Centre for Child Law v Minister of Justice and Constitutional Development*,⁹⁰ the Constitutional Court provided an elaborate discussion of children's physical and psychological immaturity, of their vulnerability to influence and peer pressure, of their lack of judgement, of their unformed character, of their youthful vulnerability to err, of their impulsiveness, of their lack of self-control, and of their lack of full moral accountability for transgressions. The prospect of children's successful rehabilitation was also highlighted, taking into account that it is precisely their immaturity and the fact that their characters are not fully developed which provide better prospects for their rehabilitation.⁹¹ In this regard, the court referred with approval to the United States Supreme Court case of *Roper, Superintendent, Patosi Correctional Center v Simmons*,⁹² where the court held:

From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.⁹³

The above-mentioned characteristics of children should therefore be taken into account and measures to deal with transgressing children in the school or criminal justice system should therefore contribute towards the enhancement of children's capacity to be developed and reformed.

The *Child Justice Act* heeds this call of the Constitutional Court through several processes which include diversion programmes which channel children away from the criminal justice system and rather focus on the development of children's skills, and address the root causes of the criminal conduct of accused children.⁹⁴ The Act also has several prescriptions on children who were found guilty of crime. Sentencing these children should also ensure the development of the child. Reintegration of the child into society as a useful citizen is also key to the provisions of the Act.

⁹⁰ *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 6 SA 632 (CC) paras 27-37.

⁹¹ *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 6 SA 632 (CC) paras 27-37.

⁹² *Roper, Superintendent, Patosi Correctional Center v Simmons* 543 US 551 (2005).

⁹³ *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 6 SA 632 (CC) para 35.

⁹⁴ Chapters 6 and 7 of the *Child Justice Act* 75 of 2008.

Despite the existence of strict procedural prescriptions regarding the suspension and expulsion of learners, there are no prescriptions as to what should happen to the learner while he or she is suspended or awaiting expulsion. In practice, this will mean that learners who are suspended or are awaiting the decision of the MEC on their expulsions will not be attending school, but will be legally staying at home. There are no legislative prescriptions that these learners should attend, for instance, anger management classes or counselling sessions. Thus they are out of school for some time, and then, where applicable, they return to school without any obligatory intervention to address their underlying problems or to enhance their best interests.

There are also no prescriptions on measures that should be taken to address the needs of victims of misconduct. The needs of victims of misconduct and other members of the school community differ vastly from those of the transgressing learner and should be addressed to ensure that they are also afforded an opportunity to develop their full potential. For example, the suspension of a bully would not address the needs of the victim of the bully, who might struggle with anxiety, low self-esteem and depression due to the bullying behaviour. The suspension will also not address the bully's anger issues.⁹⁵ Legislation should therefore prescribe measures to ensure that the needs of everyone who is affected by misconduct are considered and addressed appropriately.

There are also no provisions regarding the reintegration of the child into the class or school community after a suspension or expulsion. A suspended learner just goes back into the same school community, but the interests of neither the transgressing learners nor of the other learners are addressed, to facilitate a smooth and fruitful reintegration of the learner into the school or specific class. The needs and interests of the other learners and educators, who have to face and deal with the suspended learner, are also not addressed. The disciplinary measures taken are thus focused on punishment only. Troubled children need help, yet none is offered or prescribed.

The same applies to instances of a less serious nature where formal disciplinary proceedings are not held. Learners are often sent out of class, have to go to detention, have to do community service or have other forms of punishment imposed on them without the underlying reasons for the

⁹⁵ Le Roux and Mokhele 2011 *Africa Education Review* 324-325; Maphosa and Mammen 2011 *Anthropologist* 191.

misconduct being addressed. Children have a better chance than adults of being rehabilitated, developed and reformed, yet no explicit provisions to this effect exist in the *Schools Act*, which justifies the conclusion that the existing provisions are not in the best interests of the child.

2.1.8 The application of restorative justice practices as an indicator of child centeredness

The restorative justice approach to dealing with misconduct is in line with the best interests of children and contributes to the promotion of several human rights of children, which includes their rights to education, dignity, equality, development and the right to participate.⁹⁶

The restorative justice approach as an approach to dealing with misconduct or as an alternative to a retributive approach is not mentioned in the *Schools Act*. In fact, the *Schools Act* provides for an adversarial and retributive process only. On the other hand, restorative justice processes are explicitly included in the *Child Justice Act* and contribute towards the realisation of the best-interests-of-the-child right.⁹⁷

3 Conclusion

These issues illustrate the validity of the contention that the best interests of the child are not a primary focus in legislation pertaining to school discipline. The existing legal framework creates the impression that children should first come into conflict with the law before they are afforded the benefit of being involved in a truly child-centred approach to addressing their misconduct or crime, since the *Schools Act* does not comply with the requirements of a child-centred approach in this context. It is therefore recommended that the legislator should amend the *Schools Act* in this regard, to ensure that transgressing learners are subjected to constitutionally compliant and child-centred disciplinary processes and measures. Amendments should also focus specifically on measures to respect, protect and promote the best-interest right of the other children who are affected by the misconduct, as well as the school community at large.

⁹⁶ Reyneke *Best Interests of the Child*.

⁹⁷ Section 2(b)(ii) of the *Child Justice Act* 75 of 2008.

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List of Abbreviations

CARSA	Child Abuse Research in South Africa
CILSA	Comparative and International Law Journal of Southern Africa
DBE	Department of Basic Education
HoD	Head of Department
IJLF	International Journal of Law and the Family
JJLP	UC Davis Journal of Juvenile Law and Policy
JJS	Journal for Juridical Science
MEC	Member of the Executive Council
NY L Sch L Rev	New York Law School Law Review
NYU Rev L & Soc Change	New York University Review of Law and Social Change
Ohio St J on Disp Resol	Ohio State Journal on Dispute Resolution
SAHRC	South African Human Rights Commission
SAJE	South African Journal of Education
SFL	Support for Learning
SGB	School governing body
TG	Tydskrif vir Geesteswetenskappe
THRHR	Tydskrif vir Hedendaagse Romeins Hollandse Reg
Transnat'l L & Contemp Probs	Transnational Law and Contemporary Problems