Child Justice

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CHAPTER 23

Child Justice

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23.1 HISTORICAL OVERVIEW

23.1.1 International developments

Internationally, the development of juvenile justice (as it is called in most parts of the world) can be traced to the child savers movement and the development of separate institutions for the reformation of children in distress—'delinquent' children, orphaned children, runaways and children on the street, and children who commit offences (amongst others). These institutions were variously termed reformatories, borstals and industrial schools. Echoing the international movement, the first reformatory in South Africa, Porter Reformatory, was established by the then Governor of the Cape Colony in 1870. It closed its doors as an institution for children in conflict with the law in 1999.[1]

The culmination of this movement was the inauguration in Cook County, Illinois, of the first separate juvenile court in 1899. This dedicated court was 'welfarist' in nature and dealt with child protection and child delinquency at the same time. It was based on the benevolent jurisdiction (*parens patriae*) of the presiding judge, whose

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1 Skelton 'Freedom in the making: juvenile justice in South Africa' in Zimring, Langer & Tanenhaus (eds) *Juvenile Justice in Global Perspective* (2015) 330.

determination of the measure to be imposed was based on the needs of the child as identified by the social services professionals acting in support of the court. The court was held *in camera*, without the involvement of lawyers, and with an absence of the formalities of trials. The development of separate juvenile justice systems underpinned by legislation followed quickly in other civil and common law jurisdictions. Following the introduction of legislation in England and Wales, the first child protection laws in South Africa were enacted in the then Cape Colony in 1911 and 1913.[2]

In a landmark decision of the United States Supreme Court in *In re Gault,*[3] it was held that the mere status of being a boy does not permit a trial in a so called 'kangaroo court'. *Gault* had been sentenced, without any due process safeguards, to an effective residential term of six years (an indeterminate sentence to ensue until he turned 21 years of age) following an allegation that he had made an obscene telephone call. The US Court required that certain due process guarantees be inserted in juvenile court processes, including the right to notice of charges, the right to confront witnesses and the right to appeal.[4] To an extent, these due process guarantees remain extremely relevant, as they are currently subsumed in art 40(2) of the United Nations Convention on the Rights of the Child (hereinafter 'CRC'), discussed in para 23.4 below. South Africa is bound to implement the provisions of the Convention, having ratified it in 1995.

The retreat of welfarism as a theoretical model for approaching juvenile justice was accompanied by the growing popularity of the 'justice' theory,[5] premised on the idea that the response should be proportionate to the offence, although this paved the way for a wave of more punitive responses to juvenile offending, especially in the United States.

The 1980s saw the introduction of the first experiments with diversion programmes aimed at avoiding court proceedings and the concomitant stigmatisation of juvenile offenders, as well as the acquisition of a criminal record at a tender age. By the end of the 1980s, diversion existed in numerous different forms internationally, such that it was included in art 40(3)(*b*) of the CRC.[6]

23.1.2 The antecedents of child justice in South Africa until 1990

The following sections describe some of the key drivers that shaped the design, structure and focus of the current child justice system in South Africa. They were the foundations from which the current system has emerged.

2 The Prisons and Reformatories Act 13 of 1911, which established the principle that children and young adults should not be imprisoned; however, there were few alternatives in practice. See too the Children's Protection Act 25 of 1913, which provided that children could be detained in a place of safety pending trial. See Skelton in Zimring, Langer & Tanenhaus (eds) *Juvenile Justice in Global Perspective* at 331.

3 387 US 1 (1967).

4 Sloth-Nielsen *The Role of International Law in Juvenile Justice Reform in South Africa* (unpublished LLD Thesis, University of the Western Cape, 2001) 63.

5 Sloth-Nielsen *The Role of International Law in Juvenile Justice Reform in South Africa* 66.

6 State parties must take measures, wherever appropriate and desirable, for resorting to criminal proceedings, provided that human rights and legal safeguards are respected.

23.1.2.1 *Institutions*

The roots of child justice in South Africa can be traced to the establishment in 1879 of Porter Reformatory, named after its benefactor, former Governor of the Cape Colony Sir William Porter, and modelled on British reformatory schools. The legislative underpinning of this was the Reformatory Institutions Act 7 of 1879. Espousing a strict regime of discipline, the reformatory also provided apprenticed labour for domestic and farm work.[7] A subsequent reformatory was established at Heidelberg, Transvaal in 1909.

Industrial schools were developed from 1894. By 1902, there were nine such schools in the Cape Colony, and in the rest of the country they were established after the South African war. These were not intended to be places of detention, but were to provide practical industrial training (especially for the so-called 'poor white'). Although they were supposed to be facilities for children in the care system, in practical terms they became a halfway house between the school and the reformatory.[8] The route to an industrial school was, however, through the welfare and not the penal system.

23.1.2.2 *Legislation*

Disparate and uncoordinated legislation that was developed over the period 1879 until the 1930s set some precedents for a juvenile justice system.[9] In 1934, the South African government appointed a committee to consider whether it was desirable to dispense with the criminal procedure as applied to juvenile delinquents, and instead to deal with them in a welfarist manner, similar to care and protection proceedings. The committee's report indicates that they ultimately decided not to take the welfarist route. Instead, they drafted a Young Offenders Bill, which framed a specialised criminal justice process for children. This Bill was not passed, so children continued to be taken through the normal criminal justice process, albeit with a few special features to accommodate their young age. These included *in camera* proceedings, assistance from parents or guardians, and special measures of sanction such as referral to a reform school.[10]

23.1.2.3 *Whipping as a sanction and its abolition*

After the introduction of apartheid in 1948, successive legislative measures adopted harsher penalties for young people resisting the regime, especially after the

7 Chisolm *Reformatories and Industrial Schools in South Africa: A Study in Class, Colour and Gender, 1882–1939* (unpublished PhD thesis, University of Witwatersrand, 1989). The educational programme in the early years at Porter was minimal, and the majority of children had not previously attended school.

8 Skelton 'From cook county to Pretoria: a long walk to justice for children' (2011) 6 *Northwestern Journal of Law and Social Policy* 413.

9 Skelton (2011) 6 *Northwestern Journal of Law and Social Policy* 413 cites the First Offenders Act of 1906; the Prisons and Reformatories Act 13 of 1911; the Children's Protection Act 25 of 1913; the Children's Protection Act 25 of 1917; the Criminal Procedure and Evidence Act 31 of 1917 (SA); and the Children's Act 31 of 1937.

10 Skelton *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice* (unpublished LLD thesis, University of Pretoria, 2005).

Sharpeville uprising. Corporal punishment was the preferred punishment for young people, and until its abolition in 1994 in the Constitutional Court case of *S v Williams*,[11] an estimated 35 000 to 40 000 juvenile offenders were sentenced to a whipping annually. The judicial abolition of whipping served as a further impetus to develop a separate juvenile justice system. In *S v Williams*, the Constitutional Court in abolishing whipping sounded 'a timely challenge to the state to ensure the provision and execution of an effective juvenile justice system'.[12]

23 1.2.4 *Racialised justice*

It is widely recognised that the responses of the justice system to youthful offending were tempered by race, with young black offenders far more likely to be visited with the full might of the penal machinery, including being sentenced to detention in adult prisons. Van der Spuy et al demonstrated that the cane became the major solution to crimes committed by (black) children,[13] and that white offenders were more likely to be diverted into re-education and reintegration efforts than their black counterparts.[14] Skelton records that studies of children committing crime became polarised into evaluations of different race groups from a criminological point of view.[15]

23.1.2.5 *Deprivation of liberty*

The history of South Africa's child justice system has been materially affected by the history of deprivation of liberty of children, initially in prisons (together with adults), and subsequently also in police custody. The spotlight was thrown on children deprived of their liberty initially for participating in political unrest, and detained without trial, by an eminent persons group despatched by the International Committee of the Red Cross to review the conditions under which they were being held. The report of this team was unexpectedly made public at the height of the state of emergency that had been declared in the apartheid governments attempt to suppress political dissent; it attracted global concern for the plight of children deprived of their liberty.[16]

After the release of Nelson Mandela in 1990, political detentions of youth activists ceased, but a grouping of non-governmental organisations (NGOs) continued to advocate on behalf of children in detention for ordinary criminal offences, running campaigns such as 'Release a child for Christmas' and 'Letting in the Light'. The death of a child in police custody in 1992 at the hands of an adult cell mate sparked a further public outcry, and demands for a new child justice system intensified.[17] The focus on getting children out of adult prisons reached a peak when amendments

11 1995 (3) SA 632 (CC).
12 1995 (3) SA 632 (CC) para [74].
13 See too Pete 'Punishment and race: the emergence of racially defined punishment in colonial Natal' (1986) 1 *Natal University Law Review* 99.
14 Van der Spuy, Scharf & Lever 'The politics of youth crime and justice in South Africa' in Sumner (ed) *The Blackwell Companion to Criminology* (2004) 162–179.
15 Skelton in Zimring, Langer & Tanenhaus (eds) *Juvenile Justice in Global Perspective* 340.
16 Sloth-Nielsen *The Role of International Law in Juvenile Justice Reform in South Africa* 17 describes this fully.
17 Skelton in Zimring, Langer & Tanenhaus *Juvenile Justice in Global Perspective* 343–345.

were effected to Correctional Services legislation to prevent the pre-trial detention of children in 1996. However, due to the inadequacy of existing alternatives to pre-trial detention in prisons, the implementation of the legislation was highly problematic and the status quo ante had to be restored while plans were developed to address the issue of alternative facilities.[18] These plans were largely formulated by an Inter-Ministerial Committee on Young People at Risk (IMC) appointed in 1997. The fruits of the IMC's work on deprivation of liberty of young people is discussed further at para 23.2.4 below.

23.2 DEVELOPMENT OF THE PILLARS OF THE EMERGING CHILD JUSTICE SYSTEM AFTER 1990

23.2.1 Diversion

Diversion was first launched by the NGO NICRO (National Institute for Crime Prevention and the Rehabilitation of Offenders) in 1992. By 1993, the organisation was offering three different programmes for children in conflict with the law. Over the next decade, diversion was extended to all provinces, and the range of programmes expanded. Different service providers also entered the scene. The initiatives of the IMC added ballast to the emerging child justice system, insofar as several pilot projects concerned developing restorative justice diversionary projects, and during the period of tenure of the IMC, considerable efforts were expended on training judicial officers and prosecutors about diversion and its benefits. The way in which diversion operated at this time was through the mechanism of prosecutorial withdrawal of charges, pending the referral of the child to a diversion option and its successful completion. The system was wholly dependent on the exercise of prosecutorial discretion in favour of withdrawal of charges. Nevertheless, throughout the 1990s and until the introduction of the Child Justice Bill in Parliament in 2002, diversion gained traction as a key feature of child justice in South Africa.[19]

By the time the Child Justice Bill was readied for introduction into Parliament, three distinct phenomena could be remarked upon in relation to diversion services in South Africa.

First, it was apparent that diversion services would by and large continue to be delivered by NGOs, who were subsidised by the Department of Social Development (DSD) in terms of service level agreements. That DSD, too, would carry the responsibility for regulating diversion programmes and ensuring that the credibility and integrity of diversion was maintained. The manner in which this has subsequently been provided for in the body of the Child Justice Act 75 of 2008 (hereinafter 'CJA') and regulations is described below.

18 Sloth-Nielsen *The Role of International Law in Juvenile Justice Reform in South Africa* 170–183 describes the saga of amendments to the Correctional Services Act 111 of 1998 to restrict children's detention in prisons.

19 Sloth-Nielsen 'A short history of time: charting the contribution of social development service delivery to enhance child justice 1996–2006' (2007) 43 *Social Work/Maatskaplike Werk* 317.

Second, diversion had already enjoyed legal recognition by the time the CJA was passed. In *S v D*,[20] four children had been arrested for possession of dagga, had been taken to court, and after pleading guilty, received a criminal record within a short period of time. The matter was taken on judicial review on the basis that, in a similar matter a few weeks earlier, the accused children had been diverted. The review court, after noting the increased use of diversion in the Western Cape Province, nevertheless upheld the role of the prosecutor as *dominus litis* in deciding whether or not to press criminal charges. In *S v Z*,[21] the Court had laid down an important guiding principle. As a starting point, before proceeding with a prosecution, the court should enquire whether a child accused should be enrolled in a diversion programme if this is appropriate in the circumstances. The willingness of courts to embrace diversion set a positive tone for the extensive detail accorded diversion in the CJA, and paved the way for Parliamentary endorsement of this.

Third, the exclusive dependence on prosecutorial good will to embrace diversion in an unregulated environment, coupled with the need to ensure equal access to diversion beyond urban areas, and to children from all race groups and socio-economic classes, played an influential role in determining the shape and form in which diversion would emerge in the CJA. Thus, some of the diversion orders, the restorative justice options, and the division of diversion into two tiers, are the products of these concerns. Further, as will be seen below, the mandatory nature of the preliminary inquiry, to ensure that diversion would be considered in each and every matter, draws inspiration from concern about unfettered prosecutorial discretion leading to discriminatory access to diversion.

23.2.2 Assessment

The first assessment initiatives got underway in the Western Cape Province in 1994. They were premised on an early social history evaluation of the child, the child's family circumstances, and the nature and circumstances of the alleged commission of the offence by the child, with the aim of advising the prosecutor on whether diversion was an option before a decision on pursuing a prosecution was taken. The institution of assessment was substantially enhanced through the work of the IMC, which tested different models in various centres.[22] The Probation Services Amendment Act 35 of 2002 concretised the concept by incorporating a definition of assessment in the principal Act, and s 4(1) of the Act was amended to provide that probation officers would bear the duty of performing assessments. During that period, and until around 2006, efforts were expended on creating more probation officer posts, and enhancing skills and capacity for the performance of assessment services. A shift occurred after 2006, because it became known that South Africa was experiencing a shortage of social workers to fulfil the tasks associated with the implementation of the Children's Act 38 of 2005 (as it would become), and that

20 1997 (2) SACR 671 (C).
21 1999 (1) SACR 427 (E).
22 See, for instance, Sloth-Nielsen *The Durban Reception Assessment and Referral Centre: An Evaluation Report* (1999) (copy on file with the author). See, too, Sloth-Nielsen (2007) 43 *Social Work/Maatskaplike Werk* 317.

generic social worker posts were needed (rather than ones specific to probation services).

This notwithstanding, the role of social workers/probation officers in the pre-trial period[23] continued to be seen as crucial to the integrated and multi-stakeholder child justice system, and has resulted in the dedicated chapter on assessment which now forms part of the CJA.

23.2.3 Reform of the child protection system

The history and ongoing trajectory of activism around children deprived of their liberty, as described earlier, led to the establishment of the South African Law Commission Project Committee on Juvenile Justice (Project Committee) shortly after the Constitution of the Republic of South Africa, 1996 (hereinafter 'the Constitution') came into operation. South Africa had ratified the CRC some months earlier (on 16 June 1995). The focus of the Project Committee was to be the formulation of recommendations for a separate criminal procedural system for children in conflict with the law. But the new international law context which the ratification of the CRC heralded, coupled with the IMC investigation into the state of care institutions, reformatories and industrial schools which had revealed shocking conditions and abuse in these facilities,[24] gave rise to the realisation that a broader investigation of child protection law was required, beyond establishing a separate justice system for children in conflict with the law. Hence a Project Committee on the Review of the Child Care Act was additionally established, also under the auspices of the South African Law Reform Commission (SALRC), but with significant representation from the DSD.

The two Project Committees (on Juvenile Justice and on the Review of the Child Care Act) worked in tandem to ensure that the products they developed were not in conflict. There are thus some points at which the child care and protection system intersects with the child justice system, and these are outlined in para 23.12.2 below.

23.2.4 The development of new institutions linked to the child justice system

A key undertaking that emerged from the IMC process was the rationalisation and reform of the various institutions linked to both the child protection system and the child justice system. The IMC introduced the concept of 'secure care' in response to the debacle that occurred in 1996 when children were released from prisons, and available alternative facilities were unable to hold children charged with serious offences safely and securely. The SALRC *Report on the Review of the Child Care Act* proposed rebranding all children's residential facilities 'child and youth care centres' (CYCCs). They would be differentiated by the programmes they offered (substance abuse programmes, programmes for children with behavioural difficulties, secure care, programmes for the reception of abandoned and orphaned children and so forth). Ultimately, these would be governed by chap 14 of the Children's Act 38 of

23 Previously their role was confined to compiling pre-sentence reports after conviction.
24 IMC, Government of the Republic of South Africa *In Whose Best Interests?* (1997).

2005. Facilities which previously resorted under the Department of Education (notably reformatory schools and some schools of industry) would be transferred to the provincial DSDs,[25] who would then be the custodian of all children's residential care facilities, whether operated by the DSD itself, or whether operated by NGOs or faith-based organisations. Over the period 2001 until now, secure-care facilities have been designated, built or commissioned in all provinces.[26] The process of transfer/repurposing of institutions formerly under the auspices of the Education departments has now taken place. [27]

23.2.5 The antecedents of the monitoring system for child justice

When the IMC was established and children were again by law permitted to be detained in pre-trial detention pending the finalisation of their cases, an Inter-Sectoral Committee on Child Justice was established in 2001 with a particular focus on managing the flow of children into prisons. It comprised the Departments of Justice, Correctional Services, Social Development and Education,[28] the National Prosecuting Authority, the South African Police Service and Legal Aid South Africa. Over time it became evident that the sharing of data between the different role players was a necessary and beneficial practice to ensure that blockages could be identified and challenges addressed. The role of the current monitoring mechanism is evident throughout this chapter, and is briefly discussed in para 23.12.1 below.

23.3 THE LAW REFORM PROCESS

The process of developing a proposal for a new juvenile justice system commenced with the appointment of a Project Committee of the SLRC in 1996, as noted in s 23.2.3 above. The Project Committee released an Issue Paper in 1997, a Discussion Paper with a draft bill and motivated recommendations in 2000, and a Report on Juvenile Justice with its final proposals and draft bill in 2000. The Child Justice Bill was thereafter introduced to the Parliamentary process in 2002. As has been recorded, after some deliberation on the Bill, the Parliamentary process went into abeyance for a period of some years, and the Bill was only resuscitated in 2007.[29] Public hearings were convened and the Bill was reshaped to a fair degree during the deliberations. The final version was adopted in 2008, with the date for implementation set at 1 April 2010, to enable planning for implementation to take place.

The documents compiled by the SALRC remain important sources of reasoning which can enhance understanding of various dimensions of the CJA. An example is the SALRC approach to legal representation of children facing trials in a child justice court, which were premised on the situation prevailing in the 1990s that most

25 Or repurposed for other ends—see para 23.12.2 below.
26 Some facilities are outsourced to private sector operators.
27 Department of Justice and Constitutional Development *Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Annual Report: 1 April 2015–31 March 2016*, available at http://www.justice-.gov.za/vg/cj/cja-anr-2015–2016.pdf.
28 In view of their role as custodian of reformatories (at the time).
29 Skelton in Zimring, Langer & Tanenhaus *Juvenile Justice in Global Perspective* 345.

children were unrepresented in court, and many refused state funded legal representation when it was offered to them, preferring to conduct their own defences. The scheme of the Act now in relation to legal representation is discussed at para 23.11 below.

23.4 CONSTITUTIONAL AND INTERNATIONAL LAW CONTEXT

Sections 28 and 35 of the Constitution underpin the constitutional parameters of child justice. The former section deals with children's rights, and of note are s 28(2) which renders the best interests of the child a paramount concern in all matters affecting the child, s 28(3) which defines a child as any person aged below 18 years, and s 28(1)(*g*) which enshrines as a constitutional right the child's right not to be detained except as a matter of last resort and for the shortest appropriate period of time, and further to be kept in conditions, and treated in a manner, that respects the child's status as a child whilst in detention.[30]

International law has influenced the development of the CJA in notable respects, as has been described fully elsewhere.[31] International law has also been significant in influencing case law which has laid down benchmarks in South African jurisprudence. In particular, in *Centre for Child Law v Minister of Justice and Constitutional Development*,[32] the section of the Criminal Law Amendment Act prescribing the imposition of a minimum sentencing regime on 16 and 17 year olds for certain specified (serious) offences was struck down as unconstitutional.[33] Cameron J pointed out that s 28(1)*(g)* of the Constitution drew inspiration from the CRC, and further cited United Nations Standard Minimum Rules for the Administration of Juvenile Justice[34] (the Beijing Rules); United Nations Rules for the Protection of Juveniles Deprived of their Liberty[35] (JDLs); and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines).[36] He said that the principles evident from these documents regarding child sentences are: proportionality (children must be dealt with in a manner 'appropriate to their well-being and proportionate both to their circumstances and the offence'; imprisonment as a measure of last resort and for the shortest appropriate period of time; that children must be treated differently from adults; and that the well-being of the child is the central consideration.[37]

30 Section 28(1)*(b)* may be relevant to children who are deprived of their liberty since they are then in the care of the state authorities and deprived of a family environment.

31 See Sloth-Nielsen *The Role of International Law in Juvenile Justice Reform in South Africa* 475–493; Skelton in Zimring, Langer & Tanenhaus *Juvenile Justice in Global Perspective* 346–351.

32 2009 (6) SA 632 (CC).

33 The Amendment Act was adopted to nullify the decision of the Supreme Court of Appeal in *S v B* 2006 (1) SACR 311 (SCA), which had held that the previous sentencing regime automatically conferred a discretion on sentencing officers where an offender was under 18 years but over 16 years of age, leaving them free without more to depart from the prescribed minimum sentence. The government sought, with the impugned amendment, to undo the implications of this decision.

34 General Assembly Resolution A/RES/40/33, 1985.

35 General Assembly Resolution A/RES/45/113, 1990.

36 General Assembly Resolution A/RES/45/112, 1990.

37 *Centre for Child Law v Minister for Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC) para [61].

International law, as well as the African Charter on the Rights and Welfare of the Child (ACRWC),[38] has most recently been cited in support of the Constitutional Court's approach to arrest and detention of a child via the prism of s 28(2) and s 28(1)*(g)* of the Constitution in *MR v Minister of Safety and Security*.[39] The rights and obligations of children contained in international and regional instruments, with particular reference to the CRC and the ACRWC are also reflected as guiding principles in s 3*(i)* of the CJA.

As noted, the formulation of s 28 of the Constitution was inspired by the CRC. In particular, the requirement that deprivation of liberty be used as a last resort and only for the shortest appropriate period of time is based on art 37*(b)* of the CRC. This article has been influential in the development of both jurisprudence in the sphere of child justice, as well as in the organisation, structure and contents of the CJA which limit detention. This topic is more fully discussed in paras 23.6 and 23.10 below.

The provision that the best interests of the child shall be of paramount concern in all matters affecting children (s 28(2)) has also been adduced in the elaboration of principles relating to child justice.

Restorative justice featured prominently in discussions which took place during and prior to the Project Committee's work. Inspired both by the then newly introduce approach in New Zealand, as well as the restorative justice leaning of the Truth and Reconciliation Commission, the concepts and practice of restorative justice feature significantly in the final version of the CJA.[40] Restorative justice features in the discussion on diversion (para 23.7 below) and sentencing (para 23.10 below).

23.5 APPLICATION OF THE ACT, AGE AND THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

23.5.1 Application of the Act

The question of age is central in determining which persons would fall under the jurisdiction of the CJA. During the law reform process, there was a fair degree of consensus that the system should apply to all children under the age of 18 in conformity with the age of childhood enshrined in the Constitution.[41] There was also a view that older youth could, exceptionally, benefit from the new procedures envisaged in the Act, such as when children below 18 commit an offence together with slightly older co-accused.

Hence, s 4(1)(*b*) provides for the Act to apply to a person alleged to have committed an offence, who was 10 years or older but under the age of 18 years when he or she was—

(a) handed a written notice in terms of s 18 or 22;
(b) served with a summons in terms of s 19; or*(c)* arrested in terms of s 20.

38 Ratified by South Africa in 2000.
39 2016 (2) SACR 540 (CC).
40 Skelton in Zimring, Langer & Tanenhaus *Juvenile Justice in Global Perspective* 351; Skelton (2011) 6 *Northwestern Journal of Law and Social Policy* 413.
41 Section 28(2).

What of the situation that arose in *S v Kwalase*,[42] where a youthful offender (15 years at the time of commission of the offence) absconded and was brought to book only when aged over the age of 21 years? A careful reading of s 4(1)*(b)* suggests that the CJA would not apply, as the child justice system could then become contaminated with the presence of much older adults in facilities and programmes designated for those below the age of 18. However, s 4(2)*(a)* gives the Director of Public Prosecutions (DPP), having jurisdiction, the discretion to direct that the matter be dealt with in terms of s 5(2) to (4). There does not appear to be an age limit to the exercise of this discretion, provided the *arrest* of the accused took place before the age of 18 years. Hence, the DPP's discretion could conceivably be exercised to cover the sort of factual situation that arose in *Kwalase*.

Effect is given to the discretion to allow older youth to have the benefit of the procedures under the CJA in s 4(2)*(b)*, which provides that the DPP having jurisdiction may, in accordance with directives issued by the National Director of Public Prosecutions (NDPP) in terms of s 97(4)*(a)*(i)*(aa)*, in the case of a person who is 18 years or older but under the age of 21 years, at the time of arrest, receipt of a written notice or service of a summons, direct that the matter be dealt with in accordance with the processes of the CJA (including access to diversion and mandatory appearance at a preliminary inquiry).

Processes commenced under the CJA (eg by an arrest or the receipt of a written notice or summons) would continue to be concluded under the CJA despite the young offender reaching the age of 18 years during the course of completion of its processes.

The CJA is also applicable to children under the age of 10 years alleged to have committed an offence as specified in s 4(1)*(a)*. This is to ensure the applicability of further procedures to such children (albeit not criminal procedures). The options for children below the age of 10 are spelt out in s 5(1) and s 9 of the CJA. Where a police official has reason to believe that a child suspected of having committed an offence is under the age of 10 years, he or she may not arrest the child, and must, in the prescribed manner, immediately hand the child over to his or her parents or an appropriate adult or guardian. If no parent, appropriate adult or guardian is available, or if it is not in the best interests of the child to be handed over to the parent, appropriate adult or guardian, the child should be sent to a suitable child and youth care centre (s 9(1)), and the police official must thereafter notify a probation officer. A probation officer must then assess the child following the procedures and principles outlined in chap 5 of the CJA, and then take one of the measures outlined in s 9(3), namely referring the child to the children's court on any of the grounds set out in s 50; referring the child for counselling or therapy; referring the child to an accredited programme designed specifically to suit the needs of children under the age of 10 years; arranging support services for the child; arranging a meeting which must be attended by the child, his or her parent or an appropriate adult or a guardian, and which may be attended by any other person likely to provide information for the

42 2000 (2) SACR 135 (C).

purposes of a meeting;[43] or deciding to take no action. Regulations 3–15 of the Act (promulgated by GN R251 in *GG* 33067 of 31 March 2010) prescribe how a child under the age of 10 years must be handed over to a probation officer, and how the various referrals that may be undertaken by the probation officer should occur in practice. If the option selected is the arranging of a meeting relating to the circumstances surrounding the allegation, the regulations prescribe the format and content of the written plan that must emerge from that meeting. Assessments of such children and their outcomes must also be recorded, and probation officers are clearly directed by reg 11 as to what they need to consider before taking a decision that no further action will ensue regarding a child aged below 10 who has been accused of an offence.

23.5.2 Minimum age of criminal capacity

As regards the minimum age for criminal responsibility, this was much debated during the law reform process, and the SALRC held a dedicated workshop to ventilate the different options that might be feasible.[44] Until the enactment of the CJA, common law provided that the minimum age for criminal responsibility was 7 years of age, with a rebuttable presumption of *doli incapax* operating for children above this age, but below the age of 14 years (derived from Roman Law). The SALRC was cognisant of the need to raise the minimum age for criminal responsibility from the very low age of 7 years, and was also aware of moves in other jurisdictions to abolish the presumption of criminal incapacity. The final version of the Bill proposed raising the minimum age from 7 to 10 years, and retaining the *doli incapax* presumption as a 'protective mantle'[45] to shield younger children from prosecution as far as possible.

The debates during the Parliamentary discussions on this issue some years later were further influenced by CRC's release in 2007 of General Comment no 10 on Children's Rights in Juvenile Justice.[46] The General Comment faced up squarely to the indeterminate position in the CRC itself (article 40(3)(*b*) of the CRC provided merely that a minimum age must be set, which should not be too low given children's age and maturity), by requiring that this age not be set at lower than 12 years, and requiring that consideration should be given by state parties to the CRC to the progressive raising of that age.

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43 The purpose of the meeting convened by a probation officer in terms of sub-s (3)*(a)*(v) is to assist the probation officer to establish more fully the circumstances surrounding the allegations against a child; and to formulate a written plan appropriate to the child and relevant to the circumstances (s 9(4)*(a)* and *(b)*). The written plan should specify the objectives to be achieved for the child and the period within which they should be achieved; contain details of the services and assistance to be provided for the child; specify the persons or organisations to provide the services and assistance; and state the responsibilities of the child and of the parent, appropriate adult or guardian (s 9(5)). If the child fails to comply with any obligation imposed on him or her, or with any responsibilities contained in the written plan, the probation officer must refer the matter to the children's court to be dealt with under chap 9 of the Children's Act 38 of 2005 (s 9(6) and (7)).

44 Sloth-Nielsen *The Role of International Law in Juvenile Justice Reform in South Africa* 117–157. See, too, Gallinetti, Kassan & Ehlers *Child Justice in South Africa: Children's Rights under Construction* (2006) Child Justice Alliance Conference Report chap 6.

45 SALRC (Project 106) *Report on Juvenile Justice* (2000) para 3.10–3.11.

46 Committee on the Rights of the Child General Comment, CRC/C/GC/10 (2007).

Parliament was, however, reluctant to move to the threshold level of 12 years in the absence of data on the incidence and nature of offending children aged below 12 years. This led to the inclusion of s 8 of the CJA. This section called for the Minister for Justice to submit a report to Parliament not later than five years after the commencement of the CJA, to determine whether or not the minimum age for criminal responsibility should be raised beyond 10 years. The information to be provided was to be based on research on the number of children aged 10, 11, 12 and 13 alleged to have committed offences in the five year period following the implementation of the Act; the nature of the offences they were accused of; the sentences imposed on these children; the number of children of these ages whose cases did not go to trial; and the number whose cases did not proceed because the prosecutor was of the view that criminal capacity would not be proved.[47]

In February 2015, the Department of Justice and Correctional Services convened a multi-stakeholder workshop to review the manner in which the scheme introduced by the CJA was operating in practice. Attended by psychiatrists, Legal Aid South Africa, magistrates, prosecutors, academics and researchers, the conference resolutions were then tabled as part of a report to Cabinet in February 2016.[48] The Department of Justice and Correctional Services has submitted this report on the Review of the Minimum Age of Criminal Capacity to Parliament for consideration; whilst a formal presentation has taken place, the contents are still under deliberation at the time of writing. The Report recommends that:

(a) The minimum age of criminal capacity be raised to 12 years with the retention of the rebuttable presumption of incapacity for children 12 years or older but under the age of 14 years, applicable (only) to children referred to the child justice court for plea and trial;

(b) The Act (ss 7, 10, 11, 41, 49, 52, 58 and 67) be amended to remove the requirement of establishing the criminal capacity of children 12 years or older but under 14 years for purposes of diversion. The prosecutor and magistrate will consider and be satisfied that the child's educational and maturity levels are such that he or she will understand and benefit from diversion before the child is diverted;

(c) Section 8 of the Act be amended and retained in the Act to provide for another review of the minimum age of criminal capacity within ten years.

Until such time as the proposals suggested are adopted by Parliament, the current position under the CJA continues, as described next. Put simply, the current minimum age for criminal responsibility is 10 years. Children below that age may not be prosecuted, in accordance with s 7(1) of the CJA. Children between 10 and below 14 years can be prosecuted, but several safeguards have been built in to ensure that (a) this does not occur for frivolous or petty cases and (b) that due consideration is given to the actual establishment of the child's criminal capacity before and during the prosecution phases.

47 Section 96(4) and (5) of the CJA.

48 At the time of writing, this report is not yet publicly available. The author is in possession of a copy.

First, s 10(1) requires that the prosecutor must have regard to a series of factors before deciding to institute a prosecution against a child falling into this age category. These are the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child, the nature and seriousness of the alleged offence, the impact of the alleged offence on any victim, the interests of the community, a probation officer's assessment report in terms of chap 5 of the CJA, the prospects of establishing criminal capacity in terms of s 11 if the matter were to be referred to a preliminary inquiry in terms of chap 7, the appropriateness of diversion, and any other relevant factor. Once the decision is made that criminal capacity is likely to be proved, the matter can either be diverted, or referred for the convening of a preliminary inquiry (discussed in para 23.8 below). If the prosecution is of the view that the child's criminal capacity will not be able to be proved, the matter will be referred to a probation officer to be dealt with in the same way as where the child is aged below 10 years and lacks criminal capacity *ex lege*.

Section 7(2) now incorporates a version of the common law rebuttable presumption of criminal incapacity. It provides that a child who is 10 years or older but under the age of 14 years, who commits an offence, is presumed to lack criminal capacity, unless the state proves that he or she has criminal capacity in accordance with s 11. Section 11, in turn, requires that the state prove beyond reasonable doubt that the child had the capacity to appreciate the difference between right and wrong at the time of the commission of the alleged offence, and the ability to act in accordance with that appreciation.[49]

Every child who is alleged to have committed an offence must be assessed by a probation officer. One of the purposes of the assessment, in the case of a child who is between the ages of 10 and 14 years, is to express a view on whether expert evidence on the criminal capacity of such a child is required. After completion of the assessment, the probation officer must compile the assessment report including, where applicable, a conclusion on the 'possible criminal capacity' of the child, if the child is between the ages of 10 and 14 years, as well as measures to be taken in order to prove criminal capacity.

An inquiry magistrate or a court may, on their own accord or at the request of the prosecutor or the child's legal representative, order an evaluation of the criminal capacity of the child by a suitably qualified person, in practice a psychologist or psychiatrist.[50]

Section 11 continues to provide that the state must prove beyond a reasonable doubt the capacity of a child who is 10 years or older but under the age of 14 years to appreciate the difference between right and wrong at the time of the commission of an alleged offence, and to act in accordance with that appreciation. In making a

49 See in general Skelton 'Proposals for the review of the minimum age of criminal responsibility' (2013) 26 *SACJ* 257; Walker 'The requirements for criminal capacity in section 11(1) of the new Child Justice Act, 2008: a step in the wrong direction?' (2011) 24 *SACJ* 33, referring to the absence of a requirement that the child must additionally be proven to have appreciated the wrongfulness of his or her particular unlawful conduct in the circumstances in which it was committed. Skelton proposes that the section be more clearly worded.

50 Section 11(3) as amended by the Judicial Matters Amendment Act 14 of 2014.

decision regarding the criminal capacity of the child in question, the inquiry magistrate (for purposes of diversion), or if the matter has not been diverted, the child justice court (for purposes of plea and trial), must consider the assessment report of the probation officer referred to and all evidence placed before the inquiry magistrate or child justice court prior to diversion or conviction, as the case may be, which evidence may include a report of an evaluation referred to in sub-s 11(3).

This section to a great extent—but not completely—recasts the common law rebuttal standard in statutory form.[51]

The provisions relating to criminal capacity were recently considered by a review court in *S v TS*,[52] a matter involving a 13-year-old girl who stabbed her stepfather with fatal results. She was originally charged with murder, but the charge was later reduced to one of culpable homicide. The accused pleaded guilty to the reduced charge and tendered a plea statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (hereinafter 'CPA'). She had armed herself with a knife to use as a deterrent, due to an altercation with him earlier in the day. She did meet him later, whereupon he threatened her, and she responded by stabbing him once with the knife in the chest, which caused his death. At the commencement of the proceedings, she had been assessed by a child psychiatrist and a clinical psychologist. They found her to have borderline mental retardation, and the IQ of a 12-year-old. The magistrate did not think this accorded with her own observations of the accused in court, and pursued an 'off the record' discussion with the mental health experts to clarify their findings. The experts were not called as witnesses. The accused was convicted on the basis of her guilty plea.

On review, the court held that it was doubtful whether the s 112(2) statement sufficiently satisfied the rebuttal of the presumption of incapacity beyond reasonable doubt. Given the requirement of *culpa* for culpable homicide, the test to be adopted appears to be that of the reasonable person, whilst the subjective frailties of the child find their proper place in the assessment of the child's criminal capacity.[53] Another relevant issue in the case were the requirements of private defence, which would render the killing justified (not unlawful). In this assessment, the relative strength of the accused and the victim, their relations, gender differences and so forth are relevant considerations. In the result, the review court did not consider that the accused's admissions (in her plea of guilty) justified a conviction, in the light of the experts' concerns and the circumstances of the case. In particular, the court was concerned 'whether she had the capacity to determine the extent to which she was entitled to use force . . . in the particular circumstance of the case and to act in accordance with that appreciation'.[54]

51 Skelton (2013) 26 *SACJ* 257 at 260 and Walker (2011) 24 *SACJ* 33 at 35.

52 2015 (1) SACR 489 (WCC), discussed in Walker 'Determining the criminal capacity of children aged 10 to 14 years: a comment in the light of *S v TS* 2015 (1) SACR 489 (WCC)' (2015) 28 *SACJ* 33.

53 S v *TS* 2015 (1) SACR 489 (WCC) para [23]; see further paras [27] and [28]. See also *S v Msbengu* 2009 (2) SACR 316 (SCA) concerning the difficulty of admitting to one's own criminal capacity in the face of the rebuttable presumption of incapacity, in the context of a guilty plea (discussed in Skelton (2013) 26 *SACJ* 257 at 268).

54 *S v TS* 2015 (1) SACR 489 (WCC) para [37].

S v *TNS* is indicative of some of the practical difficulties that the rebuttal of the presumption of incapacity has occasioned. These include a shortage of resources to conduct mental health assessments;[55] the absence of a standardised assessment tool for the mental health assessment of criminal capacity (which is a legal, not medical, construct); magistrates' uncertainty as to how they can be satisfied about a child's criminal capacity, without evidence to this effect, when diverting a child in terms of s 49(1)*(b)* at the preliminary inquiry; difficulties that legally qualified people (prosecutors and magistrates) raise concerning their competence to assess criminal capacity prior to diversion due to their lack of expertise on child development; and the fact that few children aged 10 or 11 years have been found to have criminal capacity in practice. These and other factors are fully ventilated in the Department's Report on the Minimum Age of Criminal Capacity. Despite the mentioned difficulties, the proposal to retain the rebuttable presumption for 12 and 13-year-olds appears primarily motivated by the concern that removing such protection might be constitutionally suspect in the light of s 28(2) of the Constitution.

It remains to be seen what Parliament ultimately decides.

23.6 POLICE POWERS, ARREST AND PRE-TRIAL RELEASE AND DETENTION

23.6.1 The constitutional provisions implicated in the deprivation of liberty of children

MR v Minister of Safety and Security[56] concerned an application for damages against the minister for the unlawful arrest and detention of a 15-year-old child. Since the matter commenced prior to the implementation of the CJA, she was arrested pursuant to s 40(1)*(j)* of the CPA, which permits a warrantless arrest by a peace officer of any person who 'wilfully obstructs him in the execution of his duty'. MR had intervened and interposed herself between her mother and police officers who were trying to arrest her mother for violating a protection order, the incident taking place at their house. The pair (MR and her mother) were arrested, taken to the nearest police station and detained. They were released approximately 19 hours later. The prosecutor declined to prosecute. Although at the Constitutional Court the respondent conceded the unlawfulness of the arrest and detention of MR, the Court nevertheless dealt with the constitutional and legal arguments at stake in assessing her claim for damages for wrongful arrest and detention. Bosielo AJ, writing for the majority, posed the following as the central questions to be answered in the context of the facts:

> Two crucial questions call out for an answer: first, what does the best interests of the child mean? Intricately allied to this question is: what does it mean that these best interests be accorded paramount importance? Second, what does this require of police officers who have to confront children in conflict with the law in real life situations? In other words, how does section 28(2) impact on the power of police officers to arrest

55 According to information provided at the expert workshop of February 2015, some provinces have no state-funded posts for child psychiatrists at all.

56 2016 (2) SACR 540 (CC).

> under section 40 of the Criminal Procedure Act (CPA)? Does this mean that police officers may never arrest and detain children, even when they are in conflict with the law?[57]

The evidence of both police officers was that even if they knew that she was a child when they arrested her, they would still have arrested her. Concerning her detention, their explanation is that notwithstanding that they knew that she was a child, they had no authority to release her. Only the commanding officer or investigating officer could release her.

The court first came to the conclusion that arrest and detention were two separate legal processes, based on an analysis of the relevant provisions in the CPA (ss 40 and 41 versus s 50),[58] and the 'bright line' distinguishing arrest and detention in s 35(1) and (2) of the Constitution.[59] The fact that both result in deprivation of liberty 'do not make them one legal process'.[60] It was further noted that the police have a discretion to effect an arrest for obstructing them in the course of their duties, which discretion must be exercised in such a manner that they 'weigh and consider the prevailing circumstances and decide whether an arrest is necessary', this being a 'fact specific enquiry'.[61] The discretion must further be exercised 'in the light of the Bill of Rights', 'cognisant of the importance which the Constitution attaches to the right to liberty and one's own dignity in our constitutional democracy'.[62]

Section 28(2) demands, in peremptory terms, that in all matters affecting a child, her best interests are of paramount importance. In the context of an arrest of a child, this requires of the police officers, notwithstanding the fact that they are satisfied that the jurisdictional facts in section 40 of the CPA have been met, to go further and not merely consider but accord the best interests of such a child paramount importance.[63]

Since it was conceded that she was no threat to the arresting officers, had not attempted to run away, and could easily have been handed a summons to appear in Court or placed in her father's care, had they considered her best interests, there would have been no reason to arrest her.[64]

Hence, in the context of arrests of children, s 28(2) seeks to 'insulate them from the trauma of an arrest by demanding in peremptory terms that, even when a child has to be arrested, his or her best interests must be accorded paramount importance',[65] and arrest should be resorted to when the facts are such that there is no other less invasive way of securing the attendance of such a child before a court.[66] This does not, however, mean that children can ever be arrested—rather it requires of the criminal justice system to be 'child sensitive'. The consideration of the child's

57 *MR v Minister of Safety and Security* para [5].
58 *MR v Minister of Safety and Security* paras [37] and [38].
59 *MR v Minister of Safety and Security* para [36].
60 *MR v Minister of Safety and Security* para [39].
61 *MR v Minister of Safety and Security* para [42].
62 *MR v Minister of Safety and Security* para [44].
63 *MR v Minister of Safety and Security* para [48].
64 *MR v Minister of Safety and Security* para [52].
65 *MR v Minister of Safety and Security* para [57].
66 *MR v Minister of Safety and Security* para [58].

best interests is part and parcel of the exercise of the discretion to arrest, however, and not an additional jurisdictional requirement, the Court held (at para 64).

Regarding the subsequent detention of MR, the Court affirmed that detention 'constitutes a drastic curtailment of a person's freedom which our Constitution guards jealously, and should only be interfered with where there is a justifiable cause. Second, detention has traumatic, brutalising, dehumanising and degrading effects on people'. Further noting that detention facilities for children are not ideal places and they can have harmful effects on the detained child (as they did in this scenario),[67] which is the reason why, even when a child has to be detained, s 28(1)*(g)* of the Constitution stipulates that it should be for 'the shortest appropriate time'. It was agreed that the need to detain a child is necessarily a fact-based inquiry that requires a balancing of interests.[68] In this instance, there was no evidence that police considered her individual circumstances to determine if her detention was a measure of last resort, and it followed that her detention was in flagrant violation of s 28(1)*(g)*, and therefore unlawful.[69]

Even though the decision in *MR v Minister of Safety and Security* is based on facts which occurred prior to the implementation of the CJA, its ongoing relevance to the interpretation of arrest and detention now conducted under the provisions of the CJA cannot be ignored. These provisions, too, will have to be applied in practice against the backdrop (through the lens) of the constitutional rights in s 28(2) and s 28(1)*(g)*. It is to an examination of the CJA provisions that the next section is therefore devoted.

23.6.2 Securing the attendance of the child at the preliminary inquiry[70]

The first of these methods relates to the use of arrest, which is the usual entry point for children in the criminal justice system. The Act restricts the use of arrest for certain minor offences. Section 20 provides that compelling reasons must be present justifying an arrest of a child for a Schedule 1 offence.[71] The circumstances which do justify an arrest for a Schedule 1 offence are specified in s 20(1)*(a)–(e)*, and include where the police official has reason to believe that the child does not have a fixed address, that the child will continue to commit offences unless he or she is arrested, that the child poses a danger to any person, and that the offence is in the process of being committed. The SAPS National Instruction adds three further circumstances justifying an arrest, namely where the child has absconded from foster care, from a

67 *MR v Minister of Safety and Security* para [68].

68 *MR v Minister of Safety and Security* para [69], citing *dicta* from *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC) para [29].

69 See the discussion of this case in Paizes & Van der Merwe '[Section] 40(1)*(j)*: arrest of a child and the impact of the constitutionally protected best interests of the child' 2016 (No 2) *Criminal Justice Review*, available at https://juta.co.za/newsletter/newsletter/criminal-justice-review-2-of-2016/.

70 See Sloth-Nielsen 'Deprivation of children's liberty as a last resort and for the shortest period of time: how far have we come? And can we do better?' (2013) 26 *SACJ* 316. Note that the provisions of the CJA must be read in tandem with National Instruction (2 of 2010) (published under GN 759 *GG* 33508 of 2 September 2010) which deals with children in conflict with the law and the duties and role of the police.

71 The CJA is premised on three schedules of offences, with Schedule 1 containing the least serious group and Schedule 3 the most serious. Many provisions in the CJA are ordered around the schedules.

child and youth care centre, or from temporary safe care; where the child is likely to destroy or tamper with evidential material relating to the offence; and where the child is deemed likely to interfere with the investigation into the offences unless arrested.[72]

The duty is placed on the police official effecting an arrest to inform the child of his or her rights and of the nature of the allegation against him or her, to explain to the child the immediate procedures to be followed under the CJA, and to notify the child's parents, an appropriate adult[73] or guardian, of the arrest. Where a police official has been unable to notify the adult caregivers referred to here, a written report must be submitted to the official presiding at the preliminary inquiry.[74] A further obligation is placed on the police, preferably the arresting official, to notify a probation officer of a child's arrest within 24 hours; again, if unable to do so, a written report must be submitted to the inquiry magistrate at the preliminary inquiry with reasons for non-compliance.[75] An arrested child must be brought to court within 48 hours, whether or not assessment has been effected.[76]

The use of a summons[77] or a written notice to appear in court are provided as alternatives to securing attendance by means of an arrest.[78]

Available data indicates a gradual but steady decrease in the numbers of children entering the system since the implementation of the CJA. Information on the total number of arrests is not kept—instead police collect information on the number of charges (and the number of children could well be far lower given that children may face multiple charges).

The total number of charges fell from 80 106 in the 2010/2011 reporting year, to 47 644 in the 2015/2016 reporting year.[79] The reasons for this very marked decline can only but be speculated upon as no definitive study has seen the light of day as yet. However, it has been posited that the onerous written reporting requirements placed on the police have served as a deterrent to arresting children (see, too, in this regard para 23.6.3 below).[80]

23.6.3 Pre-trial release from police custody

In accordance with the constitutional imperative to ensure that deprivation of liberty is for the shortest appropriate period of time, the scheme of the CJA is to ensure the child's early release from police custody.

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72 National Instruction 2 of 2010: Children in Conflict with the Law, GN 759 in *GG* 33508 at paras 8(3)(ii), (v) and (vi).

73 Defined as any member of the child's family including a sibling who is aged over 16 years, or a caregiver referred to in s 1 of the CJA.

74 Section 20(3)*(a)–(d)* of the CJA.

75 Section 20(4)*(a)* and *(b)*.

76 Section 20(5).

77 Section 19.

78 Section 18.

79 SAPS *Annual Report on the Implementation of the Child Justice Act 1 April 2015–31 March 2016* at 5, available at http://www.justice.gov.za/vg/cj/cja-anr-2015–2016.pdf.

80 Badenhorst *The Second Year of Implementation of the Child Justice Act: Dwindling Numbers* (2012) Child Justice Alliance Report 8. See also Sloth-Nielsen (2013) 26 *SACJ* 316.

Even where an arrest has been effected for a Schedule 1 offence, the police official must release the child into the care of a parent, guardian or appropriate adult before the child's appearance at a preliminary inquiry and as soon as possible.[81] The only exceptions to this that the Act contemplates are where the relevant adults cannot be located, despite all reasonable efforts, or are not available;[82] or that there is a risk that the child may be a danger to any other person or to himself.[83] Where a police official does not release a child charged with a Schedule 1 offence from police custody, a written report with reasons for not doing so must be furnished to the inquiry magistrate.[84] The child who is released from police custody must be given a written notice to appear at the preliminary inquiry.[85]

Furthermore, the police official must consider the possibility of detention in a facility other than police custody, such as a suitable child and youth care centre: this is regarded as being less restrictive and a more appropriate form of detention than being held in custody in police cells.[86]

Where an arrested child is charged with a Schedule 1 offence and has not been released, or has been charged with a Schedule 2 offence, the child may be released before first appearance at a preliminary inquiry by a prosecutor, who may release the child on bail.[87]

A child charged with a Schedule 3 offence may not be released by the police or prosecutor, but must appear at a preliminary inquiry.

23.6.4 Further provisions relating to release or placement in the pre-trial phase

The CJA clearly contemplates that release is the preferred option, and this is evident from the placement of s 24 in the first part of chap 4. It provides that upon appearance at a preliminary inquiry or child justice court, the presiding officer must consider the release of a child who remains (at that point) in custody, into the care of a parent, guardian or an appropriate adult or, if the child is charged with a Schedule 1 or 2 offence, on own recognisances if it is in the interests of justice to release the child. In determining whether it is in the interests of justice, the recommendations in the assessment report and all other relevant factors (listed as the child's best interests, the existence of previous convictions, the fact that the child is between 10 and 14 years and subject to the presumption of criminal incapacity, the interests and safety of the community in which the child resides and the seriousness of the offence) must be taken into account.[88] Conditions such as school attendance or home-based supervision may be attached to the release of the child.[89]

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81 Section 22(1) of the CJA.
82 Section 22(1)*(a)*.
83 Section 22(1)*(b)*.
84 Section 22(2) and SAPS Form 583*(c)*.
85 Section 23.
86 Section 26(2), and see further Sloth-Nielsen (2013) 26 *SACJ* 316 at 321.
87 Section 21(2)*(b)*.
88 Section 24(3)*(a)*–*(e)*.
89 Section 24(4)*(a)*–*(f)*.

Failure to appear on the date and at the time which was attached to the release, or failure to comply with any condition attached to the release, paves the way to bringing the child back to court on a warrant of arrest or a summons. However, in keeping with the last resort principle applicable to deprivation of liberty, this does not automatically disqualify the child from further extra-custodial decisions. Section 24(7)*(b)* requires that an inquiry into the reasons for non-appearance or non-compliance be undertaken in order to determine whether or not the failure is due to the fault of the child. If the failure is not the child's fault, release on the same conditions or on any other condition can be ordered, and, if necessary, an appropriate order can be fashioned which would assist the child and/or his or her family to comply with the conditions initially imposed. If it is found that the failure is due to fault on the part of the child, the presiding officer may nevertheless order the release of the child on different or further conditions, or may (subject to s 26) order that the child be detained.[90]

Section 25 clarifies that chap 9 of the CPA applies to a bail application, except for ss 59 and 59A, to the extent set out in s 21(2)*(b)* of the CJA. However, where bail is considered to be in the interests of justice, a separate inquiry must be held into the ability of the child or his or her parent or an appropriate adult to pay the amount of money being considered, or any other amount.[91] If after this inquiry it transpires that bail cannot be paid, the presiding officer must set conditions for release that do not include an amount of money. This is in line with the reasoning that if release has been found to be an appropriate option (with deprivation of liberty as a last resort), then ways should be sought for this to occur. Nevertheless, the 2015/2016 Annual Report on the Implementation of the CJA tabled by the Department of Correctional Services indicates that on 31 March 2016, 20 children were detained in prisons due to being unable to pay bail amounts set—these amounts ranged from R300 to R2000.[92]

The concept of 'secure care' was an explicit outcome of the saga concerning the deprivation of children's liberty in prisons in the second half of the 1990s. Intended to serve as a therapeutic environment that is at the same time secure, there are, at the time of writing, 17 557 secure-care facility beds available nationally. In 2015 to 2016, there were 5 148 admissions of children to these facilities and 4 713 releases over the same period.[93] Secure-care facilities are child and youth care centres established in terms of chap 14 of the Children's Act 38 of 2005, which are registered to provide a programme suitable for awaiting trial (and sentenced) youth.

Where a child cannot be released from police custody prior to appearance at the preliminary inquiry into the care of parents or guardians or on bail, placement in secure care must be considered by the police, depending on the age of the child and

90 Section 24(7)*(c)* and *(d)*.

91 Section 25(2)*(b)*.

92 Department of Correctional Services *2015/2016 Third Annual Report: Implementation of the Child Just Act, 75 of 2008*, available at http://www.dcs.gov.za/docs/2016%20doc/DCS%20Annual%20report%202015–16%20on%20Child%20Justice%20Act%20final%20signed%20copy.pdf.

93 2015–2016 Report of the Department of Social Development on the Implementation of the Child Justice Act (available at http://www.justice.gov.za/vg/cj/cja-anr-2015–2016.pdf at 15. Note that this figure shows a decline in admissions and releases from the 2014/2015 year, probably due to fewer children overall entering the child justice system.

the alleged offence committed by the child.[94] If this is not appropriate or applicable, the child can be detained in a police cell or locked up in the interim phase.[95] Where a child is aged between 10 and 14 years, or is over the age of 14 years and charged with a Schedule 1 or 2 offence, placement in an appropriate child and youth care centre must be considered. Where a child over the age of 14 years is charged with a Schedule 3 offence, however, the child may not be released from police custody or placed in a child and youth care centre prior to the appearance at the preliminary inquiry, but must be detained in a police cell or lock up.[96] Generally, therefore, in accordance with the policy position adopted at the time of the amendments to the Correctional Services legislation in the 1990s, detention of children in police custody is avoided to the extent possible, even prior to first appearance before a presiding officer.[97]

23.6.5 Placement at the preliminary inquiry

If a child remains in custody at the commencement of the preliminary inquiry, a decision has to be made concerning release or placement if the matter is not diverted. Again, preference has to be given to the least restrictive alternative, with the odds stacked against detention in a prison. Even when detention in a secure-care facility is ordered, the court must take into account a list of enumerated factors, such as the seriousness of the offence, the risk that the child may be a danger to himself or others, and the availability of accommodation in an appropriate child and youth care centre (with a suitable level of security).[98]

Referral to a prison is heavily restricted in accordance with the constitutional and international law principle of deprivation of liberty as a last resort. The child concerned must be aged over 14 years, the charges must relate to a Schedule 3 offence, the detention must be necessary in the interests of justice or for the safety of the public, of the child or of other children in detention, and there must be a likelihood of a sentence of imprisonment if the child were to be convicted.[99] Further to this, if the child is aged between 14 and 16 years, the referral to prison must be supported by a written certificate issued by the DPP or an authorised prosecutor to the effect that there is sufficient evidence to institute a prosecution against the child for a Schedule 3 offence, and is charging the child with such offence.[100] A child charged with a Schedule 1 or 2 offence may exceptionally be detained in a prison if,

94 Section 26(2)*(a)* and s 27*(a)*.
95 Section 26 (2)*(b)*.
96 Section 27*(b)*.
97 Sloth-Nielsen (2013) 26 *SACJ* 316 at 318–319.
98 Section 29. In *S v CKM and Others* 2013 (2) SACR 303 GNP, the court treated both a reform school sentence (imposed under the Criminal Procedure Act in 2009) and subsequent detention in a secure-care facility (after the children repeatedly absconded from the reform school), as being 'serious invasions of the child's right to freedom of movement and decision making' (para [14]).
99 Section 30(1)*(b)–(e)*. See further the factors listed in s 30(3) that must be considered before remanding a child to prison (such as the best interests of the child, the child's state of health, whether the child could be placed in an appropriate child and youth care centre, and the probable period of detention until the conclusion of the case). These factors are based largely on the provisions crafted for the re-amendments to the Correctional Services Act in 1996 (Sloth-Nielsen (2013) 26 *SACJ* 316 at 328).
100 Section 30(2).

in addition to the other factors that must usually be considered, the presiding officer finds that substantial and compelling reasons exist (including any relevant serious previous convictions or pending charges against the child, warranting remanding the child to prison—provided that the child is 14 years or older).[101]

The 'shortest period of time' principle is given effect to through the continuation of the so-called 14 day remand rule, another carry over from the 1996 amendments to the Correctional Services Act.[102] Furthermore, the CJA specifies in s 32 how the consideration of a further remand in detention (in a prison or in a child and youth care centre) is to be approached by presiding officers, and these include assessing whether detention (or placement) remains necessary, the reasons for any continued detention to be recorded, and considering reducing any bail that has not been paid.[103] It bears noting that where a child has been remanded in detention in a child and youth care centre pending trial (ie after the conclusion of a preliminary inquiry), the postponement of the matter may not exceed 30 days at a time.[104]

Have these strict controls over detention of children been effective? Here the Department of Correctional Services (DCS) Annual Report on the Implementation of the Child Justice Act for 2015/2016 is instructive. An average of 346 children were incarcerated in DCS facilities in 2010, the year of commencement of the CJA, according to Annexure A of the Report. On 31 March 2010, the actual headcount was 504 children in remand detention. This has declined steadily to an average of 167 children for 2014, and a snapshot figure for 31 March 2016 was 136 children in remand custody in correctional facilities nationally.[105]

This encouraging data indicates that secure care has indeed come to replace detention in adult prisons as the preferred option where deprivation of liberty is ordered, and that the number of children remanded to await trial in prison continues to decline.

23.7 ASSESSMENT, DIVERSION PROCEDURES AND DIVERSION PROGRAMMES

23.7.1 Assessment

Assessment was introduced as a screening process to assist in locating parents or guardians, to determine the pre-trial placement of a child, to advise the prosecution on the possibilities for the child to be diverted, and to provide the court with a brief social background report. It has always in practice been the function of social workers (acting as probation officers) employed by the DSD. Ensuring the assessment

101 Section 30(5). Reasons must be entered on the record for such an order (s 30(6)).
102 This rule, now encapsulated in s 30(4), provides that where a child is remanded in custody to a prison, the presiding officer must direct that the child be brought back to court every 14 days to reconsider the order.
103 Section 32.
104 Section 66(2)*(b)*.
105 There were 28 children who had multiple cases against them.

of children under the CJA is one of the ten key priority areas identified in the National Policy Framework on Child Justice.[106]

Although the CJA does not define assessment, its role can be derived from s 4 of the Probation Services Act 116 of 1991 which describes some of the functions of a probation officer[107] to include 'receiving, assessing and referring an accused and rendering early intervention services and programmes, including mediation and family group conferencing' and 'investigating the circumstances of an accused and providing a pre-trial report recommending the desirability or otherwise of prosecution'. The Probation Services Act also includes a definition of assessment as a 'process of developmental assessment or evaluation of a person, the family circumstances of a person, the nature and circumstances surrounding the alleged commission of an offence, its impact upon the victim, the attitude of the alleged offender in relation to the offence and any other relevant factor'. Assessment is now encapsulated in a dedicated chapter of the CJA, namely chap 3. Its purposes are clearly spelt out in s 35, namely to ascertain whether the child should be referred to the children's court (as a child in need of care and protection); to estimate the child's age if this is uncertain;[108] to gather information relating to previous convictions or previous diversions or any pending charges; to formulate recommendations concerning the release, detention and placement of the child; to establish the prospects for diversion of the matter; to establish what measures should be taken in respect of a child aged below 10 years; to express a view on whether a child aged between 10 and 14 years should be referred for an expert evaluation of that child's criminal capacity; to determine whether a child has been used by an adult to commit the crime in question; and to provide any other relevant information which the probation officer regards to be in the child's best interest or which may further any objective the CJA seeks to achieve. The recommendations which flow from the process are listed in s 40 of the CJA. This section further elaborates that it may be recommended that the child be referred for further and more detailed assessment.[109] Section 40(3) prescribes the circumstance when this might occur, namely where there is a possibility that the child may be a danger to others or himself or herself; the fact that that child has a history of repeatedly committing offences or absconding; where the social welfare history of the child warrants a further assessment; and where there is a possibility that the child may be admitted to a sexual offenders programme, a substance abuse programme or other intensive treatment programme. In some of these instances, medical reports may be required. A longer period of time is allowed in these instances because the services of other professionals might have

106 Department of Justice and Constitutional Development *Child Justice Act, 2008 (Act 75 of 2008) National Policy Framework* (May 2010) available at http://www.justice.gov.za/vg/cj/2010_NPF_ChildJustice_tabled21may.pdf.

107 Probation has recently (in 2015) been declared a speciality of social work and regulations have been promulgated to enable registration in that field. See the 2015/2016 Department of Social Development Report on the Implementation of the Child Justice Act (available at http://www.justice.gov.za/vg/cj/cja-anr-2015–2016.pdf).

108 Regulation 14 provides that this must be done on a form which corresponds substantially to Form 3 of the annexure to the regulations.

109 Section 40 (1)*(g)*. Further and more detailed assessment are not defined.

to be sought (s 48(4)*(a)* allows the preliminary inquiry to be remanded for periods not exceeding 14 days in these instances).

The information obtained from the assessment interview must be noted in a written report. Regulation 27 gives some guidance as to the level of detail that the report should contain, and requires that it must be logical and motivate any recommendations made. The regulation adds that the report should express an opinion as to the possible reasons for the child having committed the offence, express an opinion as to the extent to which the child has been influenced by adults or peers, indicate the child's ability to be reintegrated into society, and indicate whether the child acknowledges responsibility for the offence[110] (which is necessary if the child is to be considered for diversion).

The obligation to undertake assessment rests in respect of every child alleged to have committed an offence, unless assessment has been dispensed with. Assessment can be dispensed with where a prosecutor diverts a child charged with a Schedule 1 offence prior to appearance before a preliminary inquiry, provided that dispensing with the yet to be conducted assessment is in the best interests of the child.[111] It can also be dispensed with by an inquiry magistrate if the child appears at a preliminary inquiry without having been assessed, and dispensing with assessment is in the best interests of the child.[112]

Where a probation officer has been notified by a police officer of the fact that a child under the age of 10 years has been suspected of having committed an offence, the assessment must be effected within 7 days of the notification.[113] For children above the age of 10 years, the time periods differ depending on whether the child has been arrested and remains in detention (in which case it must be effected within a 48-hour period prior to the first appearance of the child at a preliminary inquiry),[114] or whether the child has been served a written notice or summons to appear, in which case the notice or summons will determined when the child must appear before a preliminary inquiry, and the assessment will have to take place prior to that appearance.

Assessment may take place at any suitable place identified by the probation officer, which may include a court, at a police station or at the offices of the DSD.[115] The location should be conducive to privacy. The probation officer is mandated to make every effort to locate a parent or an appropriate adult to attend the assessment, and may request a police official to assist in this regard.[116] A child's parent or an appropriate adult must attend the assessment unless exempted from attending by the probation officer, or is excluded for disruptive, undermining or obstructionist behaviour.[117] Other persons permitted to attend include a diversion service provider, a researcher, or another person whose presence is necessary or desirable for the

110 This is also provided for in s 40(4) of the CJA.
111 Section 41(3).
112 Section 47(5). Reasons for dispensing with the assessment must be entered on the record.
113 Section 34(3).
114 Section 43(3)*(b)* of the CJA.
115 Section 37.
116 Section 38(6)*(a)*.
117 Section 38(2).

completion of the assessment.[118] The probation officer is empowered to consult with any person who may provide relevant information during the assessment process,[119] and may consult privately with any person present at any stage.[120] Additional information obtained from a consultation with a person not present at the assessment must be shared with the child.[121]

Should a probation officer recommend placement of a child in a secure-care facility pending the finalisation of proceedings, the CJA requires that information be obtained as to the availability or otherwise of accommodation in such facility, and that the level of security and the available amenities and features are spelt out. Regulation 27 refers to the need to utilise the template in Form 5 for the sworn statement of the manager of the facility to record this information.

Recent information on the implementation of assessment has become available. The consolidated Annual Report on the Implementation of the Child Justice Act for 2012/2013 indicates that for the 2010/2011 financial year, 32 500 assessments were conducted; this dropped to 18 334 in the year that followed, and climbed again to 32 125 for the 2012/2013 financial year. The 2015/2016 Report by the Department of Social Development on the Implementation of the Child Justice Act[122] records that for that year, 206 assessments were performed in respect of children aged below the age of 10 years (and it is noted that this is a decrease of 11 compared to the previous year), whilst 23 787 children aged over 10 years were assessed. The data appears nevertheless to indicate a dropping number of children entering the child justice system overall, as 5 040 fewer assessment were performed than the previous year.

23.7.2 Diversion procedures

Since diversion was intended to be the centrepiece of the child justice system, and the preferred response to juvenile offending where possible, the CJA has dealt with diversion extensively.[123] The objectives of diversion – to deal with the child outside the formal criminal justice system, to avoid the child getting a criminal record, to prevent stigmatisation and to promote the reintegration of the child into his or her family and community, are spelt out in detail in s 51 of the CJA. So, too, the CJA lays down the general conditions for diversion to be considered, namely that the child acknowledges responsibility for the offence, that there is a *prima facie* case against the child, that the child and the parent (or appropriate adult or guardian) consent to diversion, and that the prosecutor agrees that the matter be diverted.[124] A key goal of child rights advocates was to ensure that all children, no matter their age or the

118 Section 38(3).
119 Section 39(2).
120 Section 39(3).
121 Section 39(4).
122 Available at http://www.justice.gov.za/vg/cj/cja-anr-2015–2016.pdf.
123 Wakefield 'The CRC in South Africa 15 years on: does the new Child Justice Act 75 of 2008 comply with international children's rights instruments?' (2011) 62 *Northern Ireland Law Quarterly* 167. Wakefield argued that the provisions are too detailed and speculated that this might have been the cause of the declining numbers of children being referred for diversion. However, this view, expressed at the initial stages of implementation of the CJA, is debatable.
124 Section 52(1).

offence with which they were charged, would be eligible for diversion—in compliance with art 40(3)*(b)* of the CRC. This position has been enshrined in the CJA, albeit that with respect to serious offences, children may be diverted only with the express written consent of the DPP and in exceptional circumstances (see para 23.7.2.2 below).

In the same vein, child rights advocates motivated that a child should not be excluded from diversion on the grounds that he or she had already previously been diverted. They argued that a more intense or onerous diversion option should be possible, so as to avoid the negative aspects of a criminal trial. This too has been the ultimate position adopted in the CJA.[125]

23.7.2.1 *Prosecutorial diversion*

Chapter 6 deals with diversion by a prosecutor prior to a child appearing before a preliminary inquiry. This power is, however, limited by the offence category for which the child has been charged, as only Schedule 1 offences may be considered for prosecutorial diversion. Section 41(1)*(a)*[126] spells out that this form of diversion may only be effected if the child accepts responsibility for the offence; if the child has not been unduly influenced to acknowledge responsibility; if there is a *prima facie* case against the child; if the child, his or her parents, guardian or an appropriate adult consent to diversion; and, where the child is over 10 but under 14 years, the prosecutor is satisfied that criminal capacity is likely to be proved. Furthermore, the Act requires that such diversions take place in accordance with the Directives issued by the NDPP.[127]

Section G of these Directives deals with prosecutorial diversion before a preliminary inquiry. This section adds several further possible steps to the process. Directive G2 provides that although the prosecutor's decision can be made summarily, the investigating officer and/or victim or any person with a direct interest in the affairs of the victim should be consulted if they are readily available. Directive G3 notes that even where diversion is decided upon, the child, and where possible his or her parents, must appear before a magistrate in chambers in order to have the diversion option made an order of court. If the prosecutor has dispensed with assessment, the reasons must be provided to the magistrate to be entered on the record.

The Directives also add criteria to guide decision-making. Directive G6 states that prosecutorial diversion should not be used where the offence is of a serious nature due to its facts or circumstances (even if it is a Schedule 1 offence). So, too, if the

125 National Directive F8 advises prosecutors that 'all efforts must be made to establish whether the child has previously been diverted. A diversion may still be considered despite a previous diversion or the existence of a previous conviction if the child will benefit from the proposed programs and if the child, all circumstances taken into account, should be afforded another such opportunity. Diversion is not suitable if it will bring the administration of justice into disrepute'. The Department of Social Development is mandated by s 60 of the CJA to maintain a record of children in respect of whom a diversion order has been made in terms of the Act with identifying details of the child, the offence, the diversion option, and particulars of the child's compliance with the diversion order.

126 Cross-reference to s 52(1)*(a)–(e)*.

127 Published in GN R252 in *GG* 33067 of 31 March 2010.

child has a previous conviction, previous diversion or a pending charge in respect of a similar or more serious offence. Then a variety of circumstances indicate that summary diversion should be excluded—these are the factors leading to a child being a child in need of care and protection as spelt out by s 150 of the Children's Act 38 of 2005.

The National Directives specify that the overall responsibility for deciding on diversion rests with the prosecution, and further that prosecutors are not required by the Act to give reasons for their decision, although they should keep a record of their reasons for non-diversion in the diary of the docket.[128]

23.7.2.2 *Diversion at the preliminary inquiry*

One of the central objectives of the newly introduced preliminary inquiry procedure (see para 23.8 below) is to establish whether the matter can be diverted before plea. The consideration of the assessment report provides that platform for this decision to be made. In general, the preliminary inquiry will consider the following matters for possible diversion: cases involving Schedule 1 offences where the matter has not already been diverted by the prosecutor (or withdrawn); cases involving Schedule 2 offences (provided the accused acknowledges responsibility for the commission of the offence); and for offences falling under Schedule 3, provided that the DPP has given written consent for diversion, in exceptional circumstances. This power may not be delegated.[129]

Criteria to guide the DPPs in the exercise of the latter discretion have been issued in the National Directive promulgated in terms of s 97(4)*(a)* of the Act. Directive J lists the following 'exceptional circumstance' which may motivate the DPP to permit diversion for a Schedule 3 offence: particular youthfulness; low developmental level of the child; presence of particular hardship, vulnerability or handicap (eg a child heading a household); where the victim prefers diversion as she or he does not want to testify in court; compelling mitigating circumstances such as diminished responsibility; undue influence upon the child (as where the child is used by adults to commit an offence); where there are fragile or unwilling prosecution witnesses; and where to proceed would be potentially damaging to a child witness or victim. It is worthy of note that a number of these circumstance pertain to the witness or victim, rather than attaching to the accused. It is further compulsory for the DPP, prior to issuing the written permission, to consult with the investigating officer and with the victim, in terms of s 51(3)*(b)* and Directive J3.[130]

Review courts have had several opportunities to scrutinise diversions effected by lower courts. Mujuzi[131] discusses the case of *Sobekwa* in which the diversion order was set aside because of the failure on the part of the prosecutor to obtain written

128 Directives F3 and 4.

129 Section 51(3)*(d)* of the CJA. The written indication must be handed to the presiding officer and forms part of the record.

130 Unlike the situation for diversion of Schedule 3 offences, a prosecutor diverting a Schedule 1 or 2 offence may consider the views of the victim and consult the investigating officer.

131 Mujuzi 'Diversion in the South African criminal justice system: emerging jurisprudence' (2015) 28 *SACJ* 40.

authorisation for diversion as required by s 52(3)*(a)*.[132] The offence in question was armed robbery.

He also refers to *Rabupape*[133] which involved a charge of culpable homicide due to the accused driving a motor vehicle recklessly and without a license. Since this charge appears on Schedule 2, the prosecutor should have consulted with the family of the victim before a decision to divert was taken, the review court pointed out.

In *S v M*,[134] the review court observed that:

> Inquiry magistrates are encouraged to adopt a more active role in giving effect to the aims and objectives set out in the CJA. In these instances (as in the present matters) where children are charged with very serious offences, lower courts should ensure that they comply fully with the provisions of the CJA before making diversion orders that result in a complete failure of justice.[135]

This comment applies with equal force to the selection of diversion options or programmes, discussed next.

23.7.3 Diversion programmes and options

The SALRC was motivated to ensure the widest possible access to diversion, including for persons who may previously have been diverted, for offenders charged with more serious offences, and for those living in more remote areas where traditional programme service providers did not operate. Two consequences of this were (first) the division of diversion options into two levels[136] to indicate that more serious offences could be considered for more onerous diversion conditions, and (second) the development of 'tailor-made' options which did not depend on a programme provider but could nevertheless be applied on a case by case basis, and monitored by DSD or some other appointee.

When selecting a diversion option, the principle of proportionality must be considered, as well as the nature of the offence, interests of society, and individual circumstances of the child (including educational level, cognitive ability, domestic and environmental circumstances, age and developmental needs).[137]

The options at level 1 are intended for Schedule 1 offences and include an apology, a formal caution with or without conditions, placement under one of a list of orders, referral to counselling or therapy, attendance at an educational or vocational programme, restitution, community service, and payment of compensation. The full array of options is detailed in s 53(3) of the CJA. The duration of a level 1 diversion is

132 *S v Sobekwa* [2013] JOL 30901 (ECG). See further Sloth-Nielsen 'Recent developments in child justice' (2015) 28 *SACJ* 437, for details of *S v M and Others* (HC AR401/14), dealt with as a special review instituted by the DPP after written authorisation was not obtained and an inappropriate diversion option was selected (for charges of armed robbery and possession of an unlicensed firearm); and *S v M* (HC AR 186/15) which concerned charges under the Firearms Control Act 60 of 2000 which falls under Schedule 3, owing to the maximum sentence that may be imposed—again written consent was not obtained and the proceedings were therefore not in accordance with justice.

133 S v Rabupape 2015 (2) SACR 497 (GP) .

134 (HC AR 186/15).

135 Paragraph [31].

136 The SALRC had proposed three levels, but this was considered to be too complicated when the Parliamentary debates took place.

137 Badenhorst 'Diversion provisions in terms of the Child Justice Act 75 of 2008' (2013) 26 *SACJ* 302.

a maximum of 12 months where the child is aged below 14 years, and 24 months where the child is 14 years or older.

At level 2, which can be used for Schedule 2 and 3 offences, some of the options at level one are included (but not all); further, the option of compulsory attendance at a specified place for education or vocational purposes which may include a period of residence is listed; as well as referral for intensive therapy which may include periods of residence and placement under the supervision of a probation officer coupled with restrictions on movement outside of the magisterial district in which the child resides without prior written approval of the probation officer.[138]

The maximum time periods allocated for level 2 diversion orders also indicates that they are intended to be more intensive than level 1 diversion orders, and of longer duration. Section 54(6) provides for 24 months for a child aged below 14 years for a level 2 diversion order, and up to 48 months for a child aged over 14 years.

Restorative justice options include referral to a family group conference or to victim offender mediation (or any other restorative justice option).[139] These may replace or be used in combination with any other diversion option (they do not resort under either level 1 or level 2).[140]

When making a diversion order, a probation officer or other suitable person must be appointed to monitor the child's compliance with the order.[141] Failure to comply must be reported to the magistrate or child justice court (as the case may be).[142] The child can then be re-arrested or otherwise brought back to the system to enquire as to the reasons for his or her failure to comply.[143] If the failure was not due to the fault of the child, the same option can be imposed with or without altered conditions or another appropriate order can be made which will assist the child or his or her family to comply with the diversion option.[144] Only where the failure is due to the fault of the child, can the steps outlined in s 58(4) ensure, namely the prosecutor can decide to continue with the prosecution, or another more onerous diversion option can be imposed.

The legal effect of diversion is that, once it has been complied with, no further prosecution on the same facts may be instituted,[145] but it does not count as a previous conviction.[146] The DSD must keep a register of all diversions (to ensure that children do not qualify repeatedly for diversion options which are not serving any deterrent purpose),[147] but the records of diversion fall away automatically when the child reaches the age of 21 years, unless the child has been convicted of another offence or failed to comply with the diversion order.[148]

138 Section 53(4). See Badenhorst (2013) 26 *SACJ* 302.
139 For more detail on the procedural aspects, see ss 61 and 62 of the CJA.
140 Section 53(7) of the CJA.
141 Section 57(1).
142 Section 57(2).
143 Section 58(1).
144 Section 58(3).
145 Section 59(1)*(a)* of the CJA.
146 Section 59(1)*(b)*.
147 Section 60.
148 Section 87(6).

Case law on the selection of diversion options and the manner in which they have been given force is useful. In *S v M*[149] the magistrate had erred in imposing a reporting order as the chosen diversion option (s 53(1)*(d)* and Form 6 of the CJA), whereas this is reserved for level 1 diversions. A reporting order is not competent where the charge relates to a Schedule 2 or 3 offence, in this instance the accused was charged with armed robbery and possession of an unlicensed firearm. This rendered the proceedings flawed and irregular. Furthermore, the magistrate presiding at the Child Justice Court appeared to have finalised the diverted matter immediately, instead of postponing the mater pending the receipt from a probation officer of a compliance certificate indicating that the diversion had been successfully completed (s 67(1)*(b)* of the CJA).

Again, in *S v M*,[150] the imposition of a supervision and guidance order in accordance with s 53(3)*(c)* of the CJA was not competent, as at least a level 2 diversion option ought to have been selected (since the charges related to contraventions of the Firearms Control Act of 2000. The court also pointed out that Form 6, which recorded the diversion, left much to be desired regarding the manner in which it was filled out. Crosses were inserted in the first eight diversion options, leaving the impression that all eight had been selected, relating to the eight options detailed in s 53(1)*(a)–(f)*. However, only Part F of Form 6 was subsequently completed, meaning that reg 29(3)*(a)* of the regulations to the CJA was not complied with (this regulation provides that the diversion orders in s 53(1)*(a)–(g)* must correspond substantially with Part A–F of Form 6).

Similar concerns about incorrect application of the diversion provisions of the CJA emanated from the special review brought in *S v S and Others* (AR 660/2014) also in KwaZulu-Natal. Faced with charges of contravention of an ordinance proscribing illegal hunting, three children were diverted and the following orders imposed: a compulsory school attendance order (s 53(1)*(a)* of the CJA); a family time order (s 53(1)*(b)* of the CJA); a good behaviour order (s 53(1) of the CJA); a supervision order (s 53(4)*(d)* of the CJA; and attendance at a diversion programme offered by an accredited diversion service provider. However, this particular combination order was incorrect, as the offence in question was a Schedule 2 offence due to the maximum penalty that could be imposed upon conviction.[151]

The above cases highlight the importance of judicial officers paying meticulous attention to the *ipsissima verbi* of the CJA when crafting diversion orders.

Accreditation of diversion programmes is provided for by s 58 of the CJA to be effected by the DSD. The most recent results of the accreditation process were gazetted on 13 March 2015 and *Government Gazette* 38794 has reference. During the 2015/2016 year, a total of 49 diversion service providers received full accreditation, whilst 13 were awarded candidacy status.[152] A total of 121

149 HC AR401/14 (as discussed by Sloth-Nielsen (2015) 28 *SACJ* 437).
150 HR 186/15 (as discussed by Sloth-Nielsen (2015) 28 *SACJ* 437).
151 Also discussed by Sloth-Nielsen (2015) 28 *SACJ* 437.
152 DSD report on the Implementation of the Child Justice Act 2015/2016 available at http://www.justice.gov.za/vg/cj/cja-anr-2015–2016.pdf.

programmes received approval, with 28 being awarded candidacy status.[153] These figures represent an increase on previous accreditation data, which the DSD attributes to an increase in entrants to the child justice fraternity, and improvements in the services of organisation that previously only enjoyed candidacy status.

Quality assurance panels (appointed provincially) monitor the diversion service providers and their programmes. Finally, the 2015/2016 Report records that 8 830 children were referred to diversion programmes according to DSD data (2 383 fewer than the previous year); and 3 497 were placed under home based supervision (the number in 2014/2015 was 5 529). The National Prosecuting Authority Report on the Implementation of the Child Justice Act 2015/2016 reports that according to their statistics, 8 121 children were diverted.

Clearly, the merging of data from different departments and sources provides some anomalies when the numbers do not tie up; nevertheless, that the CJA has succeeded in mainstreaming diversion seems incontrovertible.

23.8 THE PRELIMINARY INQUIRY PROCEDURE

The preliminary inquiry has been described as the 'centrepiece' of the new child justice system. The purpose of this new procedure was to introduce a compulsory pre-trial procedure, at which diversion must be considered, before the matter proceeds to trial in a formal court. This background also provides the rationale for some of the other objectives of the preliminary inquiry—to ensure deprivation of liberty is used as a last resort; to ensure that assessment is undertaken by a probation officer, and that the report emanating from that assessment is considered by the role players present (including the inquiry magistrate and the prosecutor); that children who are evidently in need of care and protection are referred to the children's court to be dealt with in terms of the Children's Act 38 of 2005; and that the views of all present are taken into consideration, including those of the child.

The preliminary inquiry has also been characterised as performing a gatekeeping role—ensuring that only cases where children who do not admit responsibility for the offence, or those who cannot be diverted, proceed beyond this 'barrier' to plea and trial in a court. It was designed against the backdrop of uneven access to diversion during the period before the implementation of the Act when it was predicated only on prosecutorial goodwill. It is a compulsory procedure (except where a child is aged below 10 years, or the matter has already been diverted by a prosecutor, or the matter has been withdrawn). It is regarded as the first appearance in court, and must therefore be convened within 48 hours of the arrest of a child (if arrested).[154]

Section 43 spells out the nature and objectives of the preliminary inquiry, as outlined in the paragraph above. Section 44 explains that the persons who are mandated to attend the preliminary inquiry include the child, his or her parent or

153 Eighteen service providers and programmes were declined as they did not meet the requisite criteria.

154 If the child has been served with a summons or written notice to appear, the time frames specific to that summons or notice will apply concerning the date upon which the child must appear at the preliminary inquiry.

guardian, the probation officer, a diversion service provider if one has been identified by the probation officer, and with the permission of the inquiry magistrate, any other person with an interest in attending or who may contribute to the inquiry.[155] The Act does not specify that a legal representative must be in attendance—it was thought that the child may not yet have secured legal representation at this early stage of the process. However, the legal representative is not excluded from attending, and in practice, with the widespread availability of legal representation through Legal Aid South Africa (see para 23.11 below), it appears that most children are in fact supported by a legal representative at the preliminary inquiry.[156]

The proceedings at the preliminary inquiry are confidential and no information furnished by any person at a preliminary inquiry may be used against the child during bail applications, plea, or subsequent trials. This is reinforced by s 47(10) which disallows an inquiry magistrate, who has presided over such an inquiry and heard any information prejudicial to the determination of the matter, from presiding over a subsequent proceeding, procedure or trial involving that child.[157]

The procedure that this 'informal round table'[158] follows is inquisitorial in nature: s 47 prescribes that the inquiry magistrate must conduct the proceedings, asking the necessary questions and eliciting information. A record must be kept. At the start, the inquiry magistrate must explain the purposes of the inquiry to the child, its inquisitorial nature, the nature of the charges against the child, inform the child of his or her rights, and explain to the child the immediate procedures to be followed in terms of the Act.[159] Since diversion is a central objective, it must be ascertained whether the child accepts responsibility for the offence at the outset. If the child does not acknowledge responsibility, then the CJA provides that no further questions regarding the alleged offence may be put to the child, and no information concerning a previous diversion or conviction against the child may be placed before the preliminary inquiry.[160] The matter would then be set down for trial in a child justice court (see para 9 below), once the issue of detention or release has been determined and a child's right to legal representation explained to him.[161]

In order for the preliminary inquiry to make a decision on diversion, the probation officer's assessment report must be placed before it (if available). Section 47(5) of the CJA permits assessment that has not yet been effected to be dispensed with, if it is in the best interests of the child to do so (and reasons must then be entered on the record). The preliminary inquiry may also require documentation necessary to establish the child's age; documentation relating to previous convictions or pending

155 Parents, guardians and other appropriate adults may be exempted from attending, and persons may be excluded if their attendance is not in the best interests of the child.

156 Communication by a representative from Legal Aid South Africa, and the expert workshop on the Minimum Age of Criminal Capacity, Pretoria, February 2015.

157 In practice, where there is only one magistrate in that jurisdiction, this means that in the (few) cases where the child is not diverted, and prejudicial information has come to light, another magistrate has to be brought in to preside over subsequent proceedings.

158 It may be held in a court or any other suitable place: s 43(1)*(b)*.

159 Section 47(2)*(a)*.

160 Section 47(2)*(b)*(i).

161 Section 49(2).

charges; the police report concerning detention of the child in police custody; and any other relevant information.[162]

The inquiry magistrate is tasked with hearing the views of all persons present at the preliminary inquiry, and ensuring the participation of the child and his or her parents or guardians.[163] Where children are co-accused in the same matter, a joint preliminary inquiry may be held, although different decisions may be reached in respect of each child.[164]

The prosecutor remains *dominis litis*, and to this end must agree to the matter being diverted if this is what the inquiry magistrate has in mind. If the prosecution does not agree to diversion, the matter must be set down for plea in the child justice court. In *S v LR*,[165] a review was instituted by the prosecution when a magistrate agreed to diversion at the request of the defence attorney, in the face of prosecutorial opposition. The diversion was in these circumstances *ultra vires* and the order of the court a quo was set aside. Mujuzi[166] agrees that a child's lawyer may not apply for diversion, as this can only be done by a prosecutor or the DPP.

In *S v M and Z*[167] it was confirmed that the preliminary inquiry is mandatory. In this matter, two children were facing (evidently, as this was poorly recorded) charges of robbery with aggravating circumstances and possession of an unlicensed firearm. The second child did not, however, appear at a preliminary inquiry and his name was added to the charge sheet when the matter was set down for trial in the child justice court. The court noted that the failure to bring the child to appear at a preliminary inquiry constituted an irregularity (in addition to other misdirections that occurred). In *S v Thwala*,[168] the court confirmed the peremptory nature of the preliminary inquiry and set aside the conviction of a girl of 14 years, whose age had been incorrectly recorded on the charge sheet as 19, until it was correctly established via a pre-sentence report. The matter was remitted to a preliminary inquiry to be convened before a different magistrate.

Even though it was an interlocutory procedure, the CJA provides for the possibility of postponement of the proceedings: s 48 contemplates the postponement where the child is in detention for a period of 48 hours, where the prosecutor indicates that diversion is being considered, but that an assessment has not yet been done. A postponement to this end may also be effected to (amongst others) secure the attendance of a person essential to the inquiry, to obtain essential information, to establish the views of the victim regarding diversion, and to make arrangements for a specific programme. One further period of 48 hours is allowed for a postponement of the preliminary inquiry, but only if this is likely to increase the prospects of diversion (bearing in mind that the accused might be in custody during this period). After the

162 Section 47(3) and (4). The inquiry may also elicit any information from any person at the inquiry, and take steps to establish the truth of any statement or correctness of any submission made.
163 Section 47(7). The child and his or her parent/guardian must be allowed to ask questions and raise pertinent issues.
164 Section 47(8).
165 2015 (2) SACR 497.
166 Mujuzi (2015) 28 *SACJ* 40.
167 Sloth-Nielsen (2013) 26 *SACJ* 316.
168 [2015] ZAGPPHC 114 (26 February 2015).

expiry of this second postponement, the preliminary inquiry must be closed and set down for trial in a child justice court.[169] The preliminary inquiry can be postponed where the child is in need of medical treatment or for an assessment regarding whether the child has a mental illness in accordance with ss 77 or 78 of the Criminal Procedure Act.[170]

According to the Department of Justice and Constitutional Development Annual Report on the Implementation of the Child Justice Act 2015/2016,[171] preliminary inquiries are one of ten key priority areas for the implementation of the CJA. The most recent data shows that 18 575 preliminary inquiries were held in that reporting year (down from 25 517 in 2012/2013). This is probably due to the overall drop in children entering the child justice system.

As regards the outcomes of preliminary inquiry, the same report records these in some detail. There were 3 026 cases referred from the inquiry to the child justice court; 89 to the children's court; and some 4 500 cases were diverted (though the vast preponderance of these (3 495) were s 41 diversions, ie prosecutorial diversions).[172] A study to determine the effectiveness and usefulness of the preliminary inquiry procedure is evidently being planned. However, this preliminary data suggests that the procedure does serve its intended purpose of increasing access to diversion.

23.9 TRIALS IN A CHILD JUSTICE COURT

If a case has not been diverted, the matter must be set down for trial in the child justice court. These are not physically separate structures, but ordinary courts which function in line with the rules provided in chap 9 of the Act. As a general proposition, the court will apply the provisions of the CPA, save where the CJA provides otherwise. Where a child is co-accused with an adult, the court will apply the CJA to the child and the CPA to the adult.[173]

The CJA mandates a more active role for the presiding officer than is usual in South Africa's adversarial system. Section 63(4) requires that the presiding officer ensure that the child's best interests are upheld during the trial, and, to this end, allows the presiding officer to elicit any information from any person involved in the proceedings, mandates him or her to ensure that the proceedings are fair and not unduly hostile to the child, as well as that they are conducted in a manner

169 Section 48(2). Section 48(4) permits postponements of 14 days for the purposes of 'further and detailed assessment' upon the recommendation of a probation officer. Such could be a mental health evaluation for which specialist intervention is required, or a medical assessment for drug addiction (to cite two possibilities). A 14-day remand is also mandated where the written authorisation of the DPP for a s 52(3) diversion is required.

170 Section 48(5).

171 Available at http://www.justice.gov.za/vg/childjustice.html.

172 Other outcomes were cases that were withdrawn, were struck off the roll or were still pending (the largest number at 10 033, ie more than half of the total numbers of preliminary inquiries held).

173 Section 63(2).

appropriate to the age and maturity of the child. This is certainly a nod in the direction of a child-friendly justice process.[174]

As was the case previously under the CPA, children appearing at trial have the right to parental assistance.[175] Such person(s) can be subpoenaed to appear. Their assistance may be dispensed with if the parent or guardians cannot be traced after reasonable efforts, and further delay would be prejudicial to the best interests of the child or to the administration of justice. If no assistance is afforded by a parent, guardian or appropriate adult, but the child nevertheless requires assistance, the court may in exceptional circumstances appoint an independent observer[176] to assist the child. The role of the parent or person assisting is not to act as legal representative of the child, but to provide moral and psychosocial support. It is unclear to what extent previous case law on this issue, under s 73 of the CPA (which provided for parental assistance), remains of relevance (given that previously one function of the parent was to question witnesses, whereas now all defendants facing trial in a child justice court will be legally represented and this will be the function of that representative: see para 23.11 below).

Children's privacy rights receive recognition in s 63(5) and (6). Both have been the subject of litigation. In *Media 24 Ltd v National Prosecuting Authority*,[177] in which one of the accused was aged below 18 years at the time of the trial, various media houses applied for permission to be present during the trial on the grounds of public interest. Due to the high-profile status of the deceased victim there was heightened public interest in the matter. Whilst s 63(5) did allow for such a discretion to be exercised by the presiding officer, it had to be interpreted in the light of the best interests of the child standard in the Constitution, the court held. This principle did not, however, trump the principle of open access to justice ('justice being seen to be done') and the public interest generally. The court held that due to the exceptional circumstances surrounding this case, the child's right to privacy could be limited; however, this had to be effected in the least restrictive manner. Consequently, limited access to a specified number of media representatives via a closed-circuit television room was permitted, and the child's face was to be concealed. No publication of the identifying details of the minor was allowed.

However, when he turned 18 years old during the course of the trial, his details were made public in the press, who have taken the view that the prohibition on publication of identifying details of a child accused ceases to have effect when they reach the age of 18 years.[178] This is the subject of pending litigation: to determine the

174 See the Council of Europe's Guidelines on Child-friendly Justice (2010) and the Guidelines on Action for Children in the Justice System in Africa (2011) (endorsed by the African Committee of Experts on the Rights and Welfare of the Child, available at http://srsg.violenceagainstchildren.org/sites/default/files/documents/docs/Guidelines_on_action_in_the_Justice_system_in_Africa.pdf).

175 Although this has (as elsewhere in the CJA) been expanded to include not only a parent or guardian but also an appropriate adult.

176 A representative from a community or organisation, or from a community police forum: s 1 of the CJA.

177 *Media 24 Ltd and Others v National Prosecuting Authority and Others (Media Monitoring Africa as Amicus Curiae): In Re S v Mahlangu and Another* 2011 (2) SACR 321 (GNP).

178 The same view has been taken regarding the publication of details of victims who reach 18 years.

scope and reach of the prohibition contained in s 63(6). The outcome is, at the time of writing, still awaited.

The CJA clarifies that diversion is possible even during trial, provided that it takes place at any time before conclusion of the case for the prosecution.[179] In *S v MK*,[180] the review court confirmed that the option of diversion can be considered at any time during the trial, and that the regional magistrate had wrongly jettisoned the option of diversion to the prejudice of the accused. This constituted a misdirection.

In an effort to ensure that children's trials are concluded speedily, especially where they are deprived of their liberty in the awaiting trial period, s 66 of the CJA provides for time limits related to postponements. The maximum period is 14 days where the child is detained in prison, 30 days where the child is deprived of his or her liberty in a child and youth care centre, and 60 days where a child has been released. Despite proposals for an overall maximum period being set, within which children's trials must be concluded that were discussed by the SALRC, no such maximum limits (eg 6 months or 1 year) were ultimately accepted for inclusion in the CJA.

The Department of Justice and Constitutional Development Annual Report on the Implementation of the Child Justice Act for 2015/2016 provides information on the number of trials held in child justice courts. There were 9 995 trials postponed during this period. There were findings of guilty in 181 trials, not guilty findings in 154 trials, 635 matters were withdrawn and 239 were struck off the roll. As the report points out, there has been a significant decrease of 73 per cent[181] in the number of outcomes recorded in the child justice court. However, they do ascribe this partly at least to changes in the manner in which details are captured, and undertake to revisit the relevant data. Nevertheless, the low number of completed trials (181 guilty findings and 154 not guilty findings) appears alarmingly low.

23.10 SENTENCING

Youth has long been a mitigating factor in sentencing in South African jurisprudence.[182] As highlighted in this chapter, alternatives to imprisonment for children underscored the commencement of a separate child justice system for children from as early as 1879, with the founding of the first reformatory. However, as Karels et al point out,[183] the system still largely treated child offenders in the same way as adult offenders, and the sentencing option for child offenders were broadly identical to adult offenders. However, the sentencing regime now established under the CJA has been profoundly affected by the constitution, notably via the abolition of juvenile whipping as a sentence in *S v Williams*[184] (on the basis of its inconsistency

179 Section 67(1).
180 2012 (2) (SACR 533 (GSJ).
181 By way of comparison, the 2014–2015 statistics were as follows: 8 855 postponed, 637 guilty, 328 not guilty, 1 295 withdrawn and 999 stuck off the roll. The number of postponements far outweighs concluded cases.
182 *S v Lehnberg* 1975 (4) SA 533 (A); *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SA 515 (SCA).
183 Karels et al *Child Offenders in South African Criminal Justice: Concepts and Process* (2014) 2.
184 1995 (3) SA 632 (CC).

with the right to freedom from cruel, inhuman and degrading treatment or punishment in s 12) and the provisions of s 28(1)*(g)*.

The leading case on sentencing is arguably *Centre for Child Law v Minister for Justice and Constitutional Development.*[185] This constitutional challenge was the product of a legislative amendment which sought to overturn the effects of an earlier Supreme Court of Appeal decision[186] which had declared that the imposition of a mandatory prescribed sentencing regime upon children aged 16 and 17 convicted of specified serious offences, was at odds with the principle of deprivation of liberty for the shortest appropriate period of time, since the prescribed sentence disallowed an individualised response to the determination of sentence which would not take, as the starting point, the longest period of time for calculating the period of imprisonment. Agreeing with the argument of the Centre for Child Law, acting on behalf of all children who might be sentenced under such an amended scheme, the Constitutional Court ruled the amending legislation unconstitutional.

In a much-quoted statement, Justice Cameron explains the reasons for taking a different approach to the sentencing of children:

The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults.[187]

The sentencing chapter of the CJA is divided into two parts.[188] The first (general) part describes the objectives of sentencing, which by and large emphasise a restorative justice basis for the selection of a sentence.[189] Additional principles apply when consideration is being given to a sentence involving deprivation of liberty, in line with art 37*(b)* of the CRC and s 28(1)*(g)* of the Constitution and existing jurisprudence.[190] The principles applicable to child and youth care centre sentences are further detailed—the court must first consider whether the offence is of such a serious nature that it indicates that the child has a tendency towards harmful activities; the harm caused must indicate that a residential sentence is appropriate, measured against the culpability of the child for causing that harm; and whether the child is in need of a particular service offered at a child and youth care centre. In *S v*

185 2009 (6) SA 632 (CC).

186 *S v B* 2006 (1) SACR 311 (SCA).

187 Paragraph [26].

188 See, in general, Terblanche 'The Child Justice Act: a detailed consideration of s 68 as a point of departure with respect to the sentencing of young offenders' (2012) 15 *Potchefstroom Electronic Law Journal* 436.

189 See ss 69(1*(a)*–*(d)* and s 69(2).

190 *S v N* 2008 (2) SACR 135 (SCA) where Cameron J (as he then was) said (para [39]): '[I]f there is a legitimate option other than prison, we must choose it; but if prison is unavoidable its form and duration should also be tempered. Every day he spends in prison should be because there is no alternative'. In *S v B* 2006 (1) SACR 311 (SCA) Ponnan AJA states that the key principles underpinning sentencing of children are proportionality and the best interests of the child (para [16]). Individualisation is important to ensure the child's reintegration into society (para [14]).

CKM[191] the court was faced with a situation where, after first being diverted and failing to comply with the conditions of the diversion order, the accused were prosecuted. They were sentenced to a reformatory school but absconded, whereafter, they were detained (without charges being brought against them) for an indefinite period in a child and youth care centre designated for awaiting trial detainees. The court (finding the detention in the child and youth care centre wholly unlawful) also had the following to say about the initial sentence:

It is obvious that the referral to a reform school[192] [which has now been replaced by a sentence to a child and youth care facility in the CJA], which amounts to an involuntary, compulsory admission to a facility where the convicted child is obliged to participate in various programmes, represents a serious invasion of the child's rights to freedom of movement and decision-making. Such a sentence should therefore not be imposed lightly or without compelling reasons.[193]

It was pointed out that neither the trial court nor the pre-sentence report had referred, at any stage, to the principle that the incarceration of children—or detention in a reform school—should be the least preferred options under all and any circumstances.[194] Concluding that the children concerned were more likely to have been candidates for the child protection system in view of their poor home circumstances and lack of supervision, the court could no longer effect this intervention due to the lapse of time and the fact that they were now nearing 18 years of age. Bearing in mind the period also spent languishing in a secure-care facility without a valid order of court, the sentence was therefore set aside and replaced with a caution and discharge.

As regards the most restrictive form of deprivation of liberty, namely imprisonment, the CJA sets additional principles to be considered. These include (amongst others) the seriousness of the offence, the protection of the community, the severity of the impact of the offence upon the victim, and the desirability of keeping the child out of prison.[195]

Two further general principles are worthy of note. First, that the impact of the offence upon the victim may be adduced at sentencing stage, where practicable by means of a victim impact statement. This means that a generous role has been accorded victims interests in the CJA (see together with the role accorded the views of victims at the diversion stage, as discussed above), and this attention to the position of victims breaks new ground in South African criminal justice. Second, the CJA makes the composition of pre-sentence reports by a probation officer mandatory (except where it is dispensed with because of undue delay which would prejudice the child—but then no sentence involving deprivation of liberty may be imposed by

191 2013 (2) SACR 303 (GNP).

192 Under the now repealed s 290 of the CPA.

193 Paragraph [15]. It is worth noting that the sentence was in the past always subject to an automatic review in chambers by a High Court. Similarly, the modern-day sentence to compulsory residence is also subject to automatic review by a judge of the High Court in terms of s 85 of the CJA (as amended).

194 Paragraph [18]. Nor had the sentencing officer sent the original sentence on review, as he was obliged to do (para [19]).

195 Section 69(4) of the CJA. These principles must be read in conjunction with the rules directly applicable to imprisonment: see s 77 discussed below.

the court).[196] The time period for preparation of the pre-sentence report is no later than six weeks after it has been requested.[197]

The court may deviate from the sentence recommended by the probation officer, but must then note the reasons for imposing a different sentence on the record.[198]

In Part 2 of the sentencing chapter, the specific sentences are detailed. First, community-based sentences, involving the harnessing of the options spelt out under the diversion chapter, are made available as sentencing options. The fulfilment of the relevant order must be monitored by a probation officer,[199] and failure of the child to comply with conditions set may result in the child being brought back to court for an inquiry into the reasons for this.[200] The 2015/2016 Department of Justice and Correctional Services Annual Report reveals that community-based sentences remain in the majority: 753 in 2013/3014, and 543 in 2014/2015. The 2015/2016 figure is low (2), possibility due to incorrect data capturing.

Next, restorative justice sentences are contemplated, either family group conferences, victim–offender mediation, or any other restorative process which is in accordance with the definition of restorative justice. The 2015/2016 Annual Report of the Department of Justice and Correctional Services indicates that after an initial upswing in restorative justice sentences (508 in 2012/2013), number have declined—179 in 2014/2015, and only 1 in 2016 (though this may be due to incorrect data capturing).

Fines as an option for children—or their exclusion as a competent sentence—were hotly debated by the SALRC, which ultimately concluded that imposing fines (on children who cannot themselves pay) penalises parents.[201] This position did not hold sway however, and s 74 now provides for the possibility of a fine or an alternative to a fine, provided that this be preceded by an inquiry into the ability of a child, his or her parents or guardian, or an appropriate adult to pay any financial penalty, and whether non-payment might result in the child being imprisoned.[202] In the alternative, the court may consider imposing symbolic restitution, payment of compensation to a specified person or organisation (or community group or charity), or obliging the child to provide some service to the benefit of a specified person or organisation (or community group or charity), also known as community service. However, the child must be 15 years of age before such order may be considered.[203] Interestingly, the figures given for the use of fines or alternative to fines are not insignificant—2013/2014 there were 43 fines and 50 alternatives, and in 2014/2015 the figures were 18 and 47 respectively. This tends to support the choice made to retain the option of monetary penalties or a suitable substitute.

196 Section 71(1)*(a)* and *(b)*.
197 Section 71(2).
198 See, in general, Terblanche 'The Child Justice Act: procedural sentencing issues' (2013) 16 *Potchefstroom Electronic Law Journal* 321.
199 Section 72(2)*(a)*.
200 The court may then confirm, amend or substitute the original sentence—s 79 of the CJA.
201 SALRC (Project 106) *Report on Juvenile Justice* (2000) para 10.41.
202 Section 74(1) of the CJA.
203 This accords with the age of compulsory schooling and the minimum age for child work.

Correctional supervision as contemplated in the CJA can also be regarded as a non-custodial sentence. This is because, in accordance with amendments effected to the Act in 2013,[204] only correctional supervision under s 276(1)*(h)* (which is served wholly outside of correctional centres and which is monitored by personnel employed by the Department of Correctional Services) may be imposed.[205] The data for 2014/2015 shows that 188 sentences of correctional supervision were imposed by child justice courts, and for 2014/2015 there were 81. The data before the amendment may not be comparable.

The two forms of custodial sentences, as already mentioned, are a sentence to compulsory residence in a child and youth care centre, and imprisonment. Each is dealt with briefly. The first is a new sentence created by the Child Justice Act (it replaces the former possibility of sentencing a child to a reform school) and it may be imposed for a period not exceeding five years or for a period which may not exceed the date on which the child turns 21 years of age, whichever date is earlier.[206] This can be contrasted with the position under the CPA when a reform school sentence was, in the first instance, for a maximum period of two years (although it could be extended until the age of 21 years).[207]

Data indicates that this form of deprivation of liberty has overtaken imprisonment considerably since the inception of the CJA: the number of sentences were 353 in 2011/2012; 335 in 2012/2013; 381 in 2013/2014; and 245 in 2014/2015. Now roughly six times more children are sentenced to this form of deprivation of liberty than are sentenced to imprisonment.

Muntingh and Ballard[208] voice two concerns relating to sentencing to a child and youth care facility. First, there is no provision in the Children's Act 38 of 2005 for early release, such as parole. However, anecdotally is has been communicated that an early release programme to incentivise good behaviour is being implemented, at least in the Western Cape.[209] Their second complaint is that there is no independent oversight body to monitor the deprivation of liberty of children in these facilities, akin to the Judicial Inspectorate of prisons. Although the Children's Act 38 of 2005 makes provision for an internal process of quality assurance, this is no substitute for independent oversight mechanisms.

The second form of deprivation of liberty is imprisonment. This sentence is highly restricted under the CJA, and s 77 of the CJA limits this option to children over the age of 14 years at the time of sentencing,[210] and in the ordinary course, to children convicted of offences set out in Schedule 3. Such a sentence may only be imposed for

204 Section 38 of Act 42 of 2013, in effect from 22 January 2014.

205 Under the original CJA, correctional supervision imposed under s 276(1)*(i)*, which required a period of incarceration prior to the community-based portion of the sentence coming into effect, was permitted for persons aged over 14 years.

206 The sentence contemplated in s 76(3) is discussed below under imprisonment because the child is first detained in child and youth care centre whereafter the sentence of imprisonment is served in a prison (after confirmation by a court).

207 Section 291 CPA.

208 Muntingh & Ballard 'Are the rights of children paramount in prison legislation?' 2013 *SACJ* 337 at 347.

209 Personal communication, provincial director of secure-care facilities (May 2016).

210 Note: the age of the child at the time of the commission of the offence is not the criterion here.

a Schedule 2 offence if substantial and compelling reasons exist for imposing a sentence of imprisonment,[211] and for a Schedule 1 offence 'if the child has a record of relevant previous convictions and substantial and compelling reasons exist' for imposing a sentence of imprisonment.[212] The possibility of a sentence of correctional supervision for which a portion of the sentence is served in prison before release under community corrections (the so called s 276(1)*(i)* of the CPA option) is provided for in s 77(4)*(b)* of the CJA; this sentence is clearly regarded as tantamount to imprisonment.

Although the sentence of life imprisonment is not mentioned in the CJA, the Act is ultimately ambiguous about this form of imprisonment for children. Given that the minimum sentencing regime (which culminated in the sentence of life imprisonment in the hierarchy set) was ruled unconstitutional in *Centre for Child Law v Minister of Justice and Constitutional Development*,[213] on the basis (inter alia) that a life sentence as the pre-ordained minimum offended the constitutional principle of detention for the shortest appropriate period of time, it could be assumed that a life sentence is no longer a competent sentence for a child aged below 18. This view is bolstered by the express prohibition on life imprisonment (without parole) as a competent sentence for offenders whose crimes were committee whilst they were below the age of 18 years in the CRC's art 37*(b)*. Moreover, s 77(6) (somewhat coyly) expressly refers to compliance with international obligations. Yet, the same section also refers to the possibility of a sentence of life imprisonment (albeit in the context of ensuring that the possibility of early release from imprisonment is not unduly curtailed). It is somewhat odd that this subsection was not amended consequent to the *Centre for Child Law* finding above (as was sub-s 77(2) which had provided for the minimum sentencing regime).[214] In the event, s 77(4)*(a)* clearly contemplates the possibility of lengthy sentences for children, as a maximum of 25 years imprisonment is permitted: this is also the period after which the possibility of parole for any person serving life imprisonment must be considered.

The case law on sentencing that has emerged under the CJA is tending to emphasise that presiding officers must pay meticulous attention to the provisions of the CJA when contemplating a sentence of imprisonment. In *S v CS*,[215] an appeal was brought against a ten-year sentence of imprisonment imposed upon a 15-year-old for a cold-blooded, unprovoked shooting of a passer-by on a motorbike. The appeal court methodically examined the trial court's analysis of the factors required to be taken into account by the CJA. The magistrate had not taken into account the desirability of keeping the appellant out of prison,[216] nor had the court investigated the suitability of other sentencing options. The court had not taken s 77(5) of the CJA into account—that the court must take into account the number of days spent

211 Section 77(3)*(b)* of the CJA.
212 Section 77(3)*(c)* of the CJA.
213 2009 (2) SACR 477 (CC).
214 By s 4*(a)* of Act 14 of 2014 (in effect from 19 May 2014).
215 2016 (1) SACR 584 (WCC), discussed by Reyneke in 'Child justice' 2016 *SACJ* 376.
216 Section 69(4)*(e)* of the CJA.

incarcerated whilst awaiting trial;[217] and had neglected to indicate why a sentence of ten years imprisonment should be regarded as the shortest appropriate period of time.

However, the appeal court dismissed the possibility of other sentencing alternatives to imprisonment; once weighed against the seriousness of the offence and the past behaviour of the accused, including his lack of remorse, the ten year sentence was ultimately substituted with a term of eight years imprisonment.

In *S v SD*,[218] the appellant was found guilty of murder of his adoptive parents when he was 17 years and 8 months old. A sentence of 12 years direct imprisonment was imposed. However, the Supreme Court of Appeal agreed that a custodial sentence was unavoidable given the severity of the crime. The court noted, however, that apart from rehabilitation (the accused was a drug user in need of intensive treatment), the court had to keep other interests in mind when imposing sentence, such as prevention. The court did not interfere with the sentence imposed and dismissed the appeal.

An interesting new possibility is the sentence created by s 76(3), which permits the imposition of a sentence to a CYCC,[219] with the addition of a sentence of imprisonment to be served thereafter. This sentence may be imposed only for a Schedule 3 offence, and for an offence which, had the accused been an adult, a sentence of imprisonment exceeding ten years would have been warranted. It would seem, on the face of it, to be pointless to sentence a child to a less restrictive form of custody if that is to be followed by imprisonment, were it not for the fact that s 76(3)*(b)* requires that the child justice court which imposed the original sentence, must, on completion of the initial portion, receive a report from the head of the CYCC on which the second sentence should be served or whether the aims of reintegration of the child into society had been fulfilled. In the first known sentence of this nature, the head of the CYCC (upon expiry of the first part the sentence) argued that reintegration had in fact been achieved.[220]

The statistics of incarceration rates of children bear out the point that the CJA has dramatically reduced the use of imprisonment as a sentence. Whilst in April 2010 (at the commencement of the Act) there were 717 sentenced children in prisons, this figure declined to 187 on 31 March 2016, a more than 73 per cent drop. The extent to which imprisonment has been replaced by a sentence to the other form of custodial sentence in a CYCC is not easy to establish, as the DSD data does not separate children in CYCC's awaiting trial, and those serving a sentence.

Finally, s 78 CJA explains that the CPA governs suspension and postponement of sentence, and that a probation officer may be appointed to monitor any conditions of postponement and to provide the court with progress reports on the child's compliance with these conditions.

217 *In casu*, 9 months and 24 days in a child and youth care centre.
218 2015 (2) SACR 363 (SCA), also discussed by Reyneke 2016 *SACJ* 376.
219 This would be after five years or until the accused turns 21, whichever occurs first: s 76(2).
220 Personal communication, manager of secure-care facilities, Western Cape DSD.

23.11 LEGAL REPRESENTATION

The CJA's fairly unique provisions pertaining to legal representation were strongly influenced by the specific history of legal representation of indigent children in the period before the reform of the Judicare (the model of legal aid in which the mandate to represent indigent clients was largely outsourced to private law firms which had prevailed in South Africa) to the model where legal services are primarily sourced from practitioners hired by Legal Aid South Africa to operate from Justice Centres.

Under the previous system, the SALRC had identified a number of challenges to children's enjoyment of legal representation at state expense. These included that children did not trust lawyers, whom they thought were in cahoots with the state; they thought that they could mount a better defence themselves; they expressed the view that their lawyers did not listen to them and rode roughshod over their wishes; and they were of the erroneous view that agreeing to legal representation was an indication of guilt.[221]

The premise of the drafters of the CJA was, first, that most children would qualify for state-funded legal representation on the basis of their lack of means. Secondly, it was understood that merely facing criminal charges in a child justice court would raise the prospect of substantial injustice ensuing if the child was not legally represented at his or her trial.[222] Thirdly, the SALRC envisaged a client-directed model of defence of children and sought to ensure that the child client would be empowered to provide independent instructions. Although the SALRC had proposed the idea of specialist (trained) lawyers to serve as legal representatives for children, this was ultimately not accepted, nor was it necessary given that Legal Aid South Africa established Children's Units in the lead-up to the adoption of the CJA, which provided a platform for specialisation amongst its staff and for dedicated training.[223]

Hence, s 80 of the CJA provides for the duties of a legal representative towards the child client: to allow the child to give independent instructions concerning the matter, to explain the rights and duties of the child in a manner appropriate to the age and intellectual development of the child, to promote diversion where appropriate, to ensure the conclusion of processes under the CJA without delay and to uphold the best interests of the child, and to uphold the highest standards of ethical behaviour and professional conduct (on pain of reporting to the relevant professional body or the imposition of other appropriate remedial sanction).

Section 82, which deals with the circumstances under which a child must be legally represented, allows for a representative of his or her own choice. Further, it subjects the decision to grant legal representation at state expense to the criteria specified in the Legal Aid South Africa Act 39 of 2014. Where the provisions diverge with the past, though, is in relation to a situation where a child refuses (waives) his or her right to legal representation. The capacity to do this is expressly removed by s 83, which states that where a child does not wish to have a legal representative, or

221 SALRC Discussion Paper 79 (Project 106) *Juvenile Justice* (1998) at 266–277.

222 Section 35(2)*(c)* of the Constitution requires the provision of legal representation at state expense if substantial injustice would otherwise result.

223 For a discussion of the changing landscape at the time, see SALRC (Project 106) *Report on Juvenile Justice* (2000) at 11.8 and 11.9.

declines to give instructions to an appointed lawyer, the court must note this on the record. Thereafter, a legal representative must be appointed by Legal Aid South Africa to assist the court. The regulations[224] to the CJA spell out the role that this legal representative should play. The representative is directed to attend all court proceedings; to address the court on any matter requested by the court; to have access to documents and statements in the docket (to the extent possible); to address the court on the merits and procedural aspects of the case and on sentence; to cross-examine and discredit witnesses, as well as object to questions posed to the child or to state witnesses; to question the admissibility of evidence; and to present evidence that will be in the best interests of the child.

To all intents and purposes, the 'court-assisting' legal representative fulfils exactly the same function as a client-instructed one. Indeed, as pointed out by Henney J in *S v LM*:[225]

> The practical effect of ch 11 is that a child who appears before a Child Justice Court is effectively never without some form of legal representation. Even if the child waives the right to legal representation, a legal representative will be appointed, whose role would be to proactively assist the court in the manner as set out in reg 48 in order to ensure that a child accused has a fair trial.[226]

Karels[227] is critical of the CJA provisions concerning legal representation on several grounds. First, she questions the manner in which the provisions disallow autonomous instruction by the (child) client because of a lack of cognitive/conative capacity to give such instructions, yet they proceed to permit a trial.[228] Secondly, she regards the obligation upon a legal representative to promote diversion as being at odds with the fact that legal representation is not mandatory at the pre-trial stage. Thirdly, she regards the requirement that counsel conduct proceedings without delay and in the child's best interests as idiosyncratic, on the same basis that legal representation is not mandatory at the pre-trial stage, although she acknowledges that Legal Aid South Africa recognises that appearance at a preliminary inquiry is part of the trial process and that state-funded legal representation is warranted at that proceeding. Fourthly, she is critical of the degree to which the CJA permits the court to interfere with the actions of legal counsel under the Act, to the extent of making an order against a legal representative who perpetrates misconduct or displays incompetence (but not against a prosecutor). Finally, she regards the 'non-waiver' provision and concomitant appointment of a legal representative to assist the court as an undue interference in the self-determination and autonomy rights of the child accused.

The 2015–2016 Report of Legal Aid South Africa on the implementation of the Child Justice Act[229] indicates that the institution provided legal representation to 11 978 children's criminal matters in that period, and that coverage of district courts was

224 Regulation 48.
225 2013 (1) SACR 188 (WCC).
226 Paragraph [17].
227 Karels 'The triumvirate role of legal counsel for child offenders: representative, intercessor or agent?' 2013 *SACJ* 276.
228 Section 80(1).
229 See http://www.justice.gov.za/vg/cj/cja-anr-2015–2016.pdf.

at 88 per cent (with coverage of regional courts being 97 per cent). Children were represented by them at preliminary inquiries in 3 441 matters. Extensive training has been provided on the CJA to Legal Aid South Africa staff, with 1 026 of their practitioners having received training in 2015–2016. The fulfilment of the child's right to legal representation in the modern-day South African criminal justice system can be regarded as a significant achievement, in compliance with art 40(2)*(b)*(ii) of the CRC and art 17(2)(iii) of the African Charter on the Rights and Welfare of the Child.

23.12 MISCELLANEOUS

23.12.1 Machinery for monitoring implementation

The requirement of a national body to monitor the implementation of the CJA was born out of the experience during the late 1990s of trying to reduce the number of children remanded to await trial in prisons. From the early years of the millennium, a national committee comprising all the relevant government departments, and with some NGO representation, began to meet. This informal structure has been given statutory recognition in ss 94– 96 of the CJA, which establishes the Intersectoral Committee for Child Justice, comprising the Director-General of Justice, the National Director of Public Prosecutions, the National Commissioner of the South African Police Services, the National Commissioner of Correctional Services, the Director-General of Social Development, the Director-General of Education and the Director-General of Health, all of whom may designate officials to represent them. Representatives from non-governmental organisations and civil society may be invited to meetings, which must be held at least twice annually.[230] The responsibilities and functions of the Intersectoral Committee are detailed in s 96 of the CJA and include developing implementation priorities, measuring progress on the achievement of the objectives of the national policy framework and of the CJA, maintaining an integrated information-management system to enable monitoring and the analysis of trends and interventions, as well as to map the flow of children though the child justice system, and to prepare and submit annual reports to Parliament on the implementation of the Act. Whilst initially the CJA provided for a joint report from the duty-bearers, this proved difficult to achieve in practice and an amendment was made in 2015 which will henceforth see the submission of separate reports from each department.

The reports referred to throughout this chapter constitute the official reports tabled thus far, and they provide at least a snapshot overview of the developing implementation of the CJA.[231]

23.12.2 Relationship to the Children's Act 38 of 2005

There remain several points at which the child justice system and the Children's Act 38 of 2005 (hereinafter 'Children's Act') intersect. The first is via the provisions of the

230 Section 95*(a)* of the CJA.
231 See http://www.justice.gov.za/vg/childjustice.html for relevant documentation.

CJA which enable the transfer of a criminal matter to the (quasi-civil) children's court for an inquiry into the care and protection needs of the child. This is provided for most directly in s 50, which allocates the responsibility for effecting this to the inquiry magistrate at the preliminary inquiry.[232] The child must appear to the inquiry magistrate to fulfil one of the criteria in s 150(1) or 150(2) of the Children's Act. In addition, s 50 draws attention to the possibility of a children's court referral where the child does not live at home or in appropriate alternative care, as well as where the child is alleged to have committed a minor offence or offences aimed at meeting the child's basic need for food or warmth.[233] The effect of a referral under s 50 is that the criminal proceedings are stopped altogether, and this has the likely effect of removing the prosecutorial discretion to insist upon a prosecution continuing. As noted earlier, it appears that this option was used in 89 cases referred from the preliminary inquiry in the year 2015–2016, and no instances were provided of referrals from a child justice court to the children's court in that reporting period.

A second point at which the Children's Act and the Child Justice Act articulate is via the provisions relating to secure care, since secure-care facilities are now classified as child and youth care centres (CYCCs). These are governed by chap 14 of the Children's Act.[234] 'Secure care' means the physical containment in a safe and healthy environment of children with behavioural and emotional difficulties and of children in conflict with the law. Since different CYCCs accommodate children who need alternative care for different reasons (orphans, abandoned children, unaccompanied migrant children) a facility which received children in conflict with the law under referral from the CJA must be registered for the delivery of a secure-care programme in accordance with s 191(2)*(h)*[235] or s 191(2)*(j)*(i)[236] of the Children's Act.

There are, as at the time of writing, 19 secure-care facilities, spread amongst the provinces. The total available accommodation is 2 456 beds. Not all facilities receive both sentenced and awaiting-trial children, and some receive either only awaiting-trial children or only sentenced children. One facility is designated to receive girls only.[237]

There has been some litigation involving secure-care facilities, notably in the Eastern Cape and the Western Cape. In *S v Goliath*[238] a magistrate had paid an

232 However, the probation officer effecting assessment is directed to include a recommendation on whether referral to the children's court is indicated (s 40(1)*(a)*; see too s 35*(a)*, which includes this as one of the purposes of assessment). A referral to the children's court is also an option listed under s 9 of the CJA in relation to children aged below the minimum age of criminal capacity.

233 This was intended to strengthen the possibility of referral of children in need of welfare interventions to the children's court. Previous studies had found that this option (as provided for by s 254 of the CPA) was rarely used.

234 Dealing with the establishment and registration of CYCCs in Part 1 of the chapter, and the operation and management of CYCCs in Part 2 of the chapter.

235 Referring to the reception of children awaiting trial or sentence.

236 Referring to children received in terms of an order under chap 10 of the CJA (as a sentence). See further under para 23.11 above.

237 See DSD 'Department of Social Development list of centres' available at http://www.justice.gov.za/vg/cj/SC-facilities-list.pdf.

238 2014 (2) SACR 290 (ECG).

impromptu visit to a secure-care facility upon reading certain newspaper reports. He discovered that children were roaming around freely, listening to music and not doing any schoolwork. His investigations revealed that the security guards were so afraid of the children that they would lock themselves into a room at night. He discovered further that many of the children absconded nightly from the facility and that the use of drugs was rampant. The buildings were being vandalised and he found broken windows, broken doors, damaged light fittings, vandalised swimming pool pumps, damaged and destroyed furniture and television sets, and broken security cameras. The main computer centre had been destroyed and attempts had been made to set the building alight. In short, the facility was wholly dysfunctional. The judge described the founding affidavit as reluctantly bringing to mind scenes from William Golding's *Lord of the Flies*. The facility was temporary closed and the children were transferred elsewhere, including to prisons.

The closure of four schools of industry in the Western Cape, and the transfer of children to other facilities in the province, including secure-care facilities, was the subject matter of a challenge by the Justice Alliance of South Africa.[239] In *MEC for Social Development, Western Cape and Others v Justice Alliance of South Africa and Another*,[240] the Supreme Court of Appeal struck down the judgment of the Western Cape High Court, which had favoured retention of the status quo and had ordered the MEC not to close the facilities. The Supreme Court of Appeal was of the view that the centres were in the process of disestablishment from a period preceding the coming into operation of the Children's Act by nine years, and that they were repurposed as schools for children with special needs. The difficulty facing the initial applicants was that, as at 1 April 2010, the centres did not fall within the ambit of s 196(1)*(d)* or *(e)* of the Children's Act (the deeming provisions which envisaged that schools of industry and reformatory schools at that date would be regarded as CYCCs). The respondent schools were accordingly not, as at 1 April 2010, maintained as schools of industry or reform schools respectively, but had been legally constituted as schools for leaners with special needs.

The original complaint was also premised on children in need of care and protection and those with behavioural problems being kept together with children awaiting trial and sentence. The Supreme Court of Appeal retorted that there is no provision in the Children's Act which requires that children in the different categories should be housed separately in the sense that they need to be placed in separate facilities.

All that the Children's Act contemplates is that children in secure care be kept separate from children not in secure care. In any event, it appears that in the Western Cape there is a more fundamental separation than that required in terms of the Children's Act, in that the different categories of children in secure care are housed separately in the facilities in which secure care is provided, while children not in secure care are placed in separate facilities.[241]

239 *Justice Alliance of South Africa and Another v Minister of Social Development, Western Cape and Others* [2015] 4 All SA 467 (WCC).

240 [2016] ZASCA 88 (1 June 2016) .

241 Paragraph [38].

In any event, the Supreme Court of Appeal was of the firm view that the placement of children in different facilities in terms of the Children's Act was a function of the provincial director of Social Development, and that the courts could not interfere in the exercise of this executive function.

23.12.3 Remaining gaps and challenges

The central issue that has emerged since the coming into operation of the CJA in 2010 is the dramatic drop in the number of children being processed through the system. The causes for this drop are speculative, but seem to emanate from the fact that fewer children are being arrested. The declining numbers permeate all aspects of the child justice system: there are fewer children in diversion programmes, fewer assessments and preliminary inquiries, and fewer children's trials being held.

At the same time, the diminishing number of children incarcerated in prisons (as awaiting-trial remandees or as sentenced prisoners) is commendable. Whilst the development of the alternative of secure-care facilities is partially accountable for the drop in numbers since the turn of the millennium, there can be no doubt, too, that enhanced vigilance by the various stakeholders in the child justice system as to implementing the constitutional and international law principle of deprivation of liberty of children as a last resort, and for the shortest appropriate period of time, must be credited too.

The time is now overdue for an in-depth qualitative study into the functioning of the child justice system, and it is to be hoped that this will ensue in the not-too-distant future.