An Assessment of the Implementation of the CYCC under the Child Justice Act 75 of 2008.

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I wish to thank my loved ones along my journey for their support and encouragement.

This dissertation is dedicated to my daughter Saanchi, and to all the children of the land, in the hope of creating a better future for them.

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CHAPTER ONE:

1.1 Introduction and Background to the Research Problem

The implementation of the Child Justice Act 75 of 2008 (hereafter "CJA") brought with it a revolutionary overhaul of the treatment of children who come into conflict with the law under the South African Criminal Justice system.

In 1994, following the dawn of a new Constitutional dispensation in the Republic, South Africa ratified the *United Nations Convention of the Rights of the Child* (hereafter "UNCRC").[1] This was the country's first international treaty to be adopted since its emergence from isolation of international foreign affairs. It is symbolic that Mr. Mandela chose to ratify this specific treaty as a token to the many children who had suffered gross human rights abuses during the height of the apartheid struggle, and also as a token of the new government's commitment to the children of South Africa.[2]

The ratification of the UNCRC held many new and important commitments for State parties to translate into their domestic laws, especially *Art 40*[3] which required a new partitioned system of juvenile justice for children to be created. That a separate system of justice for juvenile offenders now exists in South African law is a hallmark of an enlightened criminal justice system.[4]

[1] UN General Assembly, *Convention on the Rights of the Child,* 20 November 1989, United Nations, Treaty Series, vol. 1577 3 ("UNCRC").
[2] J Maguire "Children of the Abyss: Permutations of Childhood in South Africa's Child Justice Act" (2012) 15(1) *New Criminal Law Review* 68 – 121 at 94.
[3] Art 40 of the UNCRC.
[4] *Child Justice Act 75 of 200*8 ("CJA"). The *Children's Act 38 of 2005* ("*Children's Act"*) works in tandem with s50 of the CJA when the child offender is found to be a "child in need of care and protection." This finding usually comes to the attention of the inquiry magistrate at the preliminary inquiry, which inquiry is governed by chapter 7 of the CJA.

After many years and much debate, the CJA was signed into law in May 2009 with an operational date set for the 1st April 2010.[5] Upon its creation, the CJA established a new and separate procedural framework of child justice effectively overhauling the procedural and substantive treatment of children who come into conflict with the law.

The CJA was initially accompanied by the National Policy Framework[6] (hereafter "Framework") as well as a sitting committee of ministers at cabinet level, known as the Justice and Crime Prevention Cluster Inter-ministerial Committee (hereafter "JCPS"). The Framework was removed but has since been amended (the "amended Framework") and published for public comment.[7] The ministerial committee is the steering head amongst three other sub-committees[8] whose task it is to create and maintain stakeholder participation and collaboration between governmental departments and parastatals, the prime purpose of which is to facilitate and actualize the instructions under the Framework. The overarching responsibility of monitoring implementation of the CJA and tabling of Annual Reports falls on the shoulders of the JCPS. The amended Framework will be discussed in more detail in Chapter three.

Chapters six and seven of the Framework contain instructions concerning the establishment of Child and Youth Care Centres (hereafter "CYCCs"). The resources and budgets needed to implement the above are regarded as a separate priority under chapter eight of the Framework.

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[5] The difference of a year is perhaps the first clue that large and complex practical steps towards implementation of both Acts were required for their effective functioning – see further, the costing of the *Children's Act* at chapter three.

[6] GN 801 of GG 33461, 13/08/2010 ("Framework").

[7] Amended National Policy Framework on Child Justice, 2018 GN 751 of GG 41796, 27/07/2018 ("Amended Framework").

[8] S94(1) of the CJA. Briefly, the three sub-committees can be summarized as follows: s94 of the CJA creates the Director-General's Inter Sectoral Committee on Child Justice ("DG's ISCCJ"). This committee comprises the director-general in each department as well as the National Director of Public Prosecutions (hereafter "NDPP") and the National Commissioner of the South African Police Services. Compliance and the maintenance of a uniform, coordinated and co-operative approach by government departments and organs of State falls squarely on the shoulders of the DG's ISSCJ. The chairperson of this committee is the Director-General of the Department of Justice and Constitutional Development (hereafter "DOJCD").
Beneath this committee is the National Operational ISCCJ which comprises senior departmental officials and which meets monthly. This committee is utilized as the vehicle in the conveyance from policy to implementation.
The third and final committee comprises the Provincial Child Fora. Each Forum meets every quarter to inter alia assess the challenges and successes around the implementation of the CJA thus far.

Under chapter six and seven of the Framework, all secure care facilities, Reform schools and schools of industry are to be regarded as CYCCs as from 1st April 2010. All existing Reform schools and schools of industry under the control of the Department of Education (hereafter "DOE") were to be handed over to the Department of Social Development (hereafter "DSD") within two years, but as at present date, not all have been transferred. As at 2011, each province has at least one CYCC.[9]

1.2 Statement of the Problem Question and Outline of the topic (inclusive of Aims and Objectives of the Research Dissertation

The resources and budgets needed to implement the *Children's Act 38 of 2005* ("*Children's Act"*), and the CJA are regarded as a separate priority under chapter eight of the Framework. Prior to its passing, the CJA as well as the *Children's Act* were hailed as a model example of financial planning as it undertook the first ever in-depth costing exercise of law reform proposals whilst still in the drafting stages of the process.[10] Both the *Child Justice Bill 9 of 2002* as well as the CJA boasted high compliance with s35 of the *Public Finance Management Act 1 of 1999.*[11]

However, for all the financial planning involved, a number of challenges have to date been identified with regards to the implementation of the CJA ranging from a lack of uniformity in application, to limited co-operation between stakeholders and a lack of knowledge and training.[12]

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[9] J 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 S. Afr. J. Crim. Just.* 316 at [2]; C Badenhorst "Second Year of the Child Justice Act's Implementation: Dwindling Numbers" (2012) Child Justice Alliance Research Report 8. Pinelands: Open Society Foundation for South Africa available online at http://www.childjustice.org.za/publications/BadenhorstCJAImplementation2_2012.pdf; A Skelton 'Reforming the Juvenile Justice System in South Africa: Policy, Law Reform and Parallel Developments' UNAFEI. Annual Report (2007) available online at http://www.unafei.or.jp/english/pdf/RS_No75/No75_09VE_Skelton.pdf; Child Justice Project "A situational analysis of reform schools and schools of industry in South Africa" Dept of Justice, (2002), available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2003/appendices/030228situation.htm.

[10] J Sloth-Nielsen, "The Business of Child Justice" (2003) *Acta Juridica* 175-193 at 184.

[11] Financial Mail, 23rd May 2003; C Barberton, "The Cost of the Children's Bill – Estimate of the Costs to Government of the Services Envisaged by the Comprehensive Children's Bill for the Period 2005 – 2010" (July 2006) available online at http://www.socdev.gov.za/documents/2006/costcbill.pdf 5.

[12] M Schoeman and M Thobane, "Practitioners' perspectives about the successes and challenges in the implementation of the Child Justice Act" *Acta Criminologica: Southern African Journal of Criminology 28(3)/2015* 34 – 49 at 42 – 44; Parliamentary Monitoring Group Report Child Justice Workshop Report Select Committee on Security and Justice (27 May 2015) available online at https://pmg.org.za/tabled-committee-report/2511 accessed 8 May 2017.

Insofar as the implementation of the CYCC within the confines of the CJA is concerned, for all its advancement on paper, the CJA inevitably operates within a democratic but divided society where deep social inequality distances the verisimilitudes of programmatic realism.[13]

A lack of available infrastructure combined with a delay in inter-departmental transfers of Reform Schools and schools of industries, as well as logistical challenges relating to placement of children in CYCCs is a common challenge raised by stakeholders[14] and is the focus of this research paper.

Only four out of nine provinces have Reform School facilities but there are no Reform Schools for girls.[15] These Reform Schools are now to be treated as CYCCs under s196(1)(e) read with s 196(4) of the Children's Act. This "paper transfer" has created a problem all on its own: CYCCs which should be regarded as such cannot be for practical financial reasons. This challenge as it relates to the situation countrywide will be demonstrated by an analysis of *Justice Alliance of South Africa & another v Minister of Social Development, Western Cape & others*[16] ("JASA 1"); *Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another*[17] ("JASA 2") as well as its sequel in *MEC for Social Development, Western Cape v Justice Alliance of South Africa*[18] ("JASA 3") in chapter four.

Secondly, the "uneven [geographical] distribution" of these Reform Schools often results in prolonged periods of incarceration "in correctional facilities awaiting a space in these centres."[19] This point was echoed in a Report by the United Nations Children's Emergency Fund ("UNICEF") and regarded as a major infringement of the child's right to a family environment.[20]

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[13] This will be demonstrated by the cases in remaining chapters - *S v Z* 1999 (1) SACR 427 (E); *S v Z and 23 similar cases* 2004 (4) BCLR 410 (E*)*; *Jonker v Manager, Gali Thembani/JJ Serfontein School* 2014 (2) SACR 269 (ECG*); S v Goliath (CA&R36/2014) [2014] ZAECGHC 4; 2014 (2) SACR 290 (ECG) (17 February 2014)* Maguire, J (note 2 above 68 at 70).

[14] M Schoeman and M Thobane*,* (note 12 above 43, 45).

[15] C Badenhorst 2011. The Child Justice Act. What is happening after two years. Article 40, 3(3): 9. The four provinces are Kwazulu Natal, Mpumalanga, and both the Eastern and Western Cape. See also Skelton ' A Situational Analysis' (note 9 above).

[16] [2015] 4 All SA 467 (WCC) ("JASA 1").

[17] (20806/2013) [2016] ZAWCHC 34 (1 April 2016) ("JASA 2").

[18] 2016 JDR 1038 (SCA) ("JASA 3").

[19] Badenhorst (note 15 above) 9.

[20] South African Human Rights Commission 'South Africa's Children, a Review of Equity and Child Rights' (2011) 6 available at www.unicef.org/Southafrics/SA accessed 23 March 2017; L Jamieson. Children's Rights to appropriate alternative care when removed from the family environment: A review of South African Child and

The statistics contained in the 2009/2010 report indicated that 88 600 children were declared in need of care and placed in foster care, children's homes and Schools.[21]

Aims and objectives:

The motivation of this study into the position of the CYCCs in relation to the guiding principles of the Frameworks arises out of the need to establish the direction in which case law is shaping the laws on child justice. The lack of fully operational CYCCs throughout the country is demonstrated in *JASA 2* in which it was found that a Court authorized transfer of a CYCC from one governmental department to another and in ignorance of the fiscal implications involved in such transfer, offends against the doctrine of the separation of powers. This is because, policy-laden decision making which is entrusted under the separation of powers to the Executive cannot be interfered with by the judiciary. However, the lack of strategy relating to the transfers as envisaged under the Framework and the repeated undertakings by the Minister of the DSD to produce such a strategy have to date yielded very little.[22]

As at the present date, the DOE has still not transferred the remaining Reform School in Kwazulu-Natal (*viz*. the Newcastle School of Industry) under its control to the DSD.[23] According to the Annual Report of 2016, talks are underway, presumably between DSD and DOE.[24]

The significance of this research paper:

The significance of this research paper is two-fold: Little has been written about the different forms of CYCC and no attention has been given to a collaborative approach in identifying solutions to transferring existing Reform Schools and Schools of Industries from the DOE to the

Youth Care Centres. In: P Proudlock. South Africa's progress in realizing children's rights: A law review. (2014) 213 – 257.

[21] *Ibid.*

[22] See however the amended framework discussed in chapter three below.

[23] See further - South Africa. Dept. of Justice and Constitutional Development. Annual Report on the Implementation of the Child Justice Act 75 of 2008 (2016) (the "Fourth Report").

[24] *Ibid.*

DSD. The author's motivation to investigate the delay in transfer of existing CYCCs from the DOE to the DSD was based on the following facts:

• An eagerness to expose the State-delivered environment to which children in conflict with the law, and sometimes simultaneously in need of care and protection are exposed to, with the aim to strengthen laws which surround the sentencing of a child to a compulsory residence at a CYCC;

• The absence of a collaborative approach between the three-tier intergovernmental committees to ensure prompt and efficient service delivery as evidenced through the Annual Reports; and

• The existence of fragmented information on the statistics of children as they enter and exit the legal system through the CJA and CA.

1.3 Terminology and definitions

1960 Child Care Act	*Child Care Act 33 of 1960*
1983 Child Care Act	*Child Care Act 74 of 1983*
Children's Act	*Children's Act 38 of 2005*
CJA	*Child Justice Act 75 of 2008*
CJB	*Child Justice Bill*
Constitution	Constitution of the Republic of South Africa, 1996
CYCC	Child and Youth Care Centre
DG's ISSCJ	Director-General's Inter Sectoral Committee on Child Justice
DOE	Department of Education
DSD	Department of Social Development
IMC	Inter-Minsterial Committee on Young People at Risk
JASA	*Justice Alliance of South Africa & another v Minister of Social Development, Western Cape & others* [2015] 4 All SA 467 (WCC)
JASA 2	*Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another* (20806/2013) [2016] ZAWCHC 34 (1 April 2016)

JASA 3	*MEC for Social Development, Western Cape v Justice Alliance of South Africa* 2016 JDR 1038 (SCA)
JCPS	Justice and Crime Prevention Cluster Inter-Ministerial Committee
MEC	Member of the Executive Council
NDPP	National Director of Public Prosecutions
PI	Preliminary Inquiry
SALC	South African Law Commission
UNICEF	United Nations Children's Emergency Fund
UNCRC	United Nations Convention on the Rights of the Child

"Child" is defined as 'any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4 (2)'[25]

"A child in need of care" is defined as a child who "has been abandoned or is without visible means of support; displays behaviour which cannot be controlled by his or her parents or the person in whose custody he or she is; lives in circumstances likely to cause or conduce to his or her seduction, abduction or sexual exploitation; lives in or is exposed to circumstances which may seriously harm the physical, mental or social well-being of the child; is in a state of physical or mental neglect; has been physically, emotionally or sexually abused or ill-treated by his or her parents or guardian or the person in whose custody he or she is; or is maintained in contravention of Section 10."[26]

"Child and Youth Care Centre" or CYCC is defined as 'existing government children's homes, places of safety, secure care facilities, schools of industry and Reform Schools.[27]

"Reform School" is defined as a school maintained for the reception, care and training of children sent thereto in terms of the *Criminal Procedure Act 51 of 1977* or transferred thereto

[25] S1 of *Act 75 of 2008.*
[26] Section 14 (4) (aB) of the *Child Care Act 74 of 1983.*
[27] S3(c) of the *Children's Act 41 of 2007.*

under the *Child Care Act 74 of 1983*. This is a residential institution wherein children who have been sentenced by courts of law are placed.

"School of industries" is defined as a school maintained for the reception, care, education, and training of children sent or transferred thereto under the *Child Care Act 74 of 1983*.

"The First Report" refers to the 2010/2011 Annual Report on the Implementation of the CJA.

"The Second Report" refers to the 2011/2012 Second Annual Report on the Inter-sectoral Implementation of the CJA.

"The Fourth Report" refers to the 2013/2014 Fourth Annual Report on the Implementation of the Child Justice Act

"The Fifth Report" refers to the 2015/2016 Annual Report on the Implementation of the CJA.

"The Sixth Report" refers to the 2017/18 Inter-departmental annual reports on the implementation of the CJA.

The Third Consolidated Annual Report on the Implementation of the CJA has little bearing on this dissertation paper and is referenced through other sources.

1.4 Limitations of the Research

The research is hampered in one or more respects *inter alia* the lack of information or gaps in information regarding statistics as between departments as well as the *sui generis* functioning of current CYCCS leading to a lack of uniformity in application for future models.

1.5 Research goals

One of the envisaged outputs of this research paper is to establish an awareness of the complex co-ordination needed in establishing the new model CYCC which is compliant with the Constitution of the Republic of South Africa, 1996. domestic laws and international instruments. It is hoped that this paper will create an involvement by civil society in assisting with

programmes to involve youth in alternatives that decrease the pressure upon the State and state-delivered services which are crucial to the success of the CYCC model.

1.6 Research Methodology

This research paper is the outcome of a desktop study. As a result, legislation, journal articles, newspaper articles, speeches, minutes of meetings, case law, dissertations, and national and provincial budgets will be analyzed to form the content.

1.7 Structure of the Dissertation

The following chapter is a historical overview of the CYCC from its inception as a Reform School in the early 1900s, to its handover from one department to the next, finally finding a home under the *Children's Act* with the DSD. In sketching this history, the events leading up to the birth of the CYCC will be reflected in the evolving social policy changes of the time, on both a domestic and global level. The cases of *Z and 23 similar cases*,[28] *Jonker*[29] and *Goliath*[30] will set the stage for an understanding of the baggage inherited by the CYCC and its role-players.

Chapter three considers the current operational position of the CYCC within the ambit of the CJA. In this chapter, the initial and amended Frameworks which accompanied the CJA, as well as the ministerial strategy reflected in section 192 of the *Children's Act* are discussed. Lastly, an investigation undertaken to put the *Children's Act* into operation through a costing study will be highlighted.

[28] *S v Z and 23 similar cases* (note 13 above).
[29] *Jonker v Manager, Gali Thembani/JJ Serfontein School* (note 13 above).
[30] *S v Goliath* (note 13 above).

Chapter four will review the performance of the CYCC as it appears in chapter three against the inter-departmental reports of the CJA regarding the numbers of children sentenced to a CYCC, and the impact the numbers have on the placement and housing of awaiting trial and sentenced young offenders in the absence of an implemented national strategy. The chapter will conclude by analyzing the trio of *JASA* decisions[31] against the review outlined by the reports and national strategy.

Chapter five will conclude by summarizing the previous chapters and explore possible solutions with a view to improving the state of the CYCC for the overall benefit of the child justice system.

[31] *JASA 1* (note 16 above); *JASA 2* (note 17 above); and *"JASA 3"* (note 18 above).

CHAPTER TWO:

2.1 Historical Overview:

The principle that courts should, where possible, avoid sending juvenile offenders to prison, is traceable to other more general principles or policies such as those of rehabilitation and minimal intervention."[32] From as early as 1820, emerging notions of civility accompanying a gradual worldwide 'rise of the nation-state' until 1970[33] brought with it a change of attitude towards the penal system and the treatment of criminals. In August of 1845 Britain officially annexed the Colony of Natal and took control of its administration.[34] During this era the first prisons were established and controlled by the colonialists acting (for the most part) under the instructions of the British Empire. In due course, the Government streamlined and organized its processes such that by 1917[35] and under the *Industrial and Reformatory Schools Principal Act 29 VIC.NO 8, 1865* and the *Children's Protection Act, 25 of 1913*, existing schools of industry and Reform Schools were transferred to the DOE.[36] This signaled the emergence of a new penal policy for children as distinct and separate from adults, although it would be many a decade before the current machinery under the CJA was established.

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[32] J Lund 'Discretion, Principles and Precedent in Sentencing (part one)' (1979) 3 *SACC* 208; see also A Skelton and B Tshela, 'Child Justice in South Africa' ISS Monograph Series No 150, September 2008 available online at http://iss.co.za/static/templates/tmpl_html.php?node_ id=3771&slink_id=6890&slink_type=12&link_id=20 accessed 15 May 2017; A Skelton, 'A Decade of Case Law in Child Justice' (2006) Child Justice Alliance *Child Justice in South Africa: Children's Rights Under Construction* Conference Report 66.

[33] J Braithwaite 'A Future Where Punishment is Marginalized: Realistic or Utopian?" (1998 – 1999) 46 *UCLA L.Rev*. 1727 at 1731, 1735.

[34] S Pete 'Falling on stonyground: Importing the penal practices of Europe into the prisons of colonial Natal (Part 1)' (2006) 12(2) *Fundamina* 101-106.

[35] See also *Criminal Procedure and Evidence Act 31 of 1917*; Maguire (note 2 above; 75, 94).

[36] See further *s196(1)* of *Act 38 of 2005*, the relevant part of which reads as follows: *'(1) As from the date on which section 195 takes effect [1 April 2010], -. . .(d) a government industrial school established in terms of section 33 of the Children's Protection Act, 1913 (Act 25 of 1913) and maintained as a school of industries in terms of the Child Care Act [74 of 1983] must be regarded as having been established in terms of section 195 as a child and youth care centre providing a residential care programme referred to in section 191(2)(i); and (e) a reformatory established in terms of s 52 of the Prisons and Reformatories Act, 1911 (Act 13 of 1911) and maintained as a reform school in terms of the Child Care Act must be regarded as having been established in terms of section 195 as a child and youth care centre providing a residential care programme referred to in section 191(2)(j).'*

By 1944, Alan Paton's address at the National Social Welfare Conference reflects the paradigm shift in penal policy in South Africa:[37]

There is a third view of punishment, that it should be reformatory. This view gained much ground in this century. If this view is held, then the word 'punishment' becomes inappropriate and is replaced by the word 'treatment.' The whole purpose of the transfer of reformatories of South Africa from the Department of Prisons to the Department of Education was to change their goal from one of detention to one of education.[38]

Very little improvement can be said to have occurred towards the advancement of children's rights in South Africa during the struggle years. Prior to 1969 in accordance with prevailing apartheid policy, the bulk of Reform Schools and schools of industries were demarcated for Whites only (the exceptions are Ottery School of Industry and the Newcastle School of Industry which was constructed in 1969).[39] The only progressive feature in child justice is the *Child Care Act 33 of 1960 (the "1960 Child Care Act")* which heralded the establishment of the probation officer. The probation officer offered the first sign of protective mechanism for children which would later become a pivotal concept in child justice.[40] The *1960 Child Care Act*[41] was short-lived and replaced just two decades later by the *1983 Child Care Act*.[42] Following the historical framework thus far, it becomes clear that prior to the enactment of the Constitution, a comprehensive system of juvenile justice was almost non-existent. The dark years of apartheid held back for South Africa's children what their compatriots on an international front were doing for the advancement of these rights.

[37] This shift is reflected in the case law of the time: *R v Swanepoel* 1945 AD 444, followed by *R v Karg* 1961 (1) SA 231 (A): "while the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction.
[38] Child Justice Project 'A situational analysis of reform schools and schools of industry in South Africa' (note 9 above).
[39] *Ibid* at 2.
[40] For a history on probation services in South Africa see A Skelton and B Tshela (note 9 above; 36).
[41] *Act 33 of 1960.*
[42] *Act 74 of 1983.*

2.2 International Benchmarks:

Elsewhere in the world, in 1989 the United Nations gave birth to the UNCRC[43] which was promulgated on the 2nd of September 1990 and contained 54 Articles which internationally codified the rights of children. This was followed by the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, ("*The Beijing Rules*)" [44] the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, *("JDLs")*[45] and the *United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines").*[46] In 1990, the *African Charter on the Rights and Welfare of the Child*[47] (hereafter referred to as the "ACRWC") solidified the position of children's rights on a domesticated continental sphere whilst containing African ideology at its core. Indeed, it is no coincidence that the UNCRC definition of the best interests of the child is elevated to *the* prime consideration of the ACRWC in child-related matters.[48] South Africa is a State Party to the UNCRC, having ratified it in 1995, as well as the ACRWC, which was ratified on 1st July 2000.[49]

During the forty-fifth session of the United Nations General Assembly in 2007, General Comment No. 10 (hereafter referred to as "GN 10") was released by the Committee on the Rights of the Child. GN 10 interprets six core principles[50] of juvenile justice as extracted from

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[43] *United Nations Convention on the Rights of the Child* (note 1 above). The UNCRC was adopted on the 20th November 1989 and came into force on the 2nd September 1990.
[44] United Nations General Assembly (1985) Standard Minimum Rules for the Administration of Juvenile Justice (1985) ("The Beijing Rules"). Resolution 40/33 adopted by the 96th plenary meeting, 29 November 1985.
[45] United Nations Rules for the Protection of Juveniles Deprived of their Liberty. Resolution 45/113 adopted by the 68th plenary meeting, 14 December 1990.
[46] United Nations General Assembly (1990) Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines"). Resolution 45/112 adopted by the 68th plenary meeting, 14 December 1990.
[47] Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child,* 11 July 1990, CAB/LEG/24.9/49 (1990) available at https://www.refworld.org/docid/3ae6b38c18.html [accessed 18 July 2019].
[48] Binnford, W 'The Constitutionalization of Children's Rights in South Africa 60 *N.Y.L. Sch. L.Rev*. 333 (2015 – 2016) 340. Binnford opines "The African Children's Charter was the world's first regional children's rights treaty and went beyond the UN Convention on the Rights of the Child" by making the "best interests of the child" *the* primary consideration.
[49] See further: L 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?' *NILQ* 62(2) at 168-169; Schoeman and Thobane (note 12 above; 35).
[50] The six core principles are: the prevention of juvenile delinquency, interventions/diversion, age and children in conflict with the law, the guarantees for a fair trial, measures; and, deprivation of liberty, including pretrial detention and post-trial incarceration.

the UNCRC.[51] For purposes of this paper, insofar as the domestic implementation of the CYCC is concerned, GN 10 is instrumental in the interpretation of the *Arts 37* and *40* of the UNCRC by setting the tone for which workable discretions are used by practitioners in considering pre-trial detention and post-trial incarceration.[52]

Briefly, the guiding principles which form the framework around the use of and implementation of the CYCC on a domestic footing is found in the following articles of the UNCRC:-

Art 4[53] of the UNCRC obliges State Parties to establish legislative and administrative schemes necessary for implementation of the rights in the UNCRC on a domestic level. *Art 4*[54] is therefore the fountainhead of the CJA[55] as well as the *Children's Act*.[56]

Art 40[57] creates a distinct and segregated criminal justice system for children in conflict with the law by focusing the child at the epicentre of juvenile justice. Article 40(1)[58] provides:

State parties recognise the right of every child alleged as, accused of or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which take into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

The consideration of alternative sentences to imprisonment is set out in *Art 40(4)* but should also be read in conjunction with *Art 37*. *Art 40(3)(b)*[59] creates the framework for diversion processes as found in chapter seven of the CJA.[60] Authors alike agree on the importance of the need to create and to refine structured programmes relating to social development, restoration and the child's reintegration into society as these can serve as positive alternatives to current penalties available including imprisonment.[61] This approach is considered a good 'best practice' approach

[51] *United Nations Convention on the Rights of the Child* (note 1 above).
[52] Wakefield (see note 49 above; 168).
[53] *Art 4* of the *United Nations Convention on the Rights of the Child* (note 1 above).
[54] *Ibid.*
[55] *Act 75 of 2008.*
[56] *Act 38 of 2005.*
[57] *Art 40* of the *United Nations Convention on the Rights of the Child* (note 1 above).
[58] *Ibid.*
[59] *Ibid.*
[60] Act 75 of 2008.
[61] Wakefield (see note 49 above), Skelton (note 9 above).

as it mitigates the adolescence of the child in accordance with the child's "best interests." Skelton astutely observes that in practice, despite the assortment and scale of alternative sentencing options, 'the access to such options is limited by the fact that the programs supporting such alternatives tend to be clustered in urban areas.'

Article 37[62] outlaws the penal sanction capital punishment upon children, as well as their torture. In addition, children cannot be arbitrarily deprived of their liberty. If children are to be detained or imprisoned it should be as a last resort and for the shortest appropriate period of time. In addition thereto, children who are deprived of their liberty should be segregated from incarcerated adults. Lastly, deprived children are further allowed contact with their family. This article should be read in conjunction with *Art 40(2)*[63] which provides for basic pre-trial related rights.[64] Pre –trial detention as encapsulated under *Art 37* was the starting point in the revolution of child justice legislation, one of the key reasons being the dangers faced by children whilst in police custody, including breaches of the separation from adults rule[65] (see below "The Constitutional period circa 1995).

Article 1 of the ACRWC[66] should be considered along with the general principles of as enunciated in Arts *2, 3, 6* and *12* of the CRC[67] for they are also regarded as indispensable to the administration of child justice. [68]

Article 39[69] compels State Parties to enact measures of 'physical and psychological recovery and social reintegration of child victims of amongst other things, neglect, abuse and torture.'[70]

Article 43 of the CRC establishes a sixteen member Committee on the Rights of the Child. The sole duty of the Committee rests in the observation and surveillance of a member-nation's

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[62] *Art 37 of the United Nations Convention on the Rights of the Child* (note 1 above).
[63] *United Nations Convention on the Rights of the Child* (note 1 above).
[64] See further, Child Justice Alliance (Conference Report) *Child Justice Trends and Concerns with a Reflection on South Africa* (2006) 14.
[65] J Sloth-Nielsen, 'A Short History of Time' (2006) (Child Justice Alliance and Open Society Foundation for South Africa Conference Report) *Child Justice in South Africa: Children's Rights Under Construction* 21; Sloth-Nielsen, (see note 9 above); A Skelton & B Tshela (see note 32 above; 18).
[66] African Charter on the Rights and Welfare of the Child (note 47 above).
[67] *United Nations Convention on the Rights of the Child* (note 1 above).
[68] Child Justice Alliance (Conference Report) (note 64 above;11).
[69] *Art 39* of the *United Nations Convention on the Rights of the Child* (note 1 above).
[70] Wakefield (see note 43 above; 179).

domestic implementation of the CRC.[71] The impact of member-nations who have contributed towards the furtherance of the Committee will be discussed in chapter five.

2.3 The Constitutional period circa 1995:

Many a hasty attempt to achieve compliance with its international and/or domestic obligations stemming from the UNCRC and section 28 of the Constitution, led to a flurry of lawmaking. Acting in good faith towards the implementation of *Art 37(c)*,[72] section 29 of the *Correctional Services Act, 8 of 1959* was amended before the UNCRC was ratified, to outlaw detention in a police cell or prison for a youth below the age of 14 years.[73] However, this amendment was short-lived, and juveniles were subsequently detained for serious offences following a further amendment to section 29.[74] The amendment was created as a temporary measure to detain juveniles and would have expired again on 10th May 1998 when it was believed that facilities to detain them would become available.

In 1995 it became the duty of the Minister of Welfare, [75] as the head of the Inter-Ministerial Committee (hereafter "IMC") to investigate residential care as it related to children with a view to the preparation of appropriate facilities. Such facilities would complement the drive towards child-centric justice while simultaneously bolstering the ideals of diversion.[76] The Minister was tasked with identifying and funding those residential care facilities which could be exploited for this purpose.[77] This could be achieved in one of two ways: either by identifying dedicated and physically appropriate infrastructural facilities for the reception and accommodation of awaiting

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[71] (The Child Justice Project) Capacity Building in the Area of Child Justice: Report of the Final Evaluation Mission SAF/97/034) available online at https://www.unodc.org/documents/mexicoandcentralamerica/publications/JusticiaPenal/JCapacity_building_SAF.pdf ("Capacity Building Report")
[72] *Art 37(c)* of the *United Nations Convention on the Rights of the Child* (note 1 above).
[73] Amended by *the Correctional Services Amendment Act 17 of 1994;* See further S Pete, 'The Politics of Imprisonment in the Aftermath of South Africa's First Democratic Election' 11 *S. Afr. J. Crim. Just.* 51 (1998); A Dissel,"Children in Detention pending trial and sentence" in Child Justice Alliance *Child Justice Alliance Conference Report* (note 58 above; 111).
[74] *Correctional Services Act 14 of 1996.*
[75] Following the second government election in 1999, the Department of Welfare was renamed the Department of Social Development.
[76] A Dissel (note 73 above; 111 – 112).
[77] Sloth-Nielsen (see note 9 above; 318-319).

trial offenders (these became commonly referred to 'places of safety') or, by commissioning the building of entirely new structures which would serve and suit the purposes attached to secure care. In the latter situation it was envisaged that these facilities could be built by provincial departments with an option to lease the management thereof to private contractors.[78] At that point in time, a total of nine Reform Schools existed – seven for boys, and two for girls.[79]

The IMC conducted an investigation into 32 places of safety, 12 schools of industry and 9 Reform Schools in the country comparing their performance as against the norms and standards set by UNCRC. In 1996, the committee released its interim policy recommendations in its Report on Young People at Risk [80]

The IMC report found at least 85% of the youth were unsuitably placed in the facilities and more than half were children in need of care rather than correction.[81] The report further found evidence of human rights infringements such as gross overcrowding, as well as areas of abuse and neglect, especially in the arena of social services which were ill-suited to cater for children in care.[82] The ratio of staff to children ranged from 1:6 – 1:63. Serious concerns regarding staff incompetency and the failure to perform duties with a degree of care and skill were raised. In one case study, statistics revealed that as little as only 54% of personnel from residential institutions appeared to have a basic qualification in child care.[83]

It concluded that the country was in crisis. It contained a sobering assessment of the situation operating within these places and schools as follows:

It was found that there is a dearth of appropriate developmental and therapeutic programmes in Places of Safety, Schools of Industry and Reform Schools. While some sport and recreation programmes do exist in most facilities, programmes such as social skills training, life skills,

[78] This is precisely how BOSASA, a private company with notorious links to pivotal government figures was able to establish the largest private CYCC operation spanning eleven centres in six provinces. See further: 9 March 2014 *News 24* 'BOSASA Matter Gets New Life' available at https://m.news24.com/MyNews24/Bosasa-matter-gets-new-life-20140903 accessed on 23 September 2017; Badenhorst (see note 9 above); J Pauw *The President's Keepers* 1 ed (2017).
[79] Skelton, (see note 9 above); Sloth-Nielsen (see note 65 above).
[80] South Africa. Dept of Social Development, Inter-Ministerial Committee on Young People at Risk Report on places of Safety, Schools of Industry and Reform Schools *In Whose Best Interests?* (1996); see also Skelton, A Commentary on the Children's Act *RS* 7 (2015) ch13-p7.
[81] Sloth-Nielsen (see note 65 above).
[82] *Ibid*.
[83] *Ibid.*

counselling and a range of therapeutic activities to meet the needs of emotionally and behaviourally troubled children and abused, traumatised and neglected children, were found to be missing in almost every facility. Very few facilities have individual treatment or developmental plans for children and in many facilities children do not have access to a social worker or psychologist.[84]

The primary recommendation of the IMC was the immediate rationalization and movement of children from the system, combined with the *formulation of an inter-sectoral plan of action* for a total transformation of the child and youth care system. Twenty years later, as will be demonstrated by the JASA decisions, it remains to be seen whether the plan will ever materialize.

Prior to the creation of the *Children's Act*, and from the number of amendments made to the *1983 Child Care Act* in the passing years regarding the detention of children, it becomes clear that child-centered detention began evolving in the early nineties.

Section 28 of the *1983 Child Care Act* was reworked twice. The first amendment in 1991 established and maintained the first ever "places of safety for the reception, *and detention* [my emphasis], as well as the observation, examination and treatment of children under this Act, and the detention of children awaiting trial or sentence." [85]

The second amendment occurred post the Constitution, in 1999, and largely as a direct result of reports such as that of the IMC alluded to above. Section 28A of the *1983 Children's Act* was amended in 1999 and heralded the first ever "secure care facilities for the reception and secure care of children awaiting trial *or* sentence."[86]

The IMC further enhanced secure care concepts in order to create workable solutions as alternatives to imprisonment for children awaiting trial. But as Sloth-Nielsen observes, residential care in the form of secure care centres were "an explicit outcome of the reintroduction of the possibility of detention of awaiting trial children in prison in 1996."[87]

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[84] A Singh and V Singh, "A review of legislation pertaining to children, with particular emphasis on programmes offered to children awaiting trial at secure care centres in South Africa" available online at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0037-80542014000100007.
[85] *S9* of the *Child Care Amendment Act 86 of 1991.*
[86] *S3* of the *Child Care Amendment Act 13 of 1999.*
[87] Sloth-Nielsen (see note 9 above).

It is this concept of secure care that would later take on the name of a CYCC under the CJA. The new wording was an attempt to do away with the old terminology which was both outmoded and ineffective. It was also grossly uneconomical.[88]

According to the policy recommendations of the IMC, secure care was shaped by the concept of "an environment and level or form of child and youth care work, rather than focusing on a particular (architectural) form of facility."[89] Thus secure care as evolved by the CYCC, envisaged a residential facility which offered programs of intervention as well as programs for awaiting trial juveniles.[90] The facility and/or programmes are described as an intervention for children in conflict with the law, designed to ensure the appropriate physical, behavioural and emotional containment of young people.[91] The recommendation resembles the old Reform School concept but without corporal punishment.

Pursuant to the findings and effect of the IMC Report, the Western Cape embarked upon a process of rationalizing its former Reform Schools and schools of industries.[92] This process had unintended consequences of its own, particularly after the CJA became law. Sloth-Nielsen observed that prior to the promulgation of the CJA, the IMC had since 1999, chartered a course for residential care transformation which was "halting and partial."[93]

At around the same time that the DSW commissioned the investigation leading up to the conclusions of the IMC Report, a lateral process in 1996, initiated by the Department of Justice under the leadership of Dullah Omar, commissioned an investigation into juvenile justice by the South African Law Commission ("SALC"). The aim of the study was to establish a legislative framework for juvenile justice.[94] The study ultimately culminated in both the CJA and *Children's Act* of the present day.

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[88] Sloth-Nielsen (see note 65 above).
[89] *Ibid.*
[90] A Singh and V Singh, (see note 84 above).
[91] *Ibid.*
[92] Sloth-Nielsen (see note 65 above).
[93] *Ibid*.
[94] South African Law Commission *Project 106* Juvenile Justice Report (2000).

Between the time of the IMC report and the report of the SALC, the country ratified the UNCRC and adopted the National Crime Prevention strategy.[95] It is obvious that by this time, in terms of departmental policy, the waters were moving in a coordinated direction of implementation within a broader sphere of child-centered criminal justice with due regard to an inter-sectoral approach by government at a national level.

Together, the JCPS Cluster coordinated to produce an Interim National Protocol for the Management of Children Awaiting Trial.[96] It was here that the first debates surrounding the precise construction of an architecturally evolved secure care facility took place. Aspects such as different levels of security, secured lights and ceilings, closed circuit television ("CCTV") and monitors were obviously central to the debate, because at its heart were desires to move away from the concept of a 'kiddie prison'[97] whilst at the same time, creating a solution that found cohesion into with the national crime strategy and populist punitiveness.[98] In turn, succeeding in this project would create a model worthy of regional and international recognition.[99]

Recalling that the section 29 amendment to the *Correctional Services Act*[100] was due to expire in May of 1998 which coincided with the deadline for the operation of secure care facilities, and, which resulted in the unintended release of juveniles, the Minister of Correctional Services announced in February 1998 that he would no longer be incarcerating any juveniles after 10th May 1998. He would consider it the sole responsibility of the Minister of Welfare. The separation between children and adults in police custody was the explicit intention of compliance with international treaties, notably *Art* 37 of the UNCRC. The statement created a row between Ministers Dullah Omar and Geraldine Fraser-Moleketi. Omar felt that it necessary that section 29 of the *Correctional Services Act* remain allowing pretrial detention of children as he believed there were no secure care facilities available for awaiting trial children. Fraser-Moleketi on the

[95] National Crime Prevention Strategy available online at https://issafrica.org/crimehub/uploads/National-Crime-Prevention-Strategy-1996.pdf.
[96] A Singh and V Singh (see note 84 above).
[97] Sloth-Nielsen (see note 9 above; 2).
[98] A Singh and V Singh, (see note 84 above; background).
[99] Capacity Building Report (see note 71 above).
[100] *Act 14 of 1996.*

other hand found his comments premature.[101] In hindsight, Sloth-Nielsen correctly points out that "the failure of enactments of legislation was due to *a lack of appreciation of the inadequacy of alternatives* [my emphasis] to custodial confinement in prison."[102]
As the May 1998 deadline approached, there were not enough[103] secure care facilities to accommodate juveniles and as a result, the section 29 amendment was not repealed and is still in operation as at the time of writing.[104]
By 1999, the SALC published a Draft Bill on Child Justice which was sent to Parliament under the hope that it would be passed by 2000. The bill was introduced into Parliament in 2002 wherein debate ensued until 2004, after which it was shelved until 2008 due to parliamentary elections.[105]

Simultaneously, the United Nations convened a Development Programme in conjunction with the South African government in which it approved a Project Document for the Child Justice Project to create a distinct and individualized justice system for juveniles in compliance with *Art 43*.[106] The report[107] of the United Nations Development Programme reflects the mammoth task of policy implementation which had to be accomplished within a new framework. The report was finalized in 2003. [108] The report lauded the efforts of the ISCCJ in collaborating with each other and with non-governmental agencies as an exercise in interdepartmental interaction. The report also found the ISCCJ's "work on implementation planning and budgeting around the Child Justice Bill has set new standards for policy development and formulation and is changing the way that legislation should be justified."[109] The project was successful for capacity building in a plethora of ways *inter alia* through workshops and conferences.[110] It was further responsible for publishing an interim protocol for the management of children in pretrial detention and a

[101] S Peté "The good the bad and the warehoused – The politics of imprisonment during the run-up to South Africa's second democratic election" 13(1) (2000) *South African J of Criminal Justice* 25.
[102] Sloth-Nielsen"(see note 9 above; 1).
[103] The Emthonjeni juvenile centre was built at a cost of R123 million and opened by President Mandela in August 1998 – see S Pete (see note 101 above; 39).
[104] *Ibid* 36-37.
[105] Wakefield (see note 49 above;169).
[106] *Art 43 of the United Nations Convention on the Rights of the Child* (note 1 above).
[107] Capacity Building Report (note 71 above).
[108] *Ibid*; Wakefield (see note 43 above).
[109] Capacity Building Report (note 71 above; 3).
[110] *Ibid* 13 -14.

report on the minimum standards for their protection when these children were deprived of their liberty.[111]

2.4 Entering the millennium: *Art 37* and the status of detention:

Whilst the United Nations rendered assistance to South Africa to establish a separate and concrete child justice framework, the fate of many children was to face detention (pre and post - conviction) in prison or police custody. To put the picture of juvenile detention into perspective: By March 2000, 2800 children were detained countrywide in prisons. This figure declined steadily to 1921 in 2004.[112] The success of the protocol's[113] contribution to reducing pretrial incarceration is echoed in the statistics of the 2005 Annual Report by the Inspecting Judge of Prisons and his comment on the excessive numbers of children imprisoned, stating, "Children should not be in prison at all save in exceptional circumstances." According to the report, there were 3 284 children under the age of 18 years in prison, with 12 being younger than 14 years. A total of 1 775 of these children were awaiting trial, while 1 509 were serving sentences.[114] At the same date in May, there were 2047 children in secure care centres.[115] Part of this report accurately reflected the actions of most provincial governments, such as the Western and Eastern Cape which departments embarked on a rationalization process of rationalizing its facilities. However, despite the efforts to convert facilities to fall in line with anticipated legislation, there were deep challenges experienced with secure care. To contextualize the position: *Z*[116] was decided in an era preceding the implementation of the CJA, at a time when as a result of rationalizing facilities, including the closure or amalgamation of Reform Schools or schools of

[111] *Ibid* 15.
[112] D Kassan, 'First baseline study monitoring the current practice of the criminal justice system in relation to children: some preliminary findings' (2006) Child Justice in South Africa: Children's Rights Under Construction Conference Report 85-99: in 2003 there were 2329 youth in prison.
[113] Capacity Building Report (see note 71 above).
[114] Judicial Inspectorate of Prisoners. Office of the Inspecting Judge Annual Report 2004/2005 para 7.6; S Pete, "Between the Devil and the Deep Blue Sea – the Spectre of crime and prison overcrowding in post- apartheid South Africa (2006) *Obiter* 429; *S v Z and 23 similar cases* (note 13 above; para 7 read with fn 4).
[115] South African Human Rights Commission (see note 20 above; 6).
[116] *S v Z and 23 similar cases* (note 13 above).

industry, the issues primarily revolved around the child's Constitutional right to be protected from maltreatment, neglect, abuse or degradation as enshrined in s28(1)(d) of the Constitution.[117] In *Z,*[118] the unreasonably long delays experienced by children awaiting committal to a Reform School in the Eastern Cape were highlighted as amounting to a serious violation of sentenced children's rights as they were deprived of their liberty whilst at places of safety, police cells or prisons whilst awaiting the execution of their sentences. The position is exacerbated by the uneven geographical spread of Reform Schools throughout the Republic.[119]

At the time, there was only one Reform School in the Eastern Cape with a maximum capacity of 58 children. It was usually always full so children were sent to prison whilst awaiting execution of their sentence. No inter-province agreement was in place to consider placing a child at a Reform school outside of the magisterial province in which he was sentenced.[120]

In 2005, in the George Hofmeyr School of Industries case, eleven girls were detained at the Bethal Prison in Mpumalanga following a charge of malicious injury to the school property. The Centre for Child Law succeeded in obtaining an order removing the girls from prison and placing them back in the school, placing the girls under curatorship, and commencing the process of implementing a coordinated Developmental Quality Assurance (hereafter referred to as "DQA") plan between the DSD and the DoE.

Shortly thereafter, in 2006 the State's duties concerning children who were wards of the State (now declared in need of care under the *Children's Act*) were highlighted with reference to the conditions of detention at the Luckhof High School.[121] Luckhof High, a school of industries is made up of three hostels

'..in varying degrees of physical deterioration. Most dormitories have no windows. The floors are in poor conditions and there are no cubicles to provide privacy in the showers and in some instances no doors to toilets.

[117] See *S v M 2001 (2) SACR 316 (T).*
[118] *S v Z and 23 similar cases* (note 13 above).
[119] Skelton (see: note 9 above).
[120] *S v Z and 23 similar cases* (note 13 above, paras 3-4*)*.
[121] *The Centre for Child Law and Others vs. MEC for Education and Others* Case No. 19559/06 (Unreported, judgment given 30 June 2006).

There are broken windows and broken ceiling boards in the dormitories, meaning essentially that children are exposed to inclement weather in their sleeping quarters..... There appears to be no heating in the dormitories at all, and in some instances there is no electricity. The children's beds consist of old dirty foam mattresses on old bed stands. Some of the beds examined had sheets and one blanket, others had two blankets. The blankets are thin and grey, such as those used in the prisons. The bedding looks old and dirty ... Some of the children do not have proper clothing, because they sell their clothes to outsiders to obtain money for drugs ... It would seem, therefore, that the first applicant is correct in its submission that these children removed from their parents and made wards of the state, are now living in conditions which may be poorer than the conditions they were removed from.'[122]

The Court, in granting the application brought by the Centre for Child Law succinctly brought home the point of State provided alternative care by stating,

I have to pause here, perhaps in a moment of exasperation, to ask: What message do we send the children when we tell them that they are to be removed from their parents because they deserve better care, and then neglect wholly to provide that care? We betray them, and we teach them that neither the law nor state institutions can be trusted to protect them. In the process we are in danger of relegating them to a class of outcasts, and in the final analysis we hypocritically renege on the constitutional promise of protection.[123]

The application granted included the provision of sleeping bags for the children as well as perimeter and access controls.

In the absence of the CJA, which had not yet been promulgated, the reviewing judges of the High Court in the abovementioned cases, derived their reviewing discretion for interference with the trial court's imposed sentences on the basis of its inherent jurisdiction under the ambit of s173 of the Constitution as well as the "best interest" principle enshrined in s28.[124] The remedy applied by the courts was a structural interdict. This is exactly what transpired in *Z.*[125]

[122] University of Western Cape 'Guide to the UN Convention against Torture in South Africa' (2011) *Community Law Centre* 48.
[123] *Ibid* 50.
[124] The Constitution.
[125] *S v Z and 23 similar cases* (note 13 above).

Section 173 of the Constitution states that the "Constitutional Court, the Supreme Court of Appeal and the High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."[126] The remedy of the structural interdict, developed from a human rights perspective, compels an organ of State to perform its constitutional obligations and provide progress reports to the court concerned.[127] In pinning its discretion for judicial interference on section 173 of the Constitution, the Court reiterated the guiding principles of review jurisdiction as a concern for substantive justice, and "not merely the trappings of justice."[128] Upon the basis of the *JASA* decisions which will be discussed in Chapter 3, the structural interdict took centre stage.

As in the George Hofmeyr case above, the Court also elected to supervise its order relating to the DQA plan because the papers revealed allegations of indifference by senior management to requests for improvement brought by subordinates.

Further south east of the country, the only Reform School in KwaZulu Natal closed down. In fact 'repurposing' or closures were taking place countrywide for usage of the infrastructure to cater for children with special educational needs. As at 2006, there was only one Reform School situated in Mpumalanga, which served all the provinces excluding the Western Cape.[129]

By 2005, the *Children's Act* became law. The *Children's Act* was amended shortly thereafter in 2007. By May 2009, the CJA was signed into law with an operational date set for 1st April 2010. By the operation of law, and in accordance with *Art 37*[130] as implemented by section 28(1)(g) of the Constitution and the operational provisions of the *Children's Act* as read with the CJA, there followed a marked decrease number of children in correctional facilities. The decrease was owed, at least in part, to a costing study undertaken before the implementation of the *Children's Act* and the CJA. The study widely propagated the Preliminary Inquiry ("PI") process as a key alternative, and diversion through the PI process became a powerful justifier in

[126] *S173* of the Constitution; *S v Z and 23 similar cases* (note 13 above; para 27).
[127] *Ibid S v Z and 23 similar cases* (note 13 above; paras 38 – 39).
[128] *S v Z* (note 13 above; 421).
[129] A Skelton, "Lack of Reform Schools" 8(2) (2006) *Article 40(3)(b)* available online at https://journals.co.za/content/art40/8/2.
[130] *United Nations Convention on the Rights of the Child* (note 1 above).

what was ultimately seen as a cost-saving exercise. In turn, this had far reaching implications for the establishment of CYCCS as created under the *Children's Act* and the CJA.

CHAPTER THREE:

3.1 Introduction:

The focus of Chapter three is two-fold: first, the operational design of the CYCC through multiple legislation and Frameworks is outlined; [131] thereafter, the separate and consistent failings of the CYCC is presented through the case law. Lastly, a costing study of the CYCC will highlight the budget and resources which were required to put the *Children's Act*, and by implication, the CYCC into operation.

The case law reveals challenges associated with the practical implementation of the CYCC as a problem which existed in another name and well before it found a new home under the CJA. Inasmuch as care has been taken by the drafters of the legislation herein to close the gaps experienced between the sentence imposed and onward residential care of the child, there are still challenges experienced with the practical implementation of such a sentence particularly under section 76(3).[132] Although the drafters of the child-centered legislation adopted an enlightened approach by placing consultation with stakeholders as the foundation upon which service delivery of child-related services such as the CYCC was to be built upon, the cases preceding the *JASA* decisions, discussed hereunder, demonstrate fiscal constraints as well as the intricate and complex levels of communication required in the practical coordination of child-related services involving intersecting arms of government

3.2 Establishing the CYCC: Legislation, Strategy and Integration

The Three Committees

Sections 4 and 5 of the *Children's Act* deal with its implementation, as well that of the CJA. These sections contain direct instructions to organs of State at national, provincial and local level to engage in implementation of the Acts in an "integrated, coordinated and uniform manner."

[131] By this is meant the Framework (see note 6 above) and the Amended Framework (see note 7 above)
[132] *Act 75 of 2008.*

Consequently, a three-tier chain of command exists so as to co-ordinate the integrated delivery of services towards children.

The overarching responsibility of monitoring implementation of the CJA and tabling of Annual Reports falls on the shoulders of the JCPS. Compliance, and the maintenance of stable and sustained coordination and co-operation between government departments and organs of State" falls on the Director-Generals Inter Sectoral Committee on Child Justice ("DGs ISCCJ") a committee created under section 94(1) of the CJA. This committee incorporates the Director Generals of each Department as well as the National Director of Public Prosecutions and the National Commissioner of the South African Police Service. The chairperson of this committee is the Director-General of the Department of Justice and Constitutional Development (hereafter "DOJCD"). Beneath this committee is the National Operational ISCCJ which comprises senior departmental officials who meet monthly. This committee is utilized as the vehicle in the conveyance from policy to implementation. The third and final committee comprises the Provincial Child Fora. Each Forum meets every quarter to inter alia assess the challenges and successes around the implementation of the CJA thus far. The chain of command in relation to the position of the CYCC as it operates is discussed below.

The National and Provincial Strategy

Section 192 of the *Children's Act* instructs the Minister of Social Development, after consultation with other governmental departments to create a "comprehensive national strategy" which provides for the implementation of "an appropriate spread" of CYCCS. Section 192(2) requires the Member of the Executive Council (hereafter "MEC") for DSD to provide, within the national strategy, for a provincial strategy aimed at the establishment of an appropriate spread of CYCCs in the respective provinces. These CYCCs must be resourced, managed and co-ordinated to provide the required range of residential care programmes. This is important when considering the requirements associated with the CYCC brought about by the transfer of Reform Schools and schools of industries from the DOE to the DSD. The Framework and Amended

Framework, which will be discussed hereunder, bear some reference to the materialization of such strategy.[133]

Section 195 of the *Children's Act* instructs the MEC for Social Development of a Province to establish and operate CYCCs from monies appropriated by the relevant provincial legislatures for that purpose. In terms of section 196(1)[134] existing schools of industry and Reform Schools (together with various other facilities referred to in the section) are regarded as having been established in terms of section 195 as CYCCs. In both cases, the schools of industry and Reform Schools must provide a residential care programme referred to in section 191(2) of the *Children's Act*.

The CYCC Residential Care Options

Consequently, it can be seen that chapter thirteen of the *Children's Act* introduced a new concept of residential care for children by the establishment of the CYCC. A CYCC is formally defined in section 191(1)[135] as a facility which provides residential care and suitable programmes for children outside the child's family environment.

Under the *Children's Act*, residential care encompasses all secure care facilities previously known as and including places of safety, children's homes, Reform Schools and schools of industries. All these facilities are to be registered as a CYCC. There are six exceptions: A partial care facility, drop-in centre, boarding school, school hostel or other residential facility attached to a school, prison, or any other establishment used primarily for tuition or training of children may not be recognized as a CYCC.

[133] For a history and background of the strategy, see Sloth-Nielsen, J "Recent Developments in Child Justice' 2015 *SACJ* 437 at page 445-447; *National Association of Welfare Organizations and NGOs and others v MEC of Social Development, Free State and others (1719/2010) [2011]*; *National Association of Welfare Organizations and NGOs and others v MEC of Social Development, Free State and others (1719/2010) ZAFSHC (9 June 2011)*; see also Sloth-Nielsen, J & Kruuse, H "A Maturing Manifesto: the Constitutionalization of Children's Rights in South African Jurisprudence 2007 -2012" *International Journal of Children's Rights* 21 (2013) 646-678 at 654, 663.
[134] *Act 38 of 2005.*
[135] S191 of *Act 38 of 2005.*

Places of safety and Reform Schools retain their definition as under the *1983 Child Care Act*.[136] A place of safety includes any place suitable for the reception of a child, into which the owner, occupier or person in charge thereof is willing to receive a child. A Reform School as defined in section 1 is "a school maintained for the reception, care and training of children sent thereto in terms of the [CPA] or transferred thereto under this Act." [137]

A CYCC must offer programmes complaint with the provisions of section 191 of the *Children's Act* and cannot be registered without indicating the specific therapeutic, recreational and/or development programmes it offers. If a judicial officer is concerned about where to place a child, section 29 of the CJA (read with Form 5) allows the Court to establish from the Head of the CYCC on oath, the accommodation available and the reasons for non-acceptance of the child; and, the programmes in place.

3.3 Implementing the CYCC as a key priority of the Framework:

Section 194 requires the Minister of DSD to consult with interested persons and the national Ministers of Education, Health, Home Affairs and Justice and Constitutional Development in the establishment of national norms and standards for CYCCs.[138] It is noteworthy to point out that prior the CJA, key priorities relating to the implementation of the CYCC were drafted in a Framework attached to the Child Justice Bill, but were later removed.

The Framework listed ten key priorities, which include the establishment of the CYCC under paragraph 6 of its Priorities. Paragraph 6 reads as follows:-

The DSD is responsible for the provision and management, in terms of Chapter 13 of the Children's Amendment Act, 2007 (Act No 41 of 2007), for Child and Youth Care Facilities. This Act, together with the main Children's Act, 2005 (Act No 38 of 2005), also came into operation on 1 April 2010. All Secure Care Facilities and Reform Schools will, from 1 April 2010, become Child and Youth Care Centres, designated for awaiting trial and sentenced children. ***The***

[136] *Act 74 of 1983.*
[137] *Ibid.*
[138] S194(2)(a)-(n) of *Act 38 of* 2005 relate to the development and care of children in CYCCs to which the contemplated norms and standards must relate.

existing 4 Reform Schools and 17 Schools of Industry, which are administered by the Department of Basic Education at the moment, will be transferred to the Department of Social Development within the next two (2) years. *In addition a priority for the DSD is the building of an additional 18 Child and Youth Care Centres in provinces (previously known as Secure Care Facilities) within this MTEF cycle.*

Six (6) Centers have been built during the past MTEF-period by DSD, which will be opened soon.[139]

The *Children's Act* was amended in 2007 and it compelled the State to fund the responsibilities associated with implementation of the Act.[140] The removal of the Framework from the *Children's Act* was a blow to those Reform Schools and schools of industries not yet transferred to the DSD because it spawned a delay in synthesizing the educational and rehabilitation needs of the child.

The Framework has since been amended.[141] It is comforting to note that the Amended Framework regards "considerable co-ordination between Child and Youth Care Centres and the courts in the review of such a sentence" as an express priority in developing the implementation of the Acts.[142] The Amended Framework therefore instructs the DSD, in amplification of its duties under section 192[143] by stating the responsibility which rests upon the DSD as follows;-

The Department of Social Development developed national guidelines for the establishment of the Child and Youth Care Centres, and must ensure that intersectoral consultation is done prior the establishment process to ensure that these Centres are established at places where the demand is collectively identified.

In order to monitor the management of Child and Youth Care Centres, the following are required:

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[139] Framework (note 6 above).
[140] *Act 38 of 2005*.
[141] Amended National Policy Framework (note 7 above).
[142] Amended National Policy Framework (note 7 above; 31).
[143] S192 of *Act 38 of 2005*.

(i) The number of Child and Youth Care Centres (Secure Care) disaggregated by province (differentiating between facilities catering for sentenced children and children awaiting trial) must be recorded and reported on by the Department of Social Development.

(ii) The available bed space in Child and Youth Care Centres (Secure Care) for sentenced children and children awaiting trial must be recorded and reported on by the Department of Social Development disaggregated by Province.

Sections 195 and 196 of the *Children's Act* provide that 'Existing state operated' residences, including the reformatory and school of industry which were administered by the DoE would cease to do within two years of the Act coming into operation and would come to be regarded as a CYCC falling under the control of DSD. This is an express priority of the Framework. Section 196 of the *Children's Act* read with the priorities of the Framework and its amendment, is the foundation from which to understand the importance of the creation of a national and provincial strategy.

The establishment of and costs associated with overseeing a single CYCC, let alone an additional 20, on a skeleton financial budget and limited human resources is a herculean task. To cater for this, the Framework had under paragraph 8 of its priorities, regarded the financial implications as a separate consideration. Under paragraph 8, the implementation of both the CJA and the *Children's Act* places increased demands on the public treasury. In the absence of sufficient funding, courts and relevant personnel including stakeholders are constrained to provide a minimum standard of public service, seen notably in the more rural and outlying areas. Given its obligations under the treaty, South Africa is compelled to give increasing credence to the domestic legislation and measures it undertakes to meet the implementation priorities it has earmarked for completion. The Departments are implementing both the *Children's Act* as well as the CJA with existing budgets. Thus, there is a reprioritizing of services within budget allocations, as demonstrated by the guidelines of the amended Framework to ensure prioritization of services to children in conflict with the law.

3.4 The dysfunctional CYCC: An expose through the case law

By now it is clear that the CYCC is a new and novel concept created by legislation. It is multi-faceted and must provide residential care for children under the *Children's Act*, and it must provide secure care to convicted children who are sentenced under the ambit of the CJA.

In addition, and by virtue of its status either as residential care and/or secure care, it must provide the children with the requisite programs needed as per the operational requirements of the facility.[144] This is no mean task. As will be amplified in Chapter four, a situational analysis regarding the quality and impact of services and programmes offered at a CYCC reveals no evidence of an integrated approach by government departments. Research reveals lacunae ranging from staff shortages to a lack of programme design by the DSD, lack of programmes in rural communities, and a lack of accreditation and standardization of programmes.

Section 76 of the CJA: A Sentence of Compulsory Residence at a CYCC

Z[145] is a sobering example of the myriad of challenges associated with the implementation of a residential sentence as a problem having existed prior the CJA. Against this backdrop, and the coming into effect of the CJA, the CYCC assumed position within a new sentencing sphere of the CJA. It derived its status from the authority of the priorities of the Framework, as well as chapter thirteen of the *Children's Act*.

Reform Schools and schools of industries are now known as CYCCs under the CJA. However, insofar as sentencing goes, the CJA has retained the old Reform School sentence by virtue of the provisions of section 191(2)(j) of the *Children's Act* which allows for a sentence of compulsory residence combined with the application of a special treatment programme. Under section 76 of the CJA, children in conflict with the law can be sentenced to 'compulsory residence' at a CYCC.[146] Such a sentence should not exceed five years, or a period until the child turns 21,

[144] See ss191 and 192 of *Act 38 of 2005.*
[145] *S v Z and 23 similar cases* (note 13 above).
[146] S76(1) of *Act 75 of 2008*, "A child justice court that convicts a child of an offence may sentence him or her to compulsory residence in a child and youth care centre providing a programme referred to in section 191 (2) (j) of the Children's Act.

whichever date should come sooner.[147] Therefore, a sentence under section 76 of the CJA is the equivalent of a previously known Reform School sentence, albeit with a few added bells and whistles.

There are also a number of caveats to bear note of. For example, section 69(3)[148] of the CJA obliges a Court to consider six factors when sentencing a child to a CYCC described below.[149] There are differences in the factors to be considered whether sending a child to a CYCC or to prison.[150]

Under section 76(4)(d):[151]

> *Where a presiding officer has sentenced a child in terms of this section, he or she must cause the matter to be retained on the court roll for one month, and must, at the reappearance of the matter, inquire whether the child has been admitted to the child and youth care centre.* [152]

Section 76(4)(e)[153] further provides:-

> *If the child has not been admitted to a child and youth care centre, the presiding officer must* ***hold an inquiry*** [my emphasis] *and take appropriate action, which may, after consideration of the evidence recorded, include the imposition of an alternative sentence, unless the child has been sentenced in terms of subsection (3)*[154]

Section 76(4) expressly confers authority upon a judicial officer to hold an inquiry into protracted delays in the execution of sentence and it vests him with wide discretionary powers to

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[147] S76(2) of *Act 75 of 2008.*
[148] *Act 75 of 2008.*
[149] J Gallinetti "Getting to know the Child Justice Act" *The Child Justice Alliance, c/o The Chidren's Rights Project, Community Law Centre* (University of the Western Cape), 2009 available online at http://www.childjustice.org.za/publications/Child%20Justice%20Act.pdf ; 56. Compare S76(1) and (3), and s29 which raise five factors that a Court should take into consideration when detaining an awaiting trial child to a CYCC or to prison. These include the age of the child, the seriousness of the offence, the level of security at the identified centre, the risk the child poses within the centre to him/herself and/or to others, and the availability of accommodation.
[150] *Ibid 56 – 58;* Terblanche SS 'Aspects of sentencing child offenders in terms of the Child Justice Act 75 of 2008' *Child Abuse Research: A South African Journal* (2013) 14(2) 1-7 at page 5; Du Toit, C *JQR Children* 2013 (2) at page 5; *S v CS* 2013 (2) SACR 323 (ECG)*;* Van der Merwe, A *Sentencing* 2013 SACJ 399 at 403; Du Toit, C *JQR Children* 2014 (3); Du Toit, C *JQR Children* 2014 (4); Badenhorst (see note 19 above; 9).
[151] *Act 75 of 2008.*
[152] *Ibid.*
[153] *Ibid.*
[154] *Ibid.*

amend a sentence, after its imposition without the requirement of any higher court review process.

Section 76(3) appears to be the stiffest form of sentence to compulsory residence at a CYCC and is imposed upon the fulfilment of the criteria that the offence fall under schedule three i.e. the most serious offence; and that the offence is one for which if committed as an adult, would attract a sentence of direct imprisonment exceeding ten years. If a child is convicted of a schedule three offence, the punishment for which would attract a sentence for an adult to a term of imprisonment exceeding ten years under section 76(3) such child may also be imprisoned after having served the period at the CYCC, but this is dependent on whether substantial and compelling circumstances exist. Specific provision is made under Section 46[155] to bring the order to the attention of the relevant officials for purposes of compliance. Detailed duties are to be found which must be completed by the Clerk of Court. A report by the Head of the CYCC must be presented to the court upon the expiration of the period at the CYCC. This report gives a view on the extent to which sentencing objectives have been met and the chances of positive rehabilitation back into society. Courts have stressed the severity of this type of sentence option suitable only for repeat offenders for serious offences.[156] It is clear from the above that the court's jurisdiction to reconsider sentence with a view to imposing an alternative sentence under section 76 is confined to the grounds alluded to in sections 76(4)(d) and (e) only and do not cover the position under section 76(3).[157] It is submitted that there are no measures within the CJA which cater for the situation of a dysfunctional CYCC once the child is sentenced under s76(3), but the remedy may be found in sections 302 and/or 304(4) of the *Criminal Procedure Act 51 of 1977* (hereafter "CPA").[158]

Serving a sentence of Compulsory Residence at a Dysfunctional CYCC

In *S v Goliath* 2015 JOL 32716 (ECG) subsequent to the sentencing of children under section 76 of the CJA, reports emerged in July 2013 of the dysfunctionality of the Bhisho CYCC. The

[155] *Ibid.*
[156] *S v CKM and others* 2013 (2) SACR 303 (GNP) at paras 15, 26 and 32; S v CS (note 150 above; 15, 17 and 22); A Van der Merwe (see note 150 above; 403 –404).
[157] *S v Goliath* (note 13 above; paras 19 – 23).
[158] *Ibid.* In *Goliath* the second reviewing court found that the magistrate who sentenced the respective children was indeed functus officio and it subsequently withdrew the certificate of compliance under s304(1) and set the sentence aside, remitting it for sentencing afresh - para 9 and para 12; see also *S v Katu* 2001 (1) SACR 528 (E).

Bhisho CYCC which was built at a cost of R300 million, degenerated primarily through the delinquent actions of the children kept there. Such actions by the children sentenced there included a general lack of educational discipline accompanied by displays of the usage of narcotics, and criminal behaviour such as escapes from, and vandalism to facility property. Alarmed by the lack of functionality, a judicial officer of the Magistrates' Court, acting in an official capacity instituted civil proceedings [159] resulting in the temporary closure of the Bhisho facility and the removal of the children to other CYCCs. The civil proceedings called upon the five respondents, including the DOE to file written reports on *inter* alia where each child was currently being held and if it would be safe to return, as well as the further functioning of Bhisho.

Orders were subsequently made "in respect of an Implementation Plan dealing with the transfer of the Bhisho facility from the Eastern Cape DOE to the DSD and with the appointment of relevant personnel in order to ensure that the Bhisho facility again become fully functional."[160] Other orders granted by Hartle J, called upon presiding officers who initially sentenced the children to Bhisho to reconsider sentence. One presiding officer took the view that other than the provisions of section 76(4) of the CJA, there are no other provisions which allow a presiding officer to set aside his own sentence and replace it with a new one. He submitted that Hartle J sitting at the Bhisho High Court omitted to set aside the original sentences imposed which would then have allowed an alternative sentence to be imposed.[161]

Several CYCCs echo the difficulties experienced as in *Goliath*[162] in controlling the behaviour of sentenced children, and have expressed a desire for more robust, if not earlier intervention by the Courts. In order to avert dysfunctionality, it is submitted that the report sent to Court at the end of the child's stay is too long a waiting-period to report such problems as evidenced by the *Goliath*[163] situation.

With regards to the closure of facilities, different challenges arise when the facility is closed, or rationalized for other purposes. The administrative transfer of children from one CYCC to another, particularly more restrictive setting is prohibited unless an agreement reached between

[159] *Cornelius Goosen NO v MEC Basic Education, Eastern Cape and 4 others,* unreported case no. 459/13
[160] *S v Goliath* (note 13 above; para 11); Skelton (see note 80 above; 8 – 9).
[161] For the technicality of the legal question raised, see further Du Toit, JQR 2014 (3) (note 150 above)
[162] *Goliath* (note 13 above).
[163] *Ibid.*

the parties is ratified by a court order. Such agreement must naturally involve consultation as between the child and his or her guardian, and the facility concerned. In *Jonker v Manager, Gali Thembani/JJ Serfontein School* 2014 (2) SACR 269 (ECG) ("Jonker") Anna Jonker, whose grandson was residing at the Gali Thembani CYCC (hereafter "Gali Thembani"), brought an application to prevent the transfer of sentenced children from Gali Thembani to the Bhisho secure care CYCC and pleaded for the continued operation of Gali Thembani as a child care centre. In this case, the DOE closed Gali Thembani as a CYCC desiring to utilize it for mainstream educational purposes. The children were transferred without a court order ratifying the decision to move them. The Court held that there was insufficient information to make a finding on the rationality or otherwise of the administrative decision to close Gali Thembani and reconvert it into a school for children with special needs. As a result, it dismissed the applicant's claim.[164] However, it did not rule on the correctness or otherwise of the child's transfer and as such, without due consultation having taken place, the Children's Court did not ratify the transfer.

The *Jonker*[165] case highlighted the importance of consultation with the child and his or her family regarding transfer from one CYCC to the other, under section 158(3) of the *Children's Act* which requires that a child should be placed in a CYCC as close to his family and community as possible. In turn, it underscores the rights of the child under section 28 of the Constitution as well as under the UNCRC. In the European Union, it is a considered a minimum standard guideline for the treatment of both adult and child prisoners that they be incarcerated as close to their respective families as a measure of dignity. This case further confirms that given the annihilation of infrastructure and breakdown of processes and structures as between the staff of Bhisho and the children, the planning policy together with whatever little training was dispensed to role players within the operational framework of the CJA[166] has been inadequate.[167]

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[164] *Ibid.*
[165] *Jonker* (note 13 above).
[166] Skelton (see note 9 above); C Ballard, "The Situation of Children in Prison after the implementation of the Child Justice Act" (2011) 13:1 *Article 40* 1 - 4; Department of Justice and Constitutional Development. 2011: Annual Report on the Implementation of the Child Justice Act, 2008 (Act 75 of 2008) 22. Available at http://www.pmg.org.za/report/20110622-joint-meeting-implementation-child-justice-act accessed 12 April 2017 (the "First Annual Report").
[167] L Wakefield and V Odaga "The activities of the Child Justice Alliance during 2011" (2011) 13:2 *Article 40* 10 - 12.

Z[168], *Goliath*[169] and *Jonker*[170] is the collective launchpad from which to understand the consequent *JASA* decisions analyzed in Chapter four. The amended Framework appears to have taken its cue from the *JASA* decisions, and it has substantially tightened its guidelines in respect of managers of the CYCCs to "perform their responsibilities towards the child with the utmost care in order to give effect to section 28(1)(g) of the Constitution. This is because if they do not provide quality interventions and service during the time spent in the child and Youth Care Centre in terms of section 76(3) of the Act, the child runs the risk of a sentence of imprisonment at the end of the Child and Youth Care Centre."[171]

Industrial schools were not directly used for sentenced children but often presiding officers used them "as a residential option in criminal cases wherein the matters were then converted into a care and protection enquiry" as defined under section 50 of the CJA. Viewed closely, it appears that a sentence to a reformatory under the previous child justice legislation or to a CYCC under the CJA, is the equivalent of involuntary and compulsory admission to a secure care centre. In turn, this may be regarded as a serious invasion of the child's right to freedom of movement and decision-making.

3.5 Costing the Children's Act and the CJA:

Prior to the amalgamation of the CYCC, the DSD commissioned tenders in relation to costing both the *Children's Bill* [172] as well as the *Child Justice Bill* and the Children's Bill Costing Project was born. [173] The aims of the projects were to evaluate the cost to government associated with implementing the services envisaged by the comprehensive Bills. The DSD, DOJCD, the provincial DSDs and the provincial DoEs were the platform for the basis of costing the *Children's Bill*. The costing surrounded management and oversight responsibility costs (DSD), legal representation and the responsibilities of the Family Advocate (DOJCD) costs, costing of the responsibilities associated with social welfare services including the cost of running child and

[168] *S v Z* (note 13 above).
[169] *S v Goliath* (note 13 above).
[170] *Jonker* (note 13 above).
[171] Amended National Policy Framework (note 7 above; 31).
[172] *Act 38 of 2005.*
[173] A Skelton, 'Costing and Implementation Planning' 6 (2013) *RS* Ch1 – p18.

youth care centres (provincial DSD); and, the cost of running schools of industry and Reform Schools (DOE).[174]

When the Child Justice Bill was introduced into Parliament, the provisions of section 35 of the *Public Finance Management Act*[175] required financial compliance of all draft national legislation which assigned an additional function, or power, or obligation to provincial government. This meant that a memo of all financial implications of that function, or power, or obligation as the case may be must be introduced to Parliament. Its requirements were therefore a crucial factor in the passing of the Bill. As far back as 2003 the media, confident of its success, hailed the Child Justice Bill as the epitome of a fully-fledged procedural framework for child justice.

The costing of the *Children's Bill* was a requirement of the *Public Finance Management Act*.[176] Section 35 of the Act states:

Unfunded mandates. – Draft national legislation that assigns an additional function or power to, or imposes any other obligation on, a provincial government, must, in a memorandum that must be introduced in Parliament with that legislation, give a projection of the financial implications of that function, power or obligation to the province.

It is clear that section 35 of the *Public Finance Management Act*[177] therefore places an obligation to provide a memorandum of the financial implications of legislation sought to be passed immediately with the tabling of the Bill. Barberton states that this was not done when the Children's Bill was introduced into Parliament and the fact that it was not done "may have negative repercussions when it comes to its implementation."[178]

The costing of the *Children's Act*[179] was based on two sets of norms *viz.* high and low norms. Fundamentally, the differences between the two sets of norms and standards is that the high

[174] Barberton (see note 11 above; 30).
[175] *Act 1 of 1999.*
[176] *Ibid.*
[177] *Ibid*.
[178] Barberton (see note 11 above; 29).
[179] *Act 38 of 2005.*

norms reflect a uniform standard based on 'good practice' norms, whereas the low norms set a lower standard of norms applicable to non-priority services. Priority norms in the low norm category include 'children in need of protection (i.e. the section 50 enquiry situation) and 'residential placements requiring "high intensity" reunification services' (the sentencing situation).[180]

The result of the costing exercise was a 150 page report produced in August 2006 dealing with the costs associated with State-delivered services envisaged by the promulgation of the *Children's Act*.[181] The costing report on the implementation of the Child Justice Bill calculated a figure of R606.7 million needed per annum.[182] However, only a paltry sum of R30 million was allocated in the first year of implementation, despite a startup budget of at least R52 million required.

Section 5 only came into operation in 2007. The SALC Child Justice Bill dedicated an entire chapter on implementation, with reference to making funds available. The Framework initially formed part of the Bill but was later scaled down to a meagre two clauses in the final *Children's Act*. As indicated above, a progressively redesigned Framework was reintroduced in May 2018 .

3.6 Conclusion:

The kaleidoscope of factors affecting the implementation and operation of the CYCC and the monitoring thereof, from administrative complexities to sentencing constraints start to unfold in an examination of the *JASA* decisions, which will be discussed in Chapter four. It is after the *JASA* decisions that an amended Framework is re-introduced in May 2018. The *JASA* decisions call into sharp focus the tension which exists between on the one hand, policy decision-making at Cabinet level regarding the ministerial strategy to be devised regarding the implementation of the CYCC, and on the other, service delivery compliance through the Acts. Lurking in the background, the fiscal constraints surrounding the optimum functioning of the CYCC through its

[180] Barberton (see note 11 above; 7).
[181] C Barberton and S Wilson, "Recosting the Child Justice Bill" (2001) 21 available online at http://www.childjustice.org.za/downloads/RecostingReport.pdf.
[182] *Ibid*; L Wakefield, "Is the Act Working for Children? The First Year of Implementation of the Child Justice Act" (2011) 38 *SACQ* 45-50.

annual inter-departmental reports of the CJA is a reminder that planning plays a key role in all departments. Each department should have the capabilities to effectively manage their budgets in synchronicity with the aim of establishing a functioning CYCC.

CHAPTER FOUR:

4.1 Introduction:

Through the case law demonstrated in chapter three above, it becomes clear that prior the CYCC, Reform Schools and schools of industry were in disarray. From the inception of the CYCC, it was to be expected that the challenges associated with resolving the existing disarray and its accompanying inter-departmental transfers would be a long and difficult road.
According to the First Annual Report on the Implementation of the Child Justice Act there were twenty-eight (28) secure care CYCCs in South Africa, together with an additional three CYCCs which were not fully operational.[183] As alluded to in chapter one, only four out of the nine provinces had Reform School facilities.[184] The scarcity of Reform Schools coupled with their uneven geographical location created challenges where for example, a child sentenced in the Free State to a Reform School had to be sent to the Reform School in Mpumalanga.[185]
Existing Reform Schools and schools of industries were regarded as having been established as CYCCs[186] due to the transfer of the said schools which ought to have been completed by 1 April 2012.[187]

This chapter focuses on defining different facilities with reference to the purpose it is meant to serve. In theory, a secure care facility is a wide term describing those facilities used for children who are sentenced under the CJA, or those declared in need of care. But the facilities under the ambit of secure care are different, and ought to be used for a certain purpose, such as the old Reform School which is to be used in the case of a sentenced child offender. However, as will be seen below and in the *JASA* decisions, this is not always the case. If the facility could actually serve the purpose it was designed for, it may contribute positively towards the goals of creating child-centric justice as well as demonstrating its commitment to international treaties.[188]

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[183] The First Report (note 166 above); Badenhorst (see note 19 above; 27 – 28).
[184] These were, the Eastern Cape, Western Cape, Mpumalanga and KwaZulu Natal.
[185] Badenhorst (see note 19 above; 27); Badenhorst (see note 9 above; 9).
[186] s196(1)(e) of *Act 38 of 2005.*
[187] Framework (note 6 above); Badenhorst (see note 19 above; 9).
[188] See chapter two above at para 2.2 "International Benchmarks."

4.2 Entering a CYCC: A Potpourri Mix

From chapter three above,[189] it is clear that a child may enter a CYCC in any one of three ways: through pre-trial detention at a place of safety, [190] or by the imposition of sentence under section 76[191] to a previously termed "Reform School", or where the child is abandoned or neglected and is sent to a school of industry.

In all three instances the freedom of movement of the child is severely curtailed.

The above-mentioned types of facilities have now been grouped together under the umbrella term "CYCC" which represent different strains of 'residential care' under Chapter thirteen of the *Children's Amendment Act*.[192] Residential care refers to the placement and treatment of children outside the child's family environment in accordance with suitable programmes.

'Secure care' is defined in s1 of the *Children's Amendment Act*[193] to mean:

> *'the physical containment in a safe and healthy environment –*
>
> *(a) of children with behavioural and emotional difficulties; and*
>
> *(b) of children in conflict with the law.'*

It becomes apparent from the umbrella concept of the CYCC that one CYCC cannot be viewed as being identical to the other, but is a smorgasbord of facilities dependent upon the prevailing circumstances. Under the *Children's Amendment Act*,[194] residential care encompasses all secure care facilities previously known as and including places of safety, children's homes, Reform Schools and schools of industries. All these facilities are to be registered as a CYCC under the

[189] See chapter three at para 3.3 "The Legislative Creation of the CYCC."
[190] See *S v Z and 23 similar cases* (note 13 above; 414).
[191] *Act 75 of 2008.*
[192] *S195 – 197* of *Act 41 of 2007*. Ss191 – 197 read with ss170 and 173 details the rights of children confined to a CYCC.
[193] *Ibid*. Definition of 'secure care' inserted by section 3(q) of *Act 41 of 2007*.
[194] *Ibid.*

Act.[195] Reform Schools and schools of industries are therefore regarded as blanket CYCCs under section 196(1)(e) read with section 196(4) of the *Children's Act.*[196]

There are six exceptions: A partial care facility, drop-in centre, boarding school, school hostel or other residential facility attached to a school, prison, or any other establishment used primarily for tuition or training of children may not be recognized as a CYCC.

The CYCC does not only fulfill an infrastructural component of residence but it must in addition, offer programmes in accordance with section 191 of the *Children's Act,*[197] and cannot be registered without indicating the specific therapeutic, recreational and/or development programmes it offers.[198]

In an ideal situation, the secure care CYCC separately houses those children who come into conflict with the law from those diagnosed to be children in need of care. Secure care placements should ideally also separate children awaiting trial from those who are sentenced. The distinction is a necessary minimum standard in accordance with international treaties, primarily *Art 40.*[199]
In reality, most CYCCs house awaiting trial children, as well as sentenced children *and* children in need of care together as demonstrated by the situation surrounding the Ottery centre in *JASA 1*. This potpourri mix of children share dorms, classes and even recreational programmes oblivious to the cross-pollination of subcultural norms from one group to the next.[200] A broad overlap of factors impacting upon the (sometimes criminal) makeup of the child offender in relation to the child's circumstances require a conscious, coordinated input of services from governmental departments; hence, the urgency with which a national strategy[201] for the

[195] Under *s30* of the *Child Care Act 74 of 1983*, all children's homes, places of care and shelters that were run by non-governmental organizations had to be registered by the DSD. However, unregistered children's homes and places of safety continued to exist. The *Children's Act 38 of 2005* provides a more comprehensive registration process which aims to end the phenomenon of unregistered care centres – see further Skelton (note 80 above).
[196] *Act 38 of 2005.*
[197] *Ibid.*
[198] *S191(2) of Act 38 of 2005.*
[199] Art 40 of the UNCRC (note 1 above).
[200] A Cohen, "Delinquent Boys" in T Newburn (ed) *Key Readings in Criminology* 3ed. 260
[201] See chapter three at paras 3.3 and 3.4 above.

establishment and transfer of schools is sought. The knock-on effects of the lack of a strategy are echoed hereunder by the inter-departmental reports, and thereafter, the trio of *JASA* decisions.

4.3 Crunching the numbers of children sentenced to a CYCC: Inconsistent reporting through the Inter-departmental Annual Reports:

Section 96(3) of the CJA obliges the Minister of Justice and Constitutional Development to provide annual reports to the Parliamentary Portfolio Committee. In order to promote co-operation and collaboration between stakeholders the ISCCJ decided to provide a consolidated annual report to Parliament. There are at least eight different stakeholders involved from government departments, to the non-governmental sector and civil society.[202] The first Annual Report on the Implementation of the Child Justice Act[203] (hereafter "the First report") report comprised mini-reports of each stakeholder involved in the CJA. Its advantage lay in the fact that the completed interdepartmental report was holistic and inclusive.[204]

On the other hand, a combined report has contributed to weakened oversight, due to inconsistent statistical reporting, or in some cases, a total lack thereof by each stakeholder. The glaring discrepancies in reporting are observable by the varied statistics of each department and appear to be a stumbling block in assessing the number of CYCCs available for residential care, or those needing to be established, and where. One startling inconsistency in reporting appears in the First and Second Annual Interdepartmental Report on the Implementation of the Child Justice Act[205] (hereafter, "the Second report") Reports. The First Report records the admission of children into a CYCC, but omits to accurately define the type of CYCC used (i.e. a place of

[202] Wakefield (see note 173 above).
[203] The First Report (note 166 above).
[204] M Schoeman1 & M Thobane (see note 12 above). But compare Wakefield in which combined reports are arguably problematic for three reasons:- (a) that they serve different purposes; (b) that they weaken overall parliamentary oversight; and (c) that they remove political accountability towards children. Wakefield recommends improving parliamentary oversight on the CJA implementation – see: Parliamentary Monitoring Group Report (note 12 above).
[205] Department of Justice and Constitutional Development (2013) Second Annual Report on the Inter sectoral Implementation of the Child Justice Act 75 of 2008, July 2013. Pretoria: DoJCD (the "Second Report").

safety for awaiting trial children, or a CYCC used when sentence has been imposed). The Second Report records only those children who have been sentenced to a term at a CYCC.[206]

A perusal of the first three combined annual reports reveals that the reporting is inconsistent; and the quality of information inaccurate and sometimes contradictory. [207] Accurate statistical reporting is crucial in planning and the allocation of resources. Insofar as the establishment of further CYCCs is concerned, incorrect figures of 'detained' children entering the system leads to unbalanced distribution of resources throughout the Republic.

The reports further pointed to an absence of detailed analysis of the statistics and gaps in information and statistics as well as a lack of systematic year on year reporting. Shadow reports prepared by the Child Justice Alliance, a non-governmental organization found that many challenges identified in the First report were not fully resolved by the Second report.[208]

The Second report confirms an increase in diverted children[209] but it also confirms an increase in the numbers of children sentenced to compulsory residence at a CYCC.[210] During the period 1st April 2013 – 31st March 2014 a total of 381 children were sentenced to compulsory residence at a CYCC whereas only 49 children were sentenced to prison during the same period.[211] As regards awaiting trial children, 1721 children were held awaiting trial in a CYCC as at 2012/2013, up from 1534 children in the previous year. A 16.3% decrease was thereafter noted in 2013/2014 by the admission of 1440 children into CYCCs as awaiting trial detainees.[212] Therefore, between 2010/2011 and 2012/2013, CYCCs showed a 204.5% increase.[213] The highest number of detained children during the 2013/2014 period occurred in the Eastern Cape (31%), followed by KZN (30%).[214] In the Fifth Annual Report on the Implementation of the

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[206] *Ibid;* see also Parliamentary Monitoring Group report (see note 12 above; 14-15); Sloth-Nielsen (see note 9 above; 2).
[207] *Ibid* Parliamentary Group Report (see note 12 above; 14).
[208] Badenhorst (see note 9 above; 8-9).
[209] *Ibid;* The First Report (note 166 above); The Child Justice Alliance: 'The third and fourth year of the Child Justice Act's implementation: Where are we headed?' Community Law Centre: University of the Western Cape (2015)
[210] *Ibid* The First Report; Sloth-Nielsen (see note 133 above).
[211] *Ibid* Sloth-Nielsen, The Fourth Report (note 23 above)
[212] Parliamentary Monitoring Group Report (see note 12 above).
[213] *Ibid* 16.
[214] *Ibid* 17.

Child Justice Act[215] (hereafter "the Fifth report") during the 2015/2016 period, 266 children were placed in a CYCC awaiting trial. This figure rose sharply in the 2016/2017 period to 924, and decreased slightly thereafter to 863 during the 2017/2018 period.[216] The statistics demonstrate a drastic decrease in application of the CYCC as a sentencing option between 2013/2014 and 2015/2016[217] from 381 to 17, but subsequently increases to 39 in the 2017/2018 period.

When one has regard to the available bed space[218] for children sentenced to a CYCC in conjunction with the repurposing and/or closure[219] of some Reform Schools within the country as well as the "rationalization"[220] of others, the Fifth report is a somber reminder of Dullah Omar's prediction in 1998 regarding space constraints relating to secure care for children and the fiscal constraints which may be operating to reduce the figures.

Section 96(1)(e)[221] prescribed an integrated management system so as to alleviate inconsistencies in statistical reporting and enhance communication through a central location and server so as to monitor children through the child justice system. Due to a lack of central reporting and "tardy information" regarding pre and post- trial detention in alternative residential care facilities, current information is sparse[222] but remains a work in progress.

4.4 Additional challenges identified by the Reports:

[215] The Fourth Report (note 23; 136).
[216] 2017/18 inter-departmental annual reports on the implementation of the child justice act, 75 of 2008, 33 (the "Fifth Report").
[217] *Ibid* 36.
[218] Prior to the coming into operation of the CJA there were 420 beds available at four reform schools situated in the Western Cape and Mpumalanga – Skelton (see: note 9 above).
[219] The Bhisho facility: see *Goliath* and *Jonker* (note 13 above).
[220] Skelton (see: note 9 above); Child Justice Project (see note 9 above).
[221] *Act 75 of 2008.*
[222] Wakefield (see note 179 above).

As far back as 2011, participants at a workshop[223] held by the Child Justice Alliance[224] raised issues such as the number of existing Reform School facilities and their usage or repurposing, education of children under the CYCC, transfer challenges[225] and untrained staff.[226] As alluded to in chapter one, a lack of available infrastructure coupled with logistical challenges relating to placement of children in CYCCs was a common challenge[227] which formed the baseline for the *JASA* decisions. Programme re-visitation with a view to development, as well as specific skills training, and specific strategies and protocols for CYCCs were and are still needed. [228] It would appear that there is a lack of consistency in the application of a CYCC as a sentencing option and little evidence of an integrated approach by relevant departments.[229]

In the First Annual Report, there were three main challenges identified regarding the transfer of Reform Schools.[230] These included, but were not limited to, the problems associated with the transfer of staff from one department to another; the uncertainty regarding the content of education to be provided; and, the uncertainties as well as strategic and logistical concerns regarding the whole or part transfer of infrastructure. In turn, this gave rise to a challenge associated with overall governance and accountability. The report affirms the challenges raised by non-governmental organizations (hereafter "NGOs") relating to the referral of children to CYCCs.[231]

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[223] These participants comprised CYCC Heads and the Provincial Coordinators. The workshop was conducted in order to sensitize them to *inter alia* warning children of their actions bearing an effect upon them with regard to reconsideration of sentencing at the end of their stay, as well as the possibility of further incarceration – see Wakefield and Odaga (note 158 above;12).

[224] L Wakefield & J Gallinetti, Sentencing of Children to Child and Youth Care centres Workshop Report (8 June 2011) available online at http://docplayer.net/54905155-Sentencing-of-children-to-child-and-youth-care-centres.html.

[225] Programme inflexibility, untrained staff and transfer challenges were all raised as challenges – Badenhorst (see note 9 above; 26).

[226] A Singh and V Singh (note 84 above; 5 for an insight into the lacunae regarding trained staff); M Schoeman and M Thobane, (see note 12 above; 42 – 44).

[227] *Ibid* M Schoeman and M Thobane, (see note 12 above;43, 45); Badenhorst (see note 9 above); Wakefield (see note 179 above).

[228] Wakefield and Odaga (note 158;12); A Singh and V Singh (note 84 above;7).

[229] M Courtenay and Z Hansungule, 'Protecting the rights of children in conflict with the law: A review of South Africa's Child Justice Act.' In: P Proudlock. (Ed). South Africa's progress in realizing children's rights: A law review. Children's Institute, University of cape Town & Save the Children South Africa, Cape Town (2014) 153 – 165 at 159.

[230] Badenhorst (see note 9 above;29).

[231] M Schoeman and M Thobane, (see note 12 above; 45). The challenges raised included the late filing of assessment reports, the lack of guidance received for offenders who re-offend during their placement at a CYCC, and the fact that parole is not an option for those sentenced to a CYCC whereas it is for those children sent to prison.

4.5 The *JASA* decisions: heading towards an amended national strategy:

JASA 1 is the genesis upon which the later *JASA* decisions came to be delivered.

JASA 2 concerns an appeal to the Full Bench of the Cape High Court under s18(3)of the *Superior Courts Act.*[232] For convenience, the parties will be referred to as in the trial court.

JASA 3 relates to an appeal to the Supreme Court of Appeal regarding the financial implications of a court-ordered inter-departmental transfer of schools made in *JASA 1.*

In *JASA 1*, the prime issue was whether the centres in question fell to be regarded as CYCCs as enshrined under section 195 of the *Children's Act*? If the answer was positive, it would in turn lead to the question of whether children could be transferred to a more restrictive setting? The Respondents argued that the relevant schools had been repurposed in 2000 as a school for learners with special needs, thus excluding them from the ambit of consideration under section 195 as read with section 191(2).[233] The Court, per Salie-Hlophe J found that the centres in question qualified as CYCCs as defined in the *Children's Act*.[234]

Insofar as the transfer to a restrictive setting is concerned, section 171 of the *Children's Act* envisages the possibility of the child's transfer to a more restrictive environment, but only after consultation and ratification of the decision by the Children's Court.[235] Salie-Hlophe J found under section 12(1)(b) of the Constitution that the mingling of children in need of care with those awaiting trial and sentenced was not conducive to their care, development, rehabilitation and reintegration.[236] Amongst other things, the arbitrary association of children in this manner violated their respective rights to liberty.

Having declared the educational centres in question to be regarded as CYCCs they fell squarely under the administration of the DSD which was responsible for their upkeep and resources.

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[232] *Act 10 of 2013.*
[233] *Act 38 of 2005.*
[234] *JASA 1* (note 16 above; 36 – 37).
[235] Sloth-Nielson (see note 133 above;446); *Jonker* (note 13 above).
[236] *Ibid* Sloth-Nielson 447.

Salie-Hlophe J further ordered the Respondents to consider afresh the placement of children in need of care in secure care CYCCs.

In *JASA 3*, the appellants argued that the granting of the third and fourth order by the court *a quo* by declaring the educational centres as CYCCs, was tantamount to implementing the strategy as provided for in section 192 of the *Children's Act*[237] yet without the necessary consultative processes delineated in legislation.[238]

The appeal was upheld by Binns-Ward JA who overturned the order of the court *a quo*. Binns-Ward noted that by declaring the respective centres to be regarded as having being established under section 195 of the Children's Act "carried with it a duty on the MEC for Social Development, *ex lege*, to establish and operate the centres from money appropriated by the relevant provincial legislature…..it will be necessary for that Department to provide the personnel and funding to run them."[239]

The Court applied the principles enunciated in *International Trade Admin Commercial v SCAW SA (pty) ltd*[240] and found the decision to establish an appropriate spread of CYCCs 'reside in the heartland of the exercise of national and provincial executive authority.'[241]

The SCA applied the *dictum* in *Minister of Home Affairs v Scalabrini Centre*[242] to set aside the court *a quo's* orders on the basis that the said order violated the doctrine of separation of powers.[243] In this regard, Binns-Ward J further went on to state, "It is not constitutionally appropriate for a court to make a decision of its preference in respect of matters that valid legislation has entrusted to another arm of government."[244] In short, his view was that decisions requiring "polycentric and policy-laden decision making" by the Executive could not be

[237] *Act 38 of 2005.*
[238] Skelton (see note 80 above; 43).
[239] *JASA 2* (note 17 above; para 15).
[240] 2012 (4) SA 618 (CC).
[241] *Ibid* at para 44.
[242] 2013 (6) SA 421 (SCA) 57.
[243] *JASA 2* (note 17 above; para 34).
[244] *JASA 2* (note 17 above).

prescribed by the Courts.[245] This was so, he said, because the process was one which involved decision-making; which power belonged to the Executive.[246]

In furtherance, and strikingly, the court *a quo*, despite declaring the centres in question as those established under section 195 of the Children's Act *did not direct transfer of those facilities from the DOE to the DSD*.

In declaring the centres as those established under section 195, the court *a quo* failed to take into account "the logistical considerations" which involved compliance with *inter alia* "The *Public Finance Management Act*, the *Public Service Act*, the *Labour Relations Act*…and pertinent fiscal appropriations by the provincial legislature."[247]

4.6 Conclusion:

The DSD had since 2014 and until 2018 failed to provide any national strategy "aimed at ensuring an appropriate spread of child and youth care centres throughout the Republic providing the required range of residential programmes in the various regions…"[248] To this day, the failure to compile a national strategy has had wide and far-reaching ramifications on the transfers of Reform Schools and schools of industries. Consequently, and in addition, service-delivery of residential programmes is severely constrained. It is refreshing to note that an amended Framework was tabled in May 2018. However, the tabling of the strategy must encompass the cost considerations raised in the costing report alluded to in chapter three; and, it must realign its costing budget so as to make provision for separate residential care centres for children so as not to violate their constitutional rights.

[245] *Ibid* para 16.
[246] *Ibid* para 18-19 and 21.
[247] *Ibid* para 46.
[248] Sloth-Nielsen (see note 133 above; 445-447); for a deeper analysis see *National Association of Welfare Organizations and NGOs and others* (note 133 above); see also J Sloth-Nielsen H Kruuse (see note 133 above: 654, 663).

CHAPTER FIVE:

How do we resolve the position?

A glimpse into the past two and a half decades into the progress of children's rights unfolds a myriad of realities currently prevailing within the South African system. By the ratification of international treaties, South African law has revolutionized a novel domesticated system of child justice through the creation of the CJA and the *Children's Act*. The challenge remains in maintaining its commitment to child-centric justice. South Africa signed the UNCRC in 1994 but has delivered only three reports to the UNCRC Committee in 2000, 2005 and 2010. The position is even worse *vis-à-vis* the ACRWC where only one report has ever been filed.

This dissertation set out to establish the reasons for the difficulties in establishing a workable CYCC. The *JASA* decisions discussed in chapter four, point out the lack of a firm ministerial strategy and policy. Poor working relations between stakeholders and staff perceptions between the coordinating departments contribute to apathy towards achieving resolutions, particularly those affecting the transfers of the old Reform Schools and schools of industries.

In addition, and crucially, the high cost of running these facilities as well as the fact that there are simply not enough therapeutic and/or developmental and/or recreational programmes on offer can constrict the budget of the incoming department and dampens its will to absorb an added responsibility. The entire costing of the *Children's Act* while it was still a bill appears astronomical at first glance. But, when compared to the budget for Education which worked out to 18% of the consolidated government expenditure in 2005/2006, the *Children's Act* came in at between 1.3% and 8.4%.[249] This in turn hampers the effective functioning of those repurposed CYCCs.[250]

Lastly, the safety and security of both infrastructure and staff and children as evidenced by the case law, and particularly the first *JASA* decision, are increasingly a cause for concern by their lack thereof.

[249] Skelton (see note 80 above; 22).
[250] Sloth-Nielsen (see note 65 above).

Implementation in connection with the CYCC means, "to fulfill, perform, carry out, or put into effect according to or by means of a definite plan or procedure."[251] In the assessment of the CYCC as it applies to sentenced children, it would appear that there is at present, little international transfer of information between legal systems on child justice; however, the situation can only improve. The Committee of the Rights of the Child bears a heavy burden in facilitating and monitoring interaction amongst member States. The benefit of this working committee is that national and subnational judicial officers can learn a great deal by looking outside their boundaries to the documented experiences of earlier innovations.

Desert, as a retributive theory of punishment in which an accused receives his 'just deserts' for his actions, and managerialism and community are key ideas that underlie modern policy debates about the criminal justice system.[252] The CJA attempts to give effect to managerialism by endorsing the reintegration of all relevant stakeholders, within government and civil society to achieve this purpose. In addition, the CJA embraces a community approach by emphasizing prevention and early intervention. Consequently, improvements in education as a goal of prevention and/or early intervention can be transferred to the programmes in operation at a CYCC, or to educating learners at primary school who fall under the minimum age of criminal capacity.

Whether the Republic has the capacity to undertake the voluminous efforts required in implementing a workable CCYC (and the consequent number of assessments, evaluations and expert reports for children)[253] remains to be seen. In light of the statistics of the most common crimes committed by children (*viz.* Rape, robbery and assault),[254] ongoing mental evaluation and/or psychological assistance is a necessary by-product of the sentence.

The Nerina One-Stop Child Justice Centre, one of only three (3) One Stop Child Justice Centres ("OSCJC") operational in the Republic is a sterling example of integrated inter-departmental relationships.[255] Nerina's success is attributed largely to a cultivation of good working

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[251] http://www.dictionary.com.
[252] M Tonry, 'Sentencing Reform in Comparative Perspective' in *Sentencing Matters* (1996) 174 – 189 at 184
[253] L Wakefield and V Odaga (see note 158 above; 11).
[254] See Fourth Report (note 20 above); Fifth Report (note 213 above).
[255] Badenhorst (see note 9 above; 38). Nerina contains facilities and staff from a spectrum of service providers, all under one roof. Opened in 2007, it is extremely well-planned and contains two courtrooms, the SAPS, DSD, legal aid lawyers, prosecutors and magistrates placed in different sections.

relationships and cooperation. On the other hand, the Manguang OSCJC is an example in bad planning and practice management and the question remains whether government can afford to keep it afloat. The OSCJC is a large-scale enterprise that could be considered the Rolls Royce of child-centric justice. However, Nerina OSCJC and Manguang OSCJC have evolved in two different and diametrically opposed directions of growth. While Nerina OSCJC has achieved the utopian ideal, Manguang's failings are a sober reminder that the implementation of large scale enterprises such as the CYCC, requires leadership, vision, planning and an insight into the working machinery of child-centric justice. The Westville prison is a further example of the triumph of conversion: The prison is unique because of the existence of a diversion programme operating on its premises – the only known example in the country of diversion being offered in a prison setting.[256] Of significance are the contributions of forty prisoners.[257] The project is an encouraging indicator of the power of restorative justice and in addition to Nerina, be used as a model upon which to base the ideal CYCC.

Planning for the future

Skelton had observed in 2000: *Whilst law-makers should be free to dream up completely innovative solutions to the problems facing children, they should make sure that they dream with their feet planted firmly on the earth. Empty promises echoing provisions of the UN Convention will not protect children or further the promotion of their rights. Law-makers must commit themselves to what can realistically be achieved in the country they are working in, and make sure that the laws have the best possible chance of being properly implemented.*'[258]

Planning is the key to effective implementation of a new sentencing scheme.[259] This is echoed in the United Nations Capacity Building Report which placed an emphasis on transferring capacity, awareness and knowledge among officials and NGOs dealing with child justice.[260] It remains desirable to include all affected agencies and constituencies in planning to avoid

[256] J Sloth-Nielsen 'Preparing for Implementation in Kwazulu Natal' December (2004) *Article 40(b)*.
[257] S Pete, 'The Politics of Imprisonment in the Aftermath of South Africa's First Democratic Election' 11 *S. Afr. J. Crim. Just.* 51 (1998) 77.
[258] Sloth-Nielsen (note 133 above; 193).
[259] M Tonry (see note 249 above; 174, 176).
[260] Capacity Building Report (note 71 above; 4).

catastrophes such as the Luckhoff or Rosenhof situations, or the cases of *Goliath, Jonker* and *JASA*. The ISSCJ committee therefore bears great responsibility in this regard to channel the direction and focus on achieving panoply of appropriately spread CYCCs throughout the country.

Previous workshops held with government and non-government sectors in connection with establishing costs involved in establishing the *Children's Act* found that most of the services were outsourced to non-profit companies or private for profit companies. These responsibilities were not isolated from the overall responsibility of the State to ensure funding thereof. Implementation of the act required a reservoir of social workers, auxillary workers and child and youth care workers; however, the required number of workers was outnumbered by the existing registered workers.[261] To this end, the DSD is commended for implementing a bursary scheme for social work degrees.

National and Subnational judges can learn a great deal by looking outside their boundaries to the documented experiences of earlier innovators. Other than the international benchmarks set out by the CRC and the ACRWC international transfer of information or learning between legal systems ought to be more actively pursued. The capacity building report, as a joint initiative by the UN and government of the time is credited for trying to forge a path in an otherwise unguided system. The CJA of South Africa illuminates the path for other African States to learn from, and graft onto their own legal systems.

When it comes to planning a CYCC, the *JASA* decisions will stand out as the *locus classicus* of high-level policy implementation and strategy on a macro-economic scale dependent upon the success of its inter-sectoral departments. Tonry, when discussing sentencing reform though legislative guidelines candidly states that among ambitious innovations, more fail than succeed![262] Tonry correctly observes that this is due to errors in the planning resulting from carelessness or the lack of a thorough and conscientious approach. Indeed, there can be no substitute for due diligence. Tonry cites contrasting examples from England and Wales, and Staten Island in New York to subtly point out that collaborative planning should involve the judiciary to avoid hostility once implemented. This point is not too abstract to make with

[261] Skelton (see note 80; 21).
[262] Tonry (see note 251 above; 182).

regards to the implementation of the CYCC as an elastic concept which could, if used more wisely, function as a tool in the hands of the Sentencer amidst fiscal constraints and a weak economy, not to mention an overworked justice and crime prevention cluster, and a prison bursting at the seams.

Planning should almost always include the judiciary. After all, the judiciary is the collective and independent unit handing down sentence. The judiciary should not be left in the dark regarding facilities which have changed curatorship between governmental departments as this will enable correct application of CYCC. The judiciary should be acutely aware of the difference and benefits attached to a sentence of compulsory residence in a CYCC as opposed to incarceration at a school under the control of DCS. Tonry observes further that well planned and executed innovations can alter judges behaviour and sentencing outcomes.[263]

But the JASA decisions are also a clear reminder that the transfer of the Ottery and other similar schools require a policy change, which is an executive function under the doctrine of separation of powers. *Policy changes alter sentencing practices*.[264] The lessons from the failed transfer of JASA are worth repeating:-

1. Include all affected agencies and constituencies in the planning and design work. By including everyone the planning process becomes open and accessible.
2. Anticipate and develop contingency plans.
3. Mass media should be engaged so that support can be cultivated; it may help to conduct public relations and outreach programs. Currently, amidst the political climate of alleged state capture, the mass corruption and looting of public funds, the media have a crucial and pivotal role to play in upholding transparent public interest procedures.
4. Hold training sessions. Establish monitoring programs and monitor the monitors for ultimate compliance.
5. Engage technical support.

The achievement of this utopian ideal requires a robust managerialist approach of multi-agency interaction, infused with a smattering of corporatist kinds of considerations to give

[263] *Ibid.*
[264] *Ibid* at 183.

the newly amended ministerial strategy a substantial role in influencing the content of proposals. It is submitted that the DSD act conscientiously in furthering the Amended Framework in light of fiscal considerations by concluding the outstanding transfers of Reform Schools and schools of industries. An effective strategy should "promote social change, instead of maintaining the status quo" which will be reflected through the operational mechanism that it puts in place.

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