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Towards a new juvenile justice system in Namibia
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NAMIBIA

TOWARDS A NEW JUVENILE JUSTICE SYSTEM IN NAMIBIA

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Résumé

Les efforts pour développer un système de justice pénale pour les enfants enfreignant la loi ont débuté en Namibie il y a un quart de siècle. Au fil du temps, le fait de soustraire les enfants à un système de justice classique et de les inscrire dans des programme de développement des aptitudes à la vie quotidienne sous la surveillance de contrôleurs judiciaires, est aujourd’hui largement accepté en tant que mesure alternative aux poursuites. Le nombre d’enfants en détention (en particulier en détention provisoire) a chuté de moitié, à mesure que les différents acteurs de la justice pénale des mineurs ont limité au minimum l’utilisation de la privation de liberté. Cependant, les efforts de réformes législatives initiées à divers intervalles ont stagné. Il y a désormais une vigueur renouvelée pour mettre au point une loi spécifique à la justice des mineurs en 2019, et les décisions politiques nécessaires à la mise en œuvre de cette loi ont été récemment finalisées. Cet article décrit les aspects essentiels de ce processus législatif.

1. INTRODUCTION

Namibia's moves towards developing a new juvenile justice system for children in conflict commenced a quarter of a century ago. A country which emerged from the ravages of apartheid colonisation and a bloody civil war to gain independence in 1990, Namibia was an early signatory of the UN Convention on the Rights of the Child (CRC) (1989), and received the advice that the juvenile justice system reform was required upon submission of the initial report in 1994.¹ However, bringing the law reform process to a conclusion has been halting. The first draft of a Child Justice Bill was prepared as early as 1994. In 1999, the Juvenile Justice Interministerial Committee (IMC) commissioned a Discussion Document on Juvenile Justice in Namibia. This did not result in the adoption of a separate juvenile justice statute either.² Nevertheless, some gains were made in developing restorative justice and diversion programmes, and slowly the involvement of social workers (acting as probation officers) in the nascent juvenile justice system began to take root. The IMC coordinated substantial activities pertaining to the transformation of criminal justice in steering efforts towards compliance with the CRC. A detailed plan of action was crafted and set in motion. The programme description towards a structured and holistic juvenile justice system contained a number of project interventions, namely: Law Reform, Training, Structures, Service Delivery System, Evaluation and Monitoring and Advocacy and Child Crime Prevention.³

The principle of restorative justice was deeply written into the programme description. Progress was made in a short time regarding all project interventions. There was a common understanding that the system envisaged a preventative and remedial tool, that came with limitations, in that it would be deeply dependant on an effective service delivery system. The first version of a draft Child Justice Bill was presented to the IMC in 2002. However, this did not result in law reform efforts coming to fruition.

In 2012, a multisectoral and interdisciplinary workshop was held in the capital city Windhoek,⁴ to try to build momentum for enhanced efforts at reigniting the reform process. By this time, much more information on the actual 'state of play' in relation to juvenile justice throughout the country was available, including reports of the Ombud of Namibia⁵ relating to the awful

¹ CRC/C/15/Add.14 (7 February 1994).

² S. SCHULTZ, 'Rapid Assessment of juvenile justice in Namibia' (report commissioned by the Ministry for Gender Equality and Child Welfare, 2012) (copy on file with the author).

³ S. SCHULTZ, 'Rapid Assessment of juvenile justice in Namibia', above n. 2, p. 10.

⁴ Attended by the author as an international consultant.

⁵ The Ombud for Namibia is the functional equivalent of a National Children's Rights Commission. Very recently, the Children's Ombud has been appointed, and the legislative

physical environment prevailing in the police cells in Windhoek, where children were being detained pending the finalisation of criminal trials, and a rapid assessment report commissioned by the Ministry of Gender Equality and Child Welfare⁶ for the purposes of the workshop.⁷ A draft Bill was updated and came into circulation.

Even so, it was only in 2018 that a really concerted plan was developed to bring matters to finality. There is now a fully-fledged Child Justice Bill⁸ which has been substantially redrafted, which is with the Ministry of Justice. Consultations on key policy issues with other line Ministries have been held,⁹ and it is expected that the Bill will be introduced for Parliamentary approval during 2019.

This chapter sets the context of the implementation of a new juvenile justice system in Namibia; a summary of the recently promulgated Child Care and Protection Act (No. 3 of 2015) and its relation to juvenile justice will be provided; thereafter the key principles and procedures contemplated in the Bill will be described; and conclusions will be drawn to wrap up the discussion.

2. THE NAMIBIAN CONTEXT

2.1. COUNTRY PROFILE

The population of Namibia is currently estimated at 2.5 million people (up from 1.4 million people at independence in 1990) of whom around 1.1 million are aged below 15 years. Population density is only three people per square kilometres in 2015, making Namibia one of the least (if not *the* least) densely populated countries in the world. The population is rapidly urbanising (47 percent of the population was living in urban areas in 2015), and around 25 percent of the whole population live in the capital city of Windhoek.¹⁰ Between 2011 and 2016, the rural population remained unchanged; the entire national population growth

basis for this is the Child Care and Protection Act (No. 3 of 2015), in operation from 1 February 2019. The Children's Ombud and accompanying office was established already from 2017, after the passage of the mentioned principal legislation in Parliament. The period between adoption of the child protection legislation in 2015 and the coming into operation of the Act was necessitated by the need to develop Regulations to the Act; these were promulgated finally in February 2019.

⁶ This is now the designated Ministry responsible for child protection.

⁷ The author was present at this workshop.

⁸ The author was again brought in in November 2018 to assist the Ministry of Justice to update and finalise the earlier version of the Bill.

⁹ On 21 February 2019.

¹⁰ UNICEF, 'Situational analysis of children in Namibia', 2018 (copy on file with the author).

occurred in urban areas.¹¹ The vast and spread-out nature of the population makes service delivery for child justice difficult outside of a few larger towns.

With regards to economic factors that may impact juvenile delinquency, it has been recorded that there are severe challenges facing the youth labour market in terms of both skills acquisition and labour force entry; that the capacity of the economy to ensure improved job-producing growth and to diversify from the sources of jobless growth need to be improved, and that the youth-dominant nature of rural-to-urban population movement has an impact on economic conditions and opportunities.¹² Unemployment is regarded as high (34 percent in 2016),¹³ disproportionately affecting the youth. The labour force participation rate for 15–19-year olds is 21.3 percent, and 15–19-year-olds represent 42.3 percent of the inactive population. The average unemployment rate across all age groups is nearly 30 percent, with a labour force participation statistic of around 70 percent.

There are a number of highly vulnerable groups, such as the indigenous San, who follow a migratory life in the desert regions of the country.

Officially, Namibia is classified as a middle-income country. This limits opportunities to secure donor aid and external funding, which has supported juvenile justice reform in other developing countries. However, the income discrepancy between the rich and poor is extremely high, and wealth is concentrated in the hands of few. Economic gains are derived largely from mining. Other contributing sectors are agriculture and tourism.

2.2. CHILD JUSTICE SITUATIONAL ANALYSIS

The practical reality is that, as is the case elsewhere, responsibility for the administration of services relating to child justice falls to several Ministries. These of course include the Police and Justice Ministries and the Ministry for Gender Equality and Child Welfare (hereafter MGEWCW) provides social worker casework and support services, and also supplies probation officers who carry out pre-trial assessments (screening) of children on contact with the law. Pending the adoption of the Child Justice Bill, the Criminal Procedure Act No. 51 of 1977 (as amended in 2003 to provide for child-friendly court procedures for vulnerable victims and witnesses, which do not affect children in conflict with the law) continues to apply. This Act was inherited from South Africa when Namibia was under South African rule and continues to govern the

¹¹ Ibid, p. 14.

¹² Ibid, p. 17.

¹³ Ibid.

procedures in criminal trials in Namibia. Under the current system, although improvements have been noted of late, UNICEF still reports that:

Pre-trial detention and remand in police holding cells is a problem for young people due to severe overcrowding, widespread sub-standard conditions, protracted periods of detention without trial, increased risk of being held with adults and, for young people, being held for extended periods due to parental request.¹⁴

Resources have not been devoted to meeting the minimum standards of responsibility to children in detention, including the fact that that children's courts have not been operational in all regions and there is a lack of child-specific detention facilities.¹⁵ However, since very adverse reports by the Ombudsman in 2012 on the state of the holding cells for children in Windhoek police station, renovations to these cells have improved the de facto situation. Children are detained awaiting trials in police cells, and only incarcerated in correctional facilities when sentenced.

At present, MGECW social workers assess the child and recommend whether the child should be diverted, which is then placed before the prosecutor for a decision to be taken on withdrawal of the charges for diversion. Currently the two diversion options used are pre-trial community service and the life skills programme. The social workers at the Gender-Based Violence Police Units¹⁶ are responsible for the assessment of children at the courts, and for providing supervision for pre-trial community service. Other stakeholders involved are officers from the Ministry of Youth responsible for the life skills program. However, since this Ministry's mandate is young persons aged 16–35 years old, there is at present a policy gap insofar as children aged below 16 years of age cannot access the life skills programme they offer. Despite diversionary opportunities being in place since 1998, there have, however, continued to be insufficient resources to ensure that diversionary and restorative justice mechanisms are adequate in terms of scope and quality. A sound legislative framework for diversion and restorative justice has, as noted, continued to remain elusive.

UNICEF reports that

[o]ver the period 2000 to 2007, the number of children detained almost halved from close to 600 to 300 In the 12-month period April 2015 to March 2016, 1,038 children were charged with an offence, screened and assessed, and 729 were diverted.

¹⁴ Ibid, citing the Ombud (2006).

¹⁵ CRC Concluding Observations, 2012; African Committee of Experts Concluding observations, 2016.

¹⁶ These are dedicated police units established to investigate primarily offences (including sexual offences and domestic violence) against women and children; however, they also carry the mandate for child offenders.

In the 12-month period of 2017, 788 children were screened/assessed and 482 were diverted, and 142 pre-sentence reports were prepared. Across all data, males comprised around 93% of cases. This suggests that numbers of children in detention may have stabilised at around 300 annually, and at least 60% of children are being diverted.¹⁷

The latest data from the Namibian Correctional Service shows that in 2018, there were 46 children serving sentences of imprisonment in correctional facilities. There are no dedicated juvenile or youth correctional facilities in the country.¹⁸ Children in pre-trial detention are kept in custody in police cells, in the absence of other custodial facilities (if they are not diverted or released into the care of parents or guardians or on bail). Data provided indicates that in 2017, 151 children were taken into pre-trial detention in police custody (138 males and 13 females).¹⁹

Namibia last reported to the UN Committee on the Rights of the Child in 2012. The next periodic report which would ordinarily follow does not appear to have been submitted at the time of writing. Informally it has been ascertained that it is under preparation, to be finalised this year. The Committee's concluding observations,²⁰ apart from voicing concern about the 'exceptional delay' in finalising the Child Justice Bill, noted several substantial concerns. The minimum age of criminal responsibility, which is seven years of age in the State party, is unacceptably low; children's courts are not operational in all regions; there is a lack of information in the State party report and in the public domain on the situation of children in conflict with the law; and the Committee bemoaned the lack of special detention facilities for children. Both boys and girls are being incarcerated with adults; and there remain poor conditions of detention, including in prisons.²¹ With reference to street children, specific adverse remarks were made about the lack of services to these children and their vulnerability to arrest and detention.²²

In 2015, Namibia's initial report on the African Children's Charter (ACRWC) was considered by the African Committee of Experts on the Rights and Welfare of the Child. In dialogue with the Committee, the government of Namibia explained that the implementation of children's rights would be

¹⁷ UNICEF, 'Situational analysis of children in Namibia', above n. 10, p. 131.

¹⁸ The figures for preceding years were: 2017 – 52; 2016 – 48; 2015 – 36; and 2014 – 43. These are not official statistics, however.

¹⁹ The figure for preceding years were: 2016 – 85; 2015 – 227; 2014 – 97; 2013 – 243. Although an overall reduction in numbers seems to be indicated when a longer-term view is taken (back to 2008), the numbers are also seemingly rather erratic. Again, these are not official statistics.

²⁰ CRC/C/Nam/CO/2-4 (16 October 2012).

²¹ Para. 73.

²² Para. 63.

improved with the enactment of the comprehensive Child Care and Protection Bill (which has since been effected) and the establishment of a new Ministry of Poverty Alleviation and Social Welfare. The Committee raised concerns about standards of coordination and resourcing and the need to raise the age of criminal responsibility, and urged the government of Namibia to address various shortcomings within the area of justice for children.

The Namibian Government developed and adopted its National Human Rights Action Plan for the period 2015–2019 with attention paid to, amongst others, the Constitution and treaty-based obligations. Strategies relevant to child justice included:

- improving measures to build capacities of law enforcement and justice sectors, including in juvenile justice, anti-trafficking and gender-based violence and violence against children;
- establishing child-friendly courts in all regions;
- developing and adopting a juvenile justice policy, provide training to all workers in the juvenile justice system on the Convention on the Rights of the Child, and developing and monitoring service standards for juvenile detention; and
- finalising and implementing the Child Care and Protection Bill (now Act), the Child Justice Bill and the Trafficking in Persons Bill.²³

3. THE CHILD CARE AND PROTECTION ACT (NO. 3 OF 2015) AND ITS LINKS TO JUVENILE JUSTICE

One reason for the long process of reform in the sphere of child justice, was the parallel process of developing the country's child protection legislation. This consultative process took some years (more than nine years) and was concluded only when an omnibus Bill was passed in Parliament in 2015. However, it could not be promulgated until February 2019, due to the fact that the regulations (subsidiary legislation) required to underpin implementation had not been finalised. There are, however, explicit links between the provisions of the Child Care and Protection Act, which deals with a vast range of issues apart from child protection, such as setting up a children's advocate in the office of the Ombudsman, establishing a children's fund, children's courts and rules to govern their proceedings, all manner of provisions concerning the residential care

²³ UNICEF, 'Situational analysis of children in Namibia', above n. 10, p. 35.

system, proof of parentage and parental responsibilities and rights of children born outside of marriage, to name a few provisions.

More specifically there are four places at which the child justice system must look to the Child Care and Protection Act 2015 (CCPA) for legislative authority. These are discussed briefly here.

First, the CCPA provides for the appointment of social workers, auxiliary social workers, child protection organisation and, crucially, probation officers by the Minister of Gender Equality and Child Welfare. This clearly foresees that social work services to children in the criminal justice system will be overseen by that Ministry, and that a sufficient number of social workers and probation officers are designated or appointed to deal with persons charged with criminal offences (under any law).²⁴

Second, mindful of the exposé of the terrible conditions that children were experiencing in detention in police cells, and perhaps concerned about the inordinate delay in bringing a child justice law to fruition, the CCPA contains a purpose-driven provision in §231 headed 'Rules concerning children in police or prison cell'. These apply to detained children, as well as children who are present in detention facilities – for example, because of the detention of their caregiver.²⁵ Amongst the provisions is a provision that children must be kept separately from adults, although they may be permitted to eat or exercise with adults if there is proper supervision by a member of the correctional services or a police officer; that they must be permitted visits by parents, guardians, care-giver, legal practitioners, social workers, probation officers, health workers, religious counsellors or any other person who in terms of any law is entitled to visit the child, but such visit must be in the best interests of the child. Further, they must be detained in conditions that take into account the particular vulnerability of a child and reduce the risk of harm to the child in question; and must be housed with children who are at the same stage of criminal prosecution, so that children who are accused of a crime are detained separately from children who have been convicted of a crime or children who are awaiting sentencing.

Section 231(3) and (4) set up a complaints system to handle concerns about the conditions of a child in prison or police cell or upon any observation that a

²⁴ S. 35: 'The Minister may designate a sufficient number of social workers in the Ministry or in the employment of the State with the agreement of the ministry of which such social workers are staff members and who comply with the prescribed requirements, as probation officers or may appoint sufficient number of social workers complying with such prescribed requirements as probation officers, to deal with persons who are alleged to have committed offences or have been convicted of offences and to exercise the powers and to perform the functions conferred or imposed by or under this Act or any other law on a probation officer.'

²⁵ Art. 30 of the African Charter on the Rights and Welfare of the Child (1990) which Namibia has ratified, provides protection for children of imprisoned mothers. This provision remains unique in international treaty law.

child has been injured or is severely traumatised while in custody, as well as a method for investigating and following up on complaints.

Third, Chapter 5 of the CCPA sets out an array of residential facilities which are required for the child protection system, ranging from places of safety, shelters and places of care, to child detention centres. Some of those regulated by this chapter already exist and were established in terms of the Children's Act (No. 33 of 1960),²⁶ which has now been repealed. However, child detention centres are a new concept, and are intended to be places for the reception, care and treatment of children who are awaiting trial or are sentenced.²⁷ Prescribed standards for the structural, safety, health and other requirements must be adopted and complied with. Such centres may be operated by non-profit organisations if registered and if they comply with the prescribed standards. It seems as though existing reform schools and schools of industry were destined to be re-branded as children's detention centres. However, the author has been advised that no such facilities currently exist in Namibia.²⁸ Therefore their 'conversion' to child detention centres is also not possible.

Fourth, children in conflict with the law may be deemed to be children in need of protective services, and the criminal proceedings against them converted to care and protection enquiries. This has always been possible under s. 254 of the Criminal Procedure Act, though not often used. Section 131 of the CPPA provides for several 'overlap' instances between the criminal justice system and the childcare and protection system in defining who a child in need of protective services is. These include: that a child is engaging in behaviour that is harmful or is likely to be harmful to the child or any other person and the parent or guardian or the person with the care of the child is unable or unwilling to control that behaviour;²⁹ that the child lives or works on the streets or begs for a living;³⁰ that the child is being or is likely to be neglected, maltreated or physically or mentally abused;³¹ that the child is addicted to alcohol or other dependence-producing drug and is without any support to obtain treatment for such dependency.³² Certain children may be found to be in need of protective services, such as children below the age of 16

AQ: Should this read "CPA" or "CCPA"?

²⁶ This legislation was also inherited from apartheid South Africa.

²⁷ They can also be used for children with behavioural or emotional difficulties. They are to be established under the auspices of the Minister responsible for the administration of the CCPA, i.e. the MGEW, in consultation with the Minister responsible for Education.

²⁸ S. SCHULTZ, 'Rapid Assessment of juvenile justice in Namibia', above n. 2, mentions no facilities other than police stations and correctional facilities.

²⁹ S. 131 (1)(b).

³⁰ S. 131(1)(c); the CRC Committee noted in its concluding observations that children living on the street are particularly vulnerable to being caught up in the criminal justice system (Concluding observations para. 69).

³¹ S. 131(1)(d).

³² S. 131(1)(e).

who are habitually absent from school; these children may be involved in delinquency as well.³³

4. KEY PRINCIPLES AND PROCEDURES IN THE CHILD JUSTICE BILL

All previous versions of the Child Justice Bill developed since the first one in 2002 were modelled on the Child Justice Act of close neighbour and former coloniser South Africa. The South African law was adopted in 2008 and has been in force since 2010.³⁴ However, early versions of the Bill before its introduction into Parliament and prior to extensive reworking have served as the blueprint, which was barely updated when a revised Namibian version was released in 2013 and again in 2018. There are thus key similarities as well as key differences between the two legislative forms at present.

4.1. KEY SIMILARITIES BETWEEN THE CURRENT NAMIBIAN LEGISLATIVE PROPOSALS AND THE CHILD JUSTICE ACT OF SOUTH AFRICA

The first main similarity relates to the overall procedural orientation of the Namibian (and South African) legislation in detailing a new process for dealing with children in conflict with the law. As with South Africa, protection and residential care provisions are located outside of the child justice statute, in the Children's Act 37 of 2005 (South Africa) and the Child Care and Protection Act 3 of 2015 (Namibia).

Second, the diversion provisions are broadly the same. Contained in a dedicated chapter, the orders provided for are both programmatic (community service orders, referral to life skills programmes) and referrals that can be adapted to the individual child, such as orders for positive peer association, good behaviour, compulsory school attendance, and for time at home to spend with his or her family. These are borrowed directly from early drafts of the South African Act. They were developed in South Africa to allow for individualised responses to children in conflict with the law, and also to provide options for children living in small towns or rural areas not serviced by formal diversion programmes. The provision of diversion orders in two levels (one for more petty cases, the other for more serious charges), copies the South African version as well.

³³ S. 131(2)(j).

³⁴ Act 75 of 2008.

Third, the legal representation chapter bears much similarity to the South African version that was current around the turn of the millennium. So, the obligations placed upon legal representatives of children, the right to have a legal representative assigned at state expense in certain instances, what happens when a child refuses assigned counsel and so forth, first appeared in the South Africa Child Justice Act. There are some minor differences, however: an early provision directing that candidate attorneys may represent child defendants only after completion of their first year of practical experience remains, at the time of writing, in the Namibian draft.

Fourth, given that they tend to mirror the alternatives referred to as diversion possibilities, the alternative sentencing provisions are similar to the South African provisions.

4.2. KEY DIFFERENCES BETWEEN THE CURRENT NAMIBIAN LEGISLATIVE PROPOSALS AND THE CHILD JUSTICE ACT OF SOUTH AFRICA

The centrepiece of the South African system is a new interim ‘case conference’, termed the Preliminary Inquiry. Chaired by a judicial officer, and attended by the child, parents or others in loco parentis, the prosecutor and the probation officer who has undertaken the pre-trial screening, the Inquiry serves a gatekeeping role aimed at ensuring that diversion is considered as early as possible in the process, if the child has not already been screened out of the system another way, such as by prosecutorial diversion. Second, the Inquiry makes this decision based on the maximum information that can be collected and adduced at that point in the process. Third, the Inquiry definitively establishes whether the person before it is aged below 18 (i.e. a child), and above the minimum age for criminal responsibility.

The Preliminary Inquiry was a feature of all of the drafts of the Namibian Child Justice Bill until 2019. A policy decision has recently been taken that the Inquiry procedure does not enjoy widespread support, especially amongst the magistracy, and that it would be difficult to implement practically. This is because the practice has developed over the years that cases involving juvenile defendants are set down on the court roll almost immediately and then postponed for the screening to be conducted by a probation officer. Fourteen days is allocated for this, given that there are sometimes vast distances that probation officers must travel to reach the child in this sparsely populated country. Convening a Preliminary Inquiry within 48 hours of arrest and ensuring that the screening is completed so that the decision-takers have some background information to inform the course of action that they decide upon would simply not be feasible and might result in additional delays in finalising cases were it to be compulsory. At present prosecutors can exercise their discretion to divert or

withdraw cases (with or without conditions) summarily, without the need for a formal case conference.

Second, a divergence between the South African blueprint and the Namibian model is the extensive provision for restorative justice processes, which has grown since the early drafts of the Namibian Bill, and harkens to the early (and as far as can be ascertained, continuing) enthusiasm for restorative justice, especially in more rural and traditional communities.³⁵ Thus the Namibian version spells out in some detail the benefits to both victim and offender of family group conferences, and the potential benefits to the community. The process for referring and convening a family group conference is detailed, and its intended result, namely the formulation of a written plan with resolution(s) appropriate to the child (including possible referral to a diversion programme), his or her family and to local circumstances which is consistent with the principles contained in the Act is outlined. The plan must state the responsibilities of the child, the child's parent (or an appropriate adult in lieu of a parent or guardian); state the personal objectives for the child, the child's parent or an appropriate adult; and include such other matters relating to the education, employment, recreation and welfare of the child as are relevant. Provisions for monitoring its implementation and the fulfilment of its conditions are spelt out.

A third innovation in the Namibian draft is to be the establishment of a Directorate of Child Justice, located within the Ministry of Justice. A specific person is to be appointed as Director, and the Directorate may employ other staff. This is intended to ensure that monitoring and assessing the policies and practices of the Ministry responsible for child justice regarding the implementation of this Act takes place; that reporting on any matter, including any law or enactment or any procedure regarding child justice, occurs. Further, the Director will ensure the operation of the Act is kept under continuous review, with the view to any recommendations for improvement; and he or she will perform such functions as training of personnel charged with the administration of child justice, as well as training of police officials concerned with the application of the Act's provisions. The Director is mandated to increase public awareness of matters relating to the administration of child justice; to encourage the development within the Ministry responsible for child justice policies and services designed to ensure the effective application of this Act; and, on his or her own initiative or at the request of the Minister responsible for justice, advise the Minister on any matter relating to the administration of this Act. The Directorate for Child Justice must produce an annual report on the

³⁵ Whilst the South African Child Justice Act does provide for restorative justice (see ss. 61 and 62) it is not nearly as elaborate as the Namibian proposal, which may originate with other aboriginal peoples.

operation of the Act, including qualitative and statistical information necessary for reviewing the progress made in implementation of the child justice system. The establishment of this Directorate will provide a clear locus of responsibility for the ongoing development of the Child Justice system, which will by law rest with the Ministry for Justice.

Finally, whilst South Africa is in the process of amending the minimum age of criminal responsibility to raise it from the current age of 10 to 12 years,³⁶ with the retention of the existing rebuttable presumption of criminal incapacity set to now apply to children of 12 and 13 years,³⁷ Namibia seems set to jettison the age old rebuttable presumption and set a fixed minimum age of criminal responsibility at 14 years. This is a welcome step to ensure coherence with international law. The CRC's Committee's General Comment No. 10 (Children's Rights in Juvenile Justice)³⁸ regards the setting of two ages (which is the practical effect of the existence of the rebuttable presumption) as discriminatory and as being ineffective in preventing younger children from facing criminal trials, especially since, in practice, children facing more serious charges tend to be targeted. The Committee also bemoans the lack of specialist evaluation of the child's competence that often results in presiding officers making judgements as to their maturity and foresight. In addition, Draft General Comment No. 24 (which is a revision and update of General Comment No. 10)³⁹ indicates that the Committee will now regard the age of 14 years as the minimum level at which the age of criminal responsibility should be set.

5. CONCLUSIONS

The finalisation of Namibian child justice legislation, which seems to have the necessary impetus to now proceed to the stage of Parliamentary consideration, draws to an end a long journey – one in fact begun a quarter of a century ago. The long passage of time has had both benefits and disadvantages.

³⁶ Bill 32 B of 2018 was finalised in Parliament in November 2018 and awaits presidential assent and promulgation.

³⁷ Before the Child Justice Act came into operation, the minimum age of criminal responsibility (in accordance with common law received from Roman law) was 7 years and the rebuttable presumption applied to children above that age but under 14 years. The Child Justice Act raised the minimum floor from 7 to 10 years, but provide for a review of this decision to be effected 5 years after the coming into operation of the Act. The Bill referred to here was the culmination of that review process, which was based not only on consultations with criminal justice stakeholders and other experts, but also on a study conducted in 96 courts of children aged between 10 and 14 years arrested, diverted, charged and convicted during the period 2010–2014.

³⁸ CRC/C/GC/10.

³⁹ <<https://www.ohchr.org/EN/HRBodies/CRC/Pages/DraftGC10.aspx>>, last accessed 10.01.2019.

The benefits include that diversion has become institutionalised (through the mechanism of prosecutorial withdrawal of charges), and that referrals to programmes are a real possibility.⁴⁰ Further, the declining numbers of children in conflict with the law over time (probably because of increased awareness about the need to use deprivation of liberty sparingly, and the adoption of alternative measures by role players in the criminal justice system) bodes well for the greater likelihood of successful implementation of the envisaged system, since the numbers of children concerned, seen together with their concentration in a few larger urban areas, seem entirely manageable.

The disadvantages occasioned by the long delay undoubtedly relate to the skills built up in earlier stages amongst stakeholders, which have dissipated and been lost to the system. The loss of institutional memory has been a clear product of this drawn-out process too, as law makers and others can no longer remember why certain processes and procedures were included in the various drafts that have surfaced along the way. This can no doubt be overcome though, with the appointment of a lead agency in the Ministry of Justice (the Director of Child Justice) to drive forward the implementation of the Act and the training and conscientisation that will be required.

⁴⁰ Unfortunately, though, the initial Ministry that was tasked with (and given the budget for) diversion programme has splintered and regrouped in a new form, so that the current location of diversion service provision is not optimal.