The third & fourth year of the Child Justice Act's implementation

Where are we headed?

Lorenzo Wakefield

childjustice alliance

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Open Society Foundation for South Africa

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Legal Disclaimer:
Information contained in this publication is specifically on the third and fourth 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

Section 93(3) of the Child Justice Act[1] places a mandate on the Minister of Justice and Correctional Services to publish and table annual reports to Parliament on the Act's implementation. The purpose of these reports is to gauge the impact of the Act on children in the justice system and for Parliament to play its oversight role in this regard. The Department of Justice has on an annual basis published and tabled these reports in Parliament.

The Child Justice Alliance[2] has, since 2010, published its own report on the implementation of the Child Justice Act that portrays an independent view on the implementation of the Act, and the structural impediments that impact on the rights of children in justice system.[3]

The 2012 report highlighted challenges in relation to the decrease in the number of children being diverted away from the formal court system, the sentencing of children to child and youth care centres, the potential of One-Stop Child Justice Centres and the challenges faced by the existing centres in South Africa.

As with previous reports, this report will only deal with three thematic issues that are topical to children in the justice system. They are as follows:

- The impact of the Criminal Law (Matters Pertaining to Sexual Offences) Amendment Act[4] on criminalising the consensual sexual behaviour of children and mandatory placement of child offenders on the sex offenders' register;
- The dwindling numbers of children diverted and consequences this has for children in child and youth care centres, together with other statistics on the Act's implementation; and
- The amendments proposed by the Judicial Matters Amendment Bill[5] and its impact on children in the justice system, accountability and oversight.

1 Act 75 of 2008. Hereinafter referred to as "the Act."
2 The Child Justice Alliance consists of a civil society membership of organisations that research and advocate for the rights of children in the justice system. For more information about Child Justice Alliance please visit: www.childjustice.org.za. Hereinafter referred to as "the Alliance."
3 The first report was published by the Open Society Foundation for South Africa and can be referenced as: C Badenhorst (2011) "Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good intentions, questionable outcomes" Criminal Justice Initiative Occasional Paper Series 10. The second report was published by the Child Justice Alliance and can be referenced as: C Badenhorst (2012) Second Year of The Child Justice Act's Implementation: Dwindling Numbers.
4 Act 32 of 2007. Hereinafter referred to as "the Sexual Offences Act."
5 Bill 3 of 2015. Hereinafter referred to as "the JMAB of 2015."

2

The impact of the Sexual Offences Act on the child justice system

The Sexual Offences Act has impacted in the following two important areas on children in the justice system:

- The criminalisation of consensual sexual behaviour by children between the ages of 12 and 16 years; and
- The mandatory placing of children's name on the sex offenders' register.

In both of these areas aspects of the Sexual Offences Act were declared unconstitutional during the period under review.

2.1 The criminalisation of consensual sexual behaviour by children between the ages of 12 and 16 years

The Sexual Offences Act contains an entire chapter on sexual offences committed against children.[6] The Sexual Offences Act also creates certain offences for consensual sexual behaviour of certain categories of children, based on the fact that, according to the law, they do not have the capacity to consent to sexual relations. These offences include both rape and sexual assault.

Section 15 of the Sexual Offences Act states that:

6 See chapter 3 of the Sexual Offences Act.

(1) A person ('A') who commits an act of sexual penetration with a child ('B'), is despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child.

(2)(a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the National Director of Public Prosecutions if both A and B were children at the time of the alleged commission of the offence: Provided that, in the event that the National Director of Public Prosecutions authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1).

Subsection (1) provides for the criminalisation of sexual relations with a child between 12 and 16 years where the older person is 16 years or older. This has always been part of the law, and is known as statutory rape. Only the older person is charged. However, subsection (2) is the problematic provision in this instance because it states that children between the ages of 12 and 16 years who have consensual sexual intercourse will both have committed a sexual offence. Section 16 of the Sexual Offences Act allows for a similar position with regards to children, but refers to non-penetrative acts.

Section 56 of the Sexual Offences Act states that:

(2) Whenever an accused person is charged with an offence under –

(b) section 16, it is a valid defence to such a charge to contend that both the accused persons were children and the age difference between them was not more than two years at the time of the alleged commission of the offence.

This means that children between the ages of 12 and 16 years who have a less than a two year age gap between them, can raise a so called "close-in-age defence" but only for non-penetrative sexual acts. Children in the same age category that have more than a 2-year age difference between them cannot raise this defence, whether for sexual penetration or non-penetrative sexual activity. The definition for non-penetrative sexual activity includes fondling and kissing.

Research by Flischer and Gewers has shown that consensual sexual exploration between adolescents is not unusual in South Africa. The phenomenon is in keeping with trends in other comparable countries. In fact, sexual experimentation and expression is normative behaviour for adolescents.[7] Surely it is then inappropriate to treat them as criminals for these incidents.

7 The Constitutional Court relied on this report in the case of Teddy Bear Clinic for Abused Children and Another v Ministerof Justice and Constitutional Development and Another [2013] ZACC 35 (Also reported as 2013 (2) BCLR 1429 (CC); 2014 (2) SA 168 (CC) . The report is available as an attachment to the applicants' papers in that matter at www.constitutionalcourt.org.za

The primary intention of the legislature was to protect children from any form of undue influence that adults might have over younger children or teenagers. However, in the process they criminalised the behaviour of both children engaging in sexual acts with one another and this contradicts the intention of protecting children. An example of the harm this caused is the commonly-known "Jules High School" case where the then National Director of Public Prosecutions decided to charge a gang rape victim of 15 years old with contravening section 15 of the Sexual Offences Act, after she stated that she consented to sexual intercourse. This received a lot of critique, as a victim of rape, was charged with raping herself.[8]

Minnie also raised the constitutionality of sections 15 and 16 as he rightly argued that charging children between the ages of 12 and 15 years who consented to sexual activity might violate their rights to privacy, dignity and physical integrity.[9]

The Constitutional Court had to deal with the constitutionality of these provisions in the matter of Teddy Bear Clinic and Another v The Minister of Justice and Constitutional Development and Another.[10] The applicants in this case are organisations that provide psychosocial services to child victims and, in the case of the Teddy Bear Clinic, diversion services for children who committed sexual offences. One of the arguments raised by the applicants – which is of relevance to the child justice system – is that sections 15 and 16 were harmful towards children in that these sections exposed them to the harshness of the criminal justice system. The applicants also argued that criminalising behaviour that is biologically natural would not serve the best interest of children.[11] The applicants also argued that further harmful consequences of sections 15 and 16 of the Sexual Offences Act relates to the fact that children's names will have to be placed on the sex offenders' register, which will stigmatise them and limit their future career opportunities.[12]

One of the arguments raised by the respondents – relevant to the child justice system – was that sections 15 and 16 were not harmful to children in the justice system, as children charged with these offences will be diverted.[13]

The Constitutional Court agreed with the arguments raised by the applicants in relation to the constitutionality of sections 15 and 16 of the Sexual Offences Act and ordered Parliament to amend the legislation. This amendment, they ordered, should entail the decriminalisation of consensual sexual behaviour of children between the ages of 12 and 16 years.[14] The Court disagreed with the respondents that the option of diversion could save the provisions from unconstitutionality. The Court stated that the fact that they are charged will still infringe their dignity by stigmatising them.[15] The court eloquently explained this as follows:

8 http://mg.co.za/article/2010-11-18-jules-high-girl-admits-to-consensual-sex (Accessed on 18 March 2015). See also http://www.timeslive.co.za/local/2015/03/13/sex-video-shame-led-gauteng-pupil-to-kill-herself where it was reported that the girl who had consensual sexual relations with the two boys in this case committed suicide, largely because of stigma that she experienced because of this incident.
9 D Minnie (2009) "Sexual Offences against Children" in T Boezaart Child Law in South Africa page 552.
10 [2013] ZACC 35.Hereinafter referred to as "The Teddy Bear Clinic" case.
11 See para. 28 of Khampepe J judgment.
12 Ibid.
13 See para 32 of Khampepe J judgment.
14 See para 117 of Khampepe J judgment.
15 See para 56 of Khampepe J judgment.

"When that individual is publicly exposed to criminal investigation and prosecution, it is almost invariable that doubt will be thrown upon the good opinion his or her peers may have of him or her. In this regard, consideration of the "Jules High School case" is instructive. Two boys had sexual intercourse with a girl. All three children were investigated and subsequently prosecuted under section 15 of the Sexual Offences Act. As the NDPP explained in the High Court, "[the two boys] were arrested outside school premises in the late morning during the week. Their peers were aware that they had been arrested. The media had dubbed them 'gang rapists'. The boys and their family were deeply shamed and traumatised". The NDPP decided to prosecute the girl because she had "willingly sneaked out of the school yard to engage in consensual sexual intercourse with the boys". At the time the proceedings were initiated in the High Court the female learner had yet to return to school or write her end-of-year examinations. I fail to see how, having admitted that section 15 was implemented against the three learners in full view of the public, and having acknowledged the resultant exposure and trauma those learners suffered, the respondents can possibly claim that the impugned provisions do not lead to the shaming and stigmatisation of adolescents."

– Khampepe J

A further problem of suggesting that diversion cures unconstitutionality is that the requirements for diversion in the Child Justice Act state that the accused must acknowledge that he or she has committed an offence. Thus a child must acknowledge that he of she committed an offence for what seemed biologically normal to them. The court found that criminalisation of 'normative' sexual behaviour was unconstitutional.

2.2 The mandatory placing of children's names on the sex offenders' register

A further impact of the Sexual Offences Act on the child justice system relates to the placing of convicted child offenders' names on the sex offenders' register. Khampepe J alluded to this in her judgment in the Teddy Bear Clinic case, where she stated that this risk of further stigmatisation of a child for consensual sexual acts if such acts remained on the statute.[16] Subsequently, in the case of J v The National Director of Public Prosecutions[17] the Court was required to determine the constitutionality of the automatic placement of child sex offenders' names on the sex offenders' register. The facts of this case and the background to the Constitutional Court case are as follows:

16 See para. 57 of Khampepe J judgment.
17 Case CCT 114/ 13. Also reported as J v National Director of Public Prosecutions and Another 2014 (2) SACR 1 (CC)Hereinafter referred to as "The J" case.

J, a 14-year-old boy, raped one 7-year old and two 6-year old boys. He was also charged with assault to cause grievous bodily harm of a 12-year old girl. J pleaded guilty to all the charges and received a custodial sentence to both a child and youth care centre and prison. The magistrate also ordered that J's details be placed on the sex offenders' register.

During review proceedings the presiding officers in the Western Cape High Court questioned the appropriateness of including J's details on the sex offenders register, taking the objects, sections 2, 3 and 4 of the Child Justice Act, and the Constitution into account.

A full bench of presiding officers in the High Court found that including a child's name on the sex offenders register may be a limitation of a child's rights. The High Court, however, found that such limitation is justifiable in terms of section 36 of the Constitution. The High Court also found that section 50(2) of the Sexual Offences Act is unconstitutional in that it does not allow an accused to make representations as why his or her names should not be included on the sex offenders' register.

The primary issue the Constitutional Court had to deal with was whether the High Court's declaration of constitutional invalidity should be confirmed.[18]

Before explaining the Constitutional Court's approach to this matter, it is important to note that the central consequence of having one's name on the sex offenders register is that it limits one's ability to find employment because it prevents convicted sex offenders from working with children or persons with mental disabilities. Section 51(2) of the Sexual Offences Act stipulates that a person who was sentenced to more than 18 months in prison or convicted of two or more sexual offences against a child or person with a mental disability will not be able to expunge his/ her name from the sex offenders register. In the case of J, as the law stood before the judgment, his name could never be removed from the register – despite the fact that he had not been permitted to make representations as to why his name should not be on the register in the first place. The offences committed by J were very serious. However, placement on the register occurs in the case of every conviction. It is only the length of time that varies depending on the sentence or on whether there is more than one offence. The following example demonstrates the unfairness of this.

Phumeza, a 15-year-old girl sends a semi-naked selfie of herself to her 16-year-old boyfriend, John. Phumeza has never been convicted of any offence in the past. John's parents see the photo and lay charges against Phumeza of producing and distributing child pornography (under the Films and Publications Act) well as another count under the Sexual Offences Act of showing child pornography to a child. Phumeza pleads guilty and is convicted. She is sentenced to 19 months imprisonment, wholly suspended. Her name will go on the sex offenders' register for life for two reasons: She has been convicted of more than one offence, and she has been sentenced to more than 18 months imprisonment.

As one can see from this example, Phumeza's actions occurred within a consensual relationship with a similarly aged individual. There was no violence involved and there is no reason to believe that she will commit any further sexual offences. However, because she was convicted of two sexual offences against a child, and because of her sentence (which is still fairly 'light') her name will be on the register for life, thus limiting her career choices and stigmatising her as a sex offender.

18 See para 14 of Skweyiya ADCJ judgment.

In fact, during the period under review a case very similar to this example came before the courts. A girl, SP, pleaded guilty to four counts of manufacturing and distributing child pornography to an older man, in exchange for airtime. She was sentenced to three years imprisonment, wholly suspended, as well as compulsory attendance at a programme for sex offenders. Her case was taken on review by the Centre for Child Law– and one of the grounds was that her name would have gone on the register which is something that the prosecutor, magistrate and legal representative all failed to point out to her. Another concerning aspect of her case was that she was not dealt with under the Child Justice Act at all – her plea and sentence agreement were conducted under the Criminal Procedure Act despite the fact that she was under the age of 18 years at all times material to her case. In March 2015 her conviction and sentence were set aside by the Bloemfontein High Court, unfortunately no judgment was handed down because the State withdrew their opposition at the last minute.[19]

This case raises a further concern – that when a child is charged with a sexual offence, there is a risk that he or she may not be tried under the Child Justice Act. It is important to reiterate that all child offenders, regardless of the offence they are charged with, must be dealt with in terms of the Child Justice Act.

In the Constitutional Court case of J v NDPP, Skweyiya ADCJ in his judgment found that the Child Justice Act calls for an individualised approach for children.[20] In other words, all "consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interest of society."[21] He went further to correctly state that the Act embedded the notion of participation by a child in all matters concerning such child. In this regard he quoted section 3(c) of the Act. An individualised approach, taking the context and the representations of a child in the justice system into account, is clearly favoured in Skweyiya's judgment. The Court found the fact that section 50 of the Sexual Offences Act allows a court no discretion with regards to placing a child's name on the sex offenders' register is contrary to such an invidualised and participatory approach.

Skweyiya also alluded to the fact that the current provisions – although protective in nature – do not take the rehabilitation of children into account. He found that although the purpose of the provisions (which is to protect children and persons with disabilities from sex offenders) must nevertheless be understood jointly with the need to take the best interest and the malleability of child offenders into account.[22] On this basis he ordered that the provisions are unconstitutional and that the legislature must amend the Sexual Offences Act to take an individualised approach to children who are convicted of sexual offences by providing an opportunity for representations to be made by or on behalf of children before deciding whether or not to place them on the sex offenders register.

19 The Heads of Argument are available at www.centreforchildlaw.co.za. See also 'Sexting girl cleared' The Times March 17 2015 page 5.
20 See para. 39 of Skweyiya ADCJ judgment.
21 Section 3(a) of the Act.
22 See para. 49 of Skweyiya ADCJ judgment.

The Department of Justice and Constitutional Development elected to combine the amendments required by both the Teddy Bear Clinic and the J case into one Amendment Bill. After an initial round of consultation, it was tabled in Parliament as the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill on 8 December 2014.[23]

2.3 Are the proposed amendments in line with the Constitutional Court judgments?

The proposed amendments decriminalise consensual sexual behaviour of children within the 12 to 16 year old category. With regard to teenagers aged 16 years or older but under the age of 18 years, the Bill provides some protection by excluding prosecution where there is less than two years in age difference between the two participants to the consensual sexual act. This could be explained by way of examples, as follows:

Bianca, who is 13 years old, and Byron, who is 15 years old, have a relationship. During the course of this relationship Byron and Bianca attends a kiss-a-thon at a local mall. Because of the amendments to the Sexual Offences Act, their behaviour is no longer a crime.

However, if Byron was 16 years old and Bianca 13 years old and she falls pregnant because of consensual sex between her and Byron, then Byron is liable to be charged under section 15 of the Act, because he is more than two years older than her and he is older than 16 years of age, while she is younger. Of course, the Director of Public Prosecutions retains a discretion whether to prosecute or not, and diversion of such an offence is also a possibility.

The amendments as proposed in relation to sections 15 and 16 of the Sexual Offences Act are thus sound in taking the Constitutional Court order into account. However, at the time of writing the Bill is still under deliberation by the Portfolio Committee on Justice and Constitutional Amendment, and it is possible that further amendments might be made. It is therefore premature to give a final comment on this.

The proposed amendments that seek to cure the constitutional problem of automatically placing children's names on the sex offenders' register are less satisfactory. The Sexual Offences Amendment Bill makes provision for an individualised approach, but places the onus on a convicted child to bring representations as to why their names should not be placed on the sex offenders' register. If psychological assessments are deemed to be required the costs for such assessment must be borne by the accused. It is not clear whether children represented by Legal Aid will be able to access such reports due to the costs factor, and there is thus a concern that the proposed provision will only benefit children whose parents have resources to afford such assessments.

The Community Law Centre and the Centre for Justice and Crime Prevention have proposed a system that would still place the costs of assessments on the State, but that would alleviate this cost by targeting assessments to be in cases where they are necessary. They propose that as a default position no convicted child's name goes on the sex offenders' register and that the prosecutor be left with the discretion to decide whether or not a child's name should go on the register. If the prosecutor is of the opinion that this should be the case, then the court must postpone the proceedings for an assessment to take place as to whether or not the child is likely to commit a sexual offence in the future.[24] It thus takes into account that in

23 Bill 18 of 2014. Hereinafter referred to as "The Sexual Offences Amendment Bill".

24 Community Law Centre and Centre for Justice and Crime Prevention (2015) Submission to the Portfolio Committee on Justice and Correctional Services on the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill page 16. The Centre for Child Law also argued that this mechanism should apply in relation to children's names being placed on the sex offenders' register.

certain instances it would be likely that a child's name be placed on the register, but in many instances this might not be the case. With this position in mind, it would alleviate the costs of assessments for the State and be in the best interest of children convicted of committing a sexual offence. As the Portfolio Committee on Justice and Correctional Services is still deliberating at the time of writing, the final outcome of the process is not yet known.

The Sexual Offences Amendment Bill also requires that children already on the sex offenders' register should apply to have their names expunged at their own cost. Once again, this is concerning, but will not be discussed in this report due the fact that it does not impact on the child justice system as legislated for in the Child Justice Act.[25]

2.4 What impact does this have on the Child Justice Act?

The Sexual Offences Act does not seem to have been drafted with child offenders in mind. While tough laws to deter and deal with adult offenders who victimise children may well be justified, the reach of these laws draws child offenders into its ambit.

As Skelton has pointed out with regard to the Teddy Bear Clinic case:

> ***'The judgment is a refreshing reminder of the imperative of balance when drafting laws about sexual offences. This legislation aimed to protect children from sexual harm, but ended up placing them at risk through stigmatisation and criminalisation of developmentally normative conduct'.[26]***

The case of SP, who sent 'selfies' to an older man and to two boys, also raises alarm bells about the operation of prosecutorial discretion. This case was so obviously a suitable opportunity for diversion, but it was not used.

Even if the Sexual Offences Amendment Bill brings about positive results for child offenders, there are still questions to be asked about the resources needed to really provide effective assessments and diversion programmes. With diversion numbers declining, there seem to be few prospects for more specialised sexual offender programmes being developed, yet these are clearly needed. In addition, the opportunity for in depth individualised assessment of risk for placement on the register actually presents opportunities to fine tune programmatic responses to offenders, and link them with the services they require to prevent re-offending. However, will there be sufficient resources to ensure suitably qualified people to conduct those assessments – and once we do know the real needs, what therapeutic services will be made available, if any? The system for child sex offences still focuses too much on punishment, and too little on treatment.

25 See Community Law Centre and Centre for Justice and Crime Prevention (2015) op cit for more information about the expungement of existing names on the sex offenders' register.

26 A Skelton 'Adolescent consensual sex decriminalized by the South African Constitutional Court' (2014) 29(1) Justice Report 22.

3

Tracking diversion, children in child and youth care centres and other statistics on the implementation of the Act

As stated above, the Department of Justice has tabled yearly reports on the implementation of the Act in Parliament. This section of the report will analyse the statistics on diversion. The second part of this section will investigate statistics pertaining to other aspects of the child justice system provided during the third and fourth year reports, respectively and analyse these within against all the implementation reports on the Act thus far.

3.1. Children diverted and placed within child and youth care centres

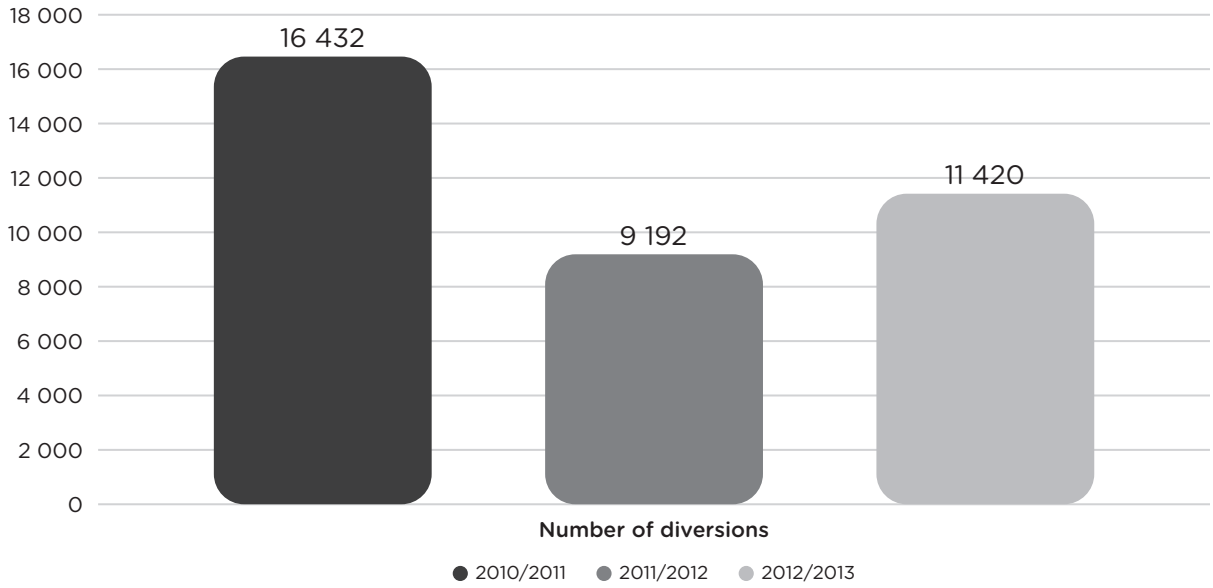
The Act provides for diversion at various points of the criminal procedure for children. Section 41 of the Act states that the prosecutor can divert a child for a schedule 1 offence, instead of taking the child through a preliminary inquiry. Similarly, sections 52(1) and 67(1) allows for diversion at a preliminary inquiry or child justice court, respectively.[27] Diversion is a key element of a child-friendly justice system as it lowers the trauma and stigmatisation a child may face, avoids a criminal record and contains strong components to deal with the prevention of future crime.

27 The Act states the specific requirements in order to divert a child at these points of the procedure.

The Department of Justice has consistently reported on the number of children diverted since the implementation of the Act in three of the four implementation reports. The fourth report (measuring the implementation for the financial year 01 April 2013 – 31 March 2014) does not contain any statistics on children diverted during this financial year. This should be addressed, as the number of children diverted is vitally important for a child-friendly justice system.

Be that is it may, the third implementation report contains the following statistics for children diverted since 1 April 2010 until 31 March 2013.

FIGURE 1: Number of children diverted

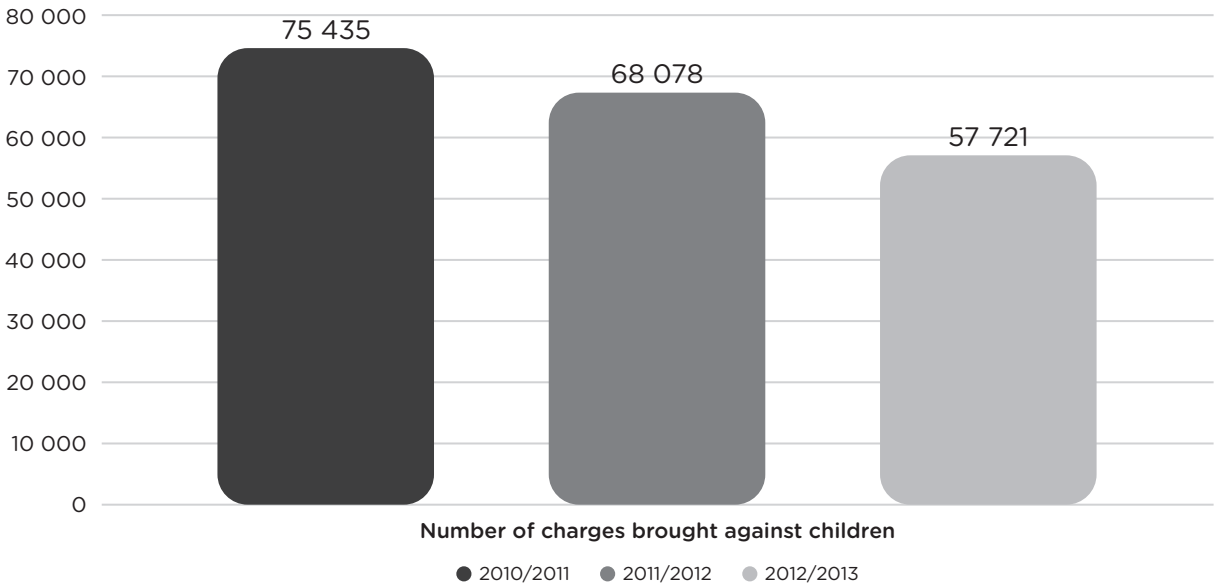


Members of Parliament and civil society have questioned why the statistics for diversion have lowered since the start of the implementation of the Act.[28] Parliament instructed the Department of Justice to conduct research to establish why the number of children diverted during the first year of implementation has decreased.[29] Four years later this research still has not been published by the Department of Justice. However, one sees a further decline in children being diverted during the second year of the implementation of the Act and a slight increase during the third year implementation of the Act, but no where near back up to previous levels. As stated above, the fourth year implementation report does not state the number of children diverted for the period covered by that report.

28 S Waterhouse (2011) "Parliament reviews the implementation of the Child Justice Act" Article 40 Volume 13, Number 2 page 5.
29 Ibid.

The number of children diverted should be compared against the number of charges brought against children for these periods. The following figures – as per the fourth annual implementation report – gives one an overview of this:

Figure 2: The number of charges brought against children[30]



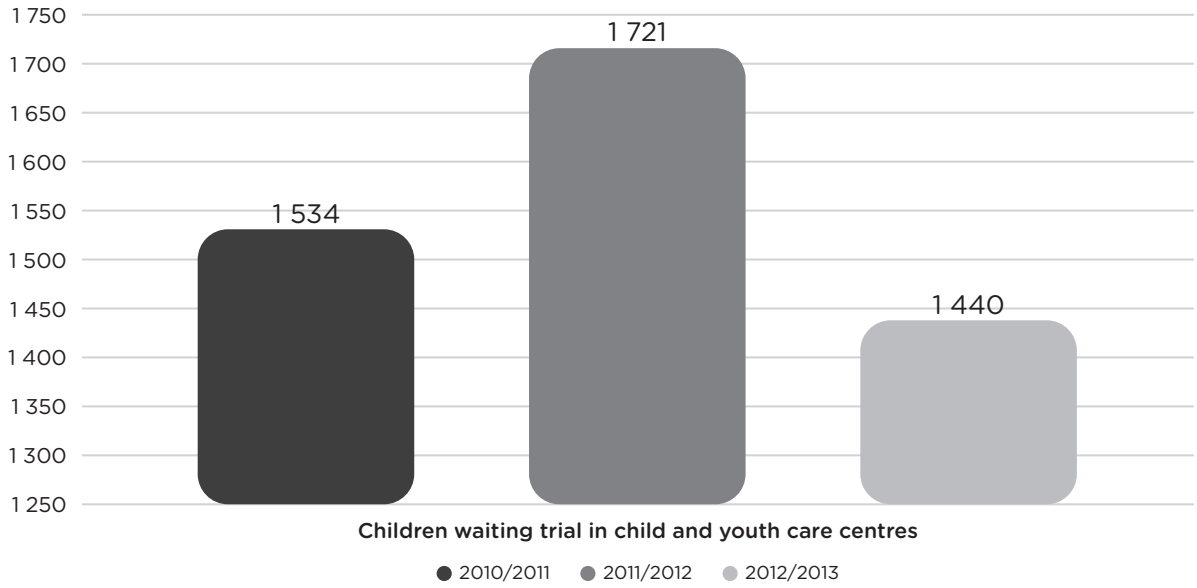
During the first year's implementation of the Act, 75 435 children were charged,[31] of which only 16 462 children were diverted. This means that 21.8% of children charged benefited from diversion during the first year of implementation of the Act. This is remarkably low. Similarly, during the second year of implementation of the Act, of the 69 078 charges brought against children, only 9 192 children benefited from diversion and during the third year implementation, 57 721 charges were brought against children and only 11 420 children benefited from diversion. It would be inaccurate to calculate percentages of children benefiting from diversion for the second and third year implementation of the Act, largely because the Department of Justice reported on the number of charges brought against children, as opposed to the number of children charged. Needless to say, the trend indicates that very few children benefit from diversion in the child justice system. This runs contrary to the expectation that the Child Justice Act would increase the number of diversions – both in terms of actual numbers, and as a percentage.

If children are not diverted, it is expected that – in all probability – the number of children in child and youth care centres (especially in centres catering for children who have not been convicted or sentenced) would increase over this period. The statistics for children not sentenced, in child and youth care centres – as per the fourth annual report on the implementation of the Act – are as follows:

30 The first implementation report states that 75 435 children were charged, while the second and third implementation report states that 68 078 and 57 721 charges were brought against children. More than one charge can be brought against a child.

31 See Department of Justice and Constitutional Development (2011) Annual Report on the Implementation of the Child Justice Act page 45.

Figure 3: Un-sentenced children in child and youth care centres



When compared to the number of diversions, it is evident that the number of children awaiting trial in child and youth care centres is very low. As stated above, it was expected that if children were not diverted, that the number of children awaiting trial in child and youth care centres might increase. What the data shows is that this is not the case. The average number of children awaiting trial in child and youth care centres over this three year period is 1 565, per financial year.

This should be placed in context with all other forms of awaiting trial children. The Act allows for a child to either be:

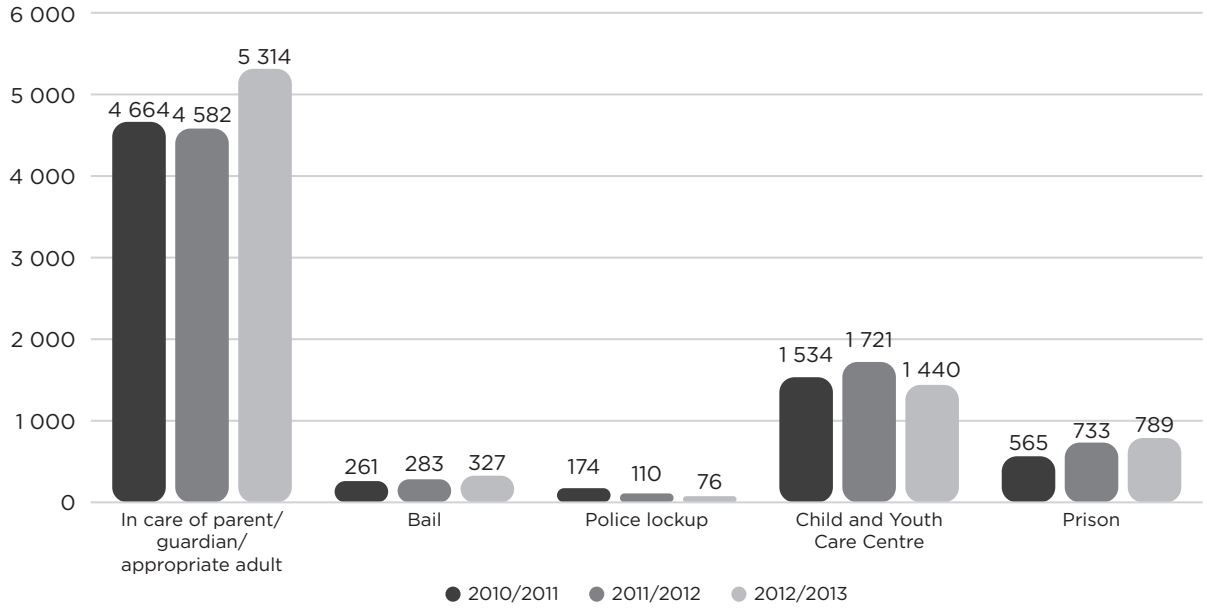
- Placed in the care of a parent, guardian or appropriate adult;[32]
- Be granted bail;[33]
- Be placed in child and youth care centres;[34]
- Police lock-up;[35] or
- Be placed in a correctional centre.[36]

Children are only allowed to be in police lock-up prior to a first appearance in court. Once a child has appeared before a presiding officer, a police lock-up would not be the viable placement facility for such child.

32 Section 24.
33 Section 25.
34 Section 29.
35 Section 20.
36 Section 30.

The following graph highlights the use of the various options of awaiting trial children over the three-year period. Data used to populate this graph were received from the fourth annual report on the implementation of the Act.

Figure 4: Children awaiting trial and the options provided



The good news that this graph shows is that more children are being placed within parental/ guardian care and if not, then child and youth care centres are the preferred method to detain children.

It is not clear what the "police lockup" category means, as children should not be detained in police cells as an awaiting trial measure. The fourth annual report on the implementation of the Act does not mention why children are held in police lockup or what this means. There seems to be a general consistency of the various options used across the three years covered. Placed within the broader context of awaiting trial children, it is clear that child and youth care centres are the preferred custodial method. The impact of the Act should not be under-estimated where the child prison population is concerned. It is clear that children are not automatically placed as remand detainees in correctional centres. Therefore, this aspiration of the Child Justice Act has largely been achieved, though it is a slight concern that the numbers are growing by a small margin each year, albeit off a small base.

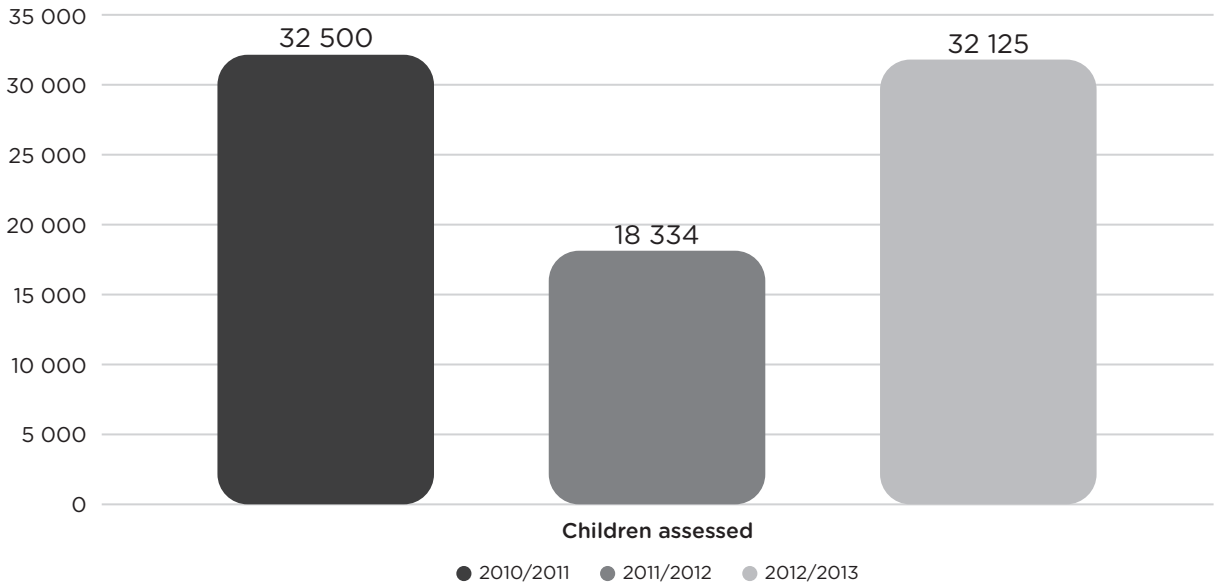
3.2 The statistics dilemma continues

The inaccuracy of the data provided by the Department of Justice is not a new phenomenon. Many authors and Parliament[37] have questioned the accuracy of the data and the inter-sectoral committee on child justice has promised to provide more accurate data.[38] The Department of Justice is not solely to blame for the inaccurate information, as the Act requires an inter-sectoral approach involving many other stakeholders in the justice system for children. This therefore means that all these stakeholders provide their own statistics, which is a formula for confusion.

The issue of charges brought against children has been alluded to in figure 2 above. It is useful to engage on the number of children assessed. In terms of section 34(1) of the Act, a probation officer must assess every child that has been charged. The only exception to this rule is if the prosecutor consented to a diversion of a child who committed a schedule 1 offence, as a first-time offender. Therefore it is expected that a large number of children charged will be assessed. The fourth annual report on the implementation of the Act does not provide one with statistics for children assessed during the 2013/2014 financial year. This is disappointing as information of this nature is important from an oversight perspective. The assessment procedure is vital to ensure that the best approach is taken for children who have allegedly committed offences and therefore government cannot simply omit a report on the number of children assessed.

The third annual report provides the following information on children assessed:

Figure 5: Children assessed by a probation officer



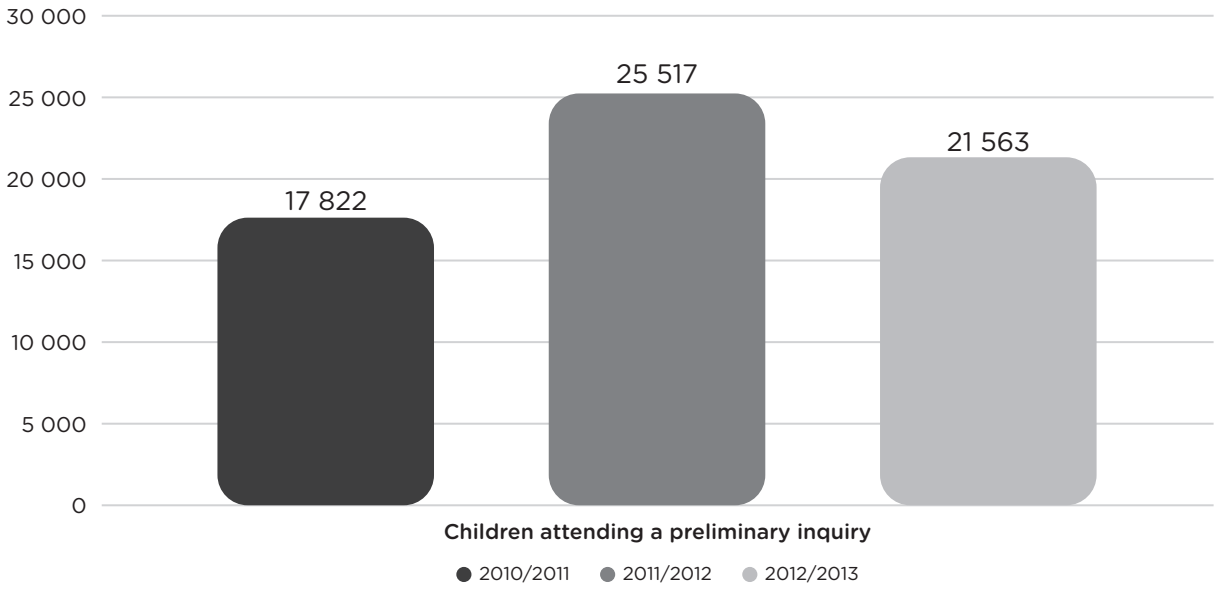
37 L Wakefield (2011) "Is the Act working for children? The first year of implementation of the Child Justice Act" South African Crime Quarterly No. 38 page 48. See also https://pmg.org.za/committee-meeting/13117/ (Accessed on 18 March 2015) for minutes of these proceedings.

38 See https://pmg.org.za/committee-meeting/13117/ (Accessed on 18 March 2015) for minutes of these proceedings.

What is evident from this data is that the number of assessments is quite erratic over the three financial years displayed. The 2011/ 2012 statistic is quite concerning, as it shows that out of the 68 078 charges brought against children during this financial year, only 18 334 children were assessed. This is a rather large attrition rate. The 2012/ 2013 financial year provides a more probable statistic in that out of the 57 721 charges brought against children, 32 125 children were assessed.

The second important area to analyse in terms of statistics is the preliminary inquiry procedure. The objectives of a preliminary inquiry are set out in section 43 (2) of the Act. Unless, a child was diverted by a prosecutor on a schedule 1 offence, every child has to attend a preliminary inquiry. The fourth annual report on the implementation of the Act provides the following figures of children who attended a preliminary inquiry:

Figure 6: Children who attended a preliminary inquiry



Compared to the number of assessments undertaken, the statistics for the 2011/ 2012 and 2012/ 2013 financial year seem probable. It is not possible to make a judgment on the 2013/ 2014 financial year because we do not have information on the number of children assessed during this period.

An interesting finding relates to the percentage of children referred to a children's court as being in need of care and protection. During the 2011/ 2012 financial year, 25.3% (4 511 children) were referred, while during the 2012/ 2013 financial year, only 15.1% (3 856 children) were referred. The percentage of children referred as being in need of care and protection during the 2013/ 2014 financial year remains similar with 14.6% (3 169 children). The number of children referred to a children's court is relatively low. Further research should be conducted into the lives of children entering the child justice system as offenders and risk factors should be mapped within this trajectory, as it is expected that a much larger number of children entering the justice system are in need of care and protection.

3.3 The fourth annual report on the implementation of the Child Justice Act

The fourth annual report on the implementation of the Act varies from the previous three reports in both format and content. The information in this report can both be criticised and welcomed at the same time.

The fourth annual report fails to contain certain statistics and information that are valuable components of the child justice procedure. It does not contain the number of charges brought against children nor the number of children charged during the 2013/ 2014 financial year. A reason for this might be because the South African Police Service counts charges and not children and therefore the rest of the statistics cannot be accurately assessed against that inaccurate baseline number. However, a decision to omit the number of charges brought against children ought to be expressly noted, with reasons. However, it could be argued that it is futile to consider the rest of the information contained in the annual report, largely because the foundational premise (i.e. the number of charges brought against children) is missing.

The report also does not contain any statistics of children diverted. As stated above, this is a vital component of the child justice procedure and is key element in the secondary and tertiary prevention of crime. Diversion measures were legislated in order to give effect to proven prevention measures and for children to benefit from a procedure that would not be punitive in nature. Reporting on how many children benefited from diversion is therefore a crucial component. All the previous annual reports on the implementation of the Act contain this information. A reason why this might have been omitted is because the number of children diverted is relatively low in comparison to the number of children charged. If that is so, it is an important trend to be open about, because it means that something is not working at the entry point of the system, and it is vital to understand what the problem is.

The third important omission in the fourth annual report relates to the number of children assessed during this financial year. The intention behind assessments by probation officers is to ensure that an appropriate response is taken with regard to each child offender. This assessment takes into account the external context and reasons for a child committing offences. Only in very limited instances may an assessment be disposed of, therefore most children charged are supposed to be assessed. It is not clear why this information was omitted.

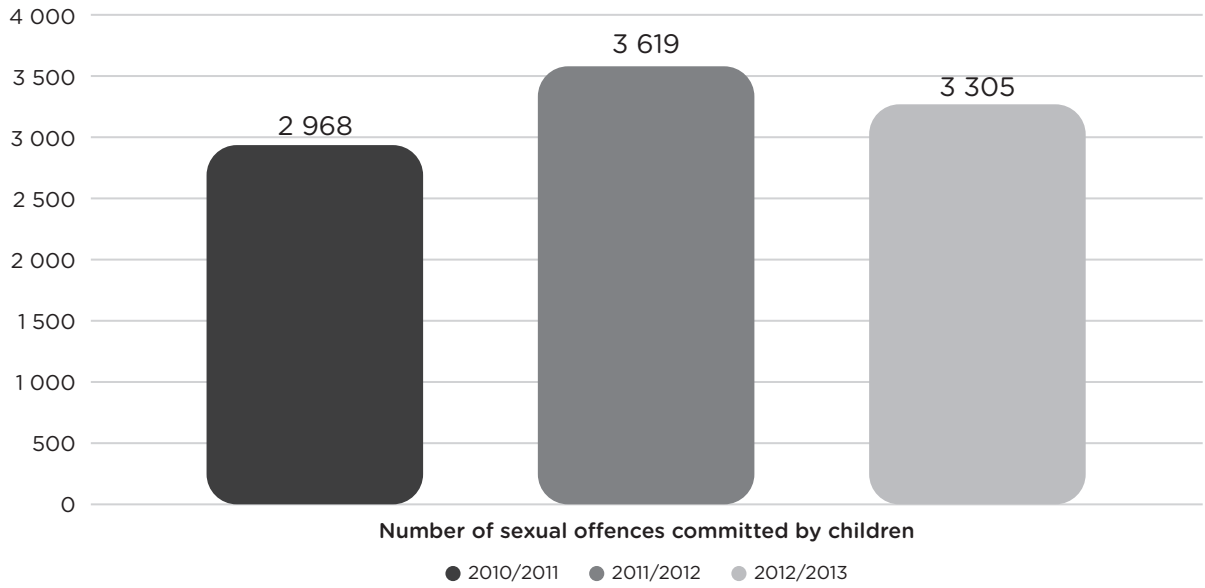
The fourth annual report compares the statistics presented across the previous financial years. This might be a useful exercise as comparisons are always useful. However, it is equally important to place the current financial year statistics in the context of that financial year. For example, when presenting the different awaiting trial measures that were utilised for children, it would also be important to compare this with the number of children charged during the said financial year. It cannot be assumed that the statistics presented for the awaiting trial population of children are the same as the children charged. If this is the case, then 22 573 children were charged during the 2013/2014 financial year[39] and history has shown that there are always inconsistencies in the reporting of children charged versus the remainder of the statistics.[40]

39 Department of Justice and Constitutional Development (2014) Annual Report on the Implementation of the Child Justice Act, 2008 (Act 75 of 2008) page 34.

40 C Badenhorst (2011) "Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good intentions, questionable outcomes" Criminal Justice Initiative Occasional Paper Series 10 page 33.

The fourth annual report on the implementation of the Act also contains valuable information not presented in previous reports. These are the number of children used by adults to commit offences[41] and the number of sexual offences committed by children.[42] Even though it does not disaggregate the statistics by the type of offence and age of child, this information is valuable for planning prevention measures. Sexual offences committed by children can be illustrated in the following graph (as per the information in the fourth annual report on the implementation of the Act):

Figure 7: Number of children who committed sexual offences

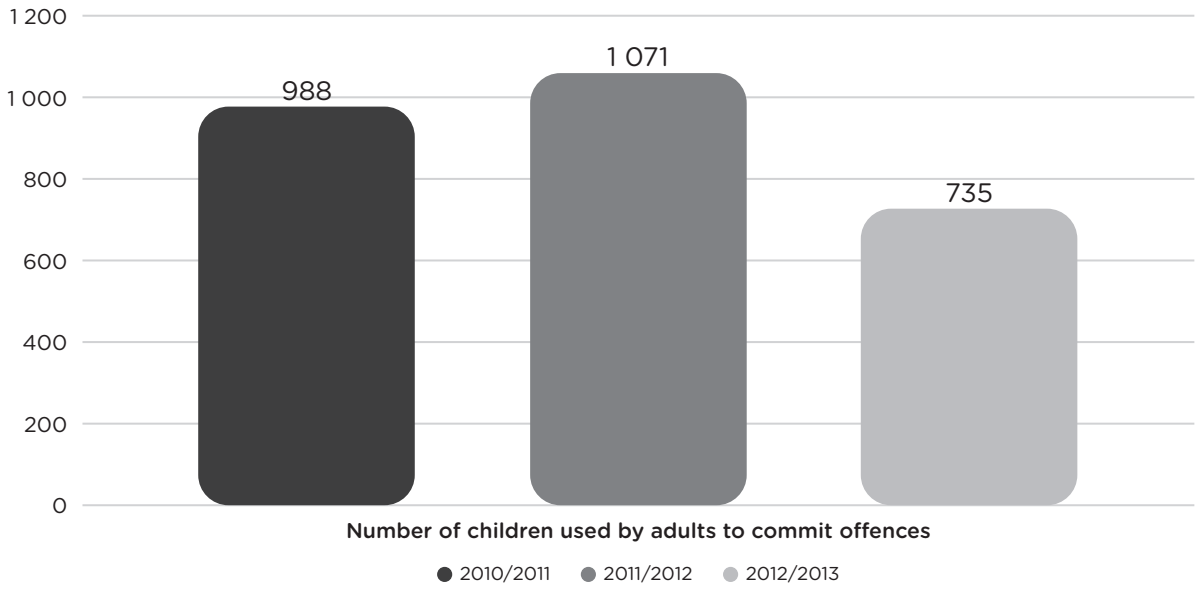


There seems to be a steady trend across the financial years on the number of children who committed sexual offences, with a sharp increase during the 2012/ 2013 financial year and a decrease during the 2013/ 2014 financial year. It must be noted that more children committed sexual offences in the 2013/ 2014 financial year, compared to the 2011/ 2012 financial year. It is not clear whether these were children charged with sexual offences or whether they were children convicted or diverted.

41 Department of Justice and Constitutional Development (2014) Annual Report on the Implementation of the Child Justice Act, 2008 (Act 75 of 2008) page 36.
42 Department of Justice and Constitutional Development (2014) Annual Report on the Implementation of the Child Justice Act, 2008 (Act 75 of 2008) page 35.

There is still a relatively low number of children used by adults to commit offences, when compared to the rest of the statistics of children in the justice system. The following chart explains this:

Figure 8: Number of children used by adults to commit offences



What is clear from this graph is that there was a major decrease in children used by adults to commit offences during the 2013/ 2014 financial year.

It would be useful to record this against reasons for such a decrease. Was it because probation officers did not probe whether adults used children to commit offences? Are these only statistics where children and adults were charged with committing the same crime? These are all important questions in order to put strategies and plans in place for the prevention of children used by adults to commit crime.

Finally, the fourth annual report should also be credited for including qualitative information on the implementation of the Act. It does this by engaging with key judicial precedent set during the financial year and considering further legislative developments that would impact on the child justice system.[43] This report looks at matters reviewed by High Court- that dealt with the reviewability of cases and with the provision of diversion.

It also engages with the legislative developments included in the following:

- **Judicial Matters Amendment Act 42 of 2013**
  This Act amended the reporting of any injury of children in police custody, where preliminary inquiries should be conducted, the automatic review of cases against children, and the expungement of criminal records against children.
- **Judicial Matters Third Amendment Act 14 of 2014**
  This Act broadened the category of persons suitable to conduct criminal capacity assessments for children between the ages of 10 and 14 years.

43 Department of Justice and Constitutional Development (2014) Annual Report on the Implementation of the Child Justice Act, 2008 (Act 75 of 2008) page 36.

4

Accountability and Oversight – where are we headed?

This section of the report will first address the overall role of Parliament in overseeing the Executive, before considering the implementation of the justice system for children in conflict with the law against that context.

4.1 Overseeing the Executive: The Role of National Parliament

The role that Parliament plays in overseeing the Executive is stated in section 55(2) and of the Constitution. In terms of this section, the National Assembly must provide for mechanisms to ensure that the national executive is accountable to it and maintain oversight over this arm of government.

Parliament describes the rationale for its oversight to be:

- To detect and prevent abuse, arbitrary behaviour or illegal and unconstitutional conduct on the part of the government and public agencies. At the core of this function is the protection of the rights and liberties of citizens.
- To hold the government to account in respect of how taxpayers' money is used. It detects waste within the machinery of government and public agencies. Thus it can improve the efficiency, economy and effectiveness of government operations.
- To ensure that policies announced by government and authorised by Parliament are actually delivered. This function includes monitoring the achievement of goals set by the legislation and the government's own programmes;
- To improve the transparency of government operations and enhance public trust in the government, which is itself a condition of effective policy delivery.[44]

44 Parliament of the Republic of South Africa Oversight and accountability model: Asserting Parliament's oversight role in enhancing democracy pages 7-8.

A question to be posed is whether the oversight role of Parliament is effectively implemented in relation to the Act r. For example, committees of Parliament and individual Members of Parliament have the authority to do oversight visits and report on such visits. Since the implementation of the Act, no reports on oversight visits was tabled by Committees or mentioned by individual Members of Parliament. Thus a key, innovative mechanism available to Parliament is not used to oversee the Executive. Considering that Parliament only oversees the implementation of the Act by way of committee meetings, it is useful to assess this next.

4.2 Overseeing the implementation of the Child Justice Act

The Act contains a very sophisticated parliamentary oversight mechanism. This oversight mechanism is set out in section 96(3) of the Act and states the following:

> The Cabinet member responsible for the administration of justice must, after consultation with the Cabinet members responsible for safety and security, correctional services, social development and health –
>
> (a) within one year after the commencement of this Act, submit reports to Parliament, by each Department or institution referred to in section 94(2), on the implementation of this Act, and
>
> (b) every year thereafter submit those reports to Parliament.

It has been argued that the purpose of this section is to gauge the impact of the Act and address the challenges and successes with regards to its implementation.[45] With that, Parliament should also be in a position to hold the Executive to account in the implementation of legislation. There are a few pieces of human rights based legislation that requires specific reports on their implementation to be presented to Parliament. Examples of this include the Domestic Violence Act, the Sexual Offences Act and the Child Justice Act.

4.2.1 The current nature of oversight on the Child Justice Act

Section 96(3) of the Act does not specifically state that Parliament must hold a meeting to consider these reports. Due to the nature of Parliamentary functions and practice, it is expected that these annual reports must be considered in Parliament. The Department of Justice and Constitutional Development should be commended for tabling annual reports on the implementation of the Act. They might not have done this on 1 April every year, as required by the Act, but they have at least tabled a report every year.

Parliament, on the other hand, has not been consistent with the consideration of annual reports on the implementation of the Act.

45 L Wakefield (2015) "The Child Justice System in South Africa: Children in conflict with the law" Policy Action Network: Children Topical Guide page 12.

The following table gives one an overview of this.

Table 1: Annual Report submission and Parliament engagement[46]

Annual Report	Date Annual Report Tabled	Date Annual Report considered	Committee considering Annual Report
2010/ 2011	April 2011	21 June 2011	Portfolio Committee on Justice and Constitutional Development and Portfolio Committee on Corrections
2011/ 2012	April 2012	12 September 2012	Portfolio Committee on Police
2012/ 2013	May 2013	23 October 2013	Select Committee on Security and Constitutional Development[47]
2013/ 2014	June 2014	Not yet considered	Not yet considered

What this table shows is that Parliament commenced with a fairly sound oversight practice on the implementation of the Act. The Portfolio Committee on Justice and Correctional Services is the ideal committee to consider these reports, because the Minister of Justice tables the reports. However, the Portfolio Committee on Justice and Correctional Services only once considered the implementation of the Act. The Portfolio Committee on Police and the National Council of Provinces Select Committee on Security and Correctional Services considered the other reports. Even though both these committees have an interest to ensure that the Act is implemented correctly and therefore have a justified oversight mandate, these committees are not ideally situated to undertake this oversight. The Portfolio Committee on Justice and Constitutional Development was the key committee in deliberating on the provisions of the then Child Justice Bill and therefore has the key mandate to consider these reports. The Portfolio Committee on Justice and Correctional Services also has the institutional memory of the deliberations on the then Child Justice Bill, and this memory is instrumental in framing the context of the implementation of the Act. The inconsistency with which different parliamentary committees consider the annual reports does not bode well with ensuring a consistent and accurate reflection on the implementation of the Act. It is necessary that this inconsistency be rectified if we want to see more compliance with the implementation of the Act and that the necessary structural challenges are addressed in a sustainable manner.

46 This table was first published by L Wakefield (2015) "The Child Justice System in South Africa: Children in conflict with the Law" Policy Action Network: Children Topical Guide pages 13 and 14.

47 It is not clear whether this meeting was to consider the 2012/ 2013 Annual Report as this cannot be deduced from the committee minutes. However, the presentations made at this meeting seem to convey that this might have been the case.

It is not only the Department of Justice and Constitutional Development that is responsible for the implementation of the Act. The Act calls for an inter-sectoral approach on its implementation.

Therefore the Portfolio Committee on Justice and Correctional Services cannot be the sole committee to oversee the implementation of the Act. This is probably why we see various committees conducting oversight on the implementation of the Act. However, it is recommended that a joint committee consisting of all the committees that oversee the implementing departments must host a combined meeting on a yearly basis to measure the implementation of the Act. This meeting must be inclusive of civil society that has an interest in the implementation of the Act.

4.2.2 The Judicial Matters Amendment Bill 2 of 2015

The Department of Justice and Constitutional Development tabled The Judicial Matters Amendment Bill 2 of 2015 in Parliament during 2015. One of the purposes of this Bill is to amend Child Justice Act "so as to further regulate reporting on the implementation of"[48] the Act. Section 19 of the Judicial Matters Amendment Bill states the following:

> Section 96 of the Child Justice Act, 2008, is hereby amended by the substitution for subsection (3) of the following subsection:
>
> (3) The Directors-General: Justice and Correctional Services, Social Development, Basic Education and Health, the National Commissioner of the South African Police Service, the National Commissioner of Correctional Services and the National Director of Public Prosecutions must each –
>
> (a) after the commencement of section 19 of the Judicial Matters Amendment Act, 2015, in the annual reports of their respective Departments or institutions to Parliament as referred to in section 40 of the Public Finance Management Act 1999 (Act No. 1 of 1999), include a separate part setting out that Department's or institution's activities and role on the implementation of this (meaning the Child Justice Act) Act; and
>
> (b) account thereon to a committee or committees of Parliament, sitting jointly or separately, as determined by Parliament.

What this section thus proposes is that high-level officials must be accountable to Parliament and that reports on the implementation of the Child Justice Act should be annexed to the Annual Reports tabled in Parliament on an annual basis. It then goes further to mandate Parliament to consider these reports.

48 Preamble to the Judicial Matters Amendment Bill.

This section is problematic for the following reasons:

- The political duty should be placed on the Minister of Justice and Correctional Services. The Executive – in the form of the Minister – is accountable to Members of Parliament, elected by the public and not officials, employed by the State.
- The current mention of high-level officials stated in section 19 does not mention the director of Legal Aid South Africa. This institution is responsible for representing children in child justice court proceedings and therefore would have valuable data on the children they represent.
- Annual Reports is not a sufficient mechanism to report on the implementation of the specific legislation. These reports state how the Departments will spend its budgets and look more at institutional arrangements to the spending and functioning of the Department. It does not look at measuring the impact of specific legislation, such as the Child Justice Act.
- The Child Justice Act imposes a complete shift to the justice system for children and reporting on it within programmes and as an an addendum to annual reports would not do it justice.

The Child Justice Act did not specifically mandate Parliament to consider the implementation of the Act by way of meetings. It only mandated the Executive to table these reports. It was always assumed that Parliament would consider reports tabled.

As seen in table 1 above, this led to an inconsistent manner in Parliament conducting its oversight. In fact, at the time of writing in April 2015, Parliament still hasn't considered the 2013/ 2014 (or fourth) report on the implementation of the Act, despite the fact that it was tabled in June 2014.

What is the reason why the Department of Justice and Constitutional Development included this amendment within the Judicial Matters Amendment Bill? Possibly the current reporting requirements are taxing on the Department and they lack the capacity to undertake this task effectively.[49] However, it should be noted that the Department of Justice and Constitutional Development always tabled reports in Parliament, as per the requirement of section 96(3) of the Act. Therefore the fault does not lie with the Department. Parliament, on the other hand, did not consistently consider these reports. It has been argued that Parliament's approach to accountability and oversight has generally been poor.[50] The fault is thus with Parliament and not the Department of Justice and Constitutional Development.[51] The amendment that Parliament must consider these reports is thus welcomed.

The amendmens proposed by the Judicial Matters Amendment Bill weaken the reporting requirements on the implementation of the Act, when in actual fact, it should be strengthened in order to measure the implementation of legislaton. It is recommended that Parliament reject the proposed clause 3(a) contained within the Bill, as these will not give one a detailed overview on the implementation of Act.

49 The Judicial Matters Amendment Bill also amends the Sexual Offences Act reporting requirements in a similar manner. See section 15 of this Bill.

50 S Waterhouse (forthcoming) People's Parliament? Do citizens influence South Africa's legislatures? in R Southall, G Khadiagala, P Naidoo, D Pillay South African Review 5.

51 See L Wakefield and S Waterhouse (2014) "Monitoring the Implementation of the Child Justice Act: Oversight of National Parliament" Article 40 Vol. 16, No 1 pages 8 – 14 for another view on the oversight role played by Parliament.

5 Conclusion

The title of this report poses a question about where we are headed with the implementation of the Act. There is no doubt that the Act (and the system) takes the best interest of children into account. This report confirms that:

- The amendments proposed in the Sexual Offences Amendment Bill are sound as far as de-criminalising consensual sexual behaviour between children aged 12 and 16 years.
- The amendments proposed in this same Bill regarding the placement of children's names on the sex offenders register, are less effective.
- The provisions of the Judicial Matters Amendment Bill are a cause for concern as far as accountability and oversight are concerned. This in effect weakens the reporting requirements of the Act, when in fact it should strengthen these requirements.

We are therefore headed in the right direction as far as the child justice system is concerned. However, the challenges that remain must be addressed systematically. The recommendations to follow may assist with addressing these challenges.

6 Recommendations

Based on the findings of this report, it is recommended that:

- The inter-sectoral committee on child justice reports should reflect more accurately and consistently on the implementation of the Act. The data presented must present an accurate reflection of the implementation of the Act. This data must also be used to ensure that challenges are addressed in the implementation of the Act. Without a clear course of action to fix defects, the reporting on such defects would be obsolete.
- The inter-sectoral committee on child justice must not omit vital information – such as data on charges brought against children, the number of assessments and the number of children diverted – on the implementation of the Act. The number of charges brought and diversion statistics must be presented in every report. Information must be consistently gathered and presented in order to permit year-on-year comparison.
- Parliament must be consistent in considering the implementation reports tabled by the Department of Justice and Constitutional Development. The current inconsistency with which these reports are considered fails to hold the implementing departments accountable.
- Section 19(3)(a) of the Judicial Matters Amendment Bill must be scrapped, as it weakens the current reporting requirements and therefore dilutes the accountability and oversight role of Parliament.

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