



Second Year of
The Child Justice Act's
Implementation:
Dwindling Numbers

A RESEARCH REPORT BY
CHARMAIN BADENHORST

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Information contained in this publication is specifically on the second year of implementation of The Child Justice Act. In particular, the information contained in this report does not constitute legal advice.

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1. Introduction

The Child Justice Act, 2008 (Act 75 of 2008)¹ (hereinafter referred to as “the Act”) was implemented on 1 April 2010, after more than a decade of lobbying, advocating, debating and discussions. In terms of section 96(3) of the Act the Minister of Justice and Constitutional Development must, after consultation with the Ministers of Police, Correctional Services, Social Development, Education and Health submit annual reports on the implementation of the Act.

On 22 June 2011 the Annual Report on the first year of implementation of the Act, was presented to Parliament by the Department of Justice and Constitutional Development, on behalf of all relevant Government Departments and Institutions referred to in section 94(2) of the Act.²

A report highlighting some of the challenges experienced during the first year of the implementation of the Act was also presented to Parliament on this date, on behalf of the Child Justice Alliance.³

Some of the challenges identified in the latter report are in the process of being addressed (such as the lack of transport guidelines which have been drafted but not finalised and the lack of uniformity of official forms used by the courts which have been workshopped by magistrates in an attempt to develop pro forma forms to be used by all courts), other challenges remain. The National Operational Inter-sectoral Child Justice Steering Committee⁴ responded positively to a briefing on the minimum age of criminal capacity by the Child Justice Alliance, but the Department of Justice has not yet embarked on the process of research required by the Act in terms of section 8 of the Child Justice Act (review of minimum age of criminal capacity within

1 Available at http://www.centreforchildlaw.co.za/images/files/childlaw/child_justice_act_2008.pdf Accessed on 20 April 2012.

2 Department of Justice and Constitutional Development. 2011. Annual Report on the Implementation of the Child Justice Act, 2008 (Act 75 of 2008). Available at <http://www.pmg.org.za/report/20110622-joint-meeting-implementation-child-justice-act> Accessed on 17 April 2012.

3 Badenhorst, C. 2011. Overview of the implementation of the Child Justice Act, 2008 (Act 75 of 2008). Good intentions, questionable outcomes. Occasional Paper 10. Open Society Foundation for South Africa. Available at http://www.osf.org.za/File_Uploads/docs/CJIOccasionalPaper10.pdf Accessed on 20 April 2012.

4 Section 94(1) of the Act provides for the establishment of the Intersectoral Committee for Child Justice which must have representation from the Heads of the various Departments tasked with the implementation and application of the Act. This Committee is therefore referred to as the Directors-General Intersectoral Committee for Child Justice. A National Operational Intersectoral Child Justice Steering Committee was established by the Directors-General Intersectoral Committee for Child Justice to ensure early detection of and swift action against operational challenges experienced by the various Departments involved in the implementation of the Act.

5 years of the Act coming into operation). Furthermore, the decrease in the number of children being brought into the system, and the concomitant drop in the number of diversions remains a challenge, and has a very negative impact on the overall implementation of the Act.

This report will focus on three (3) themes and will highlight the impact and the effects that some of the theme - related challenges have had on the overall implementation of the Act.

The three themes are:

- (1) Diversion (including the accreditation process, the continuing decrease in the number of diversions, the impact thereof and other diversion-related challenges),
- (2) The sentencing of children to compulsory residence in Child and Youth Care Centres (including the availability of facilities, the challenges being experienced in the handing over of reform school and schools of industry facilities to the Department of Social Development and related issues), and
- (3) One Stop Child Justice Centres (including the implementation of the Act at these Centres).

2. Diversion

2.1 Background

One of the objectives of the Act is to prevent and limit children's exposure to the adverse effects of the formal criminal justice system. The Act therefore encourages and promotes increased usage of diversion in suitable cases and provides a legislative framework for the consideration, application, different diversion options, consequences and monitoring of the diversion process. In terms of the provisions of the Act all cases maybe considered for diversion, irrespective of the nature or seriousness of the offence. Diversion may even be considered in suitable cases where a child offender has a record of previous diversions. A matter may be considered for diversion if:

- The child acknowledges responsibility for the offence;
- The child has not been unduly influenced to acknowledge responsibility;
- There is a prima facie case against the child; and
- The prosecutor indicates that the matter may be diverted (schedule 1 and 2 offences) or the Director of Public Prosecutions (schedule 3 offences). In the case of schedule 2 and 3 offences the views of the victim or any person who has a direct interest in the affairs of the victim and the police official responsible for the investigation of the matter should be taken into account, where it is reasonably possible to do so.

The objectives of diversion are to:

- deal with a child outside the formal criminal justice system in appropriate cases;
- encourage the child to be accountable for the harm caused by him or her;
- meet the particular needs of the individual child;
- promote the reintegration of the child into his or her family and community;
- provide an opportunity to those affected by the harm to express their views on its impact on them;
- encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;
- promote reconciliation between the child and the person or community affected by the harm caused by the child;
- prevent stigmatising the child and prevent the adverse consequences flowing from being subject to the criminal justice system;

- reduce the potential for re-offending;
- prevent the child from having a criminal record; and
- promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society.

Diversion may be considered at various stages in the child justice system:

- by the prosecutor before the preliminary inquiry (for schedule 1 offences);
- during the preliminary inquiry; and
- during the proceedings in the child justice court at any time before closure of the case for the prosecution.

2.2 Diversion Service Provider and Diversion Programme Accreditation Process and Challenges

2.2.1 Background

Section 56(2)(a) of the Act requires that the Minister of Social Development must, in consultation with the Ministers of Justice and Constitutional Development, Basic Education, Police, Correctional Services and Health create a policy framework to develop the capacity within all levels of Government and the non-governmental sector to establish, maintain and develop programmes for diversion. A system for the establishment and maintenance of diversion programmes should also be developed, setting out the criteria for the evaluation of diversion programmes as well as the criteria for the evaluation of the content of diversion programmes. The diversion programmes and diversion service providers should also be monitored to ensure that they provide quality services and that they are able to promote compliance with diversion orders.

The Policy Framework for the Accreditation of Diversion Services in South Africa was therefore developed and published by the Department of Social Development.⁵

A total of 191 diversion programmes and 55 diversion service providers have been accredited.⁶

5 Available at http://www.dsd.gov.za/index.php?option=com_docman&task=cat_view&gid=32&Itemid=39 Accessed on 10 May 2012.

6 Government Gazette No. 34960 dated 23 January 2012. Available at <http://www.justice.gov.za/legislation/notices/2012/20120123-gg34960-n49-cja.pdf> . Accessed on 19 April 2012.

2.2.2 Accreditation process

The accreditation process as described in the Policy Framework for the Accreditation of Diversion Services in South Africa consists of four (4) phases which can be summarised as follows:⁷

- **Phase one (1)** is the application phase which includes the expression of interest by the service provider to be accredited, the completion and subsequent submission of a self-assessment and the application form to the Accreditation Committee at the Provincial office of the Department of Social Development.
- **Phase two (2)** is the desk assessment of candidacy during which the Accreditation Committee conduct a desk assessment of the applicant's compliance with the requirements. Site visits are conducted and the site verification team prepares the necessary documents for submission to the Accreditation Committee.
- **Phase three (3)** involves the accreditation decision by the Accreditation Committee. The decision to award candidacy status, accreditation, deferral of accreditation or denial of accreditation is conveyed to the applicant organisation. If accreditation has been deferred or denied the organisation has 14 days after receipt of the letter to initiate the complaints process. In cases where accreditation has been awarded the organisation goes into the quality assurance cycle (phase four (4)).
- **Phase four (4)** is the maintenance of accreditation and quality assurance phase which includes site visits, annual progress reports, self reporting of changes or events and quality assurance processes.

The accreditation period is four (4) years after which the process starts from phase one (1).

2.2.3 Challenges experienced during the accreditation process

The accreditation process as prescribed in the Policy Framework for the Accreditation of Diversion Services in South Africa, poses certain challenges for the sector with regard to the implementation thereof.

- The application processes and systems are labour intensive and complex.

⁷ Department of Social Development. 2010. Policy Framework for the Accreditation of Diversion Services in South Africa. Available at http://www.dsd.gov.za/index.php?option=com_docman&task=cat_view&qid=32&Itemid=39 Accessed on 10 May 2012.

- The institutional structures are costly and Non-Governmental Organisation representatives are not reimbursed for participation in all Provinces resulting in either withdrawal from processes or additional costs to the already under resourced organisations.
- Provincial Site Verification and Quality Assurance Committees do not adhere to uniform assessment standards across the Provinces. Some organisations are of the opinion that assessments were subjective and in some areas unrealistic demands were made on the organisation that had no bearing on the rendering of services. It has emerged that there is a difference in the Provincial Accreditation Committees' interpretation of organisations' ability to implement diversion programmes. Some of the Provincial Accreditation Committees accredit the programmes separately from the site and other Provincial Accreditation Committees does it together (the site and the programme) and this resulted in diversion programmes being accredited in one Province whilst the same programme is not accredited in another Province.

2.3 Decreases in the Number of Diversions since the Implementation of the Act

2.3.1 Background

The significant decreases in the number of children being diverted from the criminal justice system was highlighted as a serious challenge and concern during the submissions to Parliament on 22 June 2011. This phenomenon was linked to the lack of training of police officers on the provisions of the Act which resulted in a decrease in the number of children in conflict with the law being apprehended⁸ by the South African Police. The reasons for the drop in the number of children arrested furnished in the Report to Parliament on 22 June 2011 stated that:

- the South African Police Service were making use of alternate methods of policing children;
- there has been a general decrease in crime during the World Cup; and
- there was normally a dip in the crime rate in winter months.

⁸ The Act provides for three methods to secure a child's attendance at a preliminary inquiry namely through a written notice, summons and arrest. The apprehension of child offenders refers to any of these methods and not only to the arrest of children.

It was pointed out that these reasons were not convincing.⁹A more realistic explanation seemed to be the fact that police officers were not trained on the provisions of the Act and this uncertainty and ignorance about how to lawfully deal with children in conflict with the law in terms of the Act resulted in police officers opting not to arrest or apprehend children suspected of committing crimes.

The number of arrests dropping is not a problem if it was matched by the number of written notices or summonses being issued, but this is not happening either.

Another explanation for the drop in diversions furnished by the National Prosecuting Authority was the administrative nature of the steps to be taken when diverting a matter, set out in the Act hampered the diversion process.

The visible decreases in the number of children being diverted were reported by civil society organisations rendering diversion services and the Department of Justice and Constitutional Development commissioned a research project to establish the reasons for the decreases in the number of diversions.

2.3.2 The research report on the decreases in diversion

The research commissioned by the Department of Justice and Constitutional Development was conducted in 2011. The draft Report has been made available to some of the role-players involved in the implementation of the Act, but it has not been published, yet.

The objectives of the research study were to:

- investigate the causes of the decreases in the numbers of children being diverted since the implementation of the Act;
- review the understanding and implementation of child diversion provisions by all the inter-sectoral stake holders; and
- identify recommendation to support the increased use of diversion.

The study was conducted in five (5) of the nine (9) Provinces namely KwaZulu-Natal, Western Cape, Eastern Cape, Mpumalanga and Gauteng. A total of 340 respondents participated in the study.

⁹ Badenhorst, C. 2011. Overview of the implementation of the Child Justice Act, 2008 (Act 75 of 2008). Good intentions, questionable outcomes. Occasional Paper 10. Open Society Foundation for South Africa. p. 16-17. Available at http://www.osf.org.za/File_Uploads/docs/CJIOccasionalPaper10.pdf Accessed on 20 April 2012.

The overall findings of the study are inconclusive and do not really take the issue or reasons for the decreases in the number of children being diverted since the implementation of the Act any further. The question still remains: Are the decreases in the number of children being diverted as a result of fewer children entering the child justice system because fewer children are being apprehended by the police? Or have the number of children entering the child justice system remained more or less the same since before the implementation of the Act but fewer of them are being diverted? These questions can only be answered with the presentation of reliable and accurate data on the number of children entering the child justice system which is another challenge being experienced. During the submission of the first annual report to Parliament in June 2011 the South African Police could only report on the number of charges against children which is inadequate since one child can face two (2) or more charges in one case.

However, from the little information provided by the research report, it appears that the speculations on the reasons for the decreases in the number of children being diverted may have been accurate. It appears as if the decreases in the number of children being diverted are mainly due to the fact that fewer children enter the child justice system. Fewer children enter the child justice system because police officers have not been adequately trained on the provisions of the Act and they are uncertain about how to apprehend children suspected of committing offences and also about how to deal with these children once they have been apprehended. This results in police officers electing to not apprehend or arrest children suspected of committing crimes, instead taking no action.

The lack of training therefore not only impacts on the number of children entering the system, but also has a negative impact on the children who do commit offences and who are not apprehended or arrested by the police since they are being denied the opportunity and benefits of early intervention to address the root causes of their criminal behaviour and thereby preventing them from falling into a life of crime. It also negatively affects the adjudication of children in the child justice system and can potentially result in the acquittal of children on technical grounds.¹⁰ This could potentially result in public doubts about the Act, its objectives, goals and benefits to society as a whole.

¹⁰ News24.com. Terre'Blanche: Cop training questioned, 30 January 2012. Available at <http://www.news24.com/SouthAfrica/News/TerreBlanche-Cop-training-questioned-20120130> Accessed on 20 April 2012.

2.3.3 The impact of the decreases in the number of children being diverted on diversion service providers

The drop in the number of children entering the child justice system and the resulting drop in the number of children being diverted also affects the sustainability of the diversion services provided for by Non-Governmental and Civil Society Organisations, the operation of these organisations and the availability of diversion and other services to children in conflict with the law.

There are a number of accredited service providers rendering diversion services to children in conflict with the law. A total number of 55 diversion service providers have been accredited in compliance with the Policy Framework on Accreditation of Diversion Services in South Africa.¹¹

For the purposes of this report, the focus will be on four (4) of the main diversion service providers in South Africa namely: National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), Khulisa Social Solutions, the Restorative Justice Centre (RJC) and Bosasa.

The trends in the number of children referred to the various organisations before and after the implementation of the Act will be analysed, the impact of any fluctuation in the number of children being referred on each organisation will be highlighted as well as the challenges faced by each organisation in rendering diversion services and related matters.

- **NATIONAL INSTITUTE FOR CRIME PREVENTION AND THE REINTEGRATION OF OFFENDERS (NICRO)¹²**

NICRO pioneered diversion programmes for child offenders since 1992, with the co-operation of public prosecutors and probation officers.¹³

NICRO'S funding from the Lottery Board (LOTTO) as well as the Department of Social Development decreased to such an extent that NICRO could not keep their services (human resources, offices and other expenses that goes with programmes) running and as a result a large number of offices were closed in December 2011 as reflected in table 1.

11 Government Gazette No. 34960 dated 23 January 2012. Available at <http://www.justice.gov.za/legislation/notices/2012/20120123-gg34960-n49-cja.pdf> . Accessed on 19 April 2012.

12 Submission received from NICRO.

13 Skelton, A & Tshehla, B. 2008. Child Justice in South Africa. ISS Monograph 150.

TABLE 1: NICRO OFFICES

OFFICES CLOSED IN DECEMBER 2011	OFFICES STILL OPERATING
Atlantis	Barberton
Beaufort West	Bloemfontein
Bellville	Cape Town
Benoni	Durban
Bethlehem	East London
Brits	Empangeni
De Aar	Kimberley
George	Mitchells Plain
Germiston	Nelspruit
Johannesburg	Pietermaritzburg
Kabokweni	Pretoria
Kroonstad	Soshanguve
Krugersdorp	Soweto
Lichtenburg	Vereeniging
Mafikeng	Witbank
Middelburg	Nelson Mandela Metropolitan
Nigel	Polokwane
Odi	Thohoyando
Okiep	
Oudtshoorn	
Paarl	
Port Shepstone	
Queenstown	
Rustenburg	
Springs	
Tonga	
Upington	
Vredenburg	
Welkom	
Worcester	
Eerstehoek	
Qwa Qwa	
Krugersdorp	
Midlands	

Although some of the remaining offices may still get some referrals from some of the courts in these areas, the services will be limited as NICRO will not have the staff capacity to focus on making these services sustainable. This will result in the possibility that service delivery will be rendered on an ad-hoc basis - pretty much back to where they started in 1992.

The number of children referred to NICRO for diversion programmes has also decreased since the implementation of the Act. Children referred to NICRO for diversion during the period 2009 to 2011 is reflected in table 2.

TABLE 2: DIVERSIONS REFERRED TO NICRO DURING 2009/2010 AND 2010/2011

REFERRAL SOURCE	2009/2010	2010/2011
Prosecutor	4274	2848
Probation Officer	4469	2673
Magistrate	552	305
Total	9295	5826

From the information in table 2 it is clear that there has been a significant drop in the number of children referred by prosecutors, probation officers and magistrates for diversion programmes to NICRO.

KHULISA SOCIAL SOLUTIONS¹⁴

Khulisa Social Solutions renders diversion services in various areas nationally. The total number of diversion referral during the period 2009 to 2012 is reflected in table 3.

TABLE 3: DIVERSIONS REFERRED TO KHULISA DURING 2009/2010 AND 2010/2011

AREA	2009/2010	2010/2011	2011/2012
North West	549	543	343
Gauteng	491	171	120

14 Submissions received from Khulisa Social Solutions.

AREA	2009/2010	2010/2011	2011/2012
Midlands	714	885	287
Durban	0	1323	722
Ulundi	303	164	166
Mpumalanga	375	602	283
Orange Free State	77	123	82
Hammanskraal	20	18	40
Western Cape	3322	0	0
Eastern Cape	39	191	22
Limpopo	0	0	0
Total	5890	4020	2065

It is clear that the number of diversions referred to Khulisa Social Solutions has also decreased significantly since after the implementation of the Act.

Diversion referrals numbers are an important target in terms of Khulisa's commitment to the Department of Social Development and Khulisa has no control over the number of diversions referred to them since it depends entirely on the number of referrals they receive from a Probation Officer.

Statistics show that on an annual basis, the numbers of referrals have dropped dramatically since the enactment of the Act. Khulisa believe that it is essential that the reasons for the drop in diversion referrals be properly researched and reported upon as soon as possible.

Khulisa also reports that the current funding challenges impact negatively on the ability to render diversion services in all the areas. Rural areas are not only suffering due to the lack of any services, but existing services have been terminated as a result of the funding crises.

- **RESTORATIVE JUSTICE CENTRE (RJC)¹⁵**

The RJC has been rendering diversion services to children in conflict with the law upon referral from the Atteridgeville and Mamelodi Magistrates Courts since 2000. The number of diversions conducted since 2000 is reflected in table 4.

15 Submissions received from RJC.

TABLE 4: NUMBER OF DIVERSION SINCE 2000

YEAR	DIVERSIONS	YEAR	DIVERSIONS
2000 -2001	11	2006-2007	207
2001 -2002	164	2007 -2008	504
2002 -2003	211	2008- 2009	455
2003 -2004	438	2009-2010	408
2004 -2005	319	2010-2011	267
2005 -2006	636		

From table 4 it is clear that there has been a significant drop in the number of diversion referrals from the numbers recorded in 2008/2009 (455) and 2009/2010 (408) to the numbers recorded in 2010/2011 (267). There has been a huge drop in the number of diversions between the year before the implementation of the Act and the first year of implementation of the Act.

The RCJ reports that the specification of funds by the Department of Social Development limits the exploration of complementary services that could be offered to strengthen the current services. Funds are allocated for assessments and diversion but not for post diversion services.

The drastic reduction in children being diverted creates the risk that the RJC will not be able to meet its commitment with the Department of Social Development because the expected number of children to be referred for diversion is higher than the actual number of children undergoing diversion.

• **BOSASA⁶**

In addition to the secure care and sentenced programmes, Bosasa also renders diversion services in the different Provinces. Bosasa's diversion programmes have a residential element attached to it and the children remain in residence for the majority of the time whilst the programme is running. They are allowed to go home during some weekends and during holidays when the programmes are not running. The time frame of the programmes varies from 1 month up t a maximum of 54 weeks. The average programmes run for between 3 to 6 months.

16 Submissions received from Bosasa.

These programmes are not separately funded and therefore children are only admitted to the programmes if there is space available in the facility. All the facilities and programmes have been accredited with the exception of their new facility in De Aar.

TABLE 5: CHILDREN DIVERTED TO BOSASA PROGRAMMES 2010 TO 2012

PROVINCE	1 APRIL 2010 TO 31 MARCH 2011	1 APRIL 2011 TO 31 MARCH 2012
North West	16	65
Gauteng	110	221
Eastern Cape	14	18
Northern Cape	9	17
Western Cape	25	65
Limpopo	5	41
Total	179	427

It is interesting to note that the number of children diverted to Bosasa offered programmes (a for-profit organisation and residential in nature) have increased during 2011/2012 as opposed to the decreases in the number of diversions being experienced by the non-profit organisations referred to above.

2.3.4 Conclusion

The decrease in the number of children referred for diversion also has a negative impact on the rights of those children that are apprehended since the diversion service providers are unable to sustain their services in various areas due to a lack of funding brought about by the decrease in numbers. This creates a huge problem because the closure of Non-Governmental Organisations destroys much of the work that was done over the decades prior to the implementation of the Act and in preparation of the Act.

Another concern in this regard is the kind of diversions that increases - diversions to for profit organisations and residential in nature increases whilst the long standing service providers (not for profit) providing community services and non-residential programmes are being allowed to disintegrate.

2.4 Diversion Related Challenges

Diversion service providers have identified various diversion related challenges

- Courts use different forms to refer children to diversion programmes and this becomes confusing. There is no standardised form that is currently being utilised. Some courts even use a detention warrant (J7) to refer children to diversion programmes and then just add that he or she must attend a diversion programme.
- Some courts and probation officers do not send assessment forms with the diversion orders.
- Not all courts specify the time frame for attendance in the programme.
- Probation officers often do not confirm whether or not there is place available for the child in the programme or facility.
- Some courts or probation officers do not specify what programme the child has been referred to.
- There appears to be inconsistency amongst some presiding officers or prosecutors; some courts withdraw the charges before the child can attend the diversion programmes and others withdraw the charges after successful completion of the programme.
- Some courts require reports on completion of diversion programmes and others just want to know whether the child was compliant or not. Some courts are not even interested in whether the child complied or not with the diversion order
- Some courts want the child to come back to court after completion of the programme and others close the file once the child is diverted.

3. Sentencing of Children to Compulsory Residence in Child and Youth Care Centres

3.1 International and National Protection Measures Applicable to the Deprivation of the Liberty of Children

The international instruments protecting the rights of children also provides for the rights of children deprived of their liberty. The instruments provides for guidelines and the various factors to be taken into consideration when contemplating the imposition of a compulsory residential sentence.

Article 37(b) of the United Nations Convention on the Rights of the Child, 1989¹⁷ states that the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

Similarly Rule 19 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), 1985¹⁸ provides that the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period. The commentary to the Beijing Rules highlights the fact that progressive criminology advocates the use of non-institutional over institutional treatment and also the fact that little or no difference has been found in terms of the success of institutionalisation as compared to non-institutionalisation. There are many unavoidable adverse influences on an institutionalised individual, especially on children, who are vulnerable to negative influences. These negative effects, the loss of liberty and the separation from the usual social environment are more acute for children than for adults because of their early stage of development. Rule 19 restricts institutionalisation in two regards: in quantity (last resort) and in time (minimum necessary period).

17 Available at http://www.centreforchildlaw.co.za/images/files/childlaw/un_convention_rights_of_the_child.pdf Accessed on 29 April 2012.

18 Available at <http://www.centreforchildlaw.co.za/index.php/child-law/international-instruments> Accessed on 29 April 2012.

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (“JDL Rules”), 1990¹⁹ also provides that the deprivation of a child should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The JDL Rules are intended to establish minimum standards accepted by the United Nations for the protection of children deprived of their liberty in all forms and to all types and forms of detention facilities in which children are deprived of their liberty (Rule 15).

The African Union’s Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa emphasises the preference of non-custodial options with a focus on restorative justice and requires that the personal liberty of a child shall only be imposed after careful consideration and shall be limited to the possible minimum.²⁰

South Africa ratified the United Nations Convention on the Rights of the Child on 16 June 1995 and the protection of the rights of children are enshrined in the South African Constitution, 1996 (Act 108 of 1996).²¹ In this regard section 28(2) provides that a child’s best interests are of paramount importance in every matter concerning the child. With regard to the deprivation of the liberty of children, section 28(1)(g) states that children should only be detained as a measure of last resort and for the shortest appropriate period of time.

In the case of *S v CKM and Two (2) Similar Cases (Centre for Child Law as Amicus Curiae)*²² the North Gauteng High Court considered the retrospective application of the Act and the guidelines to be considered by both magistrates and probation officers when sentencing children. In all three (3) of these cases, children were the accused and all the cases were heard in the Mankweng Magistrate’s Court by the same magistrate. The charges related to offences committed prior to the implementation of the Act and all three children were convicted and sentenced to be admitted to a reform school. They were all sent to the Ethokomala Reform School in Mpumalanga from which they allegedly escaped repeatedly and to which they were allegedly re-admitted after being apprehended from time to time. On the last occasion they were apprehended after having escaped and were taken to the Polokwane Secure Care Centre, an awaiting trial facility. They were assigned to the Centre administratively, without a court order and without having been charged with any offence in respect of which they were awaiting

19 Available at <http://www.centreforchildlaw.co.za/index.php/child-law/international-instruments> Accessed on 29 April 2012.

20 Available at http://www.iag-agi.org/bdf/en/corpus_document/fiche-document-195.html Accessed on 29 April 2012.

21 Available at <http://www.info.gov.za/documents/constitution/1996/index.htm> Accessed on 29 April 2012.

22 Available at http://www.centreforchildlaw.co.za/images/files/ourcases/S%20v%20CKM%20%20%20%20Similar%20Cases%20-%20Case%20Note%2013_02_12%20FINAL%20%20simpl.pdf Accessed on 25 April 2012.

trial. Their transfer to the Secure Care Facility was arranged by the social worker responsible for the pre-sentencing reports presented to the trial court prior to the accused being sentenced to the reform school.²³

CKM (fourteen years old at the time) was charged (with two other boys) with assault for allegedly hitting another boy with open hands and "tripping him causing him to fall down". There was no allegation of any injuries suffered by the victim. CKM pleaded guilty and was convicted without any evidence having been led. No previous convictions were proved against the accused. The accused had been placed in a diversion programme before being charged, but his failure to attend individual counselling sessions resulted in him being charged for the offence. Upon his guilty plea and after obtaining the probation officer's report which recommended detention in a reform school, the magistrate sentenced CKM to detention in a reform school. The recommended sentence by the probation officer was based on the fact that CKM was without supervision by a parent and had developed into a difficult child. On review the court stated that the magistrate failed to consider the fact that CKM may be a child in need of care and protection and also that sending the child offender to a reform school was unjustified on the facts presented to the trial court. The fundamental principle that the incarceration of a child should only be considered as a measure of last resort was not considered by probation officer or the magistrate. The matter was not sent on review, as it should have been and it was only after CKM spent six (6) months in the awaiting trial facility that the matter reached the High Court on special review.

IMM appeared before the Mankweng Magistrate's Court on a charge of assault with the intent to commit grievous bodily harm. He was convicted and sentenced to the same reform school as CKM (referred to above). After repeated absconding from the reform school IMM was also admitted to the said Secure Care Centre in the same manner as CKM.

FTM (the third case on review) was convicted by the same court on a charge of housebreaking with the intent to commit an unknown crime. He also failed to participate in a diversion programme prior to being charged and this also resulted in him being charged. The probation officer stated that he also developed into a troubled and troublesome child and following the recommendation of the probation officer, the magistrate sentenced him to a reform school. FTM also ended up at the Secure Care Centre due to the fact that he also repeatedly absconded from the reform school.

23 The review court criticised the detention of the children in a Secure Care Facility and stated that the committal was effected administratively and was not in accordance with the orders made by the trial court in respect of each accused. The court emphasised that no person may be incarcerated or otherwise held in detention without a valid order of a competent court.

The review court invited the Centre for Child Law to make submissions as *amicus curiae*.

The first issue that the review court had to consider was the retrospective application of the Act, because the offences were committed before the implementation of the Act and the criminal proceeding were instituted prior to the commencement of the Act. This question only applies to CKM and FTM since IMM's conviction has been previously confirmed on review by another court. The court referred to section 98(1) of the Act which provides as follows: "All criminal proceedings in which children are accused of having committed an offence, which were instituted prior to the commencement of this Act and which are not concluded before the commencement of this Act, must be continued and concluded in all respects as if this Act has not been passed."

Counsel on behalf of the State argued that the provisions of the Act are less onerous than the sentencing regime that existed prior to its introduction and therefore section 35(3)(n) of the Constitution, 1996 should apply. The latter section ensures that an accused is entitled to the least severe punishment prescribed if the sentence determined for the offence the accused has been convicted of has been changed between the date of the commission of the offence and the date of sentencing. However, counsel for the *amicus curiae* pointed out that the constitutional principles enshrined in the Bill of Rights of the Constitution relating to the paramountcy of the best interests of the child and children's rights not to be detained except as a measure of last resort and for the shortest appropriate period of time should have been applied by the court *quo*. The court *quo* failed to apply these principles when sentencing CKM and FTM. The trial magistrate's failure to observe these principles amounts to a significant misdirection resulting in justice having failed the accused and this warranted the review court's intervention. Furthermore, the committal to a reform school of CKM and FTM was regarded an inappropriate since:

- one was convicted of a minor offence;
- both were first offenders; and
- both appear to have suffered parental neglect, strongly suggesting that a referral to children's court was the most appropriate course of action to follow.

The review court set aside the court *quo*'s sentences and the consequent committal to the reform school. The review court indicated that it would be futile to refer the matter to the children's court at that stage since both children are almost eighteen years of age. The court took the time that has lapsed since the accused had been sentenced, the time that they spend at the Secure Care Facility into consideration and concluded that the fairest sentence in the circumstances of these cases would be to substitute the sentence with a caution and discharge.

3.2 Background

Reform Schools and Industrial Schools were transferred from the Department of Prisons to the Department of Education by the Children's Protection Act, 1913 (Act 25 of 1913).²⁴ Industrial Schools were historically utilised as places of alternative care for children in need of care and protection in terms of the Child Care Act, 1983 (Act 74 of 1983). Reform Schools on the other hand provided for the placement of sentenced children after being sentenced to compulsory residence in a Reform School following a conviction on a criminal charge (sentence in terms of section 290 of the Criminal Procedure Act, 1977 (Act 51 of 1977)). This section has been repealed with the implementation of the Act.

Sentencing children to Reform Schools and the availability of places in these Schools came under the spotlight in the matter of *S v Z & 23 Similar Cases*.²⁵ This case dealt with a review of 24 cases where child offenders had been sentenced to compulsory residence in Reform Schools but had been in prison for long periods of time awaiting transfer to Reform Schools. It also emerged that there were no Reform Schools in the Eastern Cape and child offenders being sentenced to Reform Schools were sent to Ethokomala Reform School in Mpumalanga.²⁶

In *TN and Another v The State*²⁷ the issue of the lack of available Reform Schools was once again highlighted by the court. Both cases were set down before the then Natal Provincial Division of the High Court of South Africa on 24 August 2006. Both applicants applied that their sentence to be detained at a Reform School be set aside. The Centre for Child Law entered the proceedings as *amicus curiae*. The first applicant was arrested in October 2004 on a charge of possession of suspected stolen goods (a jacket and a microphone). He pleaded guilty on 22 February 2005 and was found guilty as charged. On 30 March 2005 he was sentenced to be detained in a Reform School in terms of section 297(1)(d) of the Criminal Procedure Act, 1977. Pending his transfer to a Reform School he was detained at the Westville Prison. At the date of the review application he was still in detention at the prison and had spent approximately twenty-two (22) months in prison (as awaiting trial detainee and while waiting for placement in a Reform School). The second applicant was detained at the Westville Prison since

24 Skelton, A and Tshehla, 2008. Child Justice in South Africa. Institute for Security Studies. Monograph 150. September 2008.

25 2004 (4) BCLR 410 (E).

26 Mail and Guardian Online. 2003. Reform school sentence means a spell in jail. 12 August 2003. Available at <http://mg.co.za/article/2003-08-12-reform-school-sentence-means-a-spell-in-jail> Accessed on 24 April 2012.

27 Unreported Case number AR 359/2006; AR 360/2006) Available at http://www.centreforchildlaw.co.za/images/files/ourcases/our_cases_tn_the_state.pdf Accessed on 24 April 2012.

October 2004 and was convicted on 21 January 2005 on a charge of housebreaking with the intent to steal and theft. He was also sentenced to be detained in a Reform School. On the date of the application he had not been placed in a Reform School and has remained incarcerated in the Westville Prison. The court stated that although the sentences imposed on both applicants were competent and appropriate, justice demanded that both applicants, who have been detained for a grossly unreasonable period, should be released. The court furthermore urged the Department of Justice and Constitutional Development to cause magistrates to implement an administrative system whereby the progress made by the relevant authorities to place offenders in a Reform School is constantly monitored.

3.3 The Children's Act, 2005 (Act 38 of 2005)²⁸

The Children's Act, 2005 defines a Child and Youth Care Centre as a facility for the provision of residential care to more than six children outside the child's family environment. This definition covers not just children's homes but also places of safety, secure care centres, schools of industry, reformatories and shelters for children living/working on the street.²⁹

The Children's Act also states that Reform Schools and Schools of Industries must, within two years after commencement of the relevant provisions in the Children's Act, 2005, become the responsibility of the Department of Social Development. The relevant provisions of the Children's Act came into operation on 1 April 2010 and the transfer of the responsibilities from the Department of Basic Education to the Department of Social Development therefore had to be completed by 1 April 2012. This has not been complied with.

The Department of Basic Education will remain responsible for providing education to children in government schools of industry and reforms schools.

Section 196(4) of the Children's Act, 2005 provides that all existing government children's homes, places of safety, secure care facilities, schools of industries and reform schools must be registered as Child and Youth Care Centres within two years of the commencement of the relevant provisions in the Children's Act, 2005.

28 Available at <http://www.info.gov.za/view/DownloadFileAction?id=67892> Accessed on 29 April 2012.

29 Mahery, P, Jamieson, L and Scott, K. 2011. Children's Act Guide for Child and Youth Care Workers. First Edition. Children's Institute. University of Cape Town and the National Association of Child and Youth Care Workers. January 2011.

In terms of the Children's Act, 2005 these centres must offer a therapeutic programme designed for the residential care of children outside the family environment, which may include a programme designed for, among other purposes:

- the reception, development and secure care of children awaiting trial or sentence;

Children sentenced to compulsory residence in Child and Youth Care Centres in terms of section 76 of the Act will also serve their sentences in these Centres, if they have been registered to receive sentenced children.

Secure care is defined as a residential facility and/or programme of intervention which ensures the appropriate physical, behavioural and emotional containment of children who are charged with criminal offences and who are awaiting trial or have been sentenced. Such a facility provides an environment, milieu and programme conducive to the care, safety and healthy development of each child while at the same time ensuring the protection of communities.³⁰

Secure care therefore forms part of one the programmes included under the broad term of a Child and Youth Care Centre and as such must comply with all the prescriptions as outlined for Child and Youth Care Centres in the Children's Act.

3.4 Child Justice Act (Act 75 of 2008)

In terms of section 69(3) of the Act, a child justice court, must when considering the imposition of a sentence involving compulsory residence in a Child and Youth Care Centre take the following into consideration:

- whether the offence is of such a serious nature that it indicates that the child has a tendency towards harmful activities;
- whether the harms caused by the offence indicates that a residential sentence is appropriate;
- the extent to which the harm caused by the offence can be apportioned to the culpability of the child in causing or risking the harm; and whether the child is in need of a particular service provided at a Child and Youth Care Centre.

30 Department of Social Development. 2010. Blue Print, Minimum Norms and Standards for Secure Care Facilities in South Africa. August 2010. Available at http://www.dsd.gov.za/index.php?option=com_docman&task=cat_view&qid=32&Itemid=39 Accessed on 10 May 2012.

These factors need to be taken into consideration, in addition to those listed for the imposition of a sentence involving imprisonment, such as the protection of the community, the severity of the impact of the offence on the victim and the previous failure of the child to respond to non-residential alternatives, if applicable.

A child justice court may not impose a sentence involving compulsory residence in a Child and Youth Care Centre or imprisonment unless a pre-sentence report has not first been obtained.

Section 76(1) of the Act provides that a child justice court that convicts a child of an offence, may sentence the child to compulsory residence in a Child and Youth Care Centre. Such a sentence may be imposed for a period not exceeding five (5) years or for a period which may not exceed the date on which the child turns 21 years of age, whichever date is the earliest.

Section 76(3) states that a child justice court that convicts a child of a schedule 3 offence and, which offence, if committed by an adult would have justified a term of imprisonment exceeding 10 years, may, if substantial and compelling reasons exists, in addition to a sentence of compulsory residence in a child and youth care sentence (for the maximum period referred to above), sentence the child to a period of imprisonment which is to be served after completion of the period in the Child and Youth Care Centre. The head of the Child and Youth Care Centre to which the child has been sentenced to, must on completion of the child's sentence in the Child and Youth Care Centre, submit a report to the child justice court which imposed the sentence, containing his or her views on the extent to which the objectives of sentencing have been achieved and the possibility of the child's reintegration into society without serving the additional terms of imprisonment.

The child justice court, after consideration of the report and any other relevant factors, may, if it is satisfied that it would be in the interests of justice to do so:

- confirm the sentence and period of imprisonment originally imposed, upon which the child must immediately be transferred from the Child and Youth Care Centre to the specified prison;
- substitute the sentence with any other sentence that the court considers to be appropriate in the circumstances; or
- order the release of the child, with or without conditions.

If the original sentence is confirmed, the period served by the child in the Child and Youth Care Centre must be taken into account when consideration is given as to whether the child should be released on parole, following the sentence of imprisonment.

The child justice court must, when sentencing the child to compulsory residence in a Child and Youth Care Centre, specify the centre to which the child must be admitted with due regard to the information furnished by the probation officer. The child justice court must also give directions as to where the child is to be placed for any period before being admitted to the specified Child and Youth Care Centre, preferably another Child and Youth Care Centre, but not in a police cell or lock-up. The probation officer must be directed to monitor the movement of the child to the specified centre and to report to the court in writing once the child has been admitted to the centre.

The child justice court may request any official of the rank Director or above at the Department of Social Development to provide information on the availability or otherwise of accommodation for the child in a Child and Youth Care Centre, should this information not be available at the time of sentencing of the child.

Where the child justice court sentenced a child to compulsory residence in a Child and Youth Care Centre, the presiding officer must retain the matter on the court roll for one (1) month and he or she must, at the re-appearance of the matter, inquire whether the child has been admitted to the Child and Youth Care Centre specified in the order. If the child has not been admitted to a Child and Youth Care Centre, the presiding officer must hold an inquiry and take appropriate action, which may include the imposition of an alternative sentence, unless the child has been sentenced following the conviction on a Schedule 3 offence and for which a sentence exceeding 10 years would have been justified if committed by an adult (this would be where the child have been sentenced to a period of time in the Child and Youth Care Centre and an additional sentence of imprisonment referred to above).

3.5 The Child Justice Alliance Workshop on the Sentencing of Children to Child and Youth Care Centres

Section 76(3)(b) of the Act requires that the head of the Child and Youth Care Centre submit a report to the child justice court in order to inform the court about his or her views on the extent to which the objectives of sentencing have been achieved during the child's stay at the centre and also on the possibility of the child's reintegration into society without serving the additional term of imprisonment.

The purpose of the Workshop conducted by the Child Justice Alliance on 8 June 2011 was to inform and sensitise the Child and Youth Care Centre heads of their responsibility in relation to the submission of the report in terms of section 76(3)(b) of the Act, and also about the consequences in relation to this type of sentence to the child offender.

Some of the challenges raised by the participants included:

- The lack of flexibility in the programmes offered at the Child and Youth Care Centres that do not suit the needs of children of different age groups and intellectual abilities.
- Staff has not been trained to deal with specific child offenders, such as those involved in gang related activities and sex offenders.
- Magistrates still use the sentencing structure provided for in the Criminal Procedure Act, 1977 (repealed) (five (5) year sentences) and do not apply the sentencing structure provided for in section 76 of the Act.
- Children in need of care and protection still slip through the cracks and are sentenced to Child and Youth Care Centres.
- The challenges pertaining to the transferral of the old Reform School facilities from the Department of Basic Education to the Department of Social Development were also raised (see paragraph 3.7 below).

The Child Justice Alliance made various recommendations based on the interactions with participants at the Workshop and these include, among others:³¹

- The Departments of Basic Education and/ or Social Development must provide resources and strategies to develop programmes for the needs of children in different age groups in the Child and Youth Care Centres.
- Training should be conducted in order to deal with children with specific problems, like sex offenders and children who are gang members.
- Strategies and protocols should be developed for children sentenced to Child and Youth Care Centres who are also children in need of care and protection.
- Clear communication should be given to Child and Youth Care Centres in relation to the transfer process from the Department of Basic Education to the Department of Social Development, especially regarding the education needs and designation of facilities as sentencing Child and Youth Care Centres.
- Protocols for consultation between probation officers and Child and Youth Care Centres regarding pre-sentence reports.
- Strategies and protocols regarding pre-sentence reports.

31 Child Justice Alliance. 2011. Sentencing of Children to Child and Youth Care Centres. Workshop Report. 8 June 2011. Compiled by Lorenzo Wakefield and Jacqui Gallinetti. Available at http://www.childjustice.org.za/publications/Sentencing_of_Children.pdf Accessed on 25 April 2012.

3.6 Availability of Child and Youth Care Centres Receiving Sentenced Children

The Department of Justice and Constitutional Development reported that there are twenty-eight (28) Child and Youth Care Centres (secure care facilities) in South Africa. Three (3) additional facilities had been completed at the time of the report (June 2011), but had not been fully operational.³² These centres were designated for children awaiting trial and sentenced children but the report does not distinguish the trial awaiting facilities from those registered to receive sentenced children.

In terms of section 196(1)(e) of the Children's Act, 2005 the existing five (5) Reform Schools (three (3) of these are Reforms Schools and two (2) are Reform School Units established in existing Schools of Industry) are now regarded as having being established as Child and Youth Care Centres and are registered to receive sentenced children.

The Departments of Basic Education and Social Development established a joint task team to conduct an audit of all the Reform Schools and Schools of Industry. Only four (4) of the five (5) Provinces have Reform School facilities namely Eastern Cape, KwaZulu-Natal, Mpumalanga and the Western Cape. According to the audit report the Kraaifontein Reform School is not operational.

The uneven distribution of the Reform Schools creates various problems for children sentenced to detention in these facilities and for their families. The children convicted of an offence and sentenced to compulsory residence in a Child and Youth Care Centre in Bloemfontein in the Free State are sent to the Reform School in Mpumalanga. This creates various logistical and other problems. The children are separated from their families and removed from their communities and this has/could have a negative impact on their reintegration back into their families and communities. It also places a financial burden on the families of the children because they have to travel far to visit the children.

From the audit report it appears that there are no Reform Schools catering for girls in the country which automatically limits the sentencing options of child justice courts in respect of girls. Female child offenders for whom sentencing involving deprivation of liberty is indicated can therefore only be sentenced to correctional facilities.

³² Department of Justice and Constitutional Development. 2011. Annual Report on the Implementation of the Child Justice Act, 2008 (Act 75 of 2008). Available at <http://www.pmq.org.za/report/20110622-joint-meeting-implementation-child-justice-act> Accessed on 17 April 2012.

BOSASA YOUTH DEVELOPMENT CENTRES

Bosasa Youth Development Centres are currently managing eleven (11) Child and Youth Care Centres across South Africa in partnership with the Department of Social Development.

All these facilities have admitted sentenced children for the period 1 April 2011 - 31 March 2012. Below is a breakdown of the number of children admitted and for the periods for which they were sentenced in the different Provinces.

TABLE 6: NUMBER OF CHILDREN SENTENCED TO COMPULSORY RESIDENCE IN CHILD AND YOUTH CARE CENTRES MANAGED BY BOSASA DURING THE PERIOD 1 APRIL 2011 TO 31 MARCH 2012

DURATION OF THE SENTENCE	GAUTENG	EASTERN CAPE	WESTERN CAPE	NORTHERN CAPE	LIMPOPO	NORTH WEST
3 - 18 Months	26		3	13		
2 Years	3	1	11	3	1	1
3 Years			2			
4 Years					1	
5 Years				3	7	1
6 Years				2		
TOTAL	29	1	16	21	9	2

Challenges experienced as a result of receiving sentenced children into the Bosasa Youth Development Centres

Various challenges in receiving children sentenced in terms of the Act at the Bosasa Youth Development Centres have been reported by Bosasa and these include the following:

- The current infrastructure in the facilities does not allow for total separation of sentenced children from secure care children (trial awaiting). Children share the same amenities such as dormitories, classes and recreational programmes although the content of their programmes will differ.

- There are only verbal agreements in place for the admission of sentenced children in all but one Province.
- Children are sentenced to imprisonment as specified on the court orders but are then brought to Bosasa for admission by the South African Police Service.

3.7 Transfer of Reform School from the Department of Basic Education to the Department of Social Development

As stated, section 196(3) of the Children's Act, 2005 provides that the Reform Schools and the Schools of Industry must be transferred from the Department of Basic Education to the Department of Social Development within two (2) years after the coming into operation of this section. Section 196(3) came into operation on 1 April 2010 and the transfer should therefore have been completed on 1 April 2012. Various challenges relating to this transferral were identified by the Departments during the first Annual Report on the Implementation of the Child Justice Act.³³ These challenges included:

The concerns raised by staff regarding the transfer of staff from one Department to the other.

Strategic and logistical concerns and uncertainty whether entire facilities will be transferred to the Department of Social Development or only part of the facilities. Governance of the facilities and accountability were also raised.

Uncertainty as to the provision of education that will be made available for sentenced children in these facilities.

Difficulties in the transfer of the facilities were highlighted in the matter of *Anna Jonker v The Manager, Gali Thembani/JJ Serfontein School and four others*³⁴ before the Eastern Cape Division of the High Court. In this court application the applicant sought to prevent the relocation of her child and 35 other children who were in need of care and protection from the Gali Thembani/JJ Serfontein School (Queenstown) to the newly built Child and Youth Care Centre in Bhisho. This removal would follow a decision by the Provincial Department of Education to close the Gali Thembani/JJ Serfontein School with effect from 1 April 2012. It was decided to use this facility as a special school for children with learning disabilities. The Gali Thembani/JJ Serfontein School is a School

33 Department of Justice and Constitutional Development. 2011. Annual Report on the Implementation of the Child Justice Act, 2008 (Act 75 of 2008). Available at <http://www.pmg.org.za/report/20110622-joint-meeting-implementation-child-justice-act> Accessed on 17 April 2012.

34 Case number 94/2011 handed down on 19 March 2012.

of Industry which caters for children declared in need of care and protection by the children's court. The Bhishe facility is regarded as a more restrictive Child and Youth Care Centre. In terms of section 171(4) of the Children's Act, 2005 the Provincial Head of Social Development may order the transfer of a child in alternative care from one Child and Youth Care Centre to another in writing, but this is subject to a consultation process involving the child (where appropriate based on the child's age, maturity and stage of development), the child's parent/guardian of care-giver, the centre where the child has been placed and the centre where the child is to be transferred to. The children's court must ratify the transfer if the child is transferred from the care of a Child and Youth Care Centre to a "secure or more restrictive Child and Youth Care Centre". The children's court did not ratify the transfer in this case and the proposed relocation was declared unlawful by the court.

3.8 Case Law Development on the Reviewability of Sentences of Compulsory Residence in Child and Youth Care Centres

There have been conflicting judgments in two (2) of the Provincial Divisions of the High Court regarding the interpretation of section 85(1)(b) of the Act dealing with the reviewability of sentences of imprisonment and compulsory residence in child and youth care centres involving children 16 years or older but under the age of 18 years.

Section 85(1) of the Act provides as follows:

"Automatic review in certain cases

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

(a) under the age of 16 years; or

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

Section 304 of the Criminal Procedure Act, 1977 provides for the procedure on review and states that:

“(1) If, upon considering the proceedings referred to in section 303 and any further information or evidence which may, by direction of the judge, be supplied or taken by the magistrate’s court in question, it appears to the judge that the proceedings are in accordance with justice, he shall endorse his certificate to that effect upon the record thereof, and the registrar concerned shall then return the record to the magistrate’s court in question.

(2) (a) If, upon considering the said proceedings, it appears to the judge that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he shall obtain from the judicial officer who presided at the trial a statement setting forth his reasons for convicting the accused and for the sentence imposed, and shall thereupon lay the record of the proceedings and the said statement before the court of the provincial or local division having jurisdiction for consideration by that court as a court of appeal: Provided that where the judge concerned is of the opinion that the conviction or sentence imposed is clearly not in accordance with justice and that the person convicted may be prejudiced if the record of the proceedings is not forthwith placed before the provincial or local division having jurisdiction, the judge may lay the record of the proceedings before that court without obtaining the statement of the judicial officer who presided at the trial.”

The question of the reviewability of cases involving the sentencing of children, who were legally represented, to compulsory residence in a Child and Youth Care Centre came before two (2) Divisions of the High Court recently and conflicting judgments were handed down.

The Western Cape Division of the High Court handed down a judgment in the *S v R*³⁵ that due to the fact that the High Court is the upper guardian of all minors within its jurisdiction area, all cases referred to in section 85 of the Act should always be subject to review regardless of whether or not the child was legally represented at the trial.

However, in the matter *S v JM*³⁶ the North West High Court, Mafikeng ordered that a sentence of imprisonment or compulsory residence imposed upon a child, as contemplated in section 85 of the Act, who was represented by a legal adviser, is not subject to automatic review. In this case the child offender pleaded guilty to three (3) counts of housebreaking with the intent to steal and theft in the Swartruggens

35 Case number A278/2011 handed down on 14 June 2011.

36 Case number 12/2012 handed down on 28 February 2012.

Magistrate's Court on 14 September 2011. He was sentenced to compulsory residence in a Child and Youth Care Centre for a period of five (5) years. The child offender was legally represented throughout the proceedings.

Because of the conflicting judgments, the Magistrate, Port Elizabeth referred the matter *S v S*³⁷ to the Eastern Cape Division of the High Court for a determination on whether or not proceedings of the same nature where the child had been legally represented should be subject to review proceedings in terms of section 85 of the Act. In this matter the child offender, aged 17 years, was charged with using a motor vehicle without the consent of the owner (contravention of section 66(2) read with section 89(1) of the National Road Traffic Act, 1996 (Act 93 of 1996)) and with a count of housebreaking with the intent to steal and theft. The child offender was legally represented, pleaded guilty and was convicted on both counts. Following the recommendation in the probation officer's pre-sentence report, the child offender was sentenced in terms of section 76(1) of the Act to:

"... be sent to the Bhisho child and youth care centre for compulsory residence for a minimum period of two (2) years and that a programme referred to in section 191(2)(i) of the Children's Act be provided for."

The review court decided that section 85(1)(a) and (b) applies to all cases referred in these sub-sections are reviewable despite the fact that the child may have been legally represented. In this instance the court found that the proceedings were in accordance with justice and confirmed the proceeding in the magistrate's court.

This appears to be the correct interpretation of section 85 of the Act, especially in light of the provisions of section 83 of the Act which states that a child may not waive his or her right to legal representation when appearing before a child justice court. All children sentenced to compulsory residence in a Child and Youth Care Centre by a child justice court would have legal representation and the presence or absence of a legal representative could therefore not play a role in the reviewability or not of a sentence of imprisonment or compulsory residence in a Child and Youth Care Centre.

What is of concern is the fact that the High Court confirmed the sentence "compulsory residence for a **minimum period** of two (2) years ... (own emphasis). The phrase "for a minimum period of two (2) years" creates uncertainty as to the sentence imposed on the child.

37 Case number 100/2012 handed down on 30 March 2012.

Section 76(2) provides for compulsory residence in a Child and Youth Care Centre for a period not exceeding five (5) years or for a period which may not exceed the date on which the child in question turns 21 years of age, whichever date is the earliest. In this case it is uncertain for what period the child would be detained at the Child and Youth Care Centre and who will decide when the child may be released after serving a minimum of two (2) years.

4. One-Stop Child Justice Centres

4.1 Introduction

Section 89 of the Act provides for the establishment and jurisdiction of One-Stop Child Justice Centres. The Minister of Justice and Constitutional Development, in consultation with the Minister of Social Development, Police and Correctional Services, may establish these Centres and each of these Ministers is severally responsible for the provisioning of resources and services by their respective Departments.

The objective of a One-Stop Child Justice Centre is to promote co-operation between Government Departments and between Government Departments and the Non-Governmental sector and Civil Society organisations, to ensure an integrated and holistic approach in the implementation of the Act.

A One-Stop Child Justice Centre must have a child justice court and may include offices for use by:

- Members of the South African Police Service;
- Probation officers;
- Legal representatives of children;
- Diversion service providers;
- Persons authorised to trace the families of children;
- Correctional supervision officials;
- A children's court; and
- Any other relevant facility.

The Centre may also include facilities to temporarily accommodate children pending the conclusion of the preliminary inquiry.

The core feature of One-Stop Child Justice Centres is that it is based on the concept of co-ordinated, co-operative service provision by a range of role-players and services providers, from Government and Non-Governmental Organisations in one place.

There are currently two (2) existing One-Stop Child Justice Centres: One (1) in Mangaung, Bloemfontein in the Free State and one (1) in Port Elizabeth, Eastern Cape - the Nerina One-Stop Child Justice Centre. Both these Centres are fully operational and each Centre experience some challenges unique to the specific Centre in the

implementation of the Act. Two (2) additional One-Stop Child Justice Centres are to be launched during the course of 2012, one in Kerkisdorp in the North West and one in Buffalo City in the Eastern Cape.

4.2 The Mangaung One-Stop Child Justice Centre

4.2.1 Background

The Mangaung One-Stop Child Justice Centre was opened on 16 June 2002 and serves all children in conflict with the law in the Bloemfontein area. Since the Centre was established prior to the implementation of the Act, various processes in the Act, such as the preliminary inquiry, were piloted at the Centre.³⁸ The Centre is being managed by the Department of Social Development.

The Centre is housed in what was originally perceived as temporary facilities on the same premises as the Bloemfontein Secure Care Centre being managed by the Department of Social Development. There is one room being utilized as a child justice court and the preliminary inquiries and trials (for less serious offences) are being conducted there. There is limited space and the magistrate, probation officers, the legal aid representative, interpreters and the prosecutor have very small offices (some of them share offices). One part of the facility is being utilised by the South African Police Service and this section also caters for holding cells for children in detention who has to appear in the preliminary inquiries and trials.

Despite the lack of adequate space and facilities, the Centre is operational and functions according to the provisions of the Act and offers an excellent service to the children appearing there, their parents or guardians and to the community as a whole.³⁹

The Centre has received various awards, both Nationally and Internationally, for the service they provide to children and their community and various international study groups (such as Iran, Liberia, Sudan and Nepal) have visited the Centre to obtain firsthand knowledge of the functioning of such a Centre.

There are very good working relationships and co-operation between the various role-players at the Centre and this is essential to the successful operation of the Centre. There has been a drop in children being brought to the Centre since the implementation

38 Reyneke, M & Reyneke, R. 2011. Implementation of Preliminary Inquiries at the Mangaung One-Stop Child Justice Centre. *Acta Criminologica* Vol 24 No. 3.p 123 - 142.

39 Observations and interviews during a visit to the Centre on 17 and 18 May 2012.

of the Act (like in the rest of the country) but the officials at the Centre ascribe this to the successes being reached in the crime prevention programmes.

4.2.2 Challenges faced by the Mangaung One-Stop Child Justice Centre

Challenges faced by the Mangaung One-Stop Child Justice Centre include:

- One of the biggest challenges facing the Mangaung One-Stop Child Justice Centre relates to the infrastructure of the Centre. It is situated in houses that existed on the premises of the Bloemfontein Secure Care Facility. The rooms in the houses were divided into various spaces catering for a reception area, a court, various offices for the officials, and a conference room amongst others. The different spaces are very small and it is difficult to conduct a preliminary inquiry in the court room in cases where there are more than one child offender since each child's parent/guardian/appropriate adult, legal representative and probation officer have to be present together with the magistrate and the prosecutor. There are also only two toilets available for public use.
- There are no Child and Youth Care Centres for sentenced children in the Free State and all the sentenced children have to be sent to Ethokomala Reform School in Mpumalanga. Due to logistical problems and a shortage of space, children spend long periods of time in correctional facilities before being transferred to the Centre in Mpumalanga.
- There is no regional court attached to the Centre. Therefore, children in conflict with the law are being assessed by the probation officers at the Centre and the preliminary inquiries in respect of those children are being conducted by the magistrate at the Centre. In cases where the matter is not diverted and for a serious offence (schedule 2 or 3) it is transferred to the regional court at the relevant magistrate's court. Although the preliminary inquiry record is made available to the prosecutor who deals with the matter at the regional court, the probation officer loses track of the child and another legal representative is appointed for the child. There is no apparent reason why there is no regional court at the One-Stop Child Justice Centre. The Act defines a child justice court as any court provided for in the Criminal Procedure Act, 1977 dealing with bail applications, plea, trial or sentencing of a child. Regional courts are therefore also regarded as child justice courts. It seems unfair to afford children who commit less serious offences or whose cases have been diverted the benefit of a multi-disciplinary support offered at the One-Stop Child Justice Centre, but not to those who committed more serious offences (in the same jurisdiction area) and whose

matters have not been diverted. Furthermore, the children in detention appearing in the various regional courts are detained at the Bloemfontein Secure Care and these children are being transported back and forth between the Secure Care Centre and the regional courts for appearances.

4.3 The Nerina One-Stop Child Justice Centre

4.3.1 Background

The concept of a One-Stop Youth Justice Centre was first launched as a pilot project in Port Elizabeth in August 1997, as a result of the work of the former Inter-Ministerial Committee [IMC] on Youth at Risk. Because of the success of the Centre in Port Elizabeth, another Centre was established in Bloemfontein (Mangaung). The Centre in Port Elizabeth was moved to a brand-new child-friendly building in May 2007 called the "Nerina One-Stop Child Justice Centre". Since the Centre was known as "Stepping Stones" for almost ten years, most people in the community still refer to it as "Stepping Stones."

The official hand-over and opening ceremony of the new Nerina One-Stop Child Justice Centre took place on 25 May 2007. The Centre is being managed by the Department of Justice and Constitutional Development. The Centre has also received various awards for the service they provide to children and their community and various international study groups have visited the facility to obtain firsthand experience in the functioning of the Centre.

The Centre is well planned and all the role-players (Police, Social Development, Justice and Constitutional Development, Legal Aid representatives, magistrates and prosecutors) in the child justice process are housed in different sections of the building. There are two (2) courts, one (1) being utilised for preliminary inquiries and the other for child justice court trials in matters that have not been diverted (for less serious offences). The facility also provides for holding cells for children in detention.

This Centre is fully operational and deals with all the matters involving children in conflict with the law within its jurisdiction area.

The good working relationships and co-operation between the various role-players at the Centre is evident and is of utmost importance to ensure quality services being rendered to the children and the community.⁴⁰

40 Observations and interviews during a visit to the Centre on 14 and 15 May 2012.

4.3.2 Challenges faced by the Nerina One-Stop Child Justice Centre

The challenges faced by the Nerina One-Stop Child Justice Centre include:

- There has been a significant decrease in the number of children being brought to the Centre. The number of children detained at the Nerina One-Stop Centre during 2009 totalled 2403. In 2010 it was 1523 and in 2011 it was 1059. Also the number of children arrested during 2009/2010 was 2593 and in 2010/2011 it was 1629. One of the perceived reasons for these decreases is the lack of training of police officers not attached to the Centre and the resulting failure to apprehend children in conflict with the law because of the ignorance of police officers about the provisions of the Act. The Centre therefore deals with a lot less cases than it has initially been planned for.
- As a result of fewer children entering the child justice system the number of cases being diverted has also decreased. According to NICRO a total of 399 cases were referred for diversion during 2009/2010. This dropped significantly in 2011/2012 to a total of 201 cases. NICRO has therefore decided to limit the days on which they will be at the Centre. Before the decrease in cases the NICRO official was at the Centre five (5) days a week but this has been limited to two (2) days a week.
- There is also no regional court attached to the Nerina One-Stop Child Justice Centre and the concerns in this regard, noted above, are also applicable in this regard.
- The decisions to divert Schedule 2 and Schedule 3 offences are referred to the Senior Public Prosecutor and the Deputy Director of Public Prosecutions respectively. There appears to be huge delays before these decisions are conveyed to the prosecutor and this result in unnecessary delays in the finalisation of cases.
- There is no substance rehabilitation centre in the Eastern Cape and children being referred for residential treatment of substance abuse problems are sent to a rehabilitation centre in the Western Cape.

4.4 Jurisdiction of the One-Stop Child Justice Centres

Section 89(6)(a) provides that the Minister of Justice may, by notice in the *Gazette* define the area of jurisdiction of a One-Stop Child Justice Centre, which may consists of any number of districts, sub-districts or any other areas of jurisdiction created in terms of section 2 of the Magistrates' Courts Act, 1944 (Act 32 of 1944). Sub-section (b) states that the Minister may also increase or reduce the area of jurisdiction of each One-Stop

Child Justice Centre. It appears that the initially defined jurisdiction areas in respect of both the One-Stop Child Justice Centres are inadequate.

In Port Elizabeth, the Motherwell district has been excluded from the Nerina One-Stop Child Justice Centre's jurisdiction which means that children in conflict with the law are being dealt with at the Magistrates Court despite the fact that the Nerina One-Stop Child Justice Centre is very close to Motherwell. The children in detention appearing in the Motherwell magistrate's court are detained at the Nerina One-Stop Child Justice Centre and their assessments are also conducted at the Nerina One-Stop Child Justice Centre. They are being transported back and forth to the Motherwell magistrate's court for appearances.

There are also a number of districts close to the Mangaung One-Stop Child Justice Centre such as the Botshabelo, Thaba Nchu and Dewetsdorp which do not fall under the jurisdiction of the Mangaung Centre. The children in detention appearing in these courts are being detained at the Bloemfontein Secure Care Centre which is situated on the same premises as the Mangaung One-Stop Child Justice Centre. These children are also being transported back and forth between the Secure Care Centre and the various magistrates' courts where they have to appear.

With the unanticipated drop in children entering the child justice system since the implementation of the Act, both One-Stop Child Justice Centres also experienced a decrease in the number of children being brought to the Centres. The jurisdiction area of the Centres should therefore be increased to ensure that the facilities at the Centres are fully utilised.

5. Conclusion

This report only focused on three (3) themes namely diversion, the sentencing of children to compulsory residence in a Child and Youth Care Centre and the One-Stop Child Justice Centres.

There has been a significant drop in the number of children being diverted from the criminal justice system and this, with the challenges relating to the accreditation process have had a impact on Non-Governmental Organisations and Civil Society to render diversion services to children in conflict with the law.

The availability of Child and Youth Care Centres who are registered to receive sentenced children remains a challenge. The transfer of these Centres to the Department of Social Development also present various challenges. While the transfer date has passed, the transfer is still pending.

The two (2) existing One-Stop Child Justice Centres are fully operational and although there is a huge difference in the quality of the infrastructure between these Centres both have been successful in reaching the core goal: to provide co-ordinated, co-operative services by a range of role-players and services providers, from Government and Non-Governmental Organisations in one place.

6. Recommendations

- 6.1 The funding of Non-Governmental Organisations and Civil Society to be reviewed to ensure that adequate, quality and sustainable services are rendered to communities, especially to rural communities.
- 6.2 Child and Youth Care Centres registered to receive sentenced children should be established in all nine (9) Provinces. Consideration should be given to convert some spaces in existing Centres to provide for sentenced children with the required registration to receive sentenced children in terms of the Children's Act, 2005.
- 6.3 The transfer of the previous Reform Schools and Schools of Industry should be prioritised and the process should be transparent and the concerns raised by the affected staff should be addressed.
- 6.4 The provisioning of adequate infrastructure at the Manguang One-Stop Child Justice Centre should be prioritised.
- 6.5 Regional courts should be established at both the One-Stop Child Justice Centres, even if it is only on a periodic basis. Regional courts at One-Stop Child Justice Centres should be part of the planning from the start.
- 6.6 The jurisdiction of both One-Stop Child Justice Centres should be increased to ensure that the Centres are used to the fullest extent and that as many children as possible benefit from the holistic and multi-disciplinary services provided there.

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