

UNIVERSITY OF KWAZULU-NATAL

**AN EVALUATION OF THE ROLE OF PROSECUTORS IN
LESOTHO'S CHILDREN'S PROTECTION AND
WELFARE ACT NO 7 OF 2011**

by

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I appreciate my family's support.

DECLARATION

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ABSTRACT

The prosecutor has a role that he/she should play in the administration of juvenile justice. International and regional instruments have set a framework for the establishment of the juvenile justice systems within the States Parties. Lesotho, like other members to the United Nations has a juvenile justice that has been recently reformed and reflected in the Children's Protection and Welfare Act. The study seeks to examine the role of the prosecutors in Lesotho's juvenile justice system as established by the CPWA. The requirements of international laws and standards on the role of prosecutors and historical evolution of the role of prosecutors in Lesotho will be discussed to identify the extent to which Lesotho has conformed to its objectives in the CPWA and internationally. The study argues that the limited role of prosecutors will cause the system of juvenile justice to be ineffective unless some amendments are made and policies are put in place to guide the role of prosecutors in performing their duties. The comparative study of the United States of America, the United Kingdom and the Republic of South Africa revealed that measures can be put in place to regulate the role of prosecutors in the juvenile justice system. The lessons that Lesotho can adopt have been identified and recommendations have been made.

ACRONYMS

ABA	American Bar Association
ACPF	African Child Policy Forum
ACRWC	African Charter on the Rights and Welfare of the Child, 1990
DCI	Defence for Children
CPA	Child Protection Act No 6 of 1980
CPEA	Criminal Procedure and Evidence Act No 9 of 1981
CPS	Crown Prosecution Service
CPWA	Children's Protection and Welfare Act No 7 of 2011
DPP	Director of Public Prosecutions
IJA-ABA	Institute of Judicial Administration – American Bar Association
PARA	Paragraph
RSA	Republic of South Africa
UK	United Kingdom
UNCRC	United Nations Convention on the Rights of the Child, 1989
US	United States of America

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CHAPTER 1: INTRODUCTION AND BACKGROUND

1.1 Introduction

The recognition, respect and protection of the rights of children who are in conflict with the law in Lesotho are reflected in various pieces of legislation.¹ As a State Party to the United Nations Convention on the Rights of the Child, 1989 (hereinafter referred to as the UNCRC) and the African Charter on the Rights and Welfare of the Child, 1990 (hereinafter referred to as the ACRWC), Lesotho has an obligation to comply with the provisions of these instruments in realizing a juvenile justice system that ensures adequate protection of the welfare and rights of children who are in conflict with the law.²

Heeding the recommendations made in the concluding observations of the Committee on the Rights of the Child³, all laws that related to children were reviewed and compiled into one comprehensive statute, namely the Children's Protection and Welfare Act (hereinafter referred to as the CPWA).⁴ This Act provides for the rights of children who are in need of care and protection as well as for the protection of those children who are in conflict with the law. The CPWA also creates new procedures for the courts and personnel involved in proceedings that affect or involve children.⁵ By introducing these new procedures, the CPWA enhances the roles of some key role players, such as the police and probation officers, which were advocated for by the civil society and noted by the Lesotho Law Reform Commission.⁶ The role of the prosecutors, as some of the main actors in the criminal justice process, has not been enhanced, but rather, as shown in this dissertation, diminished.

¹Criminal Procedure and Evidence Act 9 of 1981 and Children's Protection Act 6 of 1980.

²Lesotho ratified the UNCRC on 10 March, 1992 and the ACRWC on 27 September, 1999; the standards of administration of juvenile justice are set in article 37 and 40 of the UNCRC and article 17 of the ACRWC.

³ Concluding observations of the Committee on the Rights of the Child, Lesotho, U.N. Doc. CRC/C/15/Add.147 (2001) at para 10.

⁴ Act No 7 of 2011 which was enacted on the 21st March, 2011.

⁵ Clauses 2, 11, 12 and 13 of the Statement and objects of the Children's Protection and Welfare Act, Government Notice no 19 of 2011.

⁶ L Chaka-Makhooane „Administration of Juvenile Justice“ in *Child Legislation Reform Project Issues Papers 1 Project 6* (2003) at 9. (on file with the author).

The Committee on the Rights of the Child recommended that a comprehensive reform of the juvenile justice system should be undertaken,⁷ because the existing legislation was incompatible with the provisions and principles of UNCRC and that the professionals essential for the development of the State Party and the implementation of the rights of children were either emigrating and those that remained were not sufficiently aware of the UNCRC.⁸ The Committee recommended for the State Party to introduce training programmes for professionals in the juvenile justice system on the relevant international standards.⁹ The reform took place with the coming into force of the CPWA. It is therefore necessary to evaluate the impact of law reform on the role of prosecutors.

This study is an evaluation of the role of the prosecutors in juvenile justice in Lesotho, against the background of the relevant international instruments. To understand the significance of the changes in the role of the prosecutors, the study will also offer a historical overview of domestic legal provisions which informed the role of the prosecutors in juvenile justice cases prior to the CPWA, such as the Constitution of Lesotho of 1993 (hereinafter referred to as the Constitution), the Children's Protection Act of 1980 (hereinafter referred to as the repealed Act) and the Criminal Procedure and Evidence Act of 1981 (hereinafter referred to as the CPEA) will be evaluated to determine whether it was recognizant of international juvenile justice standards.¹⁰

The relevant provisions of the CPWA will then be discussed to establish the role of prosecutors in juvenile justice cases, in order to establish whether such roles comply with the stated objectives of the CPWA which purport to give effect to the international recommendations. Brief overviews of the roles of the prosecutors in the United States of America (hereinafter referred to as US), the United Kingdom (hereinafter referred to as UK) and the Republic of South Africa (hereinafter referred to as RSA) will be presented, in order to establish whether Lesotho can learn from more developed jurisdictions with an adversarial system of criminal justice.

⁷ Concluding observations, note 3 above, at para 62 (a).

⁸ Concluding observations, note 3 above, at para 8, 9 and 21.

⁹ Ibid at para 62 (d).

¹⁰ Section 99 of the 1993 Constitution of the Kingdom of Lesotho; CPEA section 5 -11.

1.2 Rationale of the study

This topic was chosen because the researcher is employed by the Government of Lesotho as a Senior Crown Counsel (prosecutor) at criminal section, and has worked with children in conflict with the law. The researcher has observed that the treatment of children who are in conflict with the law is not consistent throughout the courts in Lesotho. The ways in which the cases of children are handled by prosecutors differ from one individual prosecutor to another. It has also been observed that although there are legislative provisions on how children should be treated within a criminal law setting, there is disparity in the implementation of such provisions, whose interpretation is left to the individual prosecutors.

The overall aim of the study is to make a contribution to the scarce literature about the roles of the prosecutors in juvenile justice in Lesotho as well as to inform stakeholders in children's rights about how prosecutors can effectively work with children who are in conflict with the law within the confines of the juvenile justice principles. Recommendations for improvements in the law and practice in order to enhance the effectiveness and efficiency of prosecutors in Lesotho will also be made in the study.

1.3 Aims and Objectives of the Study

Generally research on prosecutors in Lesotho is scarce and more specifically their role in proceedings that affect and involve children is a topic that is rarely explored. Hence this study aims to contribute to the literature on prosecutors in the administration of juvenile justice in Lesotho. The aim of the study is to examine the role of prosecutors in the CPWA and to assess whether the provisions of the CPWA comply with international standards and norms in the administration of juvenile justice, with a view of making suggestions for improving the effectiveness of public prosecutors in cases of children who are in conflict with the law.

The objectives of the study are:

- To identify the roles and duties of public prosecutors in cases of children who are in conflict with the law, under the CPWA;

- To identify the weaknesses of the provisions of the legal framework that inform the role of the prosecutors in juvenile justice cases;
- To identify the best practices in other jurisdictions by comparing the roles and duties of public prosecutors in the juvenile justice of the Republic of South Africa, United Kingdom and United States of America;
- To make recommendations for improving the legal framework informing of the role of prosecutors in the new juvenile justice system.

1.4 Questions to be answered by the Research

The following research questions will be answered by the study

1. What do international instruments (such as UNCRC, ACRWC and Beijing Rules) require in terms of the role of public prosecutors in the juvenile justice system?
2. What was the role of the prosecutors under the repealed Act and whether it complied with the international juvenile justice guidelines?
3. What is the role of prosecutors in the CPWA and whether such role complies with the stated objectives of the CPWA?
4. What are the weaknesses of the current legal framework in terms of the role it assigns to prosecutors in cases concerning child offenders?
5. What can Lesotho learn from the comparative experience of other countries in terms of the role of prosecutors in cases concerning juvenile crime?

1.5 Methodology

An analysis of the relevant literature on prosecutors, juvenile and criminal procedures, the repealed CPA, CPWA and other laws and case law on the topic will be carried out. For the purposes of comparative analysis secondary sources of literature will be relied upon such as background papers that led to the enactment of the CPWA, books and academic articles. Material will also be relied on that is specific to the role of prosecutors in the United Kingdom, the United States of America and the Republic of South Africa in order to carry out a comparative analysis of these jurisdictions.

This is a desk top study carried out by consulting literature, such as the internet, the library and relevant legislation with the intent to examine their content in depth.

1.6 Outline of the Study

Chapter 1 is the introductory section that illustrates the study, background, rationale, aims of the study, the methodology and the outline of the chapters of the study.

Chapter 2 contains a presentation of the relevant provisions of the international and regional instruments and soft law that provide for the administration of juvenile justice. The provisions that refer to the role of prosecutors in the juvenile justice systems will also be discussed to determine what the international instruments and non-binding documents expect of prosecutors.

Chapter 3 is an evaluation of the provisions of the national laws of Lesotho, namely, the repealed Act, the CPEA and the CPWA as they provide for the administration of juvenile justice to the extent that they relate to the role of the public prosecutor.

Chapter 4 is a comparative analysis of the juvenile justice systems in the UK, USA and RSA that are more developed and they have an adversarial criminal justice system as Lesotho. The analysis is carried out to determine what Lesotho can learn from the experiences from other States to improve its administration of juvenile justice.

In Chapter 5, conclusions will be drawn and recommendations made with the hope of contributing to the dearth of research relating to prosecutors in Lesotho.

CHAPTER 2: INTERNATIONAL AND REGIONAL PROVISIONS FOR THE ROLE OF PROSECUTORS IN JUVENILE JUSTICE

2.1 Introduction

Member nations who have ratified international human rights conventions bear an obligation to implement such instruments within their domestic jurisdictions.¹ The administration of juvenile justice forms part of the human rights of children that have to be protected and promoted by the States Parties to the relevant international human rights instruments. Compliance by States Parties to their international obligations can be measured by enactment of juvenile justice systems that incorporate the general and fundamental principles provided in the UNCRC.²

Certain principles are of particular importance in guiding the administration of juvenile justice. The best interests of the child which ought to be the overriding consideration in all matters affecting the child should be recognized in the administration of juvenile justice.³ The principle of non-discrimination should also be incorporated within the juvenile justice system to ensure that all children will be treated in an equal manner.⁴ The treatment of children who are in conflict with the law should be respectful of the child's dignity and worth.⁵ Children in conflict with the law should not be tortured or treated in an inhuman and degrading manner.⁶ The administration of juvenile justice should guarantee a child the due process rights such as a fair trial and presumption of innocence.⁷ The effective implementation of these principles greatly relies on the personnel that work within the juvenile justice system.⁸ These principles will be discussed in detail in the chapter.

¹Committee on the Rights of the Child, General Comment No 5 (2003) *General Measures of Implementation of the Convention on the Rights of the Child*, at para 1.

²Committee on the Rights of the Child, General Comment No 10 (2007) *Children's Rights in Juvenile Justice*, at para 4.

³Ibid at para 4 (b); article 3 of the UNCRC; article 4 of the ACRWC.

⁴Article 2 of the UNCRC; article 3 of ACRWC.

⁵Committee on the Rights of the Child, note 1 above, at para 22.

⁶Article 37 of the UNCRC.

⁷Article 40 of the UNCRC.

⁸Committee on the Rights of the Child, note 2 above, at para 4 (a) and (e).

Prosecutors are actors in the criminal justice system where they initiate an action against an individual who is alleged to have committed a crime.⁹ They are part of the professionals that work with children who are in conflict with the law.¹⁰ Their mandate is to ensure the respect of human rights as outlined in international instruments such as, treating all people equally before the law, presumption of innocence and the observance of the guarantees to a fair trial for an accused person.¹¹ These rights also extend to the children in conflict with the law.¹²

In this chapter, in answer to the first research question of what the international instruments require in terms of the role of public prosecutors in the juvenile justice system, an examination of the requirements of the international instruments such as the UNCRC and the Beijing Rules will be discussed in relation to the roles of the prosecutor in the juvenile justice system. Regionally, the provisions of the ACRWC as the forerunner in providing for the rights of children in Africa will also be discussed. The UN Guidelines on the Role of Prosecutors¹³ and other related Guidelines which are considered as relevant will also be analyzed to identify the international standards applicable to the role of the prosecutors. A chronological discussion of the international documents will be done in this chapter.

2.2 International Instruments

2.2.1 United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985

The administration of juvenile justice within States Parties' jurisdictions was guided by the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereinafter referred to as the Beijing Rules)¹⁴ which provided a framework for

⁹Myjer E, Hancock B and Cowdery N, *Human Rights Manual for Prosecutors* (2008) at i.

¹⁰ R Powell *Child Law: A Guide for Courts and Practitioners* (2001) at 73.

¹¹J Redpath „Failing to Prosecute? Assessing the State of the National Prosecuting Authority in South Africa“ *ISS Monograph* Number 186 (2012) at 2.

¹² O'Donnell D „Child Protection: A Handbook for Parliamentarians“ (2004) at 129.

¹³Adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990.

¹⁴United Nations Office on Crime and Drugs *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (2006) at 51.

national juvenile justice systems.¹⁵ These Rules provide fundamental principles which should be considered by Member States in designing the administration of juvenile justice system.¹⁶ The Rules provide that „Member States shall seek, in conformity with their general interests, to further the well-being of the juvenile and her or his family“.¹⁷ A juvenile offender is defined as a „child or young person who is alleged to have committed or is convicted of committing a crime“.¹⁸

The Rules urge the individual Member State to take into account its „social, cultural and economic circumstances“ when a juvenile justice system is designed.¹⁹ The application of these Rules should be impartial and non-discriminatory within national jurisdictions.²⁰ Rule 2.3 extends this principle by mandating Member States to make efforts to establish a set of laws, rules and provisions which are specific to institutions and bodies who have functions in the administration of justice.

The general principles provide that „juvenile justice services shall be systematically developed and coordinated with a view to improving and sustaining the competence of personnel involved in the services including, their methods, approaches and attitudes“.²¹ The Rules require that professionals who work within the juvenile justice system should constantly improve their skills and attitudes in order to have an efficient system.²² Powell agrees that States have an „obligation to provide an appropriate level of professionalism within the administrative and legal system.“²³

The Beijing Rules recognize the roles of the professionals within the juvenile justice system and realize the need for such professionals to have the necessary specialized skills to administer the system according to set international standards. According to Powell, professionals who work with children „have an overriding duty to be competently and

¹⁵The African Child Policy Forum (ACPF) and Defence for Children International (DCI) „Achieving Child-Friendly Justice in Africa“ (2012) at 4.

¹⁶ Rule 1 of the Beijing rules.

¹⁷ Rule 1.1 of the Beijing Rules.

¹⁸ Ibid Rule 2.2 (c).

¹⁹ Ibid Rule 1.

²⁰ Ibid Rule 2.1.

²¹ Ibid Rule 1.6.

²² Ibid, commentary on Rule 1.6.

²³ Powell R, note 10 above, at 70.

effectively trained in dealing with children“ and they „require a high level of knowledge, skill and aptitude.“²⁴The professionals in the justice system have to be skilled in order to understand and be able to implement the principles of juvenile justice.

The need for specific outline of the roles of professionals to ensure appropriate implementation is envisaged in the rules.²⁵ In the administration of juvenile justice the Beijing Rules observe that „appropriate scope of discretion“ can be exercised by personnel on the levels of „investigation, prosecution, adjudication and the follow-up of dispositions“.²⁶ This indicates that the police, prosecutors, presiding officers and rehabilitation officials ought to have the freedom to exercise discretion in carrying out their functions within the juvenile justice system.

The criminal justice professionals who should exercise the discretion should be accountable for their decisions at all levels and they should be „specially qualified and trained“ in order to perform their specific functions accordingly.²⁷ These rules indicate that there ought to be mechanisms by which professionals should abide in the exercise of their discretion and duties, as a means to ensuring an efficient and viable juvenile justice system.²⁸

In furtherance of the professionals“ duties, Rule 10 of the Beijing Rules provides for investigation and prosecution in juveniles“ cases. This Rule requires the authorities to inform a child of the charge against him/her and to inform such child“s parent or guardian of the arrest as well for the authorized official to consider release of a child. In proceeding with a case, the relevant personnel are urged to be sensitive and respectful of a child“s situation in juvenile justice proceedings, and to avoid causing harm to the child.²⁹ This Rule emphasizes the attitudes and behavior of professionals who work

²⁴Powell, note 10, at 70.

²⁵G Van Bueren *International Documents on Children* (1993) at 201.

²⁶Beijing Rule 6.1.

²⁷ G Van Bueren „Article 40: Child Criminal Justice“ in A Allen et al (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (2006) 29; United Nations Office on Drugs and Crime, note 12 above, at 56.

²⁸ Commentary on Rule 6 at 56 also explains the rule to anticipate the practice where trained and qualified professionals are involved in the juvenile justice system which has checks and balances to ensure accountability.

²⁹ Van Bueren, note 25 above, at 205.

within juvenile justice, and urges them to treat children in conflict with the law in a manner befitting to children. It is therefore essential for professionals to know their specific functions within the system in order to perform effectively and administer juvenile justice sufficiently.

Rules 7 and 11 provide for the procedures that are applicable both within a traditional criminal justice system and a juvenile justice system. In Rule 7 the rights of the juvenile are emphasized as the basic procedural rights such as right to remain silent; presumption of innocence; right to legal counsel and the right to cross-examine witnesses. Rule 11 provides for diversion as a preferable way to deal with juveniles. This Rule further specifies that the professionals, including the police, prosecutors and presiding officers, ought to be empowered to divert matters at any stage of proceedings and that standards and guidelines should be in place to guide their decisions and to ensure accountability, by provision of their domestic legal system.³⁰ These Rules indicate that the successful implementation of the standards and norms in juvenile justice are highly dependent on the role of the professionals and their understanding of such roles.

In Rule 14, a provision is made for the proceedings where a child is criminally charged, and the „competent authority“³¹ is to deal with the matter in a fair and just manner and in the best interest of that child. Though a general reference is made to the body that is responsible to hear a juvenile’s matter, it is clear that the Rule envisages a presiding officer or body and not the prosecution.

Although the Beijing Rules elaborate on the guidelines and standards of a juvenile justice system it does not specify the roles of prosecutors as independent professionals in relation to the juvenile in court or diversion, as it has been done for the roles of the police and presiding officers. The Rules provide for the behavior of professionals herein, how they should perform their functions and the need for training and education as well as the need for specialization of professionals in juvenile justice. The Rules observed that there is a need for professionals to have knowledge of children’s rights and protection and the skill to work with such children.

³⁰ Van Bueren, note 25 above, at 205 – 206.

³¹ Rule 14 and its commentary, 65.

Subsequent to the Beijing Rules, the international community concluded a more far-reaching international convention which reinforced the norms and standards of juvenile justice in the 1989 UNCRC, which is discussed in the next section.

2.2.2 United Nations Convention on the Rights of the Child, 1989

The 1989 United Nations Convention on the Rights of the Child³² is an international treaty that is binding on its Member States. It provides for the recognition and protection of the rights and welfare of children. It mandates States Parties to ensure implementation of its provisions within their domestic jurisdiction by taking „all appropriate legislative, administrative and other measures“.³³ The Committee acknowledges that such implementation may include establishing new structures, laws, monitoring of implementation and training of relevant personnel, such as the judiciary.³⁴

The UNCRC provides for the rights of all children to be implemented without discrimination.³⁵ The child in conflict with the law should receive the same treatment that another would get except where his/her circumstances warrant differential treatment.³⁶ The best interests of the child should be a primary consideration in all actions that concern a child.³⁷ States Parties are mandated to ensure special protective measures to a child by „taking all appropriate legislative and administrative measures“ to ensure the best interests of the child.³⁸ In order for the best interests of the child to be systematically applied, it is necessary to consider the impact of one’s decision on the rights and interests of the child.³⁹ The appropriate consideration would result in a child’s views being given weight where he/she is affected.⁴⁰ States Parties have to establish the factors which should

³² Adopted by the United Nations General Assembly in 1989; Lesotho ratified it in 10 March, 1992.

³³ Article 4 of the UNCRC.

³⁴ Committee on the Rights of the Child (2007), note 2 above, at para 23; C Hamilton *Guidance for Legislative Reform on Juvenile Justice* (2011) at 13.

³⁵ Article 2 of the UNCRC.

³⁶ Committee on the Rights of the Child (2007), note 2 above, at para 4(a).

³⁷ Article 3 of the UNCRC.

³⁸ Article 3 (2) of the UNCRC.

³⁹ Committee on the Rights of the Child (2003), note 1 above, at para 12.

⁴⁰ ACPF and DCI *Achieving Child Friendly Justice in Africa* (2011) at 18.

be considered in assessing the best interests of the child in each case and ensure that service providers actually do consider the established factors in working with children.⁴¹

Every child has a right to be heard in all matters that affect him/her.⁴² For a child in conflict with the law, it is essential to observe his/her right to be heard at all stages of the process of juvenile justice and for his/her views to be given due weight.⁴³ If the child is given an opportunity to express his/her views, appropriate measures can be reached which serve his/her best interests during the process of juvenile justice. The professionals that work in the juvenile justice system have the duty to respect the dignity of the child in juvenile justice system.⁴⁴ She/he should not be subjected to torture or degrading treatment which may amount to secondary trauma.⁴⁵

Children in conflict with the law should be treated in a manner that takes into account their age, maturity and development. The Committee on the Rights of the Child advises States Parties to train and develop the capacity of personnel that are involved in the administration of juvenile justice. The training is essential to inform the personnel about „the content and the meaning of the provisions of the CRC in general and those directly relevant to their daily practice in particular“.⁴⁶

Specific to this study is article 40 of the UNCRC which provides a framework for the administration of juvenile justice and outlines the due process guarantees that should be observed,⁴⁷ including how children who are in conflict with the law should be treated. As such, it reinforces the standards and norms of administration of juvenile justice in the Beijing Rules which require that an accused individual child’s sense of dignity and worth should be reflected in the treatment he or she receives.⁴⁸ The provisions of article 40

⁴¹Article 3 (3) of the UNCRC.

⁴²Article 12 of the UNCRC.

⁴³Committee on the Rights of the Child (2007), note 2 above, at para 23 (c).

⁴⁴Committee on the Rights of the Child (2007), note 2 above, at para 12.

⁴⁵Article 37 of the UNCRC.

⁴⁶Committee on the Rights of the Child (2007) at para 33.

⁴⁷ SPK Vandi *Protecting the Rights of Children in Conflict with the Law: A Comparative Study on the Administration and Practice of Juvenile Justice in South Africa and Sierra Leone* (Unpublished thesis, Central European University, 2007) at 18.

⁴⁸Article 40 (1) of the UNCRC.

illustrate and guide State Parties on how to administer a juvenile justice system within each of their jurisdictions.

States Parties have an obligation to put child friendly laws, procedures and professionals in place to carry out such laws and procedures in child-friendly institutions, within their national legal systems.⁴⁹The UNCRC envisages establishment of criminal systems with „special procedures“ that are meant for children. However, in instances that a State Party is not in a position to create a new system, they have an alternative obligation to incorporate the stated principles of juvenile justice within their domestic systems.⁵⁰The juvenile justice law should ensure that the child in conflict with the law is informed immediately of the charge against him/her, and the matter should be dealt with as soon as possible „according to law“ to ensure that she/he gets a fair hearing.⁵¹ These rights should be incorporated into the law and accordingly applied for the protection and welfare of children.

The due process guarantees as outlined in the UNCRC which are similar to those required in an adult criminal justice system, should be reflected in administration of juvenile justice law. In addition, the right to privacy of the child offender; setting of the age of criminal capacity at an age that takes into account the „emotional, mental and intellectual maturity“ of a child; provision for diversion from the criminal system and restorative justice as well as the legal representation of the child are the set requirements which are specific to children.⁵²

The Committee on the Rights of the Child acknowledges that the quality of persons that are involved in the administration of juvenile justice determine a proper and effective justice system that ensures the fair trial guarantees of a child offender.⁵³ Appropriate implementation of the provisions of the UNCRC requires that personnel who work with children should be proficient in child-related issues in order to ensure that they serve children adequately.

⁴⁹Article 40 (3) of the UNCRC.

⁵⁰ C Hamilton, note 34 above, at 3.

⁵¹Article 40 (2) of the UNCRC.

⁵² Van Bueren, note 25 above, at 8.

⁵³Committee on the Rights of the Child (2007), note 2 above, at para 23.

The creation of juvenile justice systems requires appropriate knowledge and understanding of principles and implementation by professionals who work in the criminal justice system. Such professionals include prosecutors. Hence the Guidelines for Action on Children in the Criminal Justice System, 1996 (hereinafter referred to as the Guidelines) suggest that such personnel should be educated and trained in human rights, the principles and provisions of the UNCRC and other standards and norms in juvenile justice. The international instruments' provisions therefore envisage a special system that is operated by personnel with specialized skills in juvenile justice and child development, and encourages the continuous training of personnel to ensure a consistent national approach to juvenile justice that conforms to the principles and standards.

2.2.3 United Nations Guidelines on the Role of Prosecutors, 1990

Prosecutors have a crucial role to play in the administration of criminal justice. Mofokeng J, regards the prosecutor as „the minister of truth“, and he reiterates that „the public prosecutor stands in a special relationship to the court...it is his function to present the matter to the court fully and fairly and to conduct the case with judicial discretion and a sense of responsibility“.⁵⁴

They should act in an impartial and fair manner using their discretion where a case is founded on reliable and admissible evidence.⁵⁵ The UN Guidelines on the role of Prosecutors, 1990 provide some suggestions on the operations and functions of the prosecution in the jurisdictions of Member States.⁵⁶ Their role is to represent the interests of the public or State where a crime has been committed just as well as protecting the rights and freedoms of the offender by performing specific tasks in the criminal justice system.⁵⁷ Guideline 10 specifies that the „office of prosecutors shall be strictly separated

⁵⁴MP Mofokeng *Handbook for Judicial Officers* (1986) at 8.

⁵⁵ Foreword „Standards of Professional responsibility and statement of the essential duties and rights of prosecutors“, adopted by the International Association of Prosecutors on the twenty third day of April, 1999, articles 2, 3 and 4.

⁵⁶ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27th August – 7th September 1990.

⁵⁷Commission on Crime Prevention and Criminal Justice, twentieth session, Vienna, 11-15th April, 2011, at para 60.

from judicial functions". This suggests that prosecutors have roles that are different from the judiciary. The prosecutor's active role in the criminal proceedings is signified by institution of charges for prosecution, which role shall be executed without intimidation or improper interference,⁵⁸ and in a fair and timeous manner while respecting the rights and welfare of the offender and protecting the interests of the public.⁵⁹

Specific to the role of prosecutors in the juvenile justice systems is Guideline 19 which provides that, "...where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special consideration shall be given to the nature and gravity of the offence, protection of society and the personality and the background of the juvenile." Prosecutors are therefore urged to seriously consider a juvenile's circumstances before preferring a charge against him or her. The decision to bring a child before a criminal court should be an option that is reached after exhausting other less punitive measures, such as diversion and restorative justice.⁶⁰

Hamilton indicates that a comprehensive juvenile justice system requires the establishment of „specialized units within the police, prosecution, the judiciary, the court administration and social services“⁶¹ as well as to develop procedures to be applied during any hearing or trial involving a child, codes of practice, regulations and guidelines.⁶² Hamilton further indicates that the „operational rules for prosecutors“ can be established to provide for their role in procedures and processes in the juvenile justice.⁶³

2.3 African Charter on the Rights and Welfare of the Child, 1990

Africa has a regional instrument dealing with children that came into force in 1990 which also ensures protection and respect for the rights and welfare of the child.⁶⁴ This instrument encompasses the principles of non-discrimination, the child's right to be heard

⁵⁸Guideline 4.

⁵⁹Guideline 11 and 12.

⁶⁰ Guidelines on the Role of Prosecutors, 1990, Guideline 18; Beijing Rule 11 and Article 40 (3) (b) of the UNCRC also provide for alternative measures to prosecution, while fully respecting human rights of the parties involved.

⁶¹ Hamilton, note 34 above, at 13.

⁶²Ibid, at 12.

⁶³Hamilton, note 34 above, at 7.

⁶⁴ Preamble of the African Charter on the Rights and Welfare of the Child, 1990; Lesotho ratified it on 27 September, 1999.

and the best interests of the child to be the primary consideration in all matters concerning a child. Article 17 of the ACRWC provides for the administration of juvenile justice. Accordingly, a child should be treated in a manner that is consistent with the child's dignity and worth, in a fair and timely manner and a language that the child understands should be used.⁶⁵

Unlike the UNCRC, the ACRWC does not elaborately provide for the specialized system of justice for children. As a result States Parties, through the professionals within juvenile justice, are therefore left to their own devices on how to implement these provisions on juvenile justice.⁶⁶

Hence the Guidelines on Action for Children in the Justice System in Africa, 2011⁶⁷ (hereinafter referred to as the African Guidelines) were developed as a framework to assist and guide States Parties to the African Union to meet their obligations in terms of international instruments, including the UNCRC and ACRWC.⁶⁸ The aims and objectives of the African Guidelines are to coordinate and direct actions of professionals (amongst other things) in the formal and informal justice systems in Africa⁶⁹ while taking note that the procedures in the justice systems are „mostly ad hoc in nature and fragmented“⁷⁰ and thus might victimize the child. In implementing the African Guidelines, „due regard“⁷¹ must be given to „an interdisciplinary approach“⁷², „accountability and efficiency“⁷³ as well as „the need for continued specialization and training for all actors involved with children in the justice system“.⁷⁴

⁶⁵Article 17 (1) and (2) of the ACRWC.

⁶⁶ RM Sillah and TW Chibanda „Assessing the African Charter on the Rights of the Rights and Welfare of the Child (ACRWC) As a Blueprint Towards the Attainment of Children's Rights in Africa“ (2013) 11 (2) *IOSR Journal of Humanities and Social Sciences* 50 at 54.

⁶⁷ Guidelines on Action for Children in the Justice System in Africa (Final draft) adopted at Kampala Conference, Uganda (2011), 4.

⁶⁸African Guideline 1 (a) and (b); Kampala Conference report (2012) at 4.

⁶⁹African Guideline 1 (c).

⁷⁰ The Munyonyo Declaration for Children in Africa was adopted in Kampala (2011) its Preamble noted the complexity and inconsistencies in the administration of the juvenile justice systems in Africa due to dual legal systems.

⁷¹African Guidelines, Guideline 3.

⁷²African Guideline 3 (b).

⁷³African Guideline 3 (e).

⁷⁴African Guideline (f).

The Guidelines are meant to apply to „all procedures...of...judicial nature, whether formal or informal, where children are brought into contact with, or are involved in,...criminal... law matters as, alleged offenders, persons who have been convicted or admitted responsibility for an offence or offences“.⁷⁵ The Guidelines should be implemented within the „national legislation and international standards“.⁷⁶ Although these Guidelines do not specifically make reference to prosecutors, they however define the concept of social workforce to include „allied professionals...who contribute to the functioning of child protection and justice systems“⁷⁷. This can be taken to apply to prosecutors as well. In the implementation of the Guidelines, States are obligated to „develop and effectively implement the required protocols and action steps for professionals and other actors working with children in the justice system to ensure respect for rights, co-ordination of services, avoidance of delay and the development of specialized skills and services“.⁷⁸

In outlining the elements of a child-friendly justice system, the African Guidelines state that the professionals working with children should be „screened for suitability to work with children“ and must receive training on child-related matters.⁷⁹ The proceedings that involve children should be dealt with speedily and without undue delay in a manner considerate of the child’s age, maturity and stage of development.⁸⁰ Further, specialized procedures shall be adopted and applied in the courts that deal with child matters where specialized courts are not established.⁸¹ The fair trial rights of children in conflict with the law are outlined and are inclusive of the due process guarantees observed in an adult’s criminal trial. The African documents do not directly outline what the role of prosecutors in the administration of juvenile justice should be. However as a professional working with children, it can be assumed that his/her role is to ensure that the children’s right to a fair trial are respected and the principles of administration of juvenile justice are observed.

⁷⁵African Guideline 4 (a).

⁷⁶African Guideline 6.

⁷⁷African Guideline 10.

⁷⁸African Guideline 21.

⁷⁹African Guidelines 30; 31 and 39.

⁸⁰African Guideline 32.

⁸¹African Guideline 34.

2.4 Conclusion

Lesotho as a signatory to the UNCRC and the ACRWC is obligated to domesticate the provisions of those instruments into its jurisdiction. The articles in the treaties and soft law discussed above form a basis upon which the role of prosecutors can be created in States Parties domestic jurisdiction. Articles 40 of the UNCRC and article 17 of the ACRWC are the main provisions that deal with the administration of juvenile justice. They provide for a special system of juvenile justice where States Parties domesticate the international provisions by establishing special laws, procedures and courts. The professionals that work in the administration of juvenile justice should work in an interdisciplinary approach to ensure that the welfare and interests of the child offender are safeguarded.

Although UNCRC and ACRWC do not directly provide for the role of the prosecutor in the juvenile justice system, however, the Committee on the Rights of the Child recognizes the prosecutor as a professional in the administration of juvenile justice.⁸² The African Guidelines and the Guidelines on the Role of the Prosecutor help to clarify the role of prosecutors in juvenile justice. The international instruments require prosecutors to know the principles of juvenile justice and observe them when dealing with a child in conflict with the law. The prosecutor, in the exercise of his/her duties, should have consideration for the interests and welfare of the child, to the nature of the offence and public interest.⁸³

The prosecutor should have the discretion to decide how to proceed with the case of a child offender and she/he must be accountable for the action taken.⁸⁴ The Beijing Rules require that the person who exercises the discretion should be qualified and trained in child rights and development in order to be able to protect and respect the rights of the offender.⁸⁵ He/she has the duty to consider alternative measures that would divert a child's case away from court system.

⁸²Committee on the Rights of the Child (2007), note 2 above, para 4 (e).

⁸³Guideline on the Role of the Prosecutor, Guideline 9.

⁸⁴ Beijing Rules, Rule 6.

⁸⁵Commentary on Beijing Rules, Rule 6.

As criminal justice systems impact on the human rights of people who come in contact with them, it is the obligation of each State to ensure that the systems are implemented in a fair and just manner so as not to violate the dignity and worth of the alleged offenders.⁸⁶ In this regard, prosecutors are required to treat children in a manner that will not harm them.⁸⁷ The States can ensure this equitable implementation of its international obligations by domesticating the provisions of the obligatory conventions that they are party to.⁸⁸ Hence, through prosecutors who are „agents of state“⁸⁹ the provisions of administration of juvenile justice can be effectively implemented.

The prosecutors should be guided by the relevant international laws and standards which address the administration of juvenile justice in national jurisdictions in order to facilitate the anticipated reform of national criminal justice systems or to create new ones (where they were nonexistent). The Beijing Rules require personnel, including prosecutors in juvenile justice to be trained, in order to enhance their competence and attitude when administering juvenile justice.⁹⁰

Prosecutors are required to opt for alternative measures of dealing with a child’s case before pursuing prosecution.⁹¹ Their powers and functions relating to the cases to divert and the factors to consider should be outlined by the law.⁹² Generally, it is evident that the international standards envisage a situation where children do not go through the formal justice system but get diverted or restorative justice is applied.⁹³ States have to put the programs in place where children can be referred to for diversion programs.⁹⁴ In instances where the decision is taken to prosecute a child, the prosecutor is required to

⁸⁶Committee on the Rights of the Child (2007), note 2 above, at para 4.

⁸⁷Article 40 (1) of the UNCRC.

⁸⁸Committee on the Rights of the Child (2003), note 1 above, at para 1.

⁸⁹ N Cowdery QC „Foreword“ in *Human Rights Manual for Prosecutors*(2008) at VII.

⁹⁰ African Guidelines also provide for the training of professionals working with children in the formal justice system on child rights, development and protection in the African Context, at para 36.

⁹¹Committee on the Rights of the Child (2007),note 2above, at para 10.

⁹²Ibid at para 13.

⁹³ Beijing Rules, Rule 11.2.

⁹⁴Beijing Rule 11.4.

observe the principles of fair and just trial, in order to safeguard the best interests of the child.⁹⁵

The provisions of the international instruments and soft law guide States Parties on the general aspects of the expected juvenile justice system, in terms of the principles to be incorporated within national legislation. The requirements for the role of the prosecutors can be inferred from the provisions, because prosecutors are responsible to assess legal aspects in a criminal case. It is the responsibility of States Parties to enact laws which are reflective of the general principles, standards and norms in the administration of juvenile justice with the due guidance of the general comments. Juvenile justice laws should have clear and express provisions on the roles of professionals as implementers to ensure appropriate and effective administration of juvenile justice.

A discussion of the role of prosecutors in the national legislation in Lesotho will be outlined in the next chapter to determine whether the role inferred in the international norms and standards are reflected.

⁹⁵Committee on the Rights of the Child (2007) note 2 above, at para 7.1; article 40 of the UNCRC; article 17 of the ACRWC.

CHAPTER 3: A HISTORICAL OVERVIEW OF THE EVOLUTION OF THE ROLE OF PROSECUTORS IN THE CONSTITUTION, 1993; CHILDREN'S PROTECTION ACT; THE CRIMINAL PROCEDURE AND EVIDENCE ACT, 1981 AND THE CHILDREN'S PROTECTION AND WELFARE ACT, 2011 AND CRIMINAL PROCEDURE AND EVIDENCE ACT, 1981

3.1 Introduction

The criminal justice system of Lesotho has long incorporated some elements of the administration of juvenile justice by the enactment of the Children's Protection Act of 1980 (the repealed Act).¹ The repealed Act is the first statute that dealt with children in conflict with the law² and children in need of care in the same legal instrument.³ The relevant provisions on the administration of juvenile justice were applied in conjunction with the applicable sections of the Criminal Procedure and Evidence Act (the CPEA) which „applies to all criminal proceedings instituted in respect of any offence at whatever time the offence may have been committed“.⁴

The Committee on the Rights of the Child acknowledged the existence of the juvenile justice system. However, it observed that „the general system of administration of juvenile justice“ was incompatible with the Convention and other recognized international standards for reasons including the low age of criminal responsibility; the absence of juvenile courts or failure to use them in places where they are available; the absence of free legal representation and advice for children in conflict with the law „and the occasional contradictions in the roles of probation officers and lawyers“; hence it recommended that a comprehensive reform of the juvenile justice system be undertaken.⁵ The Lesotho Law Reform Commission was entrusted with the task of

¹ No 6 of 1980.

² Ibid, Part VI sections 21 -26.

³ Ibid, preamble; M L Ntlatlapa *Transformation of the Lesotho Juvenile Justice since Ratification of the Convention on the Rights of the Child 1989: Legislation and Practice* (2009) at 37.

⁴ No 9 of 1981, section 2.

⁵ Concluding observations of the Committee on the Rights of the Child, Lesotho, para 61 (a), (b) (c) (d) and 62 (a) available on <http://www.refworld.org/docid/3b4c45514.html> accessed on 03 March 2015.

making suggestions for reforming the juvenile justice system in Lesotho so as to bring it in line with the country's international obligations.⁶ Ultimately the Children's Protection and Welfare Act⁷(the CPWA) was enacted. The Act is a comprehensive statute which covers children's rights and welfare, including juvenile justice which repealed the Children's Act of 1980.⁸

This chapter presents the statutory evolution on the role of the prosecutors in the administration of juvenile justice in Lesotho, with the aim of establishing whether the current law, the CPWA, constitutes an improvement from the old legislation and complies with its own objectives and the international juvenile justice instruments and standards, such as the UNCRC, the Beijing Rules and ACRWC whose provisions were discussed in chapter 2.

3.2 Constitutional Provisions Relevant to the Role of Prosecutors in Juvenile Justice Cases

The 1993 Constitution of Lesotho (the Constitution) is the supreme law of the Kingdom of Lesotho and any other law that is inconsistent with it shall be regarded as void.⁹ The Constitution provides for the rights and freedoms of its citizens including children.¹⁰ Within the Constitution there are provisions that are specific to children in various proceedings and how they should be treated. Although there are no provisions that specifically provide for the administration of juvenile justice, section 32 relates to the protection of children and young persons. It provides that policies shall be designed to ensure the protection and assistance to children without discrimination for reasons of parentage or other condition.¹¹

⁶ The existing system was seen as incompatible with international laws and standards, „thus in need of a complete overhaul“ L Chaka-Makhooane, „Administration of Juvenile Justice“ in *Child Legislation Reform Project* Issues Paper 1 Lesotho Law Reform Commission (2003), at 1 (copy on file with the author).

⁷ No 7 of 2011.

⁸ Ibid, Part XI section 237 (1).

⁹Section 2 of the Constitution.

¹⁰Section 4 of the Constitution.

¹¹Section 32 (a) of the Constitution.

The rights of persons accused of crimes are provided for wherein it is provided that such accused persons shall be informed of the reason for the arrest and he/she shall have a right to a fair and timeous hearing.¹² All other basic conditions of a fair hearing are outlined in section 12 which includes rights such as the right to a fair hearing within a reasonable time¹³ and the right to be presumed innocent until proven guilty.¹⁴ However there are no specific provisions relevant to juvenile justice.

The Constitution creates the office of the Director of Public Prosecutions (DPP) which has „the power in any case in which he considers it desirable...to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence“.¹⁵ The powers of the DPP shall be exercised by him in person or his representative in Lesotho“s courts of law.¹⁶ His representatives are known as public prosecutors and Crown Counsels. The independence of the DPP“s office is stated in section 99 (6) by providing that the DPP „shall not be subject to the direction or control of any person or authority“ in the exercise of his functions. This means that the DPP and his representatives shall not be directed in any way in exercising their prosecutorial duties by any person.

However, the Constitution provides for some of the principles of juvenile justice which should be recognized and respected by professionals who work with children.¹⁷ The Constitution provides that children and young people shall be protected without discrimination.¹⁸ The Constitution assures that no public official or authority, in performing his/her duties, shall treat anybody in a discriminatory manner.¹⁹ This is a protective provision which seeks to prevent discriminatory treatment by public officials while executing their public function. This can be used to protect the rights of children in

¹²Sections 6 and 12 of the Constitution.

¹³ Section 4(h) and 12 (1) of the Constitution.

¹⁴Section 12 (2) of the Constitution.

¹⁵Section 99 (2) of the Constitution.

¹⁶ Section 99 of the Constitution; the DPP is deputized by three Crown Attorneys (who are each responsible for the south, north and central region of the country) and Senior Crown Counsel in the districts head the prosecution office at Magistrate“s Courts“ level.

¹⁷Section 32 of the Constitution.

¹⁸Section 32 (1) of the Constitution.

¹⁹Section 4 (1) (n) and 18 (2) of the Constitution.

conflict with the law from being discriminated against by professionals in the juvenile justice.

Section 14 of the Constitution further provides for freedom of expression where a person shall express himself/herself without interference. This provision can apply to children in conflict with the law where they wish to contribute their views in their case, on issues such as giving a voluntary explanation for an alleged offence, diversion or plea. This provision reflects the child's right to be heard and to have his/her views to be given due weight in proceedings that affect him/her by the prosecutor.

Although these provisions do not indicate the role of prosecutors in proceedings that involve children who are in conflict with the law, they give a basis for the rights of persons accused of crime, which apply to children and should be safeguarded by the prosecutor in the performance of his/her role. The CPEA and the repealed Act were the domestic legislations that regulated the juvenile justice system in Lesotho before the enactment of the CPWA and they are discussed below.

3.3 Roles of Prosecutors in the Child Protection Act, 1980 and the Criminal Procedure and Evidence Act, 1981

While the aim of the prosecutor is to bring the offenders to justice he/she also has an obligation to respect the rights of those offenders and protect the innocent, as she/he is a representative of State in criminal proceedings. The criminal procedure „regulates...the duties and powers of the prosecutorial authority... pre-trial procedural matters,...pleadings, the course of the criminal trial , and especially the trial rights and duties of the prosecution (the state) and the defence...“²⁰ The Children's Protection Act, 1980 (referred to as the repealed Act) set up a juvenile justice system for Lesotho and recognized the role of the DPP by providing for every Subordinate Court to sit as a

²⁰PM Bekker et al *Criminal Procedure Handbook* (2003) 6 ed, at 3.

Children's Court, and to „hear and determine“²¹ a charge against a child „only if the Director of Public Prosecutions directs that the charge against that child be heard by that court, where in his opinion, such a course is in the public interest or that court is more suitable, having regard to the circumstances of the case“.²²

The prosecutor had the duty to handle a case having been fully informed of the facts and relevant law applicable to the case in order to determine the legality and admissibility of evidence. The DPP acting in accordance with the repealed Act made the decision to charge a child only after perusing the police docket and consulting with the police officer. She/he „must never mislead the court knowingly and must ensure that all factual information is entirely clear“.²³ The prosecutor must be sensitive to children in conflict with the law and use „suitable language and vocabulary throughout the proceedings taking into account the knowledge and abilities of those being addressed.“²⁴

In planning and preparing for a case, the prosecutor should know the rules of procedure applicable in a case.²⁵ She/he should know the case papers (police docket and documentary evidence) and endorsements fully.²⁶ Ultimately the prosecutor had to consider each stage of the proceedings and determine what she/he wants to achieve²⁷ and comply with any judicial directions, with the sole aim of ensuring an accused child gets a fair criminal trial.²⁸ However, the main role and duty of the prosecutor are informed by the provisions of the criminal procedure legislation and practice in Lesotho.²⁹

In the old system where the repealed Act applied, the police officer (being an investigator of a crime) prepared a docket and submitted it to a prosecutor for a decision whether or

²¹Section 5(1); Subordinate courts are Magistrates courts in Lesotho which are presided over by Magistrates form the first class to the Chief Magistrate in terms of the Subordinate Courts“ Proclamation 58 of 1938.

²²Section 5 (2).

²³Bekker et al, note 20 above, 234.

²⁴Ibid at 234.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹CPEA, No 9 of 1981.

not to prosecute. In order to reach an informed decision, the prosecutor after having reviewed all the witnesses' statements and other evidence she/he would require further investigations to be undertaken, and when satisfied that a case is sufficiently proved she/he would continue with prosecution of the case.³⁰ Because of the scarcity of resources which lead to an insufficient number of probation officers in the country, the practice of referring a child offender to probation office differed. Some prosecutors would refer a child before informing him/her about the charge, while others made the referral after informing the child of the charge.³¹

The Director of Public Prosecutions is the head of the Criminal Section in the Law Office of Lesotho.³² This office is represented by public prosecutors at Subordinate Court levels (in the districts) whose duties are outlined in the CPEA and they form a part of the Subordinate Court sitting as a criminal court. The procedure in cases where child offenders were prosecuted was outlined in section 6 of the repealed Act. This section provided for a children's court to sit in a room which was not a court room unless such a room was not available.³³ Hence child offenders' cases usually convened in the presiding officer's office/ chambers. In practice, the prosecutor had to inform the presiding officer that the case dealt with was a juvenile justice case, and request the case to be heard in chambers (in the office). The presence of other persons who were not related to the child was prohibited in the proceedings of a child offender's case unless permission was granted by the magistrate.³⁴

Initially the prosecutor would review the docket after receiving it from the police and analyze the evidence to decide whether the evidence and circumstances of the case

³⁰Bekker PM, note 20 above, at 52.

³¹ This is the author's experience as a prosecutor. The actions/decisions of a prosecutor on a case are seldom noted in a diary of a docket and not the court record where a charge has not been preferred against a suspect. In *R v Ntete Mabaleha* CR 783/01 (unreported case) an 18 years old young offender had admitted guilt to a charge of indecent assault where the facts were outlined by the prosecutor and after the child agreed with the facts the child's case was referred to the probation officer for compilation of a presentence report which recommended that the child was not aware that his act was a criminal offence and that he would not be helped by being sent to the Juvenile Training Center. However the magistrate committed him to the Juvenile Training Center after finding that the facts proved the charge in question.

³² Constitution of Lesotho section 99.

³³ Child Protection Act, section 6 (1).

³⁴ Repealed Act section 6 (3); section 173 (5) of CPEA.

require prosecution. The proceedings in the child offender's case would commence with a charge being read to the child by the magistrate and with the expectation that the child would plead to the charge in question. Generally, the normal stages of a trial - examinations in chief, cross examination and re-examination - would follow, or a plea where a plea of guilty was offered by the child or his/her representative. The repealed Act had provided for the procedures in the children's court to be established by rules made by the Chief Justice.³⁵ These rules were never made, but the practice was modified by practitioners in the administration as they saw fit for the interests of children and individual cases.³⁶

Section 25 further provided that „provision of the Subordinate Courts Proclamation 1938 and of any enactment regulating procedure in criminal cases shall have effect subject to any rules so made.“ This provision enabled the repealed Act to be applied together with the relevant statutes, such as the CPEA, that provided for criminal procedure and legal practices of the country in the administration of juvenile justice. The CPEA provides for the functions and duties of public prosecutors in the criminal justice system. The public prosecutor is defined as „any person delegated generally or especially by the DPP under this Act“.³⁷

³⁵Repealed Act, section 25.

³⁶This is based on author's own experience. A further illustration is the case of *R v Thato Chakela* CR 453/10 (unreported case) where a young offender aged 14 years old was initially charged with committing a sexual act with a 5 years old girl. On first appearance the young offender was referred by the prosecutor to the probation officer for assessment. The probation officer recommended that he should be sent home on conditions as he did not plead to the charge. After being released to his mother he came appeared for the second time before the prosecutor having been assaulted by villagers for allegedly committing a sexual act to another 5 years old girl. The prosecutor referred the young offender to the probation officer who recommended that he be sent to the juvenile Training Center pending finalization of the case. The two charges were combined and the subordinate court sat as a children's court in chambers to the exclusion of the public but in the presence of the young offender's mother and grandmother. The trial began with the young offender pleading not guilty to both charges but although duly assisted by his mother he failed to give his defense. When all the evidence was led before court he could not give any defense. When ultimately asked by the prosecutor whether he was afraid of anyone in the room he asked for his mother to leave and he admitted he was guilty of both charges. A verdict of guilty was delivered by the Magistrate who then sent the case to probation for a pre-sentence report which recommended that the child be committed to the Juvenile Training Center for rehabilitation.

³⁷The repealed Act, section 6 (1).

The CPEA further provides that the DPP may institute and undertake criminal proceedings against any person before any court, except a court martial, where an offence is alleged to have been committed, where „he considers it desirable to do so“.³⁸ This empowers the office of the DPP, through a prosecutor in charge in a particular jurisdiction, to institute criminal proceedings even in a Children’s Court. Section 6 (5) provides for a prosecutor to exercise the functions vested in him by the DPP without being subjected to the direction or control of any other person or authority, if he/she acts in accordance with the law.

The CPEA therefore regulates the role of prosecutors and the procedure they should adopt in criminal cases in any Subordinate Court and High Court. It regulates the processing of an accused person’s case from the investigation stage, to prosecution and through to sentencing (where applicable). More specific to this paper is that the CPEA provides for handling of criminal cases at pre-trial stage, in-trial procedure and step-by-step measures to be taken concerning an accused, as well as the rights of accused persons (including child offenders).³⁹ In relation to the cases of child offenders, practitioners had to modify the procedures to accommodate the children in conflict with the law.

Under the CPEA and the repealed Act the prosecutor in a child’s case would decide on whether or not to prosecute a child after consulting with the police, probation officers, the child and his/her representative and the victim, and after having considered the offence committed.⁴⁰ Where the prosecutor decides to prosecute, the child offender would be presented before a magistrate for plea and be referred to the probation unit for assessment (which often was a social inquiry).⁴¹ Upon completion of the assessment, the prosecutor sets the date for the court to reconvene so that the probation officer can present his/her recommendations on the child offender, his background and his/her case. Depending on the recommendation and whether or not the parties agree, a child can either be prosecuted or sent for counseling sessions with the probation unit.

³⁸Section 5 (a).

³⁹Section 4 „Criminal Jurisdiction“; Bekker et al, note 20 above, at 3.

⁴⁰ Section 63-98 of CPEA.

⁴¹Section 162 of CPEA.

This ensured that the prosecutor exercised his/her discretion and made an informed decision in consultation with the police as investigators and the probation unit for the welfare of the child. He/she considered the information from the police and the social circumstances of the child before deciding, without any other office's directive, on the action to take. A multi-sectorial approach was ensured in the administration of juvenile justice. The tasks of the professionals were separate but complementary.

In terms of the CPEA, a preparatory examination or an inquiry into the death of a person⁴² or a trial can be held against a child offender.⁴³ The CPEA therefore sets a structure of processes, such as examination in chief, cross examination, re-examination and the manner in which the processes should be carried out.⁴⁴ The applications that arise within the proceedings and the manner in which they should be carried out are also provided for in the CPEA.⁴⁵ It is in carrying out these processes that the prosecutors were said to be abusive and hostile to children in conflict with the law and thus not familiar with the principles of juvenile justice.⁴⁶ Since the purpose of examination of a person's evidence is to prove or disprove his/her version of events, it is necessary to give guidance on how prosecutors should approach the cross examination of child offenders in order to ensure that children do not feel intimidated.⁴⁷

In the context of the repealed Act and the CPEA, practical modifications were made by both prosecutors and magistrates to mediate the effects of the criminal system to children. For instance, the term „young offender“ as opposed to accused person was used when referring to a child offender in addressing the court and it was duly reflected in the court record.⁴⁸ However, since it was not a uniform practice required by any legal document or directive, it still left prosecutors and other professionals with wide discretion in terms of

⁴² CPEA part VII Section 63 – 98.

⁴³ Section 175.

⁴⁴ Section 146 -168.

⁴⁵ Section 152, section 159 and section 218.

⁴⁶ Chaka-Makhooane, note 6 above, at 9 and 12.

⁴⁷ C Hamilton *Guidance for Legislative Reform on Juvenile Justice: Guidance Paper* (2011) at 75.

⁴⁸ The researcher knows this through her own experience.

the language they would prefer, the type of questions to pose to children as well as the demeanor in court.

The professional ethics for prosecutors require that they should know the rules of procedure fully so that they can act with complete accuracy and understanding of the facts of a particular case and the relevant law.⁴⁹ The procedure in the repealed Act and the CPEA were complementary and enabled prosecutors to establish a set manner of dealing with juveniles and the physical set-up of the environment where a child offender's case was heard.⁵⁰

Despite the set guidelines in the repealed Act and the CPEA for prosecutors to deal with child offenders and the procedures to be adopted therein, there were still limitations on how to handle such cases effectively without negatively affecting the child offender. Firstly, the actual technicalities and process of criminal procedure in a child offender's case are the same as those applied to an adult's case. Therefore the challenge remains as to how to undertake a child offender's case differently while ensuring that the „legal safeguards are fully respected and protected“.⁵¹ The repealed Act, on its own, did not fully reflect the principles of juvenile justice such as the best interests of the child, non-discrimination and right to be treated with dignity. However, the due process rights of the child offender of being informed about the charge against him/her; the right to be presumed innocent until proven guilty and the right to a fair trial were observed.

3.4 Roles of prosecutors in the Children's Protection and Welfare Act, 2011

As previously mentioned, a comprehensive statute was enacted in compliance with the observations and recommendations of the Committee on the Rights of the Child. This was the Children's Protection and Welfare Act No 7 of 2011 (the CPWA).⁵² It was enacted pursuant to the recommendations of the Lesotho Law Reform Commission to

⁴⁹ Hamilton, note 47 above.

⁵⁰ Draft Code for Lesotho Prosecutors (2007) is a document that is used to guide prosecutors in their work. Its provisions the Guidelines on the Role of Prosecutors. (On file with the author).

⁵¹ Hamilton, note 47 above, at 37.

⁵² It came into effect on the date of its publication in the Gazette being 31st March, 2011 per section 1.

bring the juvenile justice system to comply with the UNCRC.⁵³ It was acknowledged during the reform process that one of the problems of the juvenile justice system was the attitude of the prosecutors.⁵⁴ In suggesting reform, the recommendation was that,

Proceedings should be made simple, informal and in a language that the child understands. The child must be given assistance in handling his/her case either by way of legal representation or any other person so designated by the court. The law must empower the court to take charge of the proceedings and the way juveniles are handled in court, e.g the language used by the prosecution and lawyers alike must be respectful of the child's dignity and worth.⁵⁵

The purpose of the CPWA is to consolidate and reform the laws relating to the protection and welfare of children and to provide for incidental matters in order to bring various laws in line with current child protection issues and also with the international standards on the human rights of children.⁵⁶ The CPWA covers children in need of „welfare and general care on the one hand, and those who are in conflict with the law“.⁵⁷ The child is defined as a person under the age of 18 years,⁵⁸ and his/her best interests should be taken into account and be the primary consideration for all „courts, persons, including parents, institutions or other bodies“.⁵⁹ Such actions concerning a child should take account of his/her evolving capacities, without discrimination.⁶⁰

Specific to children in conflict with the law, the CPWA's objective is that children who are arrested and brought to court should get special treatment and not be treated like adults.⁶¹ The CPWA advocates for the adoption of interrelated mechanisms that emphasize diversion and restorative justice „in place of the normal criminal justice

⁵³Chaka-Makhoane, note 6 above, at 1.

⁵⁴Ibid, at 6 and 12.

⁵⁵Chaka-Makhoane, note 6 above, at 30.

⁵⁶ Statement of objects and reasons of the Child Protection and Welfare Act, 2011 Government Notice No 19 of 2011, section 1; section 2 (1) of the CPWA.

⁵⁷Section 2.

⁵⁸Section 3 of the CPWA.

⁵⁹Section 4 of the CPWA.

⁶⁰Section 5 and 6.

⁶¹Note 56 above, Section 12.

procedures and processes”.⁶² It is in line with these objectives that the provisions of the CPWA will be discussed to determine whether they promote the stated objectives. The weaknesses in so far as it provides for the role of prosecutors will be identified and recommendation for reform made.

Part XI of the CPWA provides for children in conflict with the law, age of criminal responsibility and age determination. This part further establishes a new system of juvenile justice by introducing a new process of preliminary inquiry and the children’s court which will be discussed below in relation to prosecutor. A variety of personnel working in the administration of juvenile justice are indicated and defined in the interpretation section and within the CPWA. The various provisions that are understood to refer to the prosecutor will be discussed to analyze the role of prosecutors in the CPWA and whether they allow for effective compliance with the objectives of the CPWA. This section of the paper will discuss the role of the prosecutors as they appear within a particular procedure as outlined in the CPWA.

3.4.1 Preliminary inquiry

According to the CPWA, the prosecutor will come to know of a child offender’s case when a probation officer submits the social assessment report to him/her for the prosecutor to convene a preliminary inquiry.⁶³ This social assessment report would either recommend diversion for a child offender, release of such an offender to a certain person or the placement of such a child to a place of safety.⁶⁴ The preliminary inquiry is defined as

A compulsory procedure which takes place before charges are instituted in relation to an alleged offence and which is held in all cases involving a child over the minimum age of criminal responsibility, where diversion, conversion to a Children’s court inquiry or a

⁶²Section 13.

⁶³ Section 87 (7) and (10); section 90 (4); section 91 (1) of the CPWA.

⁶⁴Section 87 (7) of CPWA.

decision to decline to charge the child has not yet been taken in accordance with this Act.⁶⁵

The purpose of the preliminary inquiry is to enable an inquiry magistrate to determine whether assessment has been carried out; whether diversion in the matter before him/her is possible; whether to refer the matter to the prosecutor to institute charges against the child in Children's Court; to assess whether there is sufficient evidence to warrant a prosecution.⁶⁶ At the preliminary inquiry, the prosecutor is obliged to make sure that the inquiry magistrate has an age assessment report where such an assessment was made and any other relevant documentation provided for by the CPWA or which the prosecutor deems necessary to provide.⁶⁷

Besides convening the preliminary inquiry, the prosecutor has the task to prove the child's age, criminal capacity as well as to make oral submissions to the inquiry magistrate in respect of the sufficiency of evidence of the offence the child is faced with. In the preliminary inquiry, the prosecutor has to prove beyond a reasonable doubt, to an inquiry magistrate, that an offender aged between 10 and 14 years, as a matter of fact, has the appreciation of right and wrong and is able to act in accordance with that appreciation.⁶⁸

Where the child is over 14 years old, the prosecutor may be requested by the inquiry magistrate to provide an oral report on the sufficiency of evidence against a child.⁶⁹ If the inquiry magistrate is satisfied of the sustainability of prosecution due to the sufficiency of evidence before him/her, he/she may refer the matter to the prosecutor for institution of a charge against the child or refer the matter for diversion. This can also be done especially where a child denies responsibility for the offence.⁷⁰ These provisions are likely to limit the prosecutorial freedom to act according to his/her discretion in analyzing a child

⁶⁵Section 3 (interpretation section).

⁶⁶Section 106 (3).

⁶⁷Section 107 (2).

⁶⁸ Section 79 (4) of the CPWA; *R v MalefetsaneMohlomi* CR No 06/2013, Review case No 06/2013, at para 27.

⁶⁹Section 111 (1); CR No 06/2013, at para 34.

⁷⁰ Ibid, section 106 (3) (d), section 110 (4) (b) and section 111 (1) & (3).

offender's case and deciding whether or not to prosecute or present the child for any form of proceedings.⁷¹

Further, in the practice of criminal justice, including the old juvenile justice system, the prosecutor is given a docket upon completion of investigations by the police. That evidence is studied by the prosecutor to evaluate its sufficiency and legality, whether it was obtained lawfully by the police. Although the CPWA does not prohibit the police from consultation with the prosecution and subsequent referral of the docket such non-disclosure might make the consultation to seem discretionary by the police resulting in insufficient time or opportunity to study legal aspects of a child's case. This may limit the opportunity of the prosecutor to discuss the matter with the investigator on the evidence in the case alleged (or referral back for further investigations) before presenting it to the inquiry magistrate.⁷² This limitation would possibly continue to predispose a child offender to unnecessary court appearances whereas a prosecutor could have decided much earlier that there was no case that warranted even an appearance at the preliminary inquiry for such a child.

The inference from the wording of the CPWA suggests that the prosecutor approaches the preliminary inquiry after having studied a social assessment report. The provisions of the CPWA suggest that the prosecutor gets acquainted to a child's case through the probation officer who has made a recommendation in the assessment of the child.⁷³ Since the section on the role of the police does not indicate any interaction between the police and the prosecutor there may be an inadvertent practice of excluding the prosecutor from interaction with the case of the child before initiating the preliminary inquiry requirements.⁷⁴ The familiar and old-way of instituting criminal cases has been, therefore, amended. The prosecutor may then act in accordance with the probation officer's

⁷¹Nlatlapa MK, note 3 above, views this as „an encroachment of the judiciary into the executive functions of the state“ at 72.

⁷²Section 107 sets the time period of 48 hours to present a child for assessment and a preliminary inquiry, which can be taken to be the period that the prosecutor could possibly have to refer a docket back to police for further investigations had he/she been in contact with the docket in adequate time prior to arrest of a child.

⁷³Section 130.

⁷⁴Part XI of the CPWA.

recommendation or where she/he disagrees with the recommendations, state reasons for such disagreement.⁷⁵

It is not clear to what extent the prosecutor gets to be informed of the legal aspects of the offence allegedly committed by the child, in order to enable such prosecutor to assess the child's criminal capacity and to be able to decide whether or not to prosecute. The prosecutor's ability to exercise discretion and the obligation to be adequately prepared and informed of the facts and law of the case, as required by the CPEA, although not completely eradicated might be compromised in attempting to ensure the protection of the child.

The preliminary inquiry is an inquiry that should be carried out in every case that involves children in conflict with the law.⁷⁶ The CPWA provisions that provide for referrals are not clear on how such referrals should be carried out. When a child is arrested, it would have been desirable for the CPWA to require that the prosecutor is informed alongside with the probation officers. It would have also been desirable to provide that the police should send the police docket to the prosecutor to study the case and decide on the suitable action to take, before convening a preliminary hearing in an attempt to attain a speedy conclusion of the case.⁷⁷ The prosecution has to be given room to decide whether or not to refer a child's case to a preliminary inquiry where he/she is not going to prosecute or divert. There are cases that a police and probation officer may view as fit for an inquiry but which may prove insufficient according to prosecutor's assessment.

3.4.2 Children's court

A case of a child in conflict with the law shall be heard and determined by a Subordinate Court sitting as a Children's Court and shall hear and determine cases as they are brought

⁷⁵ Section 130 (2) (b) and (3)(c) of the CPWA.

⁷⁶Section 107.

⁷⁷ S Peete J *Delays in the Administration of Criminal Justice in Lesotho* (1999) Issues Paper 1; Project 2.

before them.⁷⁸The Subordinate Court sitting as the Children's Court hears cases of children in conflict with the law as well as welfare proceedings. The CPWA provides that the proceedings in the Children's Court shall be informal and child-friendly in order to allow all persons involved (including the child) to participate actively.⁷⁹ The child's procedural rights, such as the presumption of innocence and the right to a fair trial should be respected in order to ensure that the best interests of the child are considered.⁸⁰ A presiding officer, according to his traditional role, has to ensure that the proceedings in the Children's Court and the conduct of the court personnel are protective of the children in the case before him/her.⁸¹ In ensuring such protection, the presiding officer „shall protect a child offender...from a hostile or intimidating cross-examination where such cross-examination is regarded by the presiding officer as being prejudicial to the well-being of the child or the fairness of the proceedings“.⁸²

Makara AJ in *R v Malefetsane Mohlomi*⁸³ correctly explains that the transformed nature of the Subordinate Court into a Children's court with special jurisdiction and procedures which do not absolve the presiding officer in the proceedings from regulating the proceedings and ruling on relevant issues of evidence, its admissibility and related aspects. In addition to their traditional roles magistrates further acquire extra responsibilities including eliciting evidence from anyone in the children's court in order to ensure optimal protection of an accused child.⁸⁴ However, this extra role extends in to

⁷⁸Section 133 (1).

⁷⁹Sections 133 (3) and 138 of the CPWA. Sections 171 (2) and 173 (4) and (5) of CPEA. The children's court proceedings are to be conducted in camera, away from the public in order to create an environment that is sensitive to children and that will encourage a child's maximum participation. Section 133 (3) provides that where possible, a courtroom „shall be located and designed in a way which is conducive to the dignity and protection of children.“ According to Resident Magistrate Motebele (a Magistrate in the Children's court, Maseru) „The normal set-up of the magistrate sitting behind a desk on an elevated floor wearing a black gown is substituted by a magistrate wearing normal clothes and the magistrate sitting in a place at the same level as a child or everybody else. The language that is used in children's court is simple and sensitive to a child's age and mother tongue and toys are available for children to use during proceedings.“

⁸⁰The Constitution of Lesotho outlines these protections in section 6 (2) and section 12.

⁸¹Section 138 (7).

⁸²Section 138 (12).

⁸³CR No 10/2013 Review case No 06/2013at para 39. This is the first case to be decided under the CPWA.

⁸⁴Section 138 (1).

the traditional prosecutorial role of presenting an accused person before court and leading any such proceedings in a court of law in accordance with the due process of the law.⁸⁵

The *Malefetsane Mohlomi* case involved four accused, including two child offenders, who were jointly charged as adults. The trial magistrate had referred the case to the High Court for review after convicting all four accused, upon realizing that two of the accused were children aged 16 and 17 respectively when they committed the crime. Makara AJ concluded that the procedural rights of the child offenders had been violated because the prosecutor as a „minister of justice“ in a criminal case was ignorant of the provisions and applicability of the CPWA and had inadvertently misled the court.⁸⁶

However, the Acting Judge did not indicate what specific duty the prosecutor failed to fulfill under the CPWA which resulted in the court being misled since the CPWA gives both the Inquiry Magistrate and the Children’s court Magistrate the power to control and direct the proceedings as well as elicit information from any person. The learned Acting Judge expressed concern that the prosecutor had accepted without suspicion that both accused were 18 years as indicated on the docket that he received, without ascertaining the accuracy of such ages despite the submission of the children’s birth certificates. The decision indicates that the prosecutor presented a case involving child offenders to the magistrate without having held a preliminary inquiry where the age and social assessments could have been presented.⁸⁷

Although the Acting Judge indicated that the CPWA introduces „inquisitorial proceedings... that prescribes emphasis on substantial justice rather than legal technicalities“ his decision is mainly based on the procedural irregularities, such as not assessing the ages of the child offenders, that occurred and which he attributes to the prosecutor’s deceit and innocence of the presiding magistrate.⁸⁸ Firstly, the CPWA requires that once a child has been arrested by the police, a probation officer must be

⁸⁵ Section 175.

⁸⁶ *R v MalefetsaneMohlomi*, para 7 and 77.

⁸⁷ CPWA sections 105 and 106.

⁸⁸ CR 10/2013 at para 100.

informed for age and social assessments to be made, which should be completed within a period of 48 hours (two days).⁸⁹ After the completion of these assessments, the CPWA requires that the assessment report should be sent to the prosecutor to convene a preliminary inquiry before a case could start.⁹⁰

However, probation officers are not stationed at district level. All districts rely on the services of probation officers from Maseru, who visit districts when there is a case to attend to.⁹¹ Secondly, the district of Quthing, where the case occurred, had at the time only one Magistrate to hear cases.⁹² Given these challenges of limited human resources, it is impossible to conform to the provisions of the CPWA in other most districts in Lesotho. The provisions of the CPWA require the police and probation officer to ensure and ascertain the age of child offenders not the prosecutor. The law requires the prosecutor to convene the preliminary inquiry once the assessment report is in his/her hands and not the police docket. In this case the prosecutor dealt with the case as per the CPEA because he was informed by the docket that the accused were all 18 years or above. The prosecutor, however, still had the professional responsibility to ascertain, from the accused, about the accuracy of their personal details, including age.

Although the prosecutor's reasons for not applying the CPWA are not indicated in the judgment, it is possible that the CPWA was not applied either because of the practical difficulties of limited human resource or the prosecutor was also not aware of the new system of juvenile justice.⁹³ This case indicates that the juvenile justice system in Lesotho, per the CPWA, requires adequate preparation of the personnel working in the

⁸⁹Para 63- 70; CPWA section 79 -81.

⁹⁰CR 10/2013 at para 66; CPWA section 105 and 106.

⁹¹This information was gathered in a personal communication with a member of the Probation Unit on 14th July 2015 that although Probation Officers are based in Maseru they visit various districts weekly alternating days (except the mountain areas which are visited bi-quarterly) per a set schedule. For example, Mofale's Hoek (Mondays); Leribe (Tuesdays); Quthing (Wednesdays); Botha Bothe (Thursdays) and Mafeteng (Fridays). According to him Maseru and Berea are also categorized into areas and visited according to schedule.

⁹²A Magistrate in the Children's court in Maseru in a personal conversation on 13th July 2015 indicated that the implementation of juvenile justice is complicated in the districts such as Quthing and Thaba Tseka where there is usually only one Magistrate stationed to hear all forms of cases, including children's cases.

⁹³Informal discussions with the professionals involved in the case suggest that the prosecutor was not aware of the provisions of the CPWA. Ethical considerations prevent the disclosure of the identity of the professionals with whom I had these informal discussions.

system for the implementation of the CPWA as well as the establishment of guidelines or policies to guide the CPWA implementation by actors.

The DPP may refer a case for plea and trial where the child is charged with an offence that would exceed the jurisdiction of the children's court or the child faces more than one count of charges against him/her.⁹⁴ Where a child is charged together with an adult the case has to be separated except where an application of joinder is made successfully. A child offender can also be tried before a court that is not ordinarily a Children's Court, such as the High Court, but which has jurisdiction to try a child's case, in cases of murder, treason or sedition or any other offence and the likely sentence will exceed the jurisdiction of the Children's Court.⁹⁵ Any other court, including the Children's Court, is obligated to conduct its proceedings in accordance with the provisions of the CPWA and with due regard to the best interests of the child.⁹⁶

The CPEA as the statute that regulates the criminal procedure and evidence in Lesotho informs the work of the actors in the criminal justice system, namely the police, prosecutors and magistrates.⁹⁷ The provisions of the CPWA specifically contradict the CPEA which give the prosecution the power to institute, conduct and discontinue criminal proceedings on behalf of the state by transferring such power to the inquiry magistrate.⁹⁸ The CPEA further asserts that the prosecution „shall not be subject to the direction or control of any person or authority“ except where the court questions the lawfulness of the function exercised.⁹⁹ The CPWA deviates from the norm where the prosecutor initiates the court proceedings without prompting from the magistrate, whether preliminary proceedings or an actual trial.¹⁰⁰ This encroachment of prosecutorial powers might not achieve the legitimate objective of affording special treatment to accused children by promoting their dignity and worth when there are no regulatory

⁹⁴Section 134.

⁹⁵Section 134 (1).

⁹⁶Sub-section (4).

⁹⁷Preamble of Act No 9 of 1981.

⁹⁸ Section 5 of the CPEA reflects Section 99 of the Constitution.

⁹⁹ Section 6 (5) of the CPEA is countered by section 106 of the CPWA which places the prosecution in a position to act according to the direction or control of the inquiry magistrate.

¹⁰⁰Section 11 and 175 of CPEA.

measures put in place to monitor the exercise of such statutory encroachment by magistrates.¹⁰¹

The absence of provisions in the CPWA that acknowledge the application of provisions of the CPEA in the administration of child offenders' cases might hinder the effective implementation in respect of which procedure should be adopted since the CPEA has neither been repealed nor amended by the CPWA. Hamilton asserts that the new juvenile justice legislation should „set out...the extent to which other criminal laws are to apply to children“ to ensure effective implementation of juvenile justice and synergy among the laws that apply to children in conflict with the law.¹⁰²

Some reference is made to the role of the prosecutor in the CPWA in various sections which suggests that the prosecutor has a role to play in the administration of juvenile justice. For instance, section 130 deals with the “referral and powers of the prosecutor in respect of children who are above the minimum age of prosecution with respect to diversion“. The prosecutor’s role is to ensure that assessment of a child is made, upon receiving notice of a child’s case. Where assessment is not possible, the prosecutor should arrange for the assessment to be made in order for him/her to convene a preliminary inquiry.¹⁰³

The provisions suggest that the notice of a child’s case to the prosecutor will be by recommendation of the probation officer for the matter to be referred for the opening of a preliminary inquiry.¹⁰⁴The probation officer will compile an assessment report, to be presented at the preliminary inquiry, which will address the social and physiological aspects concerning the child. The prosecutor as a legal professional has to assess the unlawfulness of the alleged offence; the intention of the child as a means to establish criminal capacity as well as whether the evidence was obtained within the confines of the

¹⁰¹ This is similar to the absence of the rules by the Chief Justice in the old Act which were meant to regulate the Children’s court proceedings.

¹⁰² Hamilton, note 47 above, at 6. For instance section 4 (3) (a) of the Child Justice Act of South Africa pronounces that „the Criminal Procedure Act applies with the necessary changes as may be required...“.

¹⁰³Section 130 (5) of the CPWA.

¹⁰⁴ Section 130 (1) read with section 90 (4).

law. This assessment can be done by the prosecutor by reviewing the police docket because the questions of evidence, unlawfulness of the act and the legality of the processes undertaken in investigations can only be answered by the police. Once these legal aspects are timeously addressed, it is possible for a child's case to be completed within a short period of time as anticipated by the CPWA.

The prosecutor's duty to have and study the docket also extends to the child offender who, in terms of traditional criminal law, has a right to access the docket to prepare for his/her defense before the case proceeds. The changes introduced by the CPWA regarding the role of the prosecutors affect the right of accused juveniles to access their dockets and prepare for their defense on time because the prosecutor gets information of a child's case through the assessment report.

The provisions of the CPWA introduce a specialized system of dealing with children in conflict with the law which is inquisitorial in nature. This is indicated by introducing the preliminary inquiry and children's court proceedings which allow the magistrate to elicit information from anybody at any stage of proceedings.¹⁰⁵ This juvenile justice system introduces a system where the prosecutor gets involved once the probation officer completes the assessment report. The CPWA provides that the prosecutor can either agree or disagree with the recommendation, but he/she must convene a preliminary inquiry where a child has been arrested.¹⁰⁶ It is a compulsory role that she/he has to fulfill.

The CPEA is necessary for the application of the CPWA. It regulates criminal proceedings; the gathering of evidence and its admissibility; the duties of the prosecutor throughout the proceedings; and the sequence of stages of proceedings and the applications. It regulates, for example, the issues of pointing out; fingerprinting and admissions of guilt which have been mentioned in the CPWA. The provisions of the

¹⁰⁵CPWA.

¹⁰⁶Section 107 (1).

CPWA and the CPEA ought to be revisited in order to bring synergy between the two statutes aimed at protecting and promoting the rights of an accused person.

3.5 Conclusion

Under the repealed Act and the CPEA, the prosecutor had an essential role in the old administration of the juvenile justice by making the decision as to whether a child should go before a court or not. This essential role was further emphasized in the Constitution. The CPWA was subsequently enacted to provide for the rights and welfare of the child, including the child in conflict with the law in order to comply with international law.¹⁰⁷ This enactment was in lieu of the protection of youth and children as provided by the Constitution. However, the application of the CPWA in the administration of juvenile justice fails to observe the Constitutional provision of the exercise of prosecutorial duty without the control or direction of any person. The CPWA should acknowledge the relevant provisions of the CPEA, which is the law that regulates procedure and evidence in criminal cases, and accordingly guide the roles of professionals in order to achieve an effective administration of juvenile justice.

The CPWA introduces a variety of preliminary proceedings that should be carried out before a child is charged. The age and social assessments, the preliminary inquiry for determination of criminal capacity and possibility of diversion or prosecution are pre-trial processes that the prosecutor should have a role in. The CPWA changed the traditional dynamic of criminal justice in terms of case referrals. The prosecutor is no longer informed about a case by the police investigator, but according to the CPWA, he/she is notified through the probation officer's assessment report.

Recognizing a complementary relationship between the CPEA and CPWA can ensure a more efficient administration of juvenile justice as it would clarify procedural aspects of handling such cases. Prior to clarity being received from the legislature in terms of the relationship between the two acts, it is suggested that the prosecutor should also be

¹⁰⁷ Part XI.

informed by the police, through a police docket about a child's case as it is practice in criminal justice case referrals in Lesotho, and allows the assessment of legal aspects in the case at hand. The assessing of evidence and the prosecutor's ability to exercise his/her discretion in how to handle a case should be respected without the limitation by the law, once the preliminary procedures of assessment have been completed.

The special system introduced by CPWA promised a better administration of juvenile justice system for Lesotho. However, the prevailing status of the CPWA to the exclusion of all other laws of the country, specifically the CPEA is a challenge that needs to be addressed. Firstly, the provisions of the CPWA limit the freedom of the prosecutor to act according to his/her discretion in analyzing a child offender's case and deciding whether or not to prosecute taking into account the interests of the community and/or victim. Further, the prosecutor is not given adequate means to prepare –studying a docket and consulting with the investigator - before presenting his/her position to the inquiry magistrate. This limitation would continue to expose a child offender to unnecessary court appearances while a prosecutor could have decided, if in the possession of complete information, that there was no case that warranted even an assessment of a child.

It is essential to have a legislation that clearly outlines the roles and duties of prosecutors in the juvenile justice system. There are some provisions of the CPWA that need to be evaluated and amended in order to enable it to be effective in juvenile justice cases. The general objective of making the CPWA „a tool that can be used by everyone in dealing with issues that affect children in a holistic manner“ and that „will assist government and its partners to translate policy into clear “deliverables” in order to make children's rights a reality in Lesotho“,¹⁰⁸ can only be realized by recognizing the utility of other relevant legislation and clarifying its relation to the CPWA.

¹⁰⁸ Clause 16 Statement of Objects and Reasons of the CPWA Government notice No 19 of 2011.

CHAPTER 4: COMPARATIVE ANALYSIS OF THE REPUBLIC OF SOUTH AFRICA, UNITED KINGDOM AND THE UNITED STATES OF AMERICA

4.1 Introduction

Many countries have established juvenile justice systems, either as separate systems or special provisions within the traditional criminal system to protect and promote the rights and welfare of accused children. States continue to be guided by the Beijing Rules, the UNCRC and other relevant documents to the administration of juvenile justice discussed in Chapter 2 of this paper.

The criminal justice systems which are discussed in this chapter are adversarial, like that of Lesotho. This is a system where the prosecutor institutes a case which is to be heard by a judge and she/he decides on the matter in question, after the prosecutor and the legal representative of the accused lead his/her evidence and submits oral arguments.¹ This chapter contains an overview of the role of the prosecutors in the juvenile justice systems in the United States of America (the USA), the United Kingdom (the UK) and the Republic of South Africa (the RSA), which the researcher hopes Lesotho can learn from to ensure an efficient and effective juvenile justice system. Although the USA is not a party to the UNCRC it has established a juvenile justice system which other countries can learn from.

The USA, the UK and RSA are common law systems of English tradition.² They have adversarial systems of criminal justice in which special juvenile justice systems have been incorporated. These similarities in the legal tradition and approach to juvenile justice make the above systems useful comparators for Lesotho, from whose experience Lesotho might learn in order to create a more effective system of juvenile justice. This chapter therefore contains a presentation of the juvenile justice systems and the role of

¹A Sanders & R Young *Criminal Justice* (1994) 7.

²C Pejovic „Civil Law and Common Law: Two Different Paths to the Same Goal“ (2001) 819.

the prosecutors in these three systems, in order to identify good practices in the administration of juvenile justice in as far as they relate to the prosecutorial function.

4.2 Roles of Prosecutors in the United States of America

Although the USA is one of the countries that have not ratified the UNCRC, it does however have a long standing juvenile justice system.³ The USA has a system of law which allows its states to establish their own courts systems.⁴ This means that the juvenile justice systems differ per jurisdiction.⁵ The juvenile justice proceedings, however, should be carried out in an informal manner and the professionals working within it should have the interests of the accused children in mind when dealing with their cases.⁶

The juvenile justice system was regulated by the national standards issued by the Institute of Judicial Administration and the American Bar Association (IJA-ABA) in order to make uniform the practice of professionals, including the prosecutors, in the field the administration of juvenile justice.⁷ The standards provide that

the standards for criminal and juvenile justice alike must provide procedures for all the agencies and individuals functioning as parts of the organizational whole to arrive at a fair disposition of matters brought before them... and the roles of the actors- defendants, victims, witnesses, law enforcement officers, probation workers, judges, prosecutors, defense counsel, and administrators- must be defined with precision.⁸

³ JC Howel et al „Bulletin 5: Young Offenders and an Effective Response in the Juvenile and Adult Justice Systems: What happens, What should happen, and What we need to know (Study Group on the Transitions between Juvenile Delinquency and Adult Crime“ at 22 available on [www.https://ncjrs.gov/pdffiles/nij/grants/242935.pdf](https://ncjrs.gov/pdffiles/nij/grants/242935.pdf) accessed on 14 February 2015.

⁴ Ibid.

⁵ D John *The Juvenile Justice System: Delinquency, Processing and the Law* (2010) 6 ed, at 21.

⁶ G Cole, C Smith and C DeJong *The American System of Criminal Justice* (2014) 14 ed, at 696.

⁷ Institute of Judicial Administration and American Bar Association Commission on Juvenile Justice Standards „National Standards of Juvenile Justice: Summary and Analysis“ (1982) at 1 available on www.americanbar.org/content/dam/aba/migrated/sections/criminal_justice/PublicDocuments/JJ_Standards_Summary_Analysis.authcheckdam.pdf accessed on 14 February 2015.

⁸ Ibid.

As a result, the Institute has issued national standards for the roles of various actors in the administration of juvenile justice. The standards for prosecution were issued to guide prosecutors in their professional conduct in juvenile justice. The standards also provided for the conduct of prosecutors in the proceedings for the transfer of juveniles to adult court, in instances of violent offences.⁹ The IJA-ABA observed that the procedures and proceedings in the juvenile justice system had been altered by the introduction of due process guarantees, which caused the system to be more formal and to follow a set procedure in juvenile cases and therefore it was necessary „to create new guidelines and standards for the juvenile prosecutor“.¹⁰

The American prosecutor’s role as part of the professionals that work in the juvenile justice system¹¹ is also regulated by The American Bar Association’s Criminal Justice Standards for the Prosecution Function, 2014¹² (the ABA Criminal Standards for Prosecution). These standards guide the prosecutor’s conduct and performance in their duties within the traditional criminal justice system which also apply to juvenile justice.¹³

The prosecutor becomes involved when the child is referred to his/her office by the police or the probation officer (sometimes referred to as the intake officer).¹⁴ The prosecutor then has the discretion to decide whether or not to charge a child for delinquency or status offences, or to divert the child’s case.¹⁵ When a child is charged with committing an offence, the proceeding is regarded as a petition when it is filed in the family court.¹⁶ The petition may be filed by a prosecutor or any other person, such as a police officer or probation officer.¹⁷ The prosecutor may study the petitions already filed

⁹IJA -ABA Commission on Juvenile Justice „Standards on Prosecution“ (1970) at 3.

¹⁰Ibid.

¹¹SM Cox, J Allen and R Hanser *Juvenile Justice: A Guide to Theory, Policy and Practice* (2010) 7 ed, at 192.

¹²Fourth Edition.

¹³Standard 3-1.1 (b).

¹⁴John, note 5 above, at 31.

¹⁵ABA Criminal Justice Standards for Prosecution Function (2014), standard 3-4.2.

¹⁶ Children’s Law Office *The Family Court Process for Children Charged with Criminal and Status Offenses in South Carolina* (2006) at 1 available at <https://www.scbarr.org/public/files/docs/familycourt.pdf> accessed on 05 March 2015.

¹⁷ FE Zimring „The Treatment of Hard Cases in American Justice: In Defense of Discretionary Waiver“ (1990) 5 *Notre Dame Journal of Law, Ethics and Pub Policy* at 267.

by other people, such as the police or probation officer, in order to decide which cases warrant an appearance before the juvenile court judge.¹⁸ The prosecutor assesses the case to determine whether the facts and evidence contained can prove a case against a child¹⁹

Depending on the charge, the admission of responsibility by the child, the age and maturity of the child or whether or not he/she is a first time offender, the prosecutor may decide not to take further action and divert the matter if such diversion is considered in the interest of the child and the public.²⁰ In cases that the prosecutor deems serious, the child offender can be prosecuted. In cases such as murder and armed robbery, the prosecutor may apply for the judicial waiver to charge a child in the adult court, or use his/her prosecutorial discretion to file the child's case in adult court immediately.²¹

The prosecutor represents the state in all stages of proceedings in a juvenile case.²² She/he must maintain good relations with other stakeholders in the juvenile justice system and speedily dispose of the case.²³ The due process rights of the child offender are provided for in the juvenile courts as a means to ensure that the interests of the child are realized.²⁴ The prosecutor has to present admissible evidence before the court, which proves that the child in question committed the offence alleged. The child offender has the right to challenge such evidence, and then the prosecutor may cross-examine.²⁵

The prosecutor has a duty to take an active role in the adjudication of a juvenile case, including making applications for a juvenile's case to be transferred to adult court

¹⁸ John, note 5 above, at 35.

¹⁹ J Backstrom and GL Walker „The Role of the Prosecutor: Advocacy in the Courtroom and Leadership in the Community“ (2006) 32 (3) *William Mitchell Law Review* at 969.

²⁰ B Sims and P Preston *Handbook of Juvenile Justice: Theory and Practice* (2014) at 301.

²¹ D Neubauer and H Fradella *America's Courts and the Criminal Justice System* (2013) 11 ed, at 479; Backstrom and Walker, note 15 above, indicate that the prosecutorial discretion requires a prosecutor to be accountable for his/her decisions and must have legal expertise to make such informed decisions.

²² Backstrom and Walker, note 15 above, at 9; IJA-ABA Juvenile Justice Standards Relating to Prosecution (1979) at 7.

²³ ABA Criminal Justice Standards for Prosecution Function (2014), standard 3-1.9 and standard 3-3.3.

²⁴ See *In Re Gault* 387 US 1S.Ct 1428(1967) it was decided that the juveniles' rights to be informed of the charge against them, the right to legal representation and the right against self- incrimination should be realized to ensure their right to fair trial.

²⁵ Cole, Smith and DeJong, note 6 above, at 219.

(waiver or transfer hearings) where an application is made in court on whether or not to transfer a juvenile to the adult court to be dealt with as an adult during examinations of evidence and disposition of cases.²⁶ She/he must handle the child's case in a fair and sensitive manner to ensure that children, either the offender or witnesses, do not feel intimidated during examinations of evidence.²⁷ She/he can enter into plea negotiations with the defense.²⁸ Plea bargains may be discussed entered into with the consent of the victims but without coercing the child into admitting guilt for something in return.²⁹ The prosecutor has a duty to prove a case against a child offender beyond a reasonable doubt.³⁰ This is the standard used also in the adult criminal courts to be proved by the state (prosecutor). At the disposition of the case, the prosecutor is consulted and may suggest appropriate programs for the juvenile.³¹

The prosecutor also has a further role to recommend ways to dispose of a child's case.³² It is at the stage of conclusion of the case that his/her role differs from prosecutors involved in ordinary cases. She/he is required to consider the interests of the child offender and balance them against those of the community, when recommending a sentence. In deciding on sentencing recommendations, the prosecutor must not strive for the most severe penalty but must recommend one that will rehabilitate the child/young offender.³³ Once a child has been sent to a program as a sentencing measure or for rehabilitation, the prosecutor has a duty to periodically monitor the child, and where the program is adverse to the child's interest, the prosecutor must inform the court immediately.³⁴

The prosecutor has the duty to represent the state in an appeal or review where it has been instituted by a child.³⁵ The prosecutor has an obligation to consider whether the state's

²⁶Backstrom and Walker, note 15 above, at 10.

²⁷ Ibid.

²⁸Backstrom and Walker, note 15 above, at 10.

²⁹ Cole et al, note 6 above, at 219.

³⁰*In re Winship* 387 US 358, 90 S.Ct 1068 (1970).

³¹Backstrom & Walker, note 15 above, at 10.

³² Institute of Judicial Administration, (note 18 above), part VII.

³³IJA-ABA, note 18 above, at 5.

³⁴Ibid, standard 7.2 and B.

³⁵ Ibid, at 9 paragraph VIII.

interests would be compromised if she/he does not oppose the contention or even support the child's case.³⁶ Discretion is the essence for the role of juvenile prosecutors in that they handle cases upon their discretion which is informed by what is in the best interest of the youth while safeguarding the interests of the state. Legislative provisions have, however, limited the level of prosecutorial discretion in recent years, by introducing instances where a prosecutor should request a transfer a child's matter to adult court.³⁷

Prosecutors are significant part of the juvenile justice system and have a significant role in the administration of juvenile justice. The exercise of discretion is an integral part of the role of the prosecutors. They exercise discretion at the initial stage of intake of cases, in determining whether or not to prosecute or not to take action on a case, bearing in mind a variety of factors, including the interests of the child offender, the victim and the community. Their discretion is controlled by statutes, practice and policy which also ensure that they are accountable for the actions they take.³⁸ Lesotho can learn that the prosecutorial role is essential and efficient in the administration of justice.

The prosecutor's ability to review a case and consider circumstances of the child without undue interference enables such prosecutor to exercise his/her discretion on the way to handle a child's case. However, in the case of Lesotho, as indicated in chapter 3, the CPWA limits the discretion of the prosecutor by mandating the probation officer and the inquiry magistrate to recommend the action to be taken by the prosecutor in a child's case. This act obliterates that line between the separate duties of the magistracy, probation officer and prosecution. Lesotho can learn that where the exercise of discretion by prosecutors, can be curtailed by placing guidelines which prosecutors have to act in accordance with when deciding on an action against a child.

The role of the prosecutor in the US is recognized and acknowledged as an essential member of the juvenile justice system. This is in line with the international laws and standards.

³⁶IJA-ABA at 9.

³⁷Cox, Allen and Hanser, note 11 above, at 192.

³⁸Backstrom and Walker, note 1 above, at 10.

4.3 Roles of Prosecutors in the United Kingdom

The United Kingdom has a juvenile justice system which is referred to as the youth justice system.³⁹ The Youth Court is the court that primarily deals with cases of children who are aged between 10 and 17 years old as they are regarded as having criminal capacity.⁴⁰ Once a young offender goes to trial he/she gets in contact with the Youth Court which is a specialist court that is less formal.⁴¹ The youth justice system is regulated by various criminal justice statutes with the most specific being the Children and Young Persons' Act, 1933; the Crime and Disorder Act of 1998 and the Youth Justice and Criminal Evidence Act, 1999.

The youth offender's case can be sent to the Crown Court if the offence committed is a serious offence that would require a sentence that is above the jurisdiction of the Youth Court.⁴² The Crown Prosecution Service members appear in that court to present criminal cases. The Crown Prosecution Service (referred to as the CPS) is the governmental agency that prosecutes criminal cases and it is established by the Prosecution of Offences Act, 1985.⁴³ It is headed by the Director of Public Prosecutions who manages the Crown prosecutors.⁴⁴ These are qualified lawyers (solicitors and barristers) and they are guided in their work by the Code for Crown Prosecutors (referred to as the Code) which is established by the Director of Public Prosecutions and which may be amended as necessary.⁴⁵

A crown prosecutor's role starts upon receiving a criminal file or case from the police for perusal, to establish sufficiency of evidence that warrants a charge.⁴⁶ The cases referred

³⁹ It ratified the UNCRC on 16th December, 1991.

⁴⁰ D Massey *Children and Young People in the Youth Justice System: Report of Seminars organized by the All Party Parliamentary Group for Children* (2010), at 4; JM Jehle, C Lewis and P Sobota „Dealing with Juvenile Offenders in the Juvenile Justice System“ *Eur J Crim Pol Res* (2008) 14, 237 at 239.

⁴¹ Jehle, Lewis and Sobota, note 40 above, at 242.

⁴² I Blakeman „The Youth Justice System of England and Wales“ at 82 available at www.unafei.or.jp/english/pdf/RS_No78/No78_13VE_Blakeman.pdf accessed on 01 March 2015.

⁴³ 1985, see section 31 and section 1(1).

⁴⁴ Ibid, section 1 (1)(a).

⁴⁵ Ibid, section 1(1)(a), 1 (1)(3) and section 10; Code for Crown Prosecutors (January 2013) section 1(4).

⁴⁶ Section 29 of the Criminal Justice Act 1998.

by police include those of young offenders, which are persons below 18 years of age.⁴⁷ In handling cases of youth offenders, the crown prosecutor does not have to prove the criminal capacity of the youth offenders who are aged between 10 and 14 years.⁴⁸ In youth justice, the prosecution service has the role of, amongst others, „safeguarding child offenders by maintaining high standards and expedition in advice, decision-making in relation to prosecution or diversion, case preparation and advocacy“.⁴⁹ The prosecutor, in deciding on an action to take, should assess whether the evidence in the case is sufficient to prove a case against the child and whether the public interest requires prosecution.⁵⁰ In assessing the public interests the prosecutor must also consider the interests of the youth offender, such as his/her family background.⁵¹ The credibility, reliability and admissibility of the evidence should be evaluated to establish the sufficiency of the evidence for prosecution.⁵²

Crown prosecutors review the cases of youth offenders when they are referred to the CPS.⁵³ The prosecutor that is primarily charged with the duty to make decisions in the cases of youth offenders is the Youth Offender Specialist, who is an experienced and skilled lawyer in youth offender practice and procedures. He/she must be a senior prosecutor who has volunteered for the job and shown interest in youth justice.⁵⁴ The other crown prosecutors have to consult the Youth Offender Specialist when making the initial decisions whether or not to prosecute or divert youth offenders. The prosecutor’s decision whether or not to prosecute can be reviewed by the courts where it can be

⁴⁷Section 117 of the Crime and Disorder Act, 1998; Blakeman, note 41 above, at 80.

⁴⁸J Muncie „Institutionalized Intolerance: Youth Justice and the 1998 Crime and Disorder Act“ (1999) 19 *Critical Social Policy* 147 at 154; E Carrabine „Youth Justice in the United Kingdom“ at 15 available at www.projects.essex.ac.uk/ehrr/V7N1/Carrabine.pdf accessed on 05 March 2015.

⁴⁹Her Majesty’s Crown Prosecution Service Inspectorate *Safeguarding the Children: A Second review of the role and contribution of the Crown Prosecution Service to the safeguarding of children* (2008), at 2.

⁵⁰ The Code for Crown Prosecutors (2013), section 4.7 (d).

⁵¹Section 4.

⁵²Section 5.

⁵³Crown Prosecution Service Guidance on Youth Offenders available at www.cps.gov.uk/legal/v_to_z/youth_offenders/index.html accessed on 14th February, 2015.

⁵⁴ Ibid.

proved that the interests of the youth offender were not taken into consideration, such as his/her personal circumstances and family background.⁵⁵

Although a youth offender's case is normally heard in the youth court, the crown prosecutor may recommend the court which a youth offender should be tried in depending on the seriousness of the charge and the circumstances of the case. Where a child is accused with an adult, the case can be tried in the magistrate or crown court. Although the proceedings in the youth court or crown court where a youth offender is being tried are informal, the prosecutor has the role of representing the crown in the proceedings. She/he should make opening addresses; lead evidence and challenge the evidence of the defense.⁵⁶ The prosecutor also addresses the court on bail issues, examines witnesses and makes applications as in the adult criminal courts.⁵⁷

Where the prosecutor considers diverting the youth offender's case, the public interest, the best interests and welfare of the youth offender as well as the impact that a prosecution may have on a youth offender's life have to be considered.⁵⁸ The CPS has established guiding rules in the performance of their duties as they relate to youth justice, as well as to inform how they should prosecute cases of children in the Youth Court and the Crown Court. The crown prosecutor can authorize a youth conditional caution, when there is evidence that the youth has committed the offence and she/he admits to committing it.⁵⁹ The youth conditional caution can be authorized even where a youth offender has been charged in the youth or crown court.

The prosecution roles of crown prosecutors in the youth justice system are provided for in the legislation that regulates youth justice in the UK. These legislation guides the decisions of the prosecutors on handling cases of youth. The role of the prosecutor is

⁵⁵Lawyers Network Group „When is it in the Public Interest to Prosecute a Child“ (03 October, 2012) at Savailable at www.howardleague.org/fileadmin/howard_league/user/pdf/Legal/Lawyers_Network_event_handout.pdf accessed on 02 March 2015.

⁵⁶M Hannibal and L Mountford *Criminal Litigation Handbook 2014-2015* (2014) 431.

⁵⁷Jehle, Lewis and Sobota, note 40 above, 243.

⁵⁸Note 22 above, section 7; Hannibal and Mountford, note 56 above, at 418.

⁵⁹Section 66A to H of Crime and Disorder Act, 1998.

informed by legislation and rules which aim at preventing harm to young people that come into contact with the criminal justice system and prevent re-offending. Although their decisions are not influenced by any agency from outside the CPS, they work effectively with others, such as the police, and their decisions can be challenged. This ensures accountability in that the prosecutor has to show the factors that were taken into account when making a decision and how they were balanced against the interests of the child.⁶⁰

The role of the CPS is similar to the traditional role that prosecutors in Lesotho exercised in the repealed Act. The prosecution's role in the UK is clearly different from the police and the magistracy, as in the US. Lesotho can learn that the prosecutor in the youth justice system is essential to ensure the efficient and speedy administration of justice. The prosecutors have to be guided by codes or rules to regulate their role in juvenile justice as opposed to being limited in the performance of their duties. The regulatory measures, such as policies and codes that guide the work of the CPS are a learning example that Lesotho can adopt to improve the performance of its prosecution service. This ensures that separate agencies are left to perform their roles while working together efficiently with clear channels of communication to safeguard the interests of the youth offender and maintain the objectives of the youth justice system.⁶¹

4.4 Roles of Prosecutors in the Republic of South Africa

The Republic of South Africa has ratified the UNCRC and has acted in accordance with its obligations as a State Party to implement the provisions of the international instrument locally.⁶²The Constitution of the Republic of South Africa, 1996 (referred to as the Constitution) is reflective of the provisions of the UNCRC where children's rights are provided for in its own section 28. Section 28 (2) requires that all matters that concern a child should be decided upon in the best interests of the child which should be of

⁶⁰Lawyers Network, note 55 above, at 7.

⁶¹The CPS Guidance on Youth Justice.

⁶² P Mahery „The United Nations Charter on the Rights of the Child: Maintaining its Value in International and South African Law“ in T Boezaart (ed) *Child Law in South Africa* (2009)309 at 323; UNCRC was ratified on the 16th June, 1995.

paramount importance. Children in conflict with the law are treated according to the rights outlined in the Constitution in sections 28 (1) (g) and section 35.⁶³ The child in conflict with the law is guaranteed the right to remain silent; to be informed immediately of the charge/reason for his or her arrest; right to challenge evidence against him/her and the right to legal representation, among other principles.⁶⁴

In observing its international obligations RSA established a child justice system which deals exclusively with children in conflict with the law, in compliance with article 40 (3) of the UNCRC which mandates States Parties to establish laws, courts, procedures and institutions to administer child justice.⁶⁵ This child justice system is currently regulated by the Child Justice Act 75 of 2008, which has created a legislative framework with new processes and procedures that are unique to children in conflict with the law.⁶⁶

The Constitution provided for a National Prosecuting Authority to be established by an Act of Parliament.⁶⁷ The National Prosecuting Authority Act 32 of 1998 (referred to as the NPA Act) was forthwith enacted to establish the National Prosecuting Authority (referred to as the NPA) which is the one authority that has the mandate to prosecute cases in the Republic of South Africa.⁶⁸ In turn, the NPA compiled the Code of Conduct for Members of the Prosecuting Authority which regulates the work of the NPA. The NPA has the obligation to institute criminal proceedings in respect of a docket received from the police where there is sufficient admissible evidence to prove a case against an accused person, „unless a compelling reason exists“ not to do so.⁶⁹

⁶³ A Skelton „Constitutional Protection of Children’s Rights“ in T Boezaart (ed) *Child Law in South Africa* (2009) 265 at 287.

⁶⁴Section 35 and 28(1)(g) of the RSA Constitution.

⁶⁵ J Gallinetti „Child Justice in South Africa: The Rights of Children Accused of Crime“ in T Boezaart (ed) in *Child Law in South Africa* (2009) 635 at 648.

⁶⁶C Badenhorst „Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008)“Criminal Justice Initiative Occasional Paper 10(2011) at 9.

⁶⁷ J Redpath „Failing to Prosecute: Assessing the State of the National Prosecuting Authority in South Africa“ *ISS* (2012) Monograph Number 186 at 4.

⁶⁸Section 179 of Constitution, 1996.

⁶⁹Redpath, note 67 above, at vi; I Matthews „5-The National Prosecuting Authority“ 98 at 100 available at www.issafrika.org_crimehub_uploads_cich.pdf accessed on 15th October, 2014.

In acknowledgement of the role of the NPA as crucial in the criminal system, the Child Justice Act provides for „the issuing of regulations regarding any matter to be prescribed by regulation or any other matter which is necessary or practical to prescribe in order to achieve the objects of the Act“.⁷⁰The NPA issued the Child Justice Act (75 of 2008): Directives in terms of section 97 (4) (referred to as the Directives)⁷¹ in order to „provide for and promote the use of uniform norms, standards and procedures“ which serve as a guideline to ensure sensitive proceedings in child justice cases.⁷²

The Directives of the NPA provide guidance for the role of the prosecutor in child justice. Once the prosecutor receives a child’s case (in a form of a docket) she/he has the duty to consider the action she/he is to take in a child’s case. The prosecutor can divert a child’s case where a child has committed an offence and the evidence in the docket is sufficient to prove that the child committed the crime. Conditions may be imposed if a child is diverted.⁷³ It emphasizes the need for the consent of a prosecutor in diverting a child where there is prima facie case and such a child is above 10 years but younger than 18.⁷⁴ The responsibility to decide on diversion cannot be renounced by prosecution but she/he can choose not to divert a case but rather to prosecute, without giving reasons.⁷⁵In Lesotho, the prosecutor should give reasons for deciding not to divert a child’s matter in contrast to a probation officer’s recommendations.⁷⁶

The South African prosecutor receives the compliance report from the probation officer when a child has completed the diversion programme. She/he has the duty to file the report with the clerk of the child justice court as well as to keep a copy in the police docket.⁷⁷ The prosecutor can divert a case at any stage of the proceedings if she/he considers in the interests of justice and the child offender.⁷⁸

⁷⁰ Child Justice Act (75 of 2008): Directives in terms of section 97(4), directive B1.

⁷¹ Ibid.

⁷² RB Brink *The Child Accused in the Criminal System*(Unpublished thesis: Nelson Mandela Metropolitan University, 2010); Section 97(4)(e) of the Child Justice Act.

⁷³Directive F3.

⁷⁴Directive F.

⁷⁵Directive F (2).

⁷⁶Section 130 (2) of the CPWA.

⁷⁷Directive F(10).

⁷⁸Directive G.

Children who are aged between 10 years and 14 years at the time they are alleged to have committed a crime are presumed to lack criminal capacity unless the prosecution proves beyond a reasonable doubt that they appreciated the wrongfulness of their act and acted accordingly.⁷⁹ The prosecutor has the role to represent the State, by presenting cases and challenging the evidence of the defense in the proceedings of the Child Justice Court. In cases where the prosecutor decides that the criminal capacity cannot be proved she/he should withdraw the charges and refer the child to probation.⁸⁰ Children that are aged 14 years and older when committing a crime are regarded to have criminal capacity hence they can be prosecuted.

The decision to prosecute demands that the prosecutor should consider factors such as, the child's background, education level, age and family environment, the prospects of establishing criminal capacity, in terms of section 11, if the matter were to be referred to a preliminary inquiry in terms of chapter 7; the appropriateness of diversion and any other relevant factor.⁸¹ This provision is a measure of protection for children which regulates decisions of the prosecutor to prosecute.⁸² Some of these factors resemble the requirement in Lesotho's CPWA.

Where the prosecutor has decided not to divert or not to take prosecute, a preliminary inquiry should be held and the prosecutor has to attend.⁸³ The inquiry is held to determine a child's age and criminal capacity, possible diversion and to hear the views of the victim. The prosecutor has a mandate to present all the necessary information about the offence alleged, including the views of the victim where diversion may be considered.⁸⁴ The prosecutor should receive the assessment report from the probation officer before the inquiry and she/he should study the information and request further information, where

⁷⁹Section 7 (2).

⁸⁰Section 9; C Badenhorst (note 66 above) at 20; Prosecution policy directive (note 47 above) directive L (2).

⁸¹ J Gallinetti *Getting to know the Child Justice Act* at 18-19.

⁸² M McGregor *An Evaluation of the Child Justice Act* (unpublished LLM thesis, Nelson Mandela Metropolitan University 2010) at 24.

⁸³Directive H (2) and section 43 of the Child Justice Act.

⁸⁴Directive H (3) and (4).

necessary, in order to present it to the child court.⁸⁵The evidence has to be led before court and examinations of evidence be held. Child offender's cases should be concluded as speedily as possible.

Lesotho's provisions on the nature and objectives of the preliminary inquiry resemble the Child Justice Act in that both laws envisage an informal and inquisitorial pre-trial procedure which should be held in a court or any suitable place within which such a child is alleged to have committed the offence, in the presence of the inquiry Magistrate, the prosecutor, the probation officer, the child and his/her parent, guardian or appropriate person.⁸⁶ The purpose of the inquiry in both contexts is to consider the probation officer's assessment reports (both age and social assessments), his/her criminal capacity and to determine how his/her case should be dealt with.⁸⁷As in Lesotho, the prosecutor, per the Child Justice Act, forms part of the people to attend the preliminary inquiry where the magistrate asks questions and elicits information to ensure the circumstances of the child are taken into consideration and the ideal process to be taken.⁸⁸

In the South African context the prosecutor has an active role in the preliminary inquiry.⁸⁹The prosecutor also represents the State in the bail application and argues for or against the granting of bail. The directives guide the prosecutorial decisions on how prosecutors may release children accused with schedule 1 offences on bail, after consultation with the investigating officer.⁹⁰ The prosecutors therefore have the discretion to decide on how to deal with a child offender's case, such as dispensing with the assessment of a child where it was not held, if it is considered in the best interest of the child to do so.⁹¹Dispensing with the assessment requires the prosecutor to give reasons which should be recorded in the record of proceedings by the Inquiry Magistrate.

⁸⁵Directive H (4).

⁸⁶Section 43 of the Child Justice Act and section 106 and 107 of the CPWA.

⁸⁷Section 106 of CPWA and section 43 of the Child Justice Act.

⁸⁸Ibid.

⁸⁹Directive H (3).

⁹⁰Directive O (1).

⁹¹Section 41 (3) of the Child Justice Act and Directive G(3).

The inquiry magistrate in Lesotho, however, has the authority to instruct a prosecutor to refer a child to the probation officer for social assessment.⁹² The final determination of whether or not to dispense with social assessment wholly lies with the inquiry magistrate. This indicates that the prosecutors in South Africa are not subject to instruction of the other agencies unlike in Lesotho where the decision of the prosecutor can be overruled by the magistrate.

The South African prosecutor has to consent to diversion of a child's matter. She/he has the authority not to divert a case and is not obliged to give reasons for such non-diversion.⁹³ However, such reasons for not diverting should be written in the investigation diary of the docket.⁹⁴ The inquiry magistrate should record such prosecutor's confirmation not to divert and inform the child that the matter is being referred to the Child Justice Court.⁹⁵ These provisions promote the individual professionals' roles in child justice without interference from either agency by complementing each other's role. In Lesotho, on the other hand, the prosecutor does not have authority to dispense with the assessment of a child or not to divert a child's case without giving reasons for such a decision in writing.⁹⁶ She/he has to justify non-diversion to the inquiry magistrate.

Where a decision is taken to prosecute a child, section 63 of the Child Justice Act prevails. Upon completion of the preliminary inquiry, if the child is not diverted, he/she will be referred to the child justice court.⁹⁷ The prosecutors have the duty to ensure that children's cases are speedily disposed of.⁹⁸ Although it is the duty of the court to inform the child of the charge against him/her as well as about how the proceedings are going to be carried out, the prosecutor has a duty to remind the court of its obligations should the court neglect to inform the child.⁹⁹ The prosecutor also has the duty not to unfairly

⁹²Section 109 (2).

⁹³ Section 47 (9) (a) and (b)

⁹⁴ Directive F (4).

⁹⁵Section 47 (9) of the Child Justice Act.

⁹⁶Section 130 (4) of the CPWA.

⁹⁷ The Regional or High Court can also sit as a child justice court depending on the circumstances of a child's case.

⁹⁸ Prosecution Policy Directives, (note 47 above) directive O (3).

⁹⁹Prosecution Policy Directives, O (4).

subject a child to hostile cross-examine and he/she must object to any other party's hostile examination of such a child, as an officer of the court.¹⁰⁰ Ultimately, the failure of the prosecutor to act in compliance with the Directives will result in a disciplinary action being taken against him/her.¹⁰¹

The RSA juvenile justice system, though informal and child-sensitive, has preserved the role of the prosecutor where a criminal offence has been committed. The Child Justice Act indicates the extent to which the laws of criminal procedure and evidence apply in as far as children's cases are concerned. It further mandates the NPA to issue directives which will regulate the work of the NPA in relation to juvenile justice. This is an initiative that can be applied in Lesotho to ensure that administration of juvenile justice is efficient for child offenders.

4.5 Conclusion

The juvenile justice systems discussed in this chapter recognize the child offender as a person whose interests and welfare should be taken into consideration when dealing with his/her case. Since all the discussed countries have criminal justice systems that are adversarial in nature and that recognize the prosecutor as an integral part of their systems, the due process guarantees are therefore afforded children in conflict with the law. The roles of prosecutors in each of the countries are first provided for within domestic legislation, such as criminal procedure and evidence statutes, and further regulated by a code (UK), directives (RSA) or standards (USA).

The existence of a provision that mandates the establishment of guidelines, codes or standards within the primary legislation ensures that the prosecutors have a clear view of how to perform their roles in juvenile justice. The existence of the codes or guidelines creates a measure of control for prosecutors in the execution of their duties. For example, the practice in the UK that a prosecutor's decision whether or not to prosecute can be

¹⁰⁰Ibid, O (5).

¹⁰¹Directive O (T).

reviewed where it is shown that the interests of the youth offender were not considered can be seen as a form of monitoring the decisions of the prosecutor.¹⁰²

Further the countries have factors outlined in their guidelines, codes or legislation to aid them in their decision-making on the action to take in a juvenile justice case. The UK mandates that the prosecutor should clearly indicate how she/he considered the factors to balance the interests of the child and the public. These factors aid prosecutors to get to a reasonably informed decision which can be justified.

Generally, the office of the prosecution in any jurisdiction is vested with the power to decide whether or not to prosecute a case where she/he finds the evidence sufficient and admissible. This decision, in all compared countries, is done by the prosecutor without the recommendation of any other agency, but duly assisted by the information from probation officers on the social background of the child. The prosecutor is therefore valued as a separate participant in the criminal process, with a distinct and important contribution to make. The work of each of these agencies cannot be effective without a collaborative effort. The youth justice system in UK is an example of collaborative team work that aims at benefiting the youth offender.

In the three jurisdictions that have been examined above, the roles of prosecutors as provided in legislation and various guidelines are adequately observed and cross-referenced in order to establish clarity on the relationship between the application of the ordinary law and child justice law. This enables the concerned professionals to apply relevant laws and ascertain their role in juvenile justice cases. The prosecutors are clearly identified and given recognition as the „gatekeepers“ in the criminal justice system in these three jurisdictions.

Lesotho can learn from these countries that the role of the prosecutor in the juvenile justice is essential and that the active involvement of prosecutors in juvenile justice cases needs not diminish the child-friendliness of the criminal justice system. The discussion in

¹⁰² See part 4.3 above.

this chapter established that the prosecutor is not only limited to presenting evidence in court against an offender. She/he has a substantial role from the time she/he first gets notice of a child's case until at sentencing stage, where she/he can facilitate for diversion of child having considered the social aspects and criminal capacity of such a child. There is recognition of the importance of prosecutorial discretion, and where there is fear of abuse of that discretion, measures were put in place to monitor or regulate the exercise of that discretion.¹⁰³

¹⁰³ See discussions on the UK and US above.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The objective of this study was to evaluate the role of public prosecutors in the administration of juvenile justice as provided for in the Lesotho's Children's Protection and Welfare Act No7 of 2011, in the light of the international standards relevant for defining the role of prosecutors in juvenile justice, and against the objectives of the CPWA itself. Lesotho's ratification of the UNCRC and the ACRWC was an indication of its commitment to observe these international standards. For children in conflict with the law, States Parties are required to establish a specialized system of juvenile justice or to incorporate the principles of the administration of juvenile justice into an already existing system.¹ The system of juvenile justice should be guided by the principles of non-discrimination,² the best interests of the child,³ and the child's right to fair trial, which is necessary in order to respect the child's dignity and worth.⁴

The International laws and standards that relate to the role of prosecutors in the administration of juvenile justice were discussed in chapter two to identify the requirements of the international standards in this regard. Article 40 (3) of the UNCRC mandates States Parties to establish procedures, legislation, codes for professionals in the juvenile justice system and institutions that serve the interests of children. The legislation that establishes the juvenile justice system should encompass clear norms, procedures, codes, policies and establish specialized institutions or units of professionals to work with children in conflict with the law.⁵ As prosecutors are the important actors in criminal cases, they have the final decision on how to deal with a child offender's case in the pre-trial phase. They also have the responsibility to ensure that the child offender is handled in a manner that is respectful of his/her human rights and his/her due process rights.

The administration of juvenile justice calls into action a multidisciplinary approach where professionals from the justice sector work together to ensure an effective and efficient

¹C Hamilton *Guidance for legislative reform on juvenile justice: Guidance paper* (2011) at 3.

²Article 2 of the UNCRC.

³ Article 3 of the UNCRC; article 4 of the ACRWC.

⁴Article 40 (1) of UNCRC.

⁵ Hamilton, note 1 above, at 10.

system that is beneficial and not harmful to children in conflict with the law. However, the law has to be clear on what role each member of a multidisciplinary team is to play. The international standards and laws require that the professionals, including the prosecutor, working within the administration of juvenile justice should be qualified in child related issues and should have the experience, competence and character to handle accused children in a manner that avoids causing harm to the child.⁶

The countries discussed in chapter 3, the USA, UK and RSA, all have set laws or policies in place to direct prosecutors in their work. They have also setup monitoring and evaluation mechanisms to monitor the performance within each of their juvenile justice system.⁷ Lesotho has to do the same to ensure ultimate protection of children in its juvenile justice system.

The CPWA limits the role of the prosecutors by providing for the prosecutor to receive the information of the case from the probation officer. From how the CPWA is drafted, it can be assumed that the prosecutor in Lesotho does not have the freedom to study the case in order to assess the evidence and decide whether or not to take action in the case on his/her own initiative. She/he acts upon recommendation of the probation officer which in essence suggests that the prosecutor no longer liaises with the police as it was the practice in the old criminal system. This further limits the prosecutorial role in verifying the legality of the procedural steps taken so far, such as the arrest of the child and admissibility of evidence and how it was obtained.

Currently Lesotho does not have a provision within the CPWA that mandates the stakeholders, specifically the prosecutions offices, to have a policy, codes or guidelines to inform their work in relation to children. This may result in inconsistencies in how each prosecutor approaches juvenile justice cases. Hamilton indicates that a Statute being a primary legislation does not contain details of the procedures and processes to be carried

⁶ Hamilton, note 1 above, at 4 and 13; the Committee on the Rights on the Child, General Comment No 10 (2007) *Children's Rights in Juvenile Justice*, at para 10; see discussion in chapter 2.

⁷ USA has numerous institutions, including the American Bar Association and juvenile justice institute; The UK has the youth offending teams and youth justice board as well as the Director of Public Prosecution who reports to the Attorney General; The RSA monitors its administration of juvenile justice by the National Director of Public Prosecutions making annual submissions to parliament on the performance.

out in juvenile justice, but that such finer details can be dealt with in the secondary legislation, such as „codes of conduct, regulations and operational rules for the prosecutors“.⁸ Admittedly, the lack of a prosecutorial policy or an act that informs the work of the prosecution is a hurdle that needs to be solved in order to bring uniformity in the work of individual prosecutors as well as to ensure their accountability and to monitor prosecutorial efficiency.

An inquiry into a child’s personal and social situation is central to juvenile justice⁹ for purposes of diversion or restorative justice of children in conflict with the law, some will be prosecuted and some will not. For those that will face prosecution it is in their best interests that the prosecutors are well aware of their obligations, how to discharge such obligations and the factors to take into consideration when deciding to take action in a child's case. If the prosecutions’ mandate and roles are clear, then it would become easy to monitor such cases and regulate the role of prosecutors to ensure uniformity in handling such cases.

The progression of the case from when the offence is investigated and referred to the prosecution will be lengthy due to the requirements that have been introduced by the CPWA. The limited resources, human and financial, in Lesotho and the geographical terrain will mostly hamper the completion of the age and social assessments before anticipated period of 48 hours within which a child should be presented to an inquiry magistrate.

The Constitution of Lesotho provides for the basic rights of personal liberty and the presumption of innocence in criminal matters and speedy trials.¹⁰ Steyn P in *DPP and another v Lebona*¹¹ pronounced that

the Constitution of Lesotho has, in clear terms, guaranteed that any person charged with a criminal offence shall be afforded a fair hearing within a reasonable time, by an independent and impartial court established by law in terms of section 12 (1) . This articulated principle is given practical

⁸ Hamilton, note 1 above, at 7.

⁹ The International NGO Council on Violence against Children „Creating a non-violent Juvenile Justice System Report (2013) at 14.

¹⁰ Section 22 of 1993 Constitution; The due process guarantees and speedy disposal of cases are also reflected and regulated by the Speedy Court Trials Act.

¹¹ LAC (1995-1999) 474 at 476.

content by the enactment of section 22 in which the Constitution sets out provisions dealing with how the fair trial is to be enforced.¹²

The enforcement of fair trial goes hand in hand with the application of rules of evidence. The concern is whether the desired informality of proceedings in a children's court will have any bearing on the rules of evidence. The concern is raised because the CPWA does not recognize the applicability of the existing criminal procedure and evidence laws which could be applied together with the CPWA. This silence could cause confusion for practitioners as to how to carry out their duties that relate to criminal procedure and evidence.

The CPWA introduces an inquisitorial system where the magistrate in Children's Court proceedings takes an active role in both the preliminary inquiry and in the trial. However, the problem is that Lesotho's justice system is an adversarial one, where the magistrate hears the submissions from the prosecution and defense in order to make a decision. Under the CPWA, the magistrate „may actively participate in eliciting evidence from any person involved in the proceedings“.¹³ The manner in which the role of the magistrate is provided in the CPWA undermines the role of the prosecutor to represent the Crown in a criminal case, especially in instances where the magistrate might ask questions that benefits either of the parties.¹⁴

The countries that have been discussed herein clearly have legislation and practice that place a responsibility on their prosecution service to empower its members by training and obligates them to commit to delivering a suitable specialized child justice system by putting guiding principles or codes in line with the requirements of the international standards. Lesotho ought to learn from these countries, and mandate the Office of the DPP to ensure that its prosecutors are empowered and their juvenile justice work is duly guided by an official document. This would be in compliance with UNCRC requirement for the States Parties to put measures in place, such as procedures, rules and regulations,

¹²Section 22(1) and (2).

¹³Section 138 of the CPWA.

¹⁴ The Acting judge in *R v MalefetsaneMohlomi* Review case No 06/2013 at para 104, views this act of the Inquiry Magistrate of taking part in determining evidence against a child as blurring the lines of separation between the role of judiciary and law enforcement agencies.

to monitor the performance of the various agencies in the administration of juvenile justice.¹⁵

Since the objective of the UNCRC is to treat children who are in conflict with the law in a milder manner as opposed to adults, it is imperative for prosecutors to be given training on the principles and guidelines on juvenile justice and child development in order to empower them to deal with children's cases in a manner that will not encourage recidivism and will lower the case load of criminal cases. The perceived active role that prosecutors take will ensure the community that their interests are taken care of and it puts in place a form of monitoring of the criminal justice system where the police, probation officers and magistrates do not dispose of cases without the prosecutors authority or consent.

5.2 Recommendations

Ideally the legislation that establishes juvenile justice systems should indicate how a child's interests should be considered when a decision is made whether or not to divert a child, or to prosecute, as well as the procedures that should apply during any proceedings that involve a child.¹⁶ If the provisions of the law are clear and elaborate then that would enable prosecutors to act within the standards and guidelines of the administration of juvenile justice.

In an attempt to achieve a juvenile justice system that will protect the interests and welfare of child offenders in Lesotho, it is recommended that the CPWA should be amended to indicate the extent of application of the relevant provisions of the Criminal Procedure and Evidence Act, 1981. This amendment would empower the prosecutors to carry out their normal role in criminal cases. It is therefore recommended that the CPWA be amended to re-evaluate and indicate clearly the role of prosecutors in the administration of juvenile justice in order to comply with international requirements of

¹⁵ Hamilton does indicate that „legislation that conforms to the international standards, but is impossible to implement, does little and may even be counter-productive in some respects“; note 1 above, 4.

¹⁶ The Committee on the Rights of the Child, note 2 above), para 10.

putting laws, codes, specialized units and institutions in place to deal with the child in conflict with the law.¹⁷

The prosecution office should be mandated to review the Draft Code of Prosecutors and amend it to include the rules of practice relevant for prosecutors in administration of juvenile justice. The measures to be taken when diverting a child's case should be outlined in the Code. The Draft Code should be given the necessary authority to come into force and be binding on prosecutors. A national policy on juvenile justice should be made for stakeholders in the administration of juvenile justice to inform any professional on how to work with children in conflict with the law. It is therefore recommended that an action plan or guidelines for prosecutors in the juvenile justice system should be established. Such a guideline would complement and seek to achieve the objectives of the CPWA related to the administration of juvenile justice.

Further just as the CPWA provides for a presiding officer of a Children's Court to be a Resident Magistrate (a senior magistrate), with children's rights training, it is desirable for a senior prosecutor who has the relevant skills, training and experience to handle cases of children. When senior prosecutors get involved they have wider authority and therefore can make decisions quicker since they do not need to require permission from hierarchically superior prosecutors.

¹⁷Article 40(3) of UNCRC.

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UNIVERSITY OF
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18 August 2014

Advocate Bothobile Shebe (212556129)
School of Law
Howard College Campus

Protocol reference number: HSS/0976/014M

Project title: An evaluation of the role of prosecutors in Lesotho's Children's Protection and Welfare Act No. 7 of 2011

Dear Advocate Shebe,

Full Approval – No Risk / Exempt Application

In response to your application dated 31 July 2014, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol have been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

.....
Dr Shenuka Singh (Chair)

/ms

Cc Supervisor: Meda Couzens
Cc Academic Leader Research: Dr Shannon Bosch
Cc School Administrator: Mr Pradeep Ramsewak

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