Children in conflict with the law: Assessing the implementation of the Child Justice Act 75 of 2008 in the Eastern Cape Province

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ABSTRACT

The study explored efforts made by various stakeholders involved in the implementation of the Child Justice Act (CJA). It is essential to get insight on the roles of stakeholders in the child justice and view how their efforts could or do not warrant an effective coordination of the child justice system. This study was inductive in nature. Primary data came from in-depth interviews with individuals and government officials as well as focus groups with children in conflict with the law. Various assumptions relating to delinquent behaviour were highlighted by a description of the various factors underlying or contributing to this behaviour. The theories discussed such as social disorganization and differential association are relevant to this study and help to understand juvenile delinquency. It is essential to look at the extent and causes of juvenile delinquency as well as the history of child justice in South Africa, so that this can be used as a yardstick to measure the development of the law on child justice and see if the coming of the new CJA has made improvements to address juvenile delinquency. This study showed that the development of international and regional norms and standards on juvenile justice such as the UN Convention on the Rights of a Child, the UN Minimum Rules for Administration of Juvenile Justice, the UN Standard Minimum Rules For the Protection of Juveniles Deprived of their Liberty the UN Guidelines for Prevention of Juvenile Delinquency and the African Charter on the Rights and Welfare of the Child provide a comprehensive framework at the international level within which the issue of child justice should be understood. The study also argued that although the CJA brought new innovations in the criminal justice system, challenges in various key provisions of CJA such as assessment, preliminary inquiry, diversion, sentencing, child and youth care centres are noted. Other key findings include lack of training or capacity building, unavailability of budget and public education awareness. There is a need to look at these challenges to improve the multi-sectoral implementation of the CJA.

Keywords: assessment, child, juvenile delinquency, preliminary inquiry, diversion, child and youth care centres

DECLARATION

I, **Kapesi Antony Chakuwamba**, declare that this dissertation is my work and that it has not been submitted for any degree or examination in any other university or institution. All the sources used have been fully acknowledged and referenced or indicated by quotation marks in the text.

Signature of candidate **……**

Date **…….**

Signature **…….**
Supervisor **(Professor Nasila S Rembe)**

Date **……**

DEDICATION

This dissertation is dedicated to my late Father, Mr. Alfonso Chakuwamba, my daughters Moreblessings and Mbalenhle, my wife Loveness, family and friends. I am highly indebted and whole heartedly grateful to these people for their support and encouragement. They were a great source of motivation throughout my study period. Thank you for showing love and care. Above all, I thank, the Lord Almighty for giving me the strength to complete this study.

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LIST OF ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
CJA	Child Justice Act
CPA	Criminal Procedure Act
CRC	Convention on the Rights of the Child
DSD	Department of Social Development
IMC	Inter- Ministerial Committee
NGOs	Non-Governmental Organizations
NICRO	National Institute for Crime Prevention and Reintegration of Offenders
NPA	National Prosecuting Authority
OAU	Organization of African Unity
OPAC	Optional Protocols on Children Involved in Armed Conflict
OPSC	Optional Protocols on the Sale of Children
OSCJC	One Stop Child Justice Centre

PI	Preliminary Inquiry
RAPCAN	Resources Aimed at the Prevention of Child Abuse and Neglect
SALC	Southern Africa Litigation Centre
SALRC	South African Law Reform Commission
SAPS	South African Police Service
UNJDL	United Nations Rules for Juveniles Deprived of their Liberty
YES	Youth Empowerment Scheme

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The African Charter on the Rights and Welfare of the Child

The Constitution of the Republic of South Africa Act, Act 200 of 1993

The Constitution of the Republic of South Africa Act, Act 108 of 1996

United Nations Convention on the Rights of the Child 1989

United Nations Standard Minimum Rules for the Administration of Juvenile Justice

United Nations Rules for the Protection of Juveniles Deprived of their Liberty

United Nations Guidelines for the Prevention of Juvenile Delinquency

UN General Assembly 29 November 1985.

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CHAPTER 1: GENERAL INTRODUCTION

1.1 Background to the study

Justice for children has been a worldwide phenomenon. Sociologist Ellen Key (1909), writing just over a hundred years ago, predicted that the 20th century would be the 'century of the child'. She was writing at the end of a century during which welfare-oriented individuals and organizations had founded houses of refuge and reformatories to which children could be referred instead of being sent to prison or deported.

The initial ideas about a separate juvenile justice system for children stemmed from a welfarist approach that coincided with the rise of behavioral sciences such as social work and psychology (Sloth-Nielsen 2001). A transatlantic social movement in the 1880s and 1890s concerned itself with the effect of market processes and industrialization on the social lives of urban populations. These reformers were of the view that individual responsibility could not be a complete explanation for widespread disorders in modern cities. They questioned the free will on which the liberal state was being built, de-emphasizing individual choice and re-describing crime and poverty as environmental problems, the root causes of which needed to be understood and resolved. Thus it is often said that the welfarist approach to juvenile justice focused on the child's needs rather than on the child's deeds (Muncie 1999:254). The welfare of the child was the most important consideration. Welfarism promoted the idea that in the justice system children should be separated from adults and that they should be dealt with in different forums with different procedures from those used for adults. There was a heavy reliance on the involvement of social workers and probation officers.

In the 1980s, the world focused on people fighting against apartheid in South Africa. These people included many children and teenagers who were arrested and jailed, often without trial. Even worse, many children were held in adult prisons. When South Africa achieved democratic rule in 1994, a new system

began to evolve for children in conflict with the law. At the same time, non-governmental organizations concerned with youth crime began experimenting with non-residential 'life skills programs' or 'diversion programs' as alternatives to prosecution and incarceration. As a result, alternative programs for young offenders have grown dramatically since 1994 (Sloth-Nielsen, 2001).

1.2 Definition of concepts

This research adopts some of the definitions from the Child Justice Act which are relevant to the study.

- **'assessment'** means assessment of a child by a probation officer in terms of chapter 5;
- **'child'** means any person under the age of 18 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);
- **'child and youth care centre'** means a child and youth care centre referred to in section 191 of the Children's Act;
- **'child justice court'** means any court provided for in the Criminal Procedure Act, dealing with the bail application, plea, trial or sentencing of a child;
- **'Children's Act'** means the Children's Act, 2005 (Act 38 of 2005);
- **'Constitution'** means the Constitution of the Republic of South Africa, 1996;
- **'Criminal Procedure Act'** means the Criminal Procedure Act, 1977 (Act 51 of 1977);
- '**diversion'** means diversion of a matter involving a child away from the formal court procedures in a criminal matter by means of the procedures established by Chapter 6 and Chapter 8 of the Act;

- **‘diversion service provider**’ means a service provider accredited in terms of section 56.
- ‘**juvenile delinquency’** constitutes any behaviour that is illegal and thus punishable by law.

• **‘probation officer’** means any person who has been appointed as a probation officer under section 20 of the Probation Services Act, 1991 (Act 116 of 1991);

• **‘restorative justice’** means an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation;

1.3 Statement of the research problem

It is important to understand the history of juvenile justice in order to contextualize current developments. The end of the 1940’s saw South Africa slip into a deeply negative era. Although there have been various pieces of legislation to protect children in conflict with the law, for example, the Child Care Act 78 of 1983, these pieces of legislation were not effective enough to protect the rights of children. The apartheid years yielded nothing positive for juvenile justice. Skelton (2008) noted that in October 1992, a 13 year old boy, Neville Synman was arrested on a charge of stealing sweets, cool drinks and cigarettes form a local shop in Robertson. In the police cell that night, Neville Synman was strangled, sodomized and then killed by his cellmates. Shapiro (2002) states that in May 1997, an older detainee in a police cell in Butterworth killed 13 year old Lubabalo Mazweni. The juvenile was detained because he was alleged to have stolen some sweets from a Butterworth store. Shapiro (2002) further states that legally, the child should not have been in a police cell at all, nor should he have been in a cell mixed with an adult offender because that led to the teenager’s abuse and death. Neither of these children lived to stand trial. Nobody knows whether or not

they would have been found guilty. Neville Synman and Lubabalo Mazweni are not the only children to have died behind bars. Their stories are, however, both significant in the development of juvenile justice in South Africa.

Furthermore, Neville's death came at a time when very few organizations were working with children in conflict with the law. According to Skelton (2008) the media attention and subsequent response to his death led to a campaign being launched in December 1992, which was titled 'Free a child for Christmas'. In this campaign lawyers assisted in bail applications and in speeding up the trials of children to see them released from police custody. It must also be said that this campaign was run with the political backdrop of Nelson Mandela's release from prison in February 1992 and the unbanning of the African National Congress. The launch of the campaign was important to enhance freedom from abuse and taking children out of terrible conditions. The campaign did of course come under severe criticism from many parties, including some child rights activists, who argued that children were simply being released onto the streets. It was argued that the conditions in prison were better than those on the streets. Others, however, argued that the conditions on the street were better than those in prison. The reality was that releasing children onto the streets did not meet the needs of the community for justice, while keeping children in prison under horrific conditions was a complete violation of their rights.

Skelton (2008) also noted that in November 1993 a conference was held entitled: "Juvenile Justice: Towards Policy and Legislative Change". At this conference, it was agreed that as policy and legislation were fragmented, there was a need to develop a new comprehensive juvenile justice system. The conference report proposed that a Juvenile Justice Drafting Consultancy be set up to draft new juvenile justice legislation for South Africa. The Drafting Consultancy, consisting mainly of non-governmental organizations, began their work almost immediately by running workshops with key role players across the country and by looking at international trends in youth justice.

Skelton (2008) further states that the Drafting Consultancy completed their recommendations in 1994 and released a report titled ‘Juvenile Justice: Proposals for Policy and Legislative Change’. These proposals outlined a comprehensive new juvenile justice system with family group conferences central to all interventions with children in conflict with the law.

Earlier the same year (1994) South Africa underwent its first democratic elections. This heralded a new era for juvenile justice. Nelson Mandela was elected President and in every major speech in his first year in office, he alluded to the plight of children in conflict with the law and committed his government to action. The legislative developments of the government were optimistic and indicated a commitment to treating children differently, although the efforts were piece-meal and fell short of separate juvenile justice system. South Africa in 1994 was brimming with positive law reform possibilities. According to Skelton (2008), inter-sectoral working groups focusing on the issues of child justice were established to debate the way forward. The need for a new juvenile justice system was widely recognized and many saw the proposals of the Drafting Consultancy as the way forward. The only problem was that the Drafting Consultancy was not set up by government and so it had no mandate to implement its recommendations.

In May 1998 an amendment to the Correctional Services Act 3 of 1998 came into force. Section 29 of that Act stated that no children could be held in prisons, police cells or locked up. The sudden, unexpected implementation of this legislation aggravated the crisis that already existed in the broader child and youth care system. Places of safety, primarily designed for housing children in need of care and protection, were already overcrowded and could not cope with the sudden influx of children who had in some instances committed some very serious crimes.

Skelton (2008) states that with the above crises, an opportunity was created to formally look into the transformation of the juvenile justice system, as well as consider broader child and youth care systems as proposed by the Drafting Consultancy. An inter- Ministerial Committee (IMC) was set up to manage this process and to draft policy which would lead to legislation and the transformation of not only the juvenile justice system, but, the child and youth care systems as a whole. The policy guidelines drafted by the IMC culminated in the release of interim policy recommendations in November 1996. The document contained a number of ideas, including a whole new paradigm in youth care thinking, which, if implemented, would have led to radical changes of the child and youth care system. One of the key principles of this new paradigm was that of restorative justice. The IMC proposed that the approach to young people in conflict with the law should include resolution of conflict, family, and community involvement in decision-making, diversion, and community based interventions. As such, the IMC set up several pilot projects to test this new policy one of which was the family group conferences pilot project.

However, to ensure the progressive establishment of a child justice system in South Africa, the Child Justice Act 75 of 2008 (hereinafter referred to as “CJA”) was implemented on 1 April 2010, after more than a decade of lobbying, advocacy, debating and discussions. The CJA represents the commitment of the South African government to implement international obligations pertaining to the universal protection of the rights of children in conflict with the law. It further embraces its constitutional commitment to ensuring that children are not detained except as a measure of last resort and for the shortest possible time. However, in instances where the imposition of an imprisonment sentence is inevitable, the CJA provides measures to protect the constitutional right of a child not to be detained with adult inmates, but to be kept in conditions that take account of his or her age. It is important to note that the past years of implementation helps us to look back and trace footprints left by the collective endeavors of various stakeholders within the child justice sector to ensure the progressive

establishment of a child justice system in South Africa. According to a research done by the Department of Justice and Constitutional Development (now Department of Justice and Correctional Services) in 2011-12, the inter-sectoral implementation refers to the collaboration of stakeholders to enhance a separate justice processes for children in conflict with the law. These first years were an exploratory learning phase for all stakeholders. Most importantly, it represents a departure from an adult justice system to a juvenile justice system that is designed to convert a child in conflict with the law into a law abiding citizen who can add value to the country in the future.

Therefore, an assessment of the CJA is necessary in order to be able to know what has worked and what gaps still exist since its implementation from 2010. The issue of inadequate resources to fully implement the CJA is still a major challenge at many child justice service points within government. The Eastern Cape Province is no exception to these challenges. The establishment of a common understanding of the CJA amongst all stakeholders involved continues to pose a serious challenge that has the potential to cause discord and delays in the child justice system.

1.4 Research questions

This dissertation will attempt to answer the following questions:

i. What is the importance of the CJA?

ii. Which stakeholders are involved in the implementation of the CJA?

iii. What progress has been made in the implementation of the CJA since its inception in 2010?

iv. What lessons can be learned and what recommendations can be made?

1.5 Aim of the study

The study explores efforts made by various stakeholders involved in the implementation of the CJA. It is essential to get insight on the roles of stakeholders in the child justice system and view how their efforts could or do not warranty an effective coordination of the child justice system.

1.6 Research hypotheses

i. There is little progress made by the multi-sectoral implementation of the CJA in the Eastern Cape Province.

ii. There have been inconsistencies in the implementation of the CJA.

iii. Lack of capacity and resources has hindered the multi-sectoral implementation of the CJA.

1.7 Significance of the study

The policy makers will find the study useful and meaningful because it assesses the effectiveness of multi-sectoral implementation of the CJA. This study can be used as a yardstick to measure the government's response to sectional needs of its beneficiaries who are, in this case, children in conflict with the law, which may serve as an indication of upholding human dignity and meeting the requirements of international human rights law obligations. This study also makes important recommendations to policy makers, human rights litigators and the judiciary who are likely to be at the forefront in ensuring that the values that underlie the constitutional protection of children in conflict with the law are upheld.

1.8 Research methodology

Research methodology is concerned with the researcher's ultimate goals and the general plan the researcher formulates for achieving these goals. According to Fitzgerald and Cox (1987:39), research methodology includes conceptualization, construction of variables, purposes and structures, as well as disadvantages of

different types of the research design, the logic of causal inferences and sampling theory. Research methodology is the study of methods and logic of science, the rules of organized research and the norm by which procedures and techniques are chosen and emphasized, the setting of guidelines for empirical-scientific investigation and the course of action of the investigator (Van der Walt et al., 1982:160).

This study was inductive in nature and aims to assessing the implementation of the CJA in the Eastern Cape Province. The study adopted a qualitative research design. Qualitative research involves 'systematic investigations that include inductive, in-depth, non-quantitative studies of individuals, groups, organizations or communities' (Thyer 2001:257). The research methods used in this study include in-depth interviews and observations. Mikkelsen (1995:17) states that there has been a controversy over the justification of using qualitative methods in social research. It is argued that qualitative research emphasizes multiple meanings and interpretations rather than imposing one dominant interpretation. Quantitative methods are associated with positivism. The quantitative principles are thus based on the view that the world is organized and bound by rules. In qualitative research on the contrary, it is assumed that rules are socially constructed and given meaning by people and these can be better understood from the social context in which they occur. Qualitative research seeks to study people in their everyday life and attempts to make sense out of a phenomenon or interpret it in terms of the meaning people attach to it.

These qualitative methodologies explore the feelings, understanding and knowledge of others and through these methods we gain a deeper insight into the processes shaping our social worlds. According to Leedy (1993:106), a qualitative research design is regarded as the process of getting to understand and interpret how various participants in a social setting construct the world around them. Therefore, the current study shows the participants' experiences and perceptions on the collaborative implementation of the CJA.

Observation involves sight or visual data collection. They are often conducted as a preliminary to surveys (Bailey, 1994:6). Observation implies a systematic noting and recording of events or artifacts in a social setting. It is a very useful way of getting understanding of the context, cross checking information and possible differences between what people say and what they do. In this study, apart from the individual in-depth interviews with various stakeholders, observation of certain child justice processes such as child and youth centers, assessment and group therapy experiences of diversion was essential. The main purpose of observation was to see the efficiency and impact of these systems.

1.8.1 Selecting the setting of the study

The research focused on the Eastern Cape Province. It was important to explore the effectiveness of the implementation of the CJA in such a developing Province with high rate of children. Children in the Eastern Cape Province are predisposed to criminal behavior due to poverty and other socio-economic factors which are dominant in their lives. The respondents in this study were selected through systematic random sampling bearing in mind that the implementation processes are spatially mediated and differentiated.

1.8.2 Sampling Strategy

A sample is a selection of units from the total population or universe that one desires to study. Sampling techniques are used when it is impossible to measure the entire population representing the phenomenon under study. If the sample is large enough and scientifically selected, it represents theoretically the population from which it is drawn (Reid, 1982:74-75). Twenty five (25) individuals participated in the study, two focus group interviews of 6 children each were conducted with youth in conflict with the law and another 13 respondents interviewed included government officials, non-governmental organizations representatives and community members. The respondents were selected

through systematic random sampling. According to Strydom and Ventor (2002:16), random sampling is the method of drawing a sample of a population. Random sampling ensures that the population as a whole is represented and that everyone has an equal chance of being selected. However, through simple random sampling, the sample will have the same characteristics as the population. As a result, this enables every member of the population to have an equal opportunity to be part of the sample. Therefore, various techniques were applied in the study to meet the objectives.

1.8.3 Primary interview data

Primary data came from in-depth interviews with individuals and government officials as well as focus groups with children in conflict with the law. The length of each interview variedfrom 45 minutes to 1 hour. The study utilized the interview schedule as a tool to collect the data.The rationale for the use of interview schedule is that, it is economical in terms of time and financial resources. De Vos et al (2005), states that the decision to make use of interview data rests on the fact that the interview material, when consequently planned and conducted represents a rich source for gaining information on a current social phenomenon. Another advantage with the interview schedule is its openness in character and flexibility which has facilitated me to gain information on the multi-sectoral collaboration in child justice issues through personal experience by the people involved in the delivery process. The focus was on government officials because they have special knowledge and detailed information on provincial child justice issues. These informants are involved in the implementation of the CJA in various areas. A few community representatives were interviewed on their perceptions on child justice issues. Two focus group interviews were conducted with children in conflict with the law to see the effectiveness or rather importance of the CJA to them. Representatives from non-governmental organizations gave a broader view of the implementation of the CJA. Another source of primary data utilized in the study included observations of assessment process, preliminary

inquiry and diversion groups. The following research techniques were utilized in the study.

1.8.4 Secondary Data and official documents

This study incorporated different types of secondary data. The first group consists of quantitative data on child justice issues. This information was obtained from various stakeholders involved with the CJA. The secondary group of data consists of written documents. These documents were used as a source of information on how government has implemented the CJA since its inception in 2010. However, the official policies and legislation included were not viewed as neutral objects. The secondary information also included literature from other studies in order to give validity to the study.

1.8.5 Analysis of primary and secondary data

The data collected in this study was analyzed using various approaches. As indicated by De Vos et al (2005), analysis of data is a process of bringing order, structure and meaning to the mass of collected data. The qualitative analysis that was applied consists of description, classification and showing how concepts can be interconnected. A discussion of the findings is reflected in this study showing that data collected from interviews was given some interpretations.

1.9 Ethical considerations

Research ethics are the moral principles that regulate all research projects that may be undertaken at any level. Research ethics ensure that the final research product is free from scientific misconduct (distortion of findings, false results), research fraud (fake data) and plagiarism (when a researcher steals the ideas of others and present them as his or her own original work without citing sources).

The study was regulated by the Informed Consent of the participants (a statement that require from participants to freely participate in the research). Among others,

the purpose of the research was discussed, voluntary participation and the procedures to be followed wereexplained, and guarantee of anonymity and confidentiality was made. This ensures participants are protected from all forms of harm and that they freely participate in this research project knowing what it entails. The information provided by research participants was kept confidential and used for academic purposes only. This procedure was in line with the University of Fort Hare policy on ethical principles of research. Section 5.1of the ethics policy alludes thatresearchers have a fundamental right to academic freedom and freedom of scientific or academic research. Section 5.2 notes thatresearchers are required to show commitment to high standards of ethical and professional conduct. In that regard, they have a duty to ensure that their work enhances the reputation and goodwill of the University. Accordingly, researchers must refrain from all forms of dishonesty, including but not limited to, falsification of data, fabrication, plagiarism, and any other form of dishonesty which undermines the integrity of the research and which may bring the UFH into disrepute.Researchers must ensure that they only undertake research work that conforms to accepted ethical standards in the relevant discipline and falls within their fields of expertise or competence. The researcher was given ethical clearance by the University of Fort Hare (see appendix c).

1.10 Chapter outline

This study is divided into five chapters. The first chapter provides an overview of the study. It outlines the focus of the study, and drew out the scope and context that underpin the study. Furthermore, it presents the methods that were used for collecting as well as analyzing the data.

Chapter 2 looks at thedelinquent and criminal behavior among young people, as they negotiate the transition from childhood to adulthood in an increasingly complex and confusing world. Some basic assumptions relating to delinquent behavior are presented, followed by a description of the various factors underlying or contributing to this phenomenon. It looks at various factors within

an individual's environment that may play a role in thecommission of crime. Then the latter part of this chapter traces the history of the child justice system in South Africa because this is to be used as a yardstick to see if the coming of the new CJA has made any changes.

Chapter 3 exploresthe development of international norms and standards on juvenile justice and identifies critical ideas and concepts that shape the laws regulating juvenile justice today. A predisposition of various human rights instruments sets the backbone to assess whether the inception of the CJA is in line with international law.It is important to assess the domestication of international and regional standards in child justice system in South Africa.The focus of this chapter is also to explore the current developments in the child justice system in South Africa. An exposition of the trends, statistics and challenges since the inception of the CJA are made with reference to the Eastern Cape Province.

Chapter 4 presents and discusses the findings of the study. The results are analyzed and interpreted using the qualitative method.

Chapter 5 presents a summary and conclusions drawn from the study. It also presents the recommendations derived from the study and provides recommendations for further study.

CHAPTER 2: ORIGINS AND DEVELOPMENT OF THE LAW ON CHILD JUSTICE IN SOUTH AFRICA

2.1 Introduction

This chapter is divided into three sections. This first section of this chapter gives an exploration of delinquent and criminal behavior among children, as they negotiate the transition from childhood to adulthood in an increasingly complex world. The statistics given in this section to illustrate the extent of crime are relevant for the purposes of discussion and objective of this chapter. The second section discusses some basic assumptions relating to delinquent behavior followed by a description of the various factors underlying or contributing to this behaviour. The chapter looks at various factors within an individual's environment that may play a role in thecommission of crime. The theories discussed such as social disorganization and differential association are relevant to this study. The last section of this chapter traces the historical development of the law on juvenile justice in South Africa. This is important to see how child justice issues have changed over time up to the point where discussions and advocacy was made in reference to the new Child Justice Act (CJA). It is essential to look at the extent and causes of juvenile delinquency as well as the history of child justice in South Africa, so that this can be used as a yardstick to measure the development of the law on child justice and see if the coming of the new CJA has made improvements to address juvenile delinquency and justice.

2.2 The concept of juvenile delinquency

According to Lauer (1998), the concept of juvenile delinquency was relatively unknown as a distinct area of academic interest to most scholars in sociology and related disciplines until late in the nineteenth century. Prior to that time, juvenile offenders were considered culpable of certain crimes or were punished like adults in the criminal justice system without any special consideration of their age. Lauer (1998) states that the concept began to change in the nineteenth century when a group of reformers set out to redeem the nation's wayward youth

in the United States of America. Following this, was an establishment of a juvenile court system in the United States. Consequently, juveniles were treated differently from adults, and certain acts that were ignored or treated informally came under the jurisdiction of a government agency (Lauer, 1998). Juvenile delinquency means bad or criminal behaviour, usually of young people (Cweba, 1992). However, behaviors considered as delinquent vary across countries and is culturally relative. In this regard, what may be treated as delinquent behaviour in one country or state may not necessarily be treated as such in another, so is the age at which a child may be held legally responsible for his or her actions (Cweba, 1992). It is therefore important to look at the extent of juvenile delinquency in South Africa.

2.3. The extent of juvenile delinquency

South Africa today is devastated by an unprecedented crime wave. Reports of shocking crime statistics daily appear in the media and juvenile delinquency is on the increase. Booyens (2003:48) has noted that South Africais experiencing unprecedented levels of children and youths beingarrested and convicted of crimes. Tshiwula (2004:6) stated that in a violent society such as South Africa, children learn that violence is an acceptable solution for problems. Together with an adverse economic situation, including unemployment, poverty and the availability of guns, South Africa is increasingly confronted with youthful criminals.

According to the Department of Justice and Constitutional Development (now Department of Justice and Correctional Services)report 2013-2014, a total of 21 563 charges were laid against children by the police by end of 2014 financial year. Although it seems high but the figure is lower than 25 517 arrested during 2012/13 reporting period. Of these 21563 charges, only 49 children were sent to prison showing a decrease in children sentenced to imprisonment but an increase in the number of children sentenced to compulsory residence in child and youth care centres as well as some children being referred for community-

based and restorative justice sentences. The 2013/14 annual report from the Department of Justice and Constitutional Development also noted an increase in sexual offences committed by children from 2 968 in 2011 to 3619 in 2012/13 reporting period and now to 3305 cases reported in 2013/14.Research by the Teddy Bear Clinic (2011) reveals that 40% of sex crimes against children were committed by children. Prior to the coming of the CJA in 2010, 30 000 South African children were successfully taken out of the legal system and diverted into educational and life skills programmes instead of serving a sentence or awaiting trial at a correctional facility (du Plessis (2007).

Of particular concern is the involvement of young offenders in violent crimes such as murder, attempted murder, rape and armed robbery. Hosken (2004) writes of a sixteen year old schoolboy who was arrested for 'hacking and stabbing' his mother to death with a kitchen knife. It was found that the mother had been stabbed repeatedly in the head, face, neck, chest and arms. The teenager committed this violent act in a fit of blind fury subsequent to an argument he had with his mother. An article by Sukhraj (2005) depicts an incidence of youth crime. A young male was brutally stabbed to death by two young offenders aged 17 and 19 years respectively, their friend (also a youth) assisted them in abducting the victim and his girlfriend but he was not involved in the murder.

This implies that the problem of juvenile delinquency existed from a long history as noted in the statistical profile and this problem continues to escalate in the present day. The reasons or causes of juvenile delinquency are explained in the next section.

2.4. Socio-criminological explanations of juvenile delinquency

Throughout the history of criminology, criminologists and others interested in deviant behavior of the youth have sought to explain why the youth deviate from the norms of society. The consequence of such explanations is models or theories aimed at explaining causal factors of juvenile delinquency. Explanation

models of juvenile delinquency take a variety of explanations such as biological, psychological and sociological. Criminologists trained in different orientations accept and support theories generated out of their own discipline. Thus, psychologists lean on psycho-criminological explanations and sociologists lean on socio-criminological theories (Whitehead & Lab, 1990:66). The following major socio-criminological theories, social disorganization and differential associationare relevant and can be contextualized to the scope of study. These theoretical assumptions give insight on why the development of law on child justice was important to address these historical and current causes.

2.4.1 Social disorganization theory

Social disorganization theory has its origins in the work of its important advocates like Shaw, McKay, Thomas and Thrasher (Kratcoski and Kratcoski, 1979:79). The theory suggests that the decline of informal controls of the family and society has an effect on juvenile delinquency and requires formal controls to take their place (Hagan, 1987:150-151). Furthermore, the theory asserts that industrialization of cities brings breakdown to the family unit and the processes that normally regulate the behaviour of adolescents. Using the concentric zone theory of Burgess, Shaw and McKay (1969) sought to explain a geographical (ecological) distribution of juvenile delinquency, according to areas of residence for juvenile delinquents (Kratcoski and Kratcoski, 1979:79).

Shaw and McKay (1969) identified areas of social disorganization as truancy, alcoholism, family breakdown and general juvenile delinquency. These community characteristics were correlated with the nature and extent of delinquency and identified the economic status of the families with the community; the family mobility within the community at large; and the heterogeneity of the families with the community (Shaw & McKay, 1969:140; Hagan, 1987:153). The implications of such correlations were that unemployment, poverty and heterogeneity of the family lead to weak control and, in turn, high rates of delinquency. Shaw and McKay (1969) noted that there are

marked variations in the rates of juvenile delinquency between areas of the city; some with high rates, while other show low rates. Rates of truancy and general delinquency vary inversely in proportion to the distance from the centre of the city, that is, the nearer the centre of the city a given locality is, the higher will be its rates of delinquency. Truants, juvenile delinquents and adult criminals are evenly distributed within a given area. The rates of delinquency and crime differ with family backgrounds. High rates of delinquency occur in areas characterized by physical deterioration and high mobility of families. Delinquents living in high rate delinquency areas are more likely to be recidivists than those from low rate delinquency areas (Reid, 1982:134).

Thomas (1923) argued that social disorganization affects social control which is necessary for monitoring balance between wants and needs of individuals. Thomas (1923) identified four requirements necessary for individuals to pursue their wishes, namely security, new experience, response and recognition. To control all of these wants between individuals, the society has instruments and institutions of social control; the family being the primary source of norms and values. The modern urban societies, he noted, weakens the structure of the family by allowing girls to move away from homes in search of wealth. Values such as purity and virginity for females are consequently disorganized and the decline of family control results into delinquent behaviour (Hagan, 1987:151).

Thrasher (1936) was one of the first socio-criminologists to conduct research on gang formation and delinquent behaviour. Thrasher et al (1983:47) maintained that gangs originate naturally during the adolescent years from play groups. Gangs develop in response to the slums of the city where families are in a disorganized state, where there is poor family discipline, and where there is a lack of family controls. In such a situation the conflicts between playgroups lead inevitably to criminal behavior (Kratcoski and Kratcoski, 1979:72). According to Hagan (1987:152), the four wishes identified by Thomas (1923) laid the foundations for the study of gangs by Thrasher. Hagan (1987) argued that needs

for security, new experience, response and recognition made life of the adolescent free and wild. Freedom and wildness find fertile ground in areas of physical deterioration, overcrowding and high family mobility.

Social disorganization theory is linked to the differential association theory as both explain delinquency from a particular cultural atmosphere. The theory of differential association is discussed in the next section.

2.4.2 Differential association theory

Sutherland (1949) advanced the concept of "differential association". This implies that Sutherland's focus was not an association among people, as the phrase implies, but around connections of ideas and behavior (Nettler, 1984:239). Sutherland (1949) hypothesized that "criminal behaviour is learned in association with those who define such behaviour favorably, and in isolation from those who define it unfavorably, and that a person in an appropriate situation engages in such criminal behaviour if, and only if, the weight of favourable definitions exceeds the weight of unfavorable definitions (Sutherland, 1949:234). Sutherland proposed that deviance was an outgrowth of a process of learning. Although his theory intended to explain white-collar crime, it became one of the most systematic and complete theories of delinquency causation. Using the premise of social disorganization theory, Sutherland asserted that such situations provided children with a situation where they could learn to accept deviance as they could conventional behaviour (Whitehead & Lab, 1990:114).

Sutherland (1949) explained that learning include techniques of crime, both complicated and simple; and motives, rationalizations, drives and attitudes. The direction of motives and drives is learned from definitions of legal codes as favourable or unfavorable. A person becomes delinquent because of an excess of definitions favourable to violation of law over definitions unfavorable to the process of learning criminal behaviour by association with criminal and anti-criminal patterns. This involves all of the mechanisms that are involved in any

other learning. While criminal behaviour is an expression of general needs and values, it is not explained by those general needs and values, since non-criminal behavior is an expression of the same needs and values (Sutherland &Cressey, 1974:75-76). Sutherland (`1949) noted that deviant behavior is learned in the same fashion as conforming behaviour. Further, he plays down the influence of the mass media, probably because of the time frame in which the theory was first proposed. For Sutherland, most learning experiences come from primary institutions such as the family, peers and religious institutions. One of the major criticisms leveled against Sutherland's theory was that it is difficult to test empirically and objectively measures of association like priority, frequency and intensity of associations (Trojanowicz and Morash, 1983:50).

All theories are linked to each other and emphasize that deviant behaviour results from values transmitted by primary groups to its individuals. Sutherland's theory maintains that if the juvenile hangs around with delinquent friends he is likely to define deviant behaviour favorably. Both theories show that the family is a primary agent of socialization and behaviour is learned. It is argued by both theories that family dysfunction is the primary cause of delinquency.

2.4.3 Family dysfunction and delinquency

One of the primary responsibilities of the family is socialization. Children are taught "thou shall's" and the "thou shall not's"; teaching them the expectations and goals of society; and teaching them the means of satisfying desires. In this aspect direct control of parents is thought by researchers (Hirschi, 1969; Slocum and Stone, 1963) to have an effect in checking delinquent behaviour. Being supervised by parents with homework, in playing games; and doing household chores serve to ensure that youth look upon parents as dependable "friends" whose supervision is necessary. Parental supervision is reflected in the form of discipline the adolescent receives from parents. Every parent uses some type of discipline in rearing children, even though it may be different from situation to situation and from child to child, as well as in content and form. Researchers

(Glueck and Glueck, 1950, Nye, 1958; McCord et al., 1959) point out that disciplinary practices of parents are important in guiding children toward a clear conception of differences of right and wrong; disciplinary practices that are wrong have serious consequences in the development of child's personality; and some forms of discipline (inconsistent, erratic, physical) lead to certain types of deviant behaviour.

Family control is affected by the extent of affection and rejection the child receives from parents. Research studies (Nye, 1958. Linden & Hackler, 1973) have shown that children, who do not find love and affection from their parents, as well as support and supervision, often resort to forces outside the family which are often deviant in nature. Such parents spend less time with their children, do not praise their children in their achievements, and do not encourage them to do good things. Adolescents who are less attached to parents are relatively free from binding morals of the society. This is a consequence of less affection and rejection from parents (Hirschi, 1969. Nye, 1958, Reiss 1951)

Adolescents who use alcohol and drugs become involved in the juvenile justice process in a number of ways. For a young person, alcohol and drug use are illegal activities as are the dealing in these substances. Beyond that, their use results in other types of delinquent activities such as violence and theft to support the habit. Moreover, it is unquestionable that a large proportion of youths who are involved with the juvenile justice process are regular users of alcohol and drugs. Therefore, it would be artificial to consider alcohol as a separate problem (Trojanowicz and Morash, 1983:322). The significance of the family influence on drug and alcohol abuse lies in the family culture itself. First, adolescents learn to use these substances from parents who are models for abstinence or indulgence. Secondly, sex and age factors are important in determining the extent of indulgence. Thirdly, the family structure has a bearing on abstinence or indulgence. Lastly, besides the fact that in the South African law it is prohibited to sell alcohol to persons under the age of 18 years and an offence to deal or use a

dependency-producing drug, the society does not approve of drunkenness or drug addiction (Middleton, 1982:579-580). This implies the need to recognize the importance of socio-criminological explanations of juvenile delinquency.

2.4.5. The importance of the socio-criminological explanations of juvenile delinquency

The theoretical explanations gave insight to the understanding of the extent and causes of juvenile delinquency. The theories makes very clear that not only does it takes a whole society in its many dimensions, forms and constituents to bring to fruition the rights of children, including those rights of children in need of special protection. The lesson that can be drawn from the theories is the importance of and need for a juvenile justice system through which contradictions, gaps and weaknesses in legislation regarding children in conflict with the law and juveniles deprived of their liberty can become more apparent and more easily addressed. A coherent and unified system is instrumental, since it would bring together various pieces of legislation and illuminates the different actors and their complementary roles in this trans-sectoral arena. It would also help to establish understanding and to foster intersectoral and interdepartmental collaboration. The next section looks at the historical development of juvenile justice system in South Africa.

2.5 History of Juvenile Justice in South Africa

Before an exploration of the development of law on child justice in South Africa, there is need to understand the roots of the development of juvenile justice which influenced South Africa. According to Skelton and Tshehla (2008), no account of child justice in South Africa would be complete without reference to the pre-colonial practices and the effect of African customary law. During the pre-colonial era, under African customary law, childhood was not defined by age but by other defining characteristics such as circumcision or the setting up of a separate household (Skelton and Tshehla, 2008). The welfare of children was tied up with

the communal welfare of the extended family, tribe or group, and children's interests might well be subjugated to the broader interests of the group – thus children were sometimes given over to other relatives to look after cattle or provide companionship, and a common method of surviving lean years was the pledging of girls in marriage (Bennett 1999). Furthermore, Saffy (2003:16) states that customary law relating to children focused on deciding which family had the stronger title to a child – this largely centered on the payment of lobola (bride wealth). Offences were dealt with by traditional leaders' courts. There was no imprisonment or institutionalization of any kind. Crimes were treated as wrongs between individuals and families, to be solved in ways that promoted harmony and well-being in society. Colonization in South Africa caused the customary law system to be overlaid by the Roman Dutch and English legal systems. Corporal punishment, deportation (to Robben Island, for example) and imprisonment for crimes became commonplace (Saffy, 2003:16).

The South African child justice regime was based on the retributive approach which was largely punitive. Children who committed offences had to receive their just deserts like their adult counterparts, with the difference being in the locus (place) of punishment (Saffy 2003). News of child-saving efforts that were happening elsewhere in the world did drift across the Atlantic, and those efforts were emulated by William Porter, the Attorney-General of the Cape Colony who set aside £20 000 for the establishment of a reformatory for juvenile offenders. According to Saffy (2003), this led to the Reformatory Institutions Act in 1879 and the subsequent establishment of the Porter Reform School in Cape Town. Other reform schools were established and, later on, these were transferred from the Department of Prisons to the Department of Education – again an example of a welfarist approach which focused on education and rehabilitation of offenders. Alan Paton was appointed as the first principal for Diepkloof Reformatory when it was transferred to the Department of Education. Further evidence of the influence of the welfarist approach was the provision in the Prisons and Reformatories Act 13 of 1911 which introduced industrial schools. Although the

Reformatory Institutions Act relied heavily on institutional care, it was the first piece of legislation that established the principle that children and young adults should not be imprisoned (Saffy 2003:16) as quoted by Skelton (2008).

Skelton (2005) noted that the Children's Protection Act 25 of 1913(Children's Protection Act), allowed for arrested children to be released by a police official. The Children's Protection Act also provided the option for children to be held in places of safety during the investigation of the offence. An important procedure included in both the 1911 and the 1913 Acts mentioned above, was the power of the court to decline to proceed with a trial in any case concerning a child, and to commit such a child to a government industrial school. This protection has survived through many subsequent enactments and currently exists in section 254 of the Criminal Procedure Act 51 of 1977.

According to Skelton (2005), the majority of child offenders in South Africa remained in a punitive criminal justice system. The Children's Protection Act established the children's court but this did not have criminal jurisdiction, though cases could be referred to it from the criminal court. The Children's Protection Act did stress that the treatment of child offenders was an educational rather than a penal problem. However, the majority of the children in the country were herded through a criminal justice system which paid minimal attention to their special needs as children. Skelton (2005) further noted that the reform efforts in the 1930s to establish a dedicated system for child offenders culminated in the Young Offenders' Bill of 1937. This Bill, if enacted, would have made sweeping changes to the way in which children in the criminal justice system would have been dealt with. Important changes proposed by the Bill included raising the minimum age of criminal capacity from seven to ten years (and the upper limit of *doli incapax* from 14 to 16 years), a ban on imprisonment for children below the age of 16 years, and the abolition of the death penalty for children. This Bill was published at the same time as the Children's Bill with the addition of a few provisions relating to child offenders such as provisions relating to the power of

referral of cases to the children's court and reform schools as a sentencing option. Once the consolidated Bill was passed into law as the Children's Act 31 of 1937, the Young Offenders' Bill faded into obscurity. Thus an important opportunity to establish a separate system for child offenders was lost (Skelton 2005).

Sloth-Nielsen (2003) states that during the 1970s and 1980s, thousands of young people were detained for political offences and this caused local and international outcry from various people. At the time, political organizations, human rights lawyers and detainee support groups rallied to the assistance of many of these children. According to Sloth-Nielsen (2003), the efforts centered on children involved in political activism, but during this period there were equally large numbers of children awaiting trial on crimes which were non-political in nature but which could invariably be traced to the prevailing socio-economic ills caused by Apartheid. There was no strategy to ensure that these youngsters were treated humanely and with adherence to just principles. By the end of the 1980s the number of political detentions waned, but the country's police cells and prisons continued to be occupied by large numbers of children caught up in the criminal justice system. The 1989 Harare International Children's Conference provided a springboard for the development of the child rights movement in South Africa and this gave rise to development of diversion programmes for children in conflict with the law.

2.5.1 The Rise of Diversion Programmes

Skelton and Potgieter (2002) have noted that in 1992, Non Governmental Organizations (NGO's) initiated a campaign to raise national and international awareness about young people in trouble with the law. The initiative was launched by the National Institute for Crime Prevention and Reintegration of Offenders (NICRO), and constituted an important milestone in South Africa's child justice history. The NGO's issued a report which called for the creation of a comprehensive juvenile justice system, for humane treatment of children in

conflict with the law, for diversion of minor offences away from the criminal justice system and for systems that humanized rather than brutalized young offenders. Skelton and Potgieter (2002) further stated that NICRO decided to offer courts alternative diversion and sentencing options that aimed to promoting the emerging restorative justice concepts specifically focused on youth. With no enabling legislation in place, the diversion programmes now offered by NICRO are widely accepted, are the subject of various National Prosecuting Authority (NPA) circulars and have been implemented in practice in most urban areas of the country. However, a caution was sounded that in the absence of clear guidelines concerning diversion and alternative sentencing, there are substantial inconsistencies and contradictions regarding the cases that are considered (Skelton and Potgieter 2002). These diversion programs have come to be used as pre-trial options, obviating the need for court appearances and criminal trials. The legal mechanism that permitted the use of diversion programs was the prosecutors' discretion to withdraw charges. Magistrates and judges have generally played a limited role in the referral of children to diversion programs. The benefits of diversion over criminal prosecution and trial are clear. Children avoid detention in police custody where they often come into contact with gangs and hardened criminals. Court time is saved because prosecutors usually withdraw cases from the court roll on condition that young offenders comply with the requirements of diversion programs. Children avoid the negative effects of a criminal record, which can brand them for life and impair their chances of obtaining employment (Sloth-Nielsen, 2003).

During diversion programs, children spend their time learning life skills, rather than wasting their time in the fruitless exercises of being tried, convicted, and sentenced (all too often, convictions involve conditionally suspended sentences). According to Muntingh (1998) longitudinal studies appear to show that diversion is effective in preventing recidivism. Some of the more established programs have been subjected to evaluation, with extremely positive results. A major follow-up study relating to 600 children who had participated in the life skills

program in the mid 1990s revealed that the re-offending rate of participating children was less than 6%. This study also found a high rate of content retention from the program among the children and reported that the intervention had improved family functioning, social adaptation, and the children's ability to resist negative peer group influences (Muntingh, 1998)

In so far as they are all non-custodial at this point, diversion programs appear to be cost effective (Sloth-Nielsen, 2003). Thus, the most widely known program, the Youth Empowerment Scheme (YES) functions on group basis once a week for 8 weeks. YES focuses on the negative effects of crime, gender sensitivity and anger management. Chiefly aimed at the large numbers of children charged with minor offences – petty stealing, minor assaults, and damage to property – data showed that the typical diversion candidate was black, 16 or 17 years old, and in trouble for shoplifting, or theft of goods valued at less than R100 (about $15 USD). Steyn (2003) states that instead of the "one size fits all" intervention of the initial (very general) life skills program, the focus shifted to more intensive programs and to specialized youth-justice issues. For example, a dedicated program aimed at children charged with sexual offences was established in 1998. This program is currently used in a variety of different settings, urban and rural, in South African provinces. Subsequently, adventure education and wilderness education programs became linked to the juvenile justice system. The intensive, experiential learning undergone by participants in these programs was shown to be beneficial for "high-risk children" and those involved in more serious offences (Steyn, 2003).

Sloth-Nielsen (2003) has noted that non-governmental and voluntary efforts to expand access to diversion programs also began to attract community-based initiatives. This was promoted by the scarcity of resources and lack of established organizations in smaller towns outside the main provincial cities. It was also predicated on the need to communicate the effectiveness of diversion (as opposed to formal prosecution) to communities affected by crime.

Importantly, community-based programs also link friends and families of high-risk children. The overall proposition is that offending and delinquency are best dealt with (in a positive way) within the circle of a child's family and community. This premise underpins the conceptualization of the program (Sloth-Nielsen, 2003). Besides diversion programme, a number policy changes began to take place regarding children in conflict with the law.

2.5.2 Policy Changes and Development of Law on Child Justice

In November 1993 an international conference was held on children in trouble with the law. At this conference, it was agreed that as current policy and legislation were fragmented, there was a need to develop a new comprehensive juvenile justice system (Skelton, 2008). The conference report proposed that a Juvenile Justice Drafting Consultancy be set up to draft new juvenile justice legislation for South Africa. A new vision needed to encompass the charging, arresting, diverting, trying and sentencing of young offenders in a system that would affirm the child's sense of dignity and worth and clearly define the role and responsibility of the police, prosecutors, probation officers and judicial officers with due regard to the rights of victims (Skelton,2008).

Skelton (1999) states that Mandela, in an address to parliament said that:

> The government will, as matter of urgency, attend to the tragic and complex question of children and juveniles in detention and prison. The basic principle from which we must proceed from now onwards is that we must rescue the children of the nation and ensure that the system of criminal justice must be the very last resort in the case of juvenile offenders.

In considering the history of child justice in South Africa, it is necessary to make mention of the use of corporal punishment as a sentence. This was based on the idea articulated in the 1870s that children should be 'birched and not branded as

criminals' (Venter 1959). This suggests that whipping was initially seen as a reformist alternative to the system of incarceration, but the use of corporal punishment for juvenile offenders was to become shockingly popular over the next century, and by the early 1990s the state was carrying out more than 30 000 whippings a year (Le Roux 2004). It was thus not surprising that issue of whipping as a sentence for juveniles was the first matter concerning juvenile offenders to come before the Constitutional Court established by the first democratic government. In case of *S v Williams and Others*, the Courtstruck down whipping as being unconstitutional on the grounds that it was cruel and unusual punishment.[1]In this course of the judgment, Langa (1995) made important remarks regarding law reform. He observed that there was a growing interest in moves to develop a separate juvenile justice system. The Court further observed that there was much room for creative methods to deal with the problem of juvenile justice. Evidence was placed before the Court of various alternative sentencing options and these were recognized by the Court, as was the value of non-custodial correctional supervision. Langa (1995) concluded that these processes, still in their infancy, could be developed through involvement by State, non-governmental agencies and institutions which were involved in juvenile justice projects.

According to the Southern Africa Litigation Centre (SALC) Project Report (2000:1) on 16 June 1995, South Africa's commitment to the plight of children within the criminal justice system was further endorsed by the ratification of the United Nations Convention on the Rights of the Child (CRC). South Africa was now obliged, in terms of article 40(3) thereof to establish laws, procedures and institutions specifically applicable to children in conflict with the law.

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[1]*S v Williams and Others* (CCT20/94) [1995] ZACC 6; 1995 (3) SA 632; 1995 (7) BCLR 861 (CC) (9 *June* 1995)

Gallinetti (2009) has noted that the establishment of the Inter-Ministerial Committee on Youth at Risk (IMC) in 1995 was arguably the most influential policy development in relation to child justice. The Committee consisted of the Ministries of Welfare, Justice, Correctional Services, Safety and Security, Education, Health and Reconstruction and development programme as well as NGO's. The purpose of the IMC was to deal with children in custody, but it set itself the goal of the development of proposals for the transformation of the entire child and youth care system for "at risk" children. From 1996-1998 the IMC set up seven pilot projects aimed at testing, in a practical way, key facts of child justice models.

One of the other areas highlighted by the wok of the IMC was diversion. The first attempt to incorporate diversion in an official document was through the inclusion of recommendations on diversion in the interim policy recommendations of the IMC. This was the first government document to formally acknowledge the limited availability of diversion programmes and the unequal access to these programmes. A key policy development that has risen from the work of the IMC werethe Diversion Guidelines for Prosecutors (Gallinetti, 2009).

Section 28 (2) of the Constitution of South Africa requires the best interest of the child to be of paramount importance in every decision taken in relation to the child. Section 28 (1) (g) sets out clear principles relating to the detention of children, including that detention should be a measure of last resort and must be used for the shortest appropriate period of time. Furthermore, children should be kept separate from adults in detention and be treated in a manner and in conditions that take into account the child's age. In this way, it can be said that the Bills of Right in the Constitution sets a new benchmark against which to measure the law relating to children in the criminal justice system.

Gallinetti (2009) has asserted that the Department of Justice and Constitutional Development requested the South African Law Commission (now known as the South African Law Reform Commission (SALRC) to include an investigation regarding juvenile justice in its programme, which led to the appointment of a project committee. The committee commenced with its work in the beginning of 1997. A consultative process was followed and a report accompanied by a proposed draft Child Justice Bill was handed to the Minister of Justice and Constitutional Development in August 2000. The Bill was introduced in Parliament towards the end of 2002 after a series of public hearings were deliberated upon by the Portfolio Committee on Justice and Constitutional Development during 2003.The Bill was finally enacted into an Act from 1 April 2010. This chronology of events shows that the CJA has a long and protracted history. The next section concludes the chapter.

2.6 Summary

This chapter sought to explore the extent and theoretical explanations for juvenile delinquency and provided insights into the historical development of juvenile justice in South Africa. The chapter argues that because South Africa never fully embraced a separate juvenile justice model, children were subjected to the mainstream criminal justice system during the whole of the twentieth century. The end of the 1940s saw South Africa slip into a deeply negative era. The apartheid years yielded nothing positive for juvenile justice. South Africa in 1994 was brimming with positive law reform possibilities. The legislative developments of the new South African government from 1994 were optimistic and indicated a commitment to treating children differently and establish a separate juvenile justice system through the implementation of the CJA. These decisions removed the informal procedures and conferred adversarial procedures that, today, characterize international juvenile justice. The next chapter discusses the international and regional frameworks which influence the current developments of CJA in South Africa.

CHAPTER 3: THE INTERNATIONAL FRAMEWORK AND CURRENT DEVELOPEMENTS OF CHILD JUSTICE IN SOUTH AFRICA

3.1 Introduction

Before the establishment of the new child justice system, South Africa had one criminal justice system that dealt with all persons, adults and children. According to Skelton (2008), the system for controlling juvenile delinquents was contained within the general criminal justice system which meted out to children or adolescents above a certain age the same criminal justice rules or procedures as adults with little or no differentiation or reduction of the applicable punishment measures. The case that children have rights has to a large extent been won. The burden now shifts to monitoring how well governments honor pledges in their national laws and carry out their international obligations.

This chapter is divided into two parts, the international and regional instruments as well as current developments in the implementation of the Child Justice Act. First, this chapter looks at the development of international and regional norms and standards on juvenile justice such as the United Nations Convention on the Rights of a Child (CRC) (United Nations,1989), the United Nations Minimum Rules for Administration of Juvenile Justice (the Beijing Rules) (United Nations, 1985), the United Nations Standard Minimum Rules For the Protection of Juveniles Deprived of their Liberty (the UNJDL Rules) (United Nations,1990), the United Nations Guidelines for Prevention of Juvenile Delinquency (the Riyadh Guidelines)(United Nations, 1990) and the African Charter on the Rights and Welfare of the Child (ACRWC) (African Union,1990). These instruments provide a comprehensive framework at the international level within which the issue of child justice should be understood. By ratifying these international instruments, South Africa is obliged to establish laws and procedures to deal with children in conflict with thelaw. The second part of this chapter explores the current developments in the child justice system in South Africa which contains an overview of the Child Justice Act (CJA) as well as a discussion of the new

concepts and procedures introduced by the CJA. The last part of this chapter discusses and explores the challenges in the implementation of the CJA since its inception. The next section looks at the binding and non-binding international instruments.

3.2 International Instruments

There is an array of international instruments which provide the normative basis for child justice system at the international level. The rights of children in conflict with the law should be seen against a wider backdrop of human rights. Paragraph 5 from the Vienna Declaration on Human Rights and Programme of Action states that:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[2]

The international standards require countries to promote the establishment of laws, procedures, authorities and institutions that respect the rights of children in conflict with the law and are directed towards their rehabilitation and reintegration into society.

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[2] *Vienna Declaration and Programme of Action. Adopted by the World Conference on Human Rights in Vienna on 25 June 1993*

There are various rules and guidelines provided for in the international framework on circumstances under which children can be deprived of their liberty and the conditions under which they should be kept while respecting children's human rights. These rules are embedded in the instruments such as the CRC and prior to the adoption of the CRC; the international community had adopted a set of non-binding rules in the juvenile justice milieu. These include the Beijing Rules, the UNJDL Rules and the Riyadh Guidelines. The norms from the above instruments were incorporated into the CRC.

3.2.1 United Nations Convention on the Rights of the Child

The General Assembly of the United Nations by its (Resolution 44/25 of November 20, 1989) adopted the CRC, which has come to be described by Freeman (1997), not only as "a landmark for children and their rights, but also as a "widely acclaimed and almost universally endorsed Convention." The CRC for example, one of its distinctive features is that its monitoring and implementation by the Committee on the Rights of the Child (the "Committee") gave rise to a new model of implementation called the General Measures of Implementation. The CRC constitutes a true challenge for the States because unlike many other international instruments, besides requiring legislative amendments and institutional adjustments, it also requires the adoption of an adjustment to a children's rights oriented philosophy.

The CRC and other related international instruments provide the determining international framework within which children in conflict with law should be managed. There are various underlying principles in the CRC. Article 4 of the CRC provides that:

> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the

present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

This place an obligation on states to establish a legislative system that gives effect to the rights contained in the CRC. The deprivation of a child's liberty and the administration of juvenile justice are dealt with in Articles 37 and 40 of the CRC. Article 37 of the CRC stipulates that: States Parties shall ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or Punishment. It further states that no child shall be deprived of his or her liberty unlawfully or arbitrarily. Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

Article 40(1-3) of the CRC provides for a concise yet comprehensive framework within which States are obliged to fashion a child justice system. States Parties recognize the right of every child alleged as, accused of, or recognized 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 takes 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. Every child alleged as or accused of having infringed the penal law has at least the guarantee to be presumed innocent until proven guilty according to law. The child must be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other

appropriate assistance in the preparation and presentation of his or her defence. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular; the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legalsafeguards are fully respected. There is need to enforce the CRC for compliance purposes.

3.2.1.1 Enforcement of the CRC

The Committee on the Rights of the Child is the body of 18 Independent experts that monitors implementation of the CRCby its State parties and its two Optional Protocols to the Convention, including the Optional Protocol on the Sale of Children (OPSC), Child Prostitution and Child Pornography and Children Involved in Armed Conflict (OPAC).All states parties are obligated to submit reports to the Committee, explaining how they have implemented their treaty obligations through domestic laws, policies and practices. States must submit an initial report two years after acceding to the Convention or Optional Protocol and then periodic reports every five years. Non-governmental organizations (NGO's) are encouraged to submit an alternative report ('Shadow Report') which provides information on specific issues that the State report either omits or is unaware of. The Committee examines each report alongside the alternative submissions and then issues its findings and recommendations to the state party in the form of "Concluding Observations"

These Concluding Observations highlight positive achievements and point out areas for improvement, setting out a list of recommendations to ensure the State complies with its obligations under the CRC and its Optional Protocols. The Concluding Observations are an important advocacy tool at the national level as well as the international level. Although the recommendations are not legally

binding under international law, they are an official United Nations document and form part of the discourse on the State's compliance with international human rights law.

At the national level, Concluding Observations are important advocacy tools and can be seen as an authoritative document in the development of National Action Plans, draft legislation and other regulations or policies. Concluding Observations can also be used as a legal source in court cases challenging the constitutionality of laws or advocating for child victims' right to access justice and seek remedy and reparations for their exploitation.

Where there is a regional human rights mechanism, the United Nations Concluding Observations serve as an important and authoritative document which can be relied upon to show state implementation of international law, as well as an advocacy tool to push for recommendations at the regional level.

The Committee produces General Comments to explain the rights contained in the CRC and provide guidance with respect to particular issues. This helps States improve both the way they write their reports and the way they implement the CRC and its Optional Protocols. NGO'Swith relevant expertise can get involved in the preparation of General Comments.

General Comments provide an authoritative interpretation of the rights contained in the articles and provisions of the CRC and its OPSC and OPAC. They are based on the Committee's experience of monitoring reports from state parties and the systematic violations, misunderstood provisions or emerging issues relevant to the treaties. The Committee has adopted eighteen General Comments and General Comment 10 is relevant to children in conflict with the law.

3.2.1.2 General Comment 10 on CRC

The Committee on the Rights of a Child, during the 44th session in Geneva from January to February 2007, issued a General Comment No 10 (2007) on the topic of Children Rights in Juvenile Justice (United Nations, 2007). The General Comment 10 discusses the leading principles underlying a comprehensive policy relating to juvenile justice. The rationale behind General Comment 10 is to provide state parties with more elaborate guidance and recommendations in their efforts to establish a juvenile justice system that complies with the CRC. The most important principles highlighted by the General Comment 10 are:

- The principle of the best interest of the child.

The Committee clearly stated that Article 3 of the CRC which deals with the best interest principle should be interpreted to mean that the traditional objectives of criminal justice, such as retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety (United Nations, 2007 paragraph 10).

- Intervention

Paragraph 25 of General Comment No.10 enjoins states parties to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings particularly children who commit minor offences. This should be the case with such offences as shoplifting or other property offences with limited damage. Statistics in many states parties indicate that a large part, and often the majority, of offences committed by children fall into these categories. It is in line with the principles set out in article 40 (1) of CRC to deal with all such cases without resorting to criminal law procedures in court. In addition to avoid stigmatization, this approach has good results for children and is in the interests of public safety, and has proven to be more cost-effective.

As noted in paragraph 26 of General Comment No.10, the Committee provided that state parties should take measures for dealing with children in conflict with the law without resorting to judicial proceedings, as an integral part of their juvenile justice systems. Paragraph 27 left the discretion with the states on the exact nature and content of the measures for dealing with children in conflict with the law without resorting to judicial proceedings.

The Committee did however, emphasized clear guidelines for the use of diversion, when proceedings are instituted against a child, the juvenile justice system should provide ample opportunities to deal with such children by using social or educational measures, and deprivation of liberty should be strictly limited, particularly at the pre-trial stage [United Nations, 2007). This means that states parties should have in place a well-trained probation service to allow for the maximum and effective use of measures such as guidance and supervision orders, probation, community monitoring or day report centres, and the possibility of early release from detention (United Nations, 2007 paragraph 28).

- The minimum age of criminal responsibility

Article 40 (3) of the CRC requires state parties to seek to promote the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law, but does not mention a specific minimum age in this regard (United Nations, paragraph 31). In the absence of a definite minimum age of criminal responsibility in the CRC, the Committee urged state parties not to set their minimum age of criminal responsibility below the age of 12 years (United Nations, 2007 paragraph 31).

- Sentencing

In General Comment No.10, the Committee further emphasized that magistrates and judges should be provided with a wide variety of possible alternatives to institutional care or prison so as to assure that deprivation of liberty is used only as a measure of last resort and for the shortest appropriate period of time (United Nations, 2007 paragraph 71). The proportionality principle was again emphasized, as well as the fact that States may not use a strictly punitive approach to deal with children in conflict with the law for this will deprive children of their liberty. Paragraph 71 of this General Comment emphasizes that, in cases of severe offences by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need of public safety and sanctions. In the case of children, such considerations must always be outweighed by the need to safeguard the well-being and the best interests of the child and to promote his/her reintegration.

The significance of the CRC is that it promotes a philosophy of respect for children**,** recognizes children as subjects of legal rights**,** challenges traditional views of children as passive recipients of care and protection and insists that children are entitled to have their needs met. South Africa's commitment to the plight of children in the criminal justice system was to a large extent endorsed with the ratification of the CRC on 16 June 1995. This means that by ratifying the CRC, South Africa undertook to develop a specialized legal framework and infrastructure for dealing with children in the criminal justice system. Skelton and Tshela (2010) states that the CRC deals with a broad range of children's rights and certain provisions of CRC as noted above provided South Africa with a comprehensive framework within which the issues of child justice must be understood. These provisions reflect a child–centered approach and set a high standard of rules for the administration of juvenile justice. The following section discusses some of the international soft law instruments on child justice.

3.2.2 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)

The Beijing Rules were the first non-binding international instrument to comprehensively detail norms for the administration of juvenile justice with a "child rights and development-oriented" approach. The Beijing Rules were adopted in 1985 by the Seventh Congress on the Prevention of Crime and the Treatment of Offenders, marking a significant milestone in the development of juvenile justice. The Beijing Rules provided the blueprint of the essential elements that an effective child justice system must contain, which includes the principle of proportionality. This Beijing Rule 5.1 clearly states that "the juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offender and the offence". This is a very important principle when a child is sentenced, as reactions to children who commit offences should also be designated as to ensure the welfare of the young offender. Rule 11 of the Beijing Rules centralized the principle of diversion. It provides that "consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by a competent authority". This rule goes further and envisages the involvement of the individual and the community in diversion. Rule 11.3 clearly states that diversion involving community service or other services should only be done with the consent of the child and his or her parent or guardian. Rule 11.4 of the Beijing Rules requires that efforts be made to provide for community programmes such as temporary supervision, restitution and compensation.

Rule 14.1-2 provides that where a child has not been diverted; the child should be dealt with by a competent authority. These proceedings must aim to serve the best interests of the child and must be conducted in an atmosphere of understanding. Rule 15 states that a child shall have the right to be legally represented in any proceedings against the child, and where a child cannot afford legal representation, the child can apply for free legal aid in countries

where provision is made for such a service. Rule 17 also provides guiding principles with regard to sentencing, such as the principle of proportionality and the wellbeing of the child as a central consideration in his or her case. The least possible measures which restrict or remove the child's liberty are stressed and corporal punishment is prohibited. The Beijing Rules conclude that research and evaluation of newly developed child justice systems are imperative so as to constantly develop in order to meet the changing realities.

This has been the case with the development of child justice in South Africa. The Beijing Rules provide a framework within which a national juvenile justice system should operate. They set standards for a fair and humane response to juveniles who find themselves in conflict with the law from the time they are arrested, throughout the ensuing processes of investigation, prosecution, adjudication and disposition, non-institutional treatment, institutional treatment and aftercare. The Rules also apply to juveniles who may be punished for any specific behaviour not punishable if committed by an adult (that is, "status offences," such as truancy and curfew for minors), juveniles in welfare and care proceedings and young adult offenders. Principles enunciated within the Beijing Rules have been encompassed in South Africa's CJA and provisions of the CRC (Brink (2010). The children in conflict with the law are protected from deprivation of their liberty as a set out in the next rule.

3.2.3 United Nations Standard Minimum Rules for the Protection of Juveniles Deprived of their Liberty

The United Nations Standard Minimum Rules for the Protection of Juveniles Deprived of their Liberty(UNJDL) is one of the three international instruments that seek the primary goal of regulating the management of institutions for young people and take into account the special entitlements of children. These rules, however, are not only applicable to juvenile justice institutions but most importantly; apply to deprivations of liberty based on children's welfare and

health. Section 3 of the Fundamental Perspectives set out in the UNJDL Rules sets out the purpose thereof, namely:

> The Rules are intended to establish minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms, and with a view to counteracting the detrimental effects of all types of detention and to foster integration in society.

This includes those held in custody during the pre-trial and trial stage as well as those sentenced to imprisonment. Deprivation of liberty is defined as meaning any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which this person is not permitted to leave at will.

Skelton (2008) noted that in the South African situation this definition would include children awaiting trial in places of safety, those placed in schools of industry and those sentenced to reform schools. The latter terminology has changed with the adoption of the Children's Act 38 of 2005 – these institutions will now be referred to as 'child and youth care centres'. The overriding message of the JDLs is that young people under the age of 18years should not be deprived of their liberty except as a measure of last resort, and that where this does occurs, each young person must be dealt with as an individual, having his or her needs met as far as possible. There is an emphasis on preparing the young person for his or her return to society from the moment of entry into the detention facility. The JDLs start off with a number of fundamental principles, the first of which states that the juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles.

A major portion of the JDLs governs the management of juvenile facilities, including their administration, the physical environment and services they offer, and disciplinary procedures considered appropriate. Compliance with all of the

above is assured through the requirement of regular and unannounced inspections and an independent complaints procedure. The JDLs conclude with a section on the appointment and training of specialized personnel to deal with young people deprived of their liberty. This is elaborated on further by section 5, which states that “The Rules are designed to serve as convenient standards of reference and to provide encouragement and guidance to professionals involved in the management of the juvenile justice system”.

The JDLs are extremely comprehensive, with detailed reference to a large number of issues which may be of importance to the daily lives of young people in prison, and are set out in 87 rules. The JDL Rules do not have the same force of law as the provisions of the international obligations that South Africa has incurred on account of its ratification of the CRC, which is an international treaty agreement but have nevertheless influenced child justice legislation in South Africa. Another non-binding instrument is the United Nations Guidelines for the Prevention of Juvenile Delinquency.

3.2.4 United Nations Guidelines for the Prevention of Juvenile Delinquency

The Riyadh Guidelines outline the basic characteristics of children as fully-fledged human beings. They emphasize the promotion of the welfare and well-being of the child. Cappelaere (1996) states that in the First Congress on Crime Prevention and Treatment of Offenders (1955), juvenile delinquency was treated as a broad category. It encompassed not only problems related to youthful offenders but also to abandoned, orphaned and maladjusted children. The Second Congress (London, 1960) already recommended limiting the concept of juvenile delinquency to violations of criminal law, excluding vaguely anti-social behaviour or rebellious attitudes that are widely associated with the process of growing up. The Riyadh Guidelines deal with the three main environments of the socialization process (family, school and community); the mass media; social policy legislation and juvenile justice administration (Cappelaere 1996).

The Riyadh Guidelines give guidance to States for strategies to prevent children from becoming involved in the commission of crimes. The Riyadh Guidelines do not provide quick or easy answers. They present the long answer to the big question of what to do about children committing criminal offences within the context of development. Real efforts must be made to provide a continuum of services which tackle the problem of juvenile offending before it occurs, followed by supporting services based on the family and the community. Without this developmental approach, no new child justice system will be effective. The Riyadh Guidelines propound a social policy focusing on the centrality of the child, the family and the involvement of the community, which are cardinally important to the development of a juvenile justice system. The Riyadh Guidelines are characterized by a verbose drafting style, with many complex ideas being linked together in intricate statements. This makes it difficult to distil the information into a succinct form. Perhaps this is because the idea of prevention is so intricately connected with issues of social philosophy that it inevitably needs more words than usual to formulate provisions on such a matter (Cappelaere 1996). Shortly after the United Nations instrument's entry into force, the Organization of African Unity (now the African Union) adopted the African Charter on the Rights and Welfare of the Child (ACRWC) which also provided the full range of children's rights but taking into consideration the virtues of the African cultural heritage. The next section discusses regional instruments relevant for child justice with particular focus on the African system for the protection of human rights.

3.3 The Regional Instruments

3.3.1 The African Charter on the Rights and Welfare of the Child

Member States of the Organization of African Unity ("OAU") adopted a Declaration on the Rights and Welfare of the African Child in 1979, which recognized the need to take all appropriate measures to promote and protect the rights and welfare of the African child. This formed the basis for the African Charter on the Rights and Welfare of the Child ("ACRWC"), which was adopted

in 1990 by the Assembly of Heads of States and of Governments of the then OAU and which entered into force in 1999. The African Charter on the Rights and Welfare of the Child (ACRWC) sets binding regional standards in the sphere of child justice on all its signatories.

Sloth-Nielsen (1996) states that, although inspired by trends in the UN system, the ACRWC prides itself on its “African perspective of rights,” and rather than replacing the existing standards in the CRC, it adds to them. It was intended to be a complementary mechanism to that of the UN in order to enhance the enjoyment of the rights of children in Africa. Its conceptualization of the rights and welfare of the African child takes into consideration the virtues of the African cultural heritage, historical background, and the values of the African civilization. Viljoen (2000) states that such a focus on African children is important because in many respects, “children are more likely to be victims of human rights violations than adults, and African children are more likely to be victims than children on other continents”. Causes of human rights violations in Africa, such as poverty, warfare, famine, and harmful cultural practices have a disproportionate impact on the continent’s children. This can result in children being neglected and in conflict with the law.

Since the entry into force of the ACRWC, considerable progress has been made towards making children’s rights visible in a variety of domains on the continent. As a regional treaty, the ACRWC has been described, in comparison with others, as a pioneering treaty and “the most progressive of the treaties on the rights of the child”. The ACRWC brings about a paradigm shift in attitudes and understanding of child rights. The challenge is to translate the provisions in the charters into concrete improvements in children’s day-to-day lives. African states need to ensure that they move away from seeing the provisions as standards to aspire towards, to operational obligations.

Like the CRC, the ACRWC is a comprehensive instrument that sets out rights and defines universal principles and norms for the status of children. The ACRWC and the CRC are the only international and regional human rights treaties that cover the whole spectrum of civil, political, economic, social and cultural rights. Both the ACRWC and the CRC define a child as a human being under the age of eighteen; although the CRC goes further to say unless majority is attained earlier under the law applicable to the child. In view of the divergent criminal justice systems in Africa, having a definitive age for children under the ACRWC is applauded as commendable. It is a second global and first regional binding instrument that identifies the child as a possessor of certain rights and makes it possible for the child to assert those rights in domestic proceedings. The ACRWC therefore adopts a holistic approach to issues relating to the rights and welfare of the child by affirming the principle that rights are indivisible and interdependent.

Children in most African countries constitute fifty percent of the population, and in recent years, there has been a lot of creation of children's rights and law across the continent (Odhongo, 2005). Until recently, most African juvenile justice systems were modeled on the ideology of the justice-welfare model as they existed at the time of reception of these laws. Odhongo (2005) noted that in recent years, domestication of children's rights across the continent continues to take place at different paces and in varied fashions. While some states elaborate children's rights in African constitutions, others do not. Further, some states have enacted children's laws either covering both welfare and justice of children in one statute or separately. Odhongo (2005) states that the South African constitutional clause pertaining to children's rights is the most extensive constitutional protection for children anywhere, while the first comprehensive Children's Act on the continent was adopted in Uganda in 1996. According to Sloth- Nielsen (1996) "these endeavors have the aim of reshaping the colonial heritage, of modernizing and synthesizing child law, and of domesticating international human rights standards, and of targeting especially vulnerable groups of children for enhanced

protection. This protection is as important when the child is in conflict with the law, as it is when his welfare is in jeopardy. The modernization of laws in Africa has seen a lot of cross-border fertilization, which has most extensively been in the field of child justice both from the programmatic and legislative points of view. Skelton (2008) noted that successful child justice reforms have been introduced in many African jurisdictions, with a "growing continental emphasis on diversion and alternative programmatic responses to children in conflict withthe law," which has seen the incorporation of restorative justice as an important element of a comprehensive child justice regime.

The monitoring body, the African Committee of Experts on the Rights and Welfare of the Child ("ACERWC), has an extensive mandate to ensure state parties comply with their treaty obligations. The ACERWC can receive state reports, individual communications as well as conduct ad hoc missions and onsite visits to states considered to be violating their treaty obligations and it also has standing before the African Court of Human and Peoples' Rights. At present, the ACRWC has been ratified by forty seven out of the fifty-four African nations.

The preamble to the ACRWC reaffirms the proclamations of the 1979 Declaration on the Rights and Welfare of the African Child and explicitly recognizes that the child in Africa "occupies a unique and privileged position in society." The ACRWC's juvenile justice provisions are similar to those in the CRC and in certain respects the CRC provides for more obligations than the Charter. In Article 5, which provides for the inherent right to life, the ACRWC prohibits the death penalty for crimes committed by children, but is silent regarding its position on life imprisonment. This omission is unfortunate because contemporary human rights law establishes that life imprisonment without a possibility of release is unacceptable for children. Article 17 of the ACRWC incorporates a number of basic principles on which a juvenile justice system should be based. A child accused or found guilty of a crime is entitled to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the

child's respect for human rights and fundamental freedoms of others. The analysis of Article 17 is that, it breaks new ground for the protection of children's rights in three respects. In the first place, it provides for the speedy determination of matters involving children.

Secondly, unlike the CRC, Article 17(3) expressly and clearly provides that reformation and re-integration of the child must be the essential aim of treatment of the child during trial and after conviction. This strengthens the contention that "rehabilitation is a right of every prisoner." Thirdly, Article 17(2) (c) (iii) guarantees every child the right to be afforded legal and other appropriate assistance in the preparation and presentation of his or her defense. Again, this formulation is not qualified in any way and finds no comparison in any other human rights instruments. Another safeguard in Article 17 is that the press and the public are prohibited from the trial of a child. However, the strictness of the child's privacy is more in the best interests of the child than is the need for exposing human rights violations through the media. Needless to say, the exposure of the violations can still be achieved without the media necessarily being present at trial and divulging the identity of the child. South Africa provides a good example of ensuring the right to privacy regarding the identity of child offenders as seen in the case of *DPP KZN v. P*were a twelve-year-old girl was convicted of her grandparent's murder, but her identity has remained private to date.

Article 17 of the ACERWC also provides that children be separated from adults in their place of detention or imprisonment. The importance of this provision cannot be emphasized enough as it is a problem in Africa, According to Article 17 of ACERWC, many states parties still have a long way to go in achieving full compliance when it comes to child justice.

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[3]*DPP KZN v. P (2006(1) SACR 243, SCA),*

The following section discusses child justice provisions under the South African constitutional and legislative framework.

3.4 The South African Constitution

The South African Constitution of 1996 has entrenched a section on children's rights. Section 28 constitutes a 'mini-charter' of children's right. It covers diverse issues such as civil and political rights, including the rights to a name and nationality (section 28(1) (a); socio-economic rights, for instance the right to basic nutrition, shelter, basic health care services and social services (section 28(1) (c); child justice (section 28(1) (g). The Constitution further entrenches the best interests of the child principle (section 28(2)). Section 28(2) requires that the best interests of the child be of paramount importance in every decision taken in relation to a child. Section 28(1) (g) sets out clear principles relating to the detention of children, including that detention should be a measure of last resort and used for the shortest appropriate period of time. Furthermore, children should be kept separately from adults in detention and treated in a manner, and kept in conditions that take account of the child's age. Of relevance to child justice is section 35 of the Constitution which deals with the rights of arrested and detained persons and although not limited to children, applies equally to them as it does to adults. Some of the rights contained in section 35 include the right to remain silent, the right to a fair and speedy trial, and the right to a legal representative and if an accused cannot afford one, the right to be assigned one by the state if substantial injustice would otherwise result. These provisions of the Constitution gave rise to the development to separate legislation for children. In the next section it is essential to look at the current developments of child justice in South Africa.

3.5 The Child Justice Act

This section will illuminate current law and practice on the administration of juvenile justice in South Africa under the CJA. Apart from gauging the extent to which the provisions of the statute are sensitive and responsive to the welfare of children in conflict with the law, an overview of the CJA will also help assess the legislation's level of compliance with the international and regional standards outlined in the preceding section.

The CJA was enacted on 1 April 2010, after more than a decade of lobbying, advocating, debating and discussions to ensure the progressive establishment of a child justice system in South Africa. The CJA represents the commitment of the South African government to implement international obligations pertaining to the universal protection of the rights of children in conflict with the law. It further embraces the constitutional commitment to ensuring that children are not detained except as a measure of last resort and then only for the shortest possible time. However, in instances where the imposition of an imprisonment sentence is inevitable, the CJA provides measures to protect the constitutional right of a child not to be detained with adult inmates, but to be kept in conditions that take account of his or her age. Section 2 of the CJA regulates the objects of the Act, whereas section 2(a) reaffirm and entrench the child's constitutional rights as contained in section 28 of the Constitution. It thus gives effect to the provisions of the Constitution. Section 2(b) of the CJA further entrenches the Constitution by promoting the "spirit of ubuntu".

It is important to note that the past years of implementation helps us to look back and trace footprints left by the collective endeavors of the various stakeholders within the child justice sector to ensure the progressive establishment of a child justice system in South Africa. According to a research done by the Department of Justice and Constitutional Development in 2011-12, the inter-sectoral implementation refers to the collaboration of stakeholders to enhance a separate justice processes for children in conflict with the law. These first years are an

exploratory learning phase for all stakeholders. Most importantly, it represents a time of departure from an adult justice system to a child justice system that is designed to convert a child in conflict with the law into a law abiding citizen who can add value to the country in the future. A central feature of the CJA is the possibility of diverting matters involving children away from the criminal justice system. The CJA also entrenches the notion of restorative justice as a sentencing option for those children who go through Child Justice Court proceedings and raises the minimum age at which a child is considered to have "criminal capacity" from 7 to 10 years of age.

3.5.1The Minimum Age and Criminal Responsibility

The minimum age of criminal responsibility is enshrined in the CJA. It has long been accepted that childhood is relevant to the general consideration of criminality. The view that young children are slow to develop mental capacity and an acknowledgement that the criminal justice system is an inappropriate place to deal with their misbehavior finds reflection in the concept of an age of criminal capacity. International instruments acknowledge the link between age and criminal capacity. The most direct reference to this is found in Article 40(3) (a) of the CRC requiring state parties to establish "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law". This obligation is reiterated in the ACRWC which is worded in similar terms. However, these provisions fall short of prescribing such an age.

According to Snyman (2002), before a person can be said to have acted with culpability, he must have criminal capacity - an expression often abbreviated simply to 'capacity'. A person is endowed with capacity if he has the mental abilities required by law to be held responsible and liable for his or her unlawful conduct. It stands to reason that people such as the mentally ill (the 'insane') and very young cannot be held criminally liable for their unlawful conduct, since they lack the mental abilities which normal adult people have. When South Africa finally ratified CRC in June 1995, it was one of the lowest minimum ages of

criminal capacity in the world. Synman (2002) states the South African law on the minimum age of criminal capacity in other words the youngest age at which a child can be charged with and found guilty of a crime has its roots in Roman law. It contains two presumptions: first, that a child under the age of seven years is irrefutably presumed not to have criminal responsibility. The presumption, being irrefutable, is considered to be a fact. The second common law presumption lays down that a child between the ages of seven and 14 years has a rebuttable presumed not to have criminal responsibility.

The CJA provides for a minimum age for criminal capacity in section 7 which reads:
(1) A child who commits an offence while under the age of 10 years does not have criminal capacity and cannot be prosecuted for that offence, but must be dealt with in terms of section 9.
(2) A child who is 10 years or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity, unless the state proves that he or she has criminal capacity.

Skelton and Badenhorst (2012) noted that the minimum age of criminal capacity has indeed been raised from 7 years to 10 years of age in terms of section 7(1) of the CJA. Such a child is irrefutably presumed to be *doli incapax*. The CJA also states, in section 7(2), that a child who is 10 years or older but under the age of 14 years at the time of the alleged commission of the offence, is presumed not to have criminal capacity unless it is subsequently proved beyond a reasonable doubt that the child had such capacity at the time of the alleged commission of the offence. Such a child is under a rebuttable presumed to be *doli incapax*. Children who are 14 years and older continue to have full criminal capacity as was the situation before the CJA came into effect in 2010

The CJA, in section 10, provides protection to the child in conflict with the law by placing further responsibilities on the state prosecutor. Section 10 regulates the

decision to prosecute children who are 10 years or older but under the age of 14 years. Section 10 provides that a prosecutor who is required to make a decision whether or not to prosecute a child referred to in section 7(2) must take into consideration the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child; the nature and seriousness of the alleged offence; the impact of the alleged offence on any victim; the interests of the community; a probation officer's assessment report in terms of Chapter 5; the prospects of establishing criminal capacity in terms of section 11 if the matter were to be referred to a preliminary inquiry in terms of Chapter 7; the appropriateness of diversion; and any other relevant factor. The CJA in both section 11 and section 40 provides for the proof of the criminal capacity of the child in conflict with the law. These statutory provisions are peremptory and provide for additional manners in which criminal capacity of children can be assessed and placed before court.

In terms of section 11(2) of the CJA the presiding officer or magistrate, in making a decision regarding the criminal capacity of the child in question for purposes of diversion; or if the matter has not been diverted, the Child Justice Court, for purposes of plea and trial, must consider the assessment report of the probation officer referred to in section 40 and all evidence placed before the inquiry magistrate or Child Justice Court prior to diversion or conviction, as the case may be, which evidence may include a report of an evaluation. This section statutorily entrenches two aspects; one is that the court must receive and have regard to the pre-trial report of the probation officer, and secondly it binds the court to make a finding on the criminal capacity of the child in conflict with the law. According to Child Justice Alliance report (2011), the Child Justice Court is a specialized court for all cases involving children. The aim of such courts is to ensure appropriate environment for child offenders and to facilitate the child justice provisions of the CJA. The CJA provides in section 11(3) that an inquiry magistrate or Child Justice Court may, on own accord, or on the request of the prosecutor or the child's legal representative, order an evaluation of the criminal

capacity of the child by a suitably qualified person, which must include an assessment of the cognitive, moral, emotional, psychological and social development of the child. Thus any party between the magistrate, prosecutor or legal representative of the child my apply for an order or order the child's evaluation of the child's criminal capacity by a suitably qualified person and such qualified person must then furnish the court with a written report within 30 days of the date of the order.

The CJA provides in section 40 for the probation officer to complete an assessment report in the prescribed manner with recommendations on the issue, of the possible criminal capacity of the child if the child is 10 years or older but under the age of 14 years, as provided for in section 10, as well as measures to be taken in order to prove criminal capacity. This shows that the age of a child is of paramount importance in child justice system in South Africa.

3.5.2 Age Determination

A peculiar challenge relating to the practice of child justice in South Africa is the fact that so many children do not know their correct birth dates or ages, or choose not to tell the correct birth date or age (Skelton and Badenhorst, 2012). Thus criminal justice personnel often find themselves dealing with difficult choices. In terms of section 337 of the Criminal Procedure Act 51 of 1977, the magistrate may estimate the age of a person if there is not enough evidence to prove the date of birth. The courts have held, however, that it is not sufficient for the judicial officer simply to record that he or she finds the accused to be of a particular age. Magistrates are reluctant to use this power, and very often rely on an age assessment by a medical practitioner. However, this is time consuming and expensive, and often it is found not to be very helpful as the medical practitioners rarely indicate a specific age (Skelton and Badenhorst, 2012).

It is clear when looking at the application that the age of the child accused of a crime is important. It is unfortunately a reality that the majority of people never

registered the birth of their children resulting in many children accused of crimes in South Africa not knowing their exact age. The CJA proposes certain measures for determining a child's age. If a child is probably below 10 years, then the police should follow the procedure in section 9, which involves taking the child to a probation officer. If however, a probation officer has estimated or a Child Justice Court determined the age of the child, then the procedures for a child of that particular age apply.

In the case of *S v Dial* magistrates were warned against estimating the age of young people claiming to be below the age of 18 years.[4] In terms of section 14 of the CJA, the inquiry magistrate at the preliminary inquiry or a judicial officer who presides in a Child Justice Court can make an age determination. This differs from age estimation as this is where the presiding officer actually sets the child's age where it was uncertain. The age estimation is just an approximation of the age based on the information the probation officer collected. The presiding officer gets to decide on what is the age of the child. In determining a child's age, the presiding officer may consider the age estimation report by the probation officer or any other document or statement by a person; subpoena a person to produce this additional document if necessary; or call for a medical examination if necessary. Once the presiding officer has determined the child's age, he or she must enter it on the record of proceedings. The assessment of the child in this process is of paramount importance.

3.5.3 Assessment

A pre-trial assessment report is essential for a preliminary inquiry. An assessment is an evaluation of a person, the family circumstances of the person, the nature and circumstances surrounding the alleged commission of an offence, its impact on the victim, the attitude of the alleged offender in relation to the offence and any other relevant factor.

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[4] *S v Dial (2006 (1) SACR 395, E)*

The CJA, in terms of section 34, provides that every child who is alleged to have committed an offence, even those who are under the age of 10 years and who therefore have no criminal capacity, must be assessed unless the assessment is dispensed with. An assessment can be dispensed with in terms of section 41(3) by a prosecutor if it is in the best interests of the child. However, the reasons for this must be placed on the record of the case. In terms of section 47(5), the inquiry magistrate can also dispense with the assessment at the preliminary inquiry if it is in the best interests of the child to do so.

Upon completion of the assessment, an assessment report must be submitted to the prosecutor before the preliminary inquiry. This report must make recommendations regarding whether a child can be diverted including to what type of programme and to which service provider the child should be referred. Whether the child can be released or if the child cannot be released, a recommendation regarding placement options can be made. The CJA also provides that if a child has not been assessed by the time he or she is brought to court, the court may extend the time for the child to be assessed by periods not exceeding seven days at a time following his or her first court appearance in a preliminary inquiry.

3.5.4 The Preliminary Inquiry

Article 40(3) of the CRC provides: “States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of or recognized as having infringed penal law.” There is currently a new procedure in the criminal justice system called the Preliminary Inquiry (PI). The CJA introduces the concept of a separate inquiry procedure, called the Preliminary Inquiry. The PI is not, but can be compared to a formal bail application in terms of the Criminal Procedure Act 51 of 1977.

In this chapter the PI will be defined, its purpose explored and evaluated if it assists in fulfilling the objectives of the CJA. The CJA defines a PI in section 43(1) as an informal pre-trial procedure which is inquisitorial in nature; and may be held in a court or any other suitable place within 48 hours of the arrest of the child. So while this is essentially the first appearance of the child in a court, the aim is to make it as child friendly and informal as possible and the fact that the inquiry is inquisitorial as opposed to accusatorial enhances the informality since it would then not be so formalistic. The objectives of a preliminary inquiry are set out in section 43(2) of the CJA and provide that the purpose thereof is to consider the assessment report of the probation officer, The further objects of the preliminary enquiry are to ensure that all available information relevant to the child, his or her circumstances and the offence are considered in order to make a decision on diversion and placement of the child to secure care.

3.5.5 Diversion

The CJA in section 2(d) provides for diversion of cases where children are the perpetrators of crime. This enactment provides not only legal certainty, but equity in dealing with children in conflict with the law. The CJA defines diversion as diversion of a matter involving a child away from the formal court procedures in a criminal matter by means of the procedures established by Chapters6 and Chapter 8. Sloth-Nielsen (1999) states that diversion is a process through which children can be ‘diverted’ away from the criminal justice system on certain conditions such as attending a specified programme. If a child acknowledges responsibility for the wrongdoing, he or she can be diverted to such a programme, thereby avoiding the stigmatizing and even brutalizing effects of the criminal justice system. Diversion gives children a chance to avoid a criminal record, while at the same time the programmes are aimed at teaching them to be responsible for their actions and how to avoid getting into trouble again. If they fail to complete the diversion programme and cannot provide a reasonable

explanation for such a failure, the prosecutor will continue with prosecution (Sloth- Nielsen, 1999).

The CJA thus now provides a regulatory framework to ensure consistency of practice and legal certainty with regard to diversion. The objectives of diversion are statutorily provided for in section 51 of the CJA which states that diversion are to deal with a child outside the formal criminal justice system in appropriate cases; to encourage the child to be accountable for the harm caused by him or her; to meet the particular needs of the individual child; to promote the reintegration of the child into his or her family and community; to prevent stigmatizing the child and prevent the adverse consequences flowing from being subject to the criminal justice system; to reduce the potential for re-offending; to prevent the child from having a criminal record; and promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society.

These provisions give effect to the objectives of the CJA and the Constitution to provide a child justice system that has diversion based on restorative justice principles and every child has a right to legal representation. Section 51 further states that the objectives of diversion are to provide an opportunity to those affected by the harm to express their views on its impact on them; to encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm and to promote reconciliation between the child and the person or community affected by the harm caused by the child. These provisions of the CJA is restorative in principle and gives effect to the objectives of the CJA and the Constitution to provide a child justice system that has diversion based on restorative justice principles. Diversion is closely linked to the concept of restorative justice. Restorative justice involves offenders making amends for what they have done and initiating a healing process for themselves, their families, the victims and the community at large. The goal of restorative

justice is for offenders to re-join the law-abiding community and thereby prevent re-offending.

Giving effect to these objectives, section 54 of the CJA requires that various factors be considered when a diversion option is selected. The diversion option must be at the appropriate level; the child's cultural, religious and linguistic background; the child's educational level, cognitive ability and domestic and environmental circumstances; the proportionality of the option recommended or selected to the child's circumstances, the nature of the offence and the interests of society; and the child's age and developmental needs in order to facilitate the change in behaviour. Importantly, section 54(2) provides that the various diversion options may be used in combination with each other. In addition, in terms of section 54(3) an individual diversion option meeting the objectives of diversion may be developed for a particular child. This allows for flexibility and creativity where a particular child's needs are not specifically catered for by the options available. At all stages in the process, children have a right to legal assistance.

3.5.6 Legal Representation

Children have a right to legal assistance in South Africa in cases where a substantial injustice would otherwise occur, and where a child or his or her family cannot afford to pay for the services of a lawyer, State funded legal representation can be obtained through the Legal Aid Board. To ensure a child centered system, the CJA endeavored to build in safeguards to ensure that the child has legal representation in his trial. In section 80(1) of the CJA the requirements that a legal representative must comply with in order to act on behalf of a child in criminal proceedings are statutorily enumerated. In giving effect to section 35 of the Constitution, section 82 provides that where a child appears before a child justice court and is not represented by a legal representative of his or her own choice (at his or her own expense), the presiding officer must refer the child to the Legal Aid Board for the matter to be evaluated

by the Board. Erasmus (1998) states that the right to legal representation is an inalienable right in the child justice courts in order to give effect to the child's constitutional right to a fair trial. Sloth-Nielsen (1999) states that rural areas are currently served by satellite Justice Centers which operate under the mentorship of the main centre. Each satellite slowly expands and is capacitated until it reaches the status of a Justice Centre. This ensures that children are represented in the court for diversion or sentencing.

3.5.7 Sentencing

For the first time in South African law, a statute now contains provisions regarding the objectives of sentencing and factors to be considered during sentencing. The CJA provides that the objectives of sentencing of child offenders are to encourage the child to understand the implications of and be accountable for harm caused, promote reintegration of the child into the family and community and to ensure that imprisonment is used as a measure of last resort and only for the shortest appropriate period of time. Youth has long been regarded as a mitigating factor in the imposition of sentence in South Africa. The reasons underlying this are first, that the moral culpability of the child is reduced if he or she is very young, and secondly, that age is relevant to the determination of a sentence which is appropriate to the individual accused (Sloth-Nielsen, 2001).

In the case of *S v Z*[5]the court pronounced three guidelines that should be followed when sentencing a child. First; the younger the child, the more inappropriate the use of imprisonment would be. Secondly; imprisonment is particularly unsuitable for first-time offenders, and thirdly; even if the sentence of imprisonment is only of short duration, this shortness does not render it appropriate.

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[5] *S v Z 1999* (10) SACR 427, E),

In *S v Kwalase* [6]the issue of proportionality was dealt with and the court underscored the importance of an individualized approach to sentencing child offenders.The Supreme Court of Appeal has described in detail the principles relevant to the sentencing of child offenders in various cases such as *S v B* and *Ntaka v the State*.[7]It is proven that, In sentencing a young offender, the presiding officer must be guided in the decision-making process by certain principles: includingthe principle of proportionality and, theleast possible restrictive deprivation of the child's liberty, which should be a measure of last resort and restricted to the shortest possible periodof time. Adherence to recognised international law principles mustentail a limitation on certain forms of sentencing such as a ban on lifeimprisonment without parole for child offenders (Sloth Nielson, 2004).

According to Gallinetti (2009), the best interests of the child principle, which is of paramount importance, also applies in the sentencing of children, though it will of course be weighed against competing rights. Odhongo (2005) submits that the express inclusion of these broadly framed principles implies that they should be of guidance to the sentencing process. These principles were to a large extent drawn from the phrasing of article (40) (1) of the CRC, and affirm the primacy of the interests of a convicted child offender and the likelihood of his or her reintegration over and above other sentencing objectives in general penal law such as deterrence and punishment. In this regard, it implied that any sentencing officer must impose a sentence which is compatible with these principles contained in the CJA. Section 72 of the CJA described a community-based sentence as a sentence which allows a child to remain in the community. Gallinetti (2009) states that the CJA now provides a framework to guide decision relating to sentencing of children to child and youth care centres.

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[6] S v Kwalase 2000 (2) SACR 135, CPD)

[7] *S v B (2006 (1) SACR 311 (SCA) and Ntaka v The State ((469/2007) [2008] ZASCA 30*

Despite the fact that the child has not been diverted at a preliminary inquiry, the child justice court may consider diversion of the matter afresh and may make a diversion order if it is found to be appropriate. Statutory provision is also made for the establishment of One-Stop Child Justice Centres (OSCJC). The Minister for Justice and Correctional Services is the primary role-player in the establishment of such centres and they have been a lot more legal developments since the inception of the new CJA.

3. 6 Reviewability of cases involving child offenders

According to Department of Justice and Constitutional Development annual report (2013-2014), there have been conflicting judgments in the provincial divisions of the High Court regarding the interpretation of section 85(1) (b) of the CJA dealing with the reviewability of sentences of imprisonment and compulsory residence in child and youth care center's involving children 16 years or older, but under the age of 18 years. The question of the reviewability of cases involving the sentencing of children, who were legally represented, to compulsory residence in a child and youth care centre came before different Divisions of the High Court recently and conflicting judgments were handed down. The Western Cape Division of the High Court handed down a judgment in the *S v Ruiter*[8] that due to the fact that the High Court is the upper guardian of all minors within its jurisdiction area, all cases referred to in section 85 of the CJA should always be subject to review regardless of whether or not the child was legally represented at the trial.

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[8] *S v Ruiter (311/2010 (2011) ZAWCHC 265)*

However, in the matter of *S v JN,* [9]ordered that a sentence of imprisonment or compulsory residence imposed upon a child, as contemplated in section 85 of the CJA, who was represented by a legal adviser, was not subject to automatic review. In this case the child offender pleaded guilty to three (3) counts of housebreaking with the intent to steal and theft in the Swartruggens Magistrate's Court. He was sentenced to compulsory residence in a child and youth care centre for a period of five (5) years. The child offender was legally represented throughout the proceedings. In the matter *S v LM,* [10] it is clear that cases are subject to automatic review in terms of the provisions of section 85 of the CJA.

3.6.1 Select Constitutional Court Jurisprudence on Child Justice

On the 6th May 2014, the Constitutional Court handed down a judgment declaring section 50(2) (a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act) unconstitutional. The section provides that when a person is convicted of a sexual offence against a child or person who is mentally disabled, a court must make an order to include the offender's particulars on the National Register for Sex Offenders. Having one's particulars entered on the Register entails certain limitations in employment, in licensing certain facilities and ventures, and in the care of children and persons with mental disabilities. In an unanimous judgment, the Constitutional Court found that section 50(2) (a) of the Sexual Offences Act infringe on the right of child offenders to have their best interests considered of paramount importance in terms of section 28(2) of the Constitution.

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[9] *S v JN (CA 2/2012/ ZANWHC 26)*

[10] *S v LM (A390/2011/ 2012 ZAWCHC 176, 2013 (1) SACR 188, WCC)*

The register fulfills a vital function in protecting children and persons with mental disabilities from sexual abuse. However, the limitation of the child offender's right is unjustifiable because a court has no discretion whether to make the order and because there is no related opportunity for child offenders to make representations. The Court limited its declaration of constitutional invalidity to child offenders.[11]

Childline South Africa, the first amicus in this application to the Constitutional Court to have section 50(2)(a) of the Sexual Offences Act declared invalid, was delighted with the decision of the Constitutional Court, as it protects the rights of children, having recommended that each child convicted of a sexual offence should be assessed, offered the opportunity of participation in a rehabilitation programme and then be reassessed for risk before their name was placed on a sexual offender register. *The Teddy Bear Clinic for Abused Children, and Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) v Minister of Justice and Constitutional Development*case in 2014 addressed whether consensual underage sex ought to be a criminal offence and thus reported.[12] The Court further ordered a moratorium on all investigations, arrests, prosecutions and criminal and ancillary proceedings (regarding adolescents) in relation to sections 15 and 16 of the Sexual Offences Act, until Parliament has remedied the defects identified. Finally, the Minister was ordered to take the necessary steps to ensure that the details of any adolescent convicted of an offence in terms of sections 15 or 16 of the Sexual Offences Act will not appear in the National Register for Sex Offenders and that such an adolescent will have his or her criminal record expunged. [13]

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[11] *Department of Justice and Constitutional Development, 2014.*

[12] *The Teddy Bear Clinic for Abused Children and RAPCAN v The Minister of Justice and Constitutional Development 2014(1) SA168 (CC) Unreported High Court case 73300/10*

[13]*Department of Justice and Constitutional Development, 2014.*

Before the judgment, these sections criminalized any and all consensual conduct of a sexual nature between children aged 12 to 15, which includes hand-holding, kissing and other behaviors consistent with normal adolescent sexual development. Both children involved would then be charged. All this marks a milestone in the new developments of child justice in South Africa despite implementing challenges.

3.7 Challenges in the implementation of the CJA

According to Department of Justice and Constitutional Development annual report (2013-2014), one of the biggest challenges facing the department at present is the unavailability of existing buildings that could be converted into OSCJC's. The CJA envisages that one-stop centre's be established to streamline the whole process from arrest to the formal court process. All the major services will be in one building-holding cells, assessment rooms, police services, probation services, a court room and rooms for presenting diversion programmes, so that parents and children will not need to travel. The Department of Justice and Constitutional Development annual report (2013-2014)also reviewed that from the few buildings that have been identified by the Provincial Child Justice Forum, it has been learned that to refurbish each building will cost a considerable amount of money. As expressly noted by the CJA, the Minister of Justice and Constitutional is not obliged to establish these OSCJC's, especially where circumstances do not permit. A further challenge for the Department of Justice and Constitutional Development is the lack of data required for the review of the minimum age of criminal capacity. In terms of section 8 of the CJA, this review has to be conducted by no later than 1 April 2015. In order to achieve this task, the Department of Justice and Constitutional Development has initiated a robust research study at all courts which is expected to be finalized in 2014/2015. The National Prosecuting Authority (NPA) was tasked with the responsibility of conducting research on the minimum age of criminal capacity and has recommended that the minimum age of criminal capacity remain at 10 years and

that the *doli incapax* presumption be retained for children 10 year or older but under the age of 14 years (Department of Justice Annual Report, 2013-2014).

UNICEF (2012), however, foresees a number of implementation challenges in translating this legislation into concrete actions to improve the care and protection of South Africa's children. Foremost among them is ensuring adequate budgetary allocations for creating and strengthening the specialized systems and structures as defined by the CJA, at national and provincial levels. In order to ensure effective implementation of this new legislation, UNICEF (2012) says it is critical that different parts of the Government work together with non-governmental and civil society organizations within an agreed framework of inter-sectoral collaboration, and that a strengthened cadre of fully trained social service professionals is deployed. Other challenges noted include lack of monitoring and evaluation tools to measure the impact of public education and awareness campaigns on child justice. The prescriptive nature of the CJA, particularly for diversion service providers and programmes requires children to be referred to accredited service providers and currently there are no specialized rooms to hold PI's and available courtrooms are not designed to conduct PI and there is a lack of adequate capacity with the Department of Health to conduct criminal capacity evaluations.

3.8 Summary

The first part of this chapter has elaborated on the development of international and regional standards which regulate child justice and their guiding principles. It provides a foundation for testing the compatibility of the treatment and protection of children in conflict with the law globally, especially for countries that have ratified or acceded to such standards thereby signifying their willingness to undertake the obligations contained therein. South Africa, a state party to both the CRC and the ACRWC is bound to respect and ensure that the rights set forth in the two treaties are assured to all children within her jurisdiction, and in the

context of this study - children in conflict with the law. It can be noted that there is domestication of international and regional standards in the CJA. The last section of this chapter has given an overview of the CJA. The new concepts and procedures introduced by the CJA were also described and various challenges in the implementation of the CJA were noted. The CJA provides children in conflict with the law a range of special protections due to their vulnerability and immaturity, the separate child justice system indeed separates the child from the deleterious effect of the adult justice system. In the following chapter, findings on the extent of juvenile delinquency and multi-sectoral implementation of the CJA in the Eastern Cape are discussed.

CHAPTER 4: FINDINGS AND DISCUSSION ON THE EXTENT OF JUVENILE DELIQUENCY AND MULTI-SECTORAL IMPLEMENTATION OF THE CHILDJUSTICE ACT

4.1 Introduction

The main aim of the study was to explore the multi-sectoral implementation of the Child Justice Act (CJA) in the Eastern Cape Province. It was essential to obtain insights into the roles of stakeholders in order to view how their efforts warranty an effective coordination of the child justice system. To achieve the research goal and objectives, the research study was rooted in a qualitative approach, which is exploratory, descriptive and contextual in nature. A purposive sampling method was used, as it was better suited to qualitative research to recruit participants willing to be included in the study. All participants in the study were briefed on the nature of the research and their written consent was secured prior to their inclusion in the study. Participants who consented to be interviewed and met the inclusion criteria were interviewed, using the interview guide. Data was collected until the point of saturation was reached, resulting in twenty-five participants being interviewed during the study. The data generated, including secondary data was analyzed using thematic data analysis, based on the phases or steps of qualitative data analysis, as described by De Vos (2005). The data must be read in the context of the research methods used. It was undertaken from an interpretive paradigm to solicit a deeper understanding about the implementation of the CJA. This chapter discusses the findings of the study. First, a description of the sample is done and findings on the extent of juvenile delinquency are discussed. Secondly, the chapter concludes by discussing the multi-sectoral implementation of the CJA, successes and challenges. Various key thematic areas and certain provisions of CJA such as assessment, preliminary inquiry, diversion, sentencing, child and youth care centers, capacity building, budgeting and public education emerged and are discussed.

4.2 Description of the sample

Analysis of the socio-demographic characteristics of the respondents revealed the differences in the categories of respondents studied. The participants in this study all resided in the Eastern Cape, South Africa and were from different neighborhoods. Of the twenty-five respondents interviewed, seventeen were male and eight were female. Twelve of the respondents were children in conflict with the law and 13 were government officials and community representatives. The ages of the respondents ranged from 14 to 50 years of age. However, all children interviewed were aged between 14 to 17years and six of them reside in the secured child and youth cares and the other six were coming from home attending community diversion programs with the National Institute for Crime Prevention and Reintegration of Offenders (NICRO) in East London. Evidence cited in Siegel and Senna (2000:58) suggests that the age of onset of a criminal is of great consequence on the duration of such behaviour; individuals who are inclined towards anti-social behaviour at an early age are more likely to commit crime for longer and are more likely to develop into career criminals. This shows the extent of juvenile delinquency across various ages.

4.3 Findings on the extent of juvenile delinquency

There are various findings emerging from the study showing the extent of juvenile delinquency. This can be shown through the nature of offences committed by children, interventions done with children and an exploration of the causes of juvenile delinquency. All these aspects clearly shows that the problem of juvenile delinquency exist in the communities. First to be discussed is the type of offences.

4.3.1 Type of offences

From the study it can be revealed that there are various offences committed by children. The CJA is very clear on various schedules of offences committed by children. Section 87 of the CJA provides offences ranging from schedule 1 to 3.

Schedule 1 offences are regarded as less serious offences and schedule 3 offences being the most serious ones. Atotal of four thousand one hundred and fifty-five children have been charged for various offences which range from violent and non violent crimes.[14]The Provincial Department of Social Development (DSD) reports (2014/15) shows that 3 993 children were arrested. In table 1 below, the study reveals categories of offences committed or charges leveled against the children interviewed.

Table 1: Type of offences by juvenile offenders

Offences committed	Number of respondents
Theft	2
Shoplifting	4
Assault GBH	2
Possession of drugs	3
Possession of stolen goods	1

Source: Interviews with respondents on 27-28 March 2015.[15]

It can be seen from the Table that children commit different type of offences. Shoplifting and possession of drugs appear most frequently and these are Schedule 1 and Schedule 2 offences as defined in section 87 of the CJA. The least committed offence was possession of stolen goods which was committed by only one of the respondents. Some of the Social Workers interviewed stated that children are exposed to all types of offences but the majority commits petty offences. [16]

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[14]*The Eastern Cape South African Police Service (2014) statistics*

[15]*Interviews with respondents on 27-28 March 2015.*

[16]*Interviews with social workers on 24-25 March 2015.*

Booyens (2003:48) cited various statistics to illustrate the problem of youth offending in South Africa today. Booyens concluded that South Africais experiencing unprecedented levels of children and youths being arrested and convicted of crimes.

This was also noted by Howell (2003:55) who states that the problem with partaking in criminal offending at a young age is that youth offenders do not accept the norms of society and therefore are unable to form positive attachments with other people in the community. This shows the extent of juvenile delinquency. This shows that the rate of crime amongst children needs to be addressed though appropriate options cited in Section 53 of the CJA. The importance of the CJA is that it provides s a number of options for children in order for them to get proper intervention.

4.3.2 Type of interventions

The table below indicates the type of interventions administered on child offenders.

Table 2: Interventions for child offenders

Programme	Number of Respondents
Drug programme	6
Life skills	6

Source: Interviews with respondents on 27-28 March 2015.

As noted from the study, most of the children interviewed were attending the diversion programmes in line with section 53 of the CJA. There were 6 children doing community diversion level one with NICRO and an additional 6 children placed at a child and youth secure centre in East London attending level two diversion. In applicable cases, a rehabilitative or therapy programme was recommended by the court. At the time of attending the programme, none of

children in the sample had previous convictions against them. One social worker stated that:

> *It has been NICRO's experience that the programmes are generally used for first-time offenders and this profile is consistent with other analyses of the client group.*

All the respondents had to see a social worker and undergo regular drug testing. The programmes are both educational and therapeutic. Another social worker stated that:

> *The Nicro life skills programme is aimed atpreventing re-offending of young people and deal with underlying problems of criminal behavior.*

This is supported by Muntingh (2001) who states that a suitable intervention is required for juveniles to reduce chances of recidivism. Respondents were asked "What support did you receive after your appearance in court? The most frequent responses were that they all attended the diversion programme. They were either been referred to the programme by the court or a social worker or they attended it because they had committed a crime. The latter response is particularly interesting because it indicates an immediate realization of responsibility on the part of the participant. Other responses referred to issues such as to bring about a change in their lives, to learn and to show others that they can change. Respondents were asked what impressed them most about the programme in which they participated. Two responses stand out from the long list, namely the co-ordination and facilitation of the programme, and the games they played in the programme. The programme relies strongly on interactive and experiential learning techniques, such as games and role-playing to make the programme material accessible. Very few respondents gave negative responses such as "Nothing" or "Can't remember". This emphasizes the importance and effectiveness of referring children to appropriate intervention as per the CJA in

order to reduce the risk of reoffending. The purpose of the CJA is to reduce the harm caused by crime and ensure children become responsible and contributing citizens. The next section discusses the causes of juvenile delinquency.

4.3.3 Causes of Juvenile Delinquency

It was revealed in the study that there are various causes of crime committed by children. According to Siegel et al (2003:59) juvenile delinquency can be explained through a variety of socio-theoretical constructs all which stress the importance of the society and various social institutions. Furthermore, Siegal (2003) states that emphasis will always be placed on factors that place the juvenile at risk of problem behaviour or that are seen as being conducive to the commission of crime. In the study, individual views hold that delinquency is basically caused by factors such as personal choices and decision-making influenced by psychological and biological factors. Other theories such as those advanced by Akers (1977) postulate that youthful misbehavior is either caused by a youth's place in the social structure, in particular his/her relationship with social institutions and processes as well as the youth's reaction to social conflict. Finally, there are theories that regard delinquency as a developmental process, reflecting the changes that occur in young people's as they steadily grow in the course of their life. One of the social workers interviewed stated:

> *The family plays a significant role in the transmission of the societal values. Any destructive element to the family affects the methods of control and ultimately results in children misbehavior.*

This finding is consistent with Bartollas (2000:357) who states that these children typically suffer inadequate parenting, disruptive family bonds and poverty. These children do not have a solid foundation with which to start life and their differences from others are exacerbated by their day to- day interactions with their social environment, at home and school. This idea is reiterated by another social worker who stated that:

Causes of crime among children vary from availability of drugs, family history of the problem behaviour, lack of commitment to school, and friends who engage in the problem behaviour.

The children interviewed also supported this assertion and cited peer pressure and family problems as factors that predispose them to fall prey to criminal behaviour. However, it is evident from the study that certain social background patterns correlate with juvenile delinquencies. Even though some of the findings of this study are consistent with what exist in previous literature in criminology and sociology, there are some findings that appear to be at variance with already accepted notions. This shows that the causes of crime by children are many and need immediate response and actions from all stakeholders involved in the implementation of the CJA.The next section discusses themajor findings on multi-sectoral implementation of the CJA.

4.4. Major findings on multi-sectoral implementation of the Child Justice Act.

Various findings were noted in the multi-sectoral implementation of the CJA. First to be discussed is lack of training or capacity building.

4.4.1 Lack of training or capacity building

Capacity building in the child justice sector requires more attention, including the continued appointment of dedicated staff within the available resources and continued intersectoral and departmental training. In terms of human resources, capacity building further implies that the various departments will prioritize the allocation of additional resources and budgets, where necessary, to appoint and train the required staff. The development of training courses and learning programmes by the various government departments and institutions, as provided for in terms of section 97 of the CJA, forms an integral part of the successful implementation of the Act. The intersectoral nature of the CJA

necessitates that the relevant departments and institutions conduct intersectoral training together and focus training specifically on the roles and responsibilities of the officials in each department. According to Badenhorst (2011), the National Policy Framework for Child Justice accentuates capacity building within the child justice sector as the key requirement in the effective implementation of the CJA. It highlights capacity building as focusing on the numerical increase of human resources, as well as the enhancement of skills and knowledge.

Lack of training has been identified as a challenge in the implementation of the CJA. Most government officials' interviews cited training as a dire need in the Eastern Cape Province. The majority of respondents stated the need for training of more police officers since they are new recruits who do not know about the CJA. According to the Eastern Cape Provincial Child Justice Forum Report, (February, 2015), 335 magistrates, police officers, prosecutors, attorneys and probation officers received training in the areas identified. Training took place in February 2015 in Queenstown, Lusikisiki, and Tabankulu in the Eastern Cape Province. Although different stakeholders were trained, the training of police officers is consistent with the South African Police Service (SAPS) national initiatives to improve CJA implementation. The Department of Justice and Constitutional Development annual reports shows that atotal of 45 292 personnel were trained from 2010 to end of 2013. This figure is still far below the expected number of officers who require training in this regard. The training for SAPS members will bring a better understanding of the SAPS responsibilities and could provide better guidance and on the job training to members. SAPS also could take the lead in establishing working relationships with other service providers.

An official of the Department of Justice and Constitutional Development stated:

> *Since the inception of the CJA, the NPA has trained only 54 prosecutors due to unforeseeable budget constraints. In addressing this challenge,*

NPA has taken a decision to focus its training endeavors only on prosecutors who work in Child Justice Courts.

The annual report (2013/14) from the Department of Justice and Constitutional Development shows that the total number of prosecutors trained over the last four years of implementation of CJA amounts to 617 at national level. In addition, more prosecutors received training and are able to deal with child justice matters in an appropriate, efficient and sensitive manner.

Furthermore, the study reveals that, in the Eastern Cape Province the Department of Justice also trained 85 court clerks. One court official stated more dedicated child justice court clerks are needed to ensure that every court has capacity to effectively implement the CJA. Another magistrate emphasized the importance of training by stating this:

A workshop on Child Justice was also conducted for District Magistrates with the assistance of the National Office.

This training was intended to improve the judicial knowledge on diversions, sentencing options. This finding implies that the target in the performance plan for the training of officials on the implementation of the CJA has been met to a limited extent but more training is still needed to increase compliance with the provisions of the CJA and services to children in conflict with the law.

Another capacity building issue that emerged from the study is lack of proper infrastructure.In terms of the CJA, all courts are deemed to be child justice courts. One social worker interviewed states that:

The courts are not child friendly, because children feel intimidated when they come to court.

In these instances, the study indentified that the magistrates' chambers or court boardrooms are not viable as preliminary inquiry rooms. Additional microphones and recording machines are also needed to record the proceedings of the preliminary inquiries. According to the court official, the Department of Justice and Constitutional Development has requested additional budgetary allocations to ensure that every court establishment has a dedicated Child Justice Court. Another finding that emerged in the study is the assessment of child offenders.

4.4.2 Assessment of child offenders

Section 34(1) of the CJA provides that every child who is alleged to have committed an offence must be assessed by a probation officer. If a child has not been assessed, the prosecutor or magistrate may dispense with the assessment, if it is in the best interests of the child to do so, provided that the reasons for dispensing with the assessment must be entered on the record of the proceedings by the magistrate in chambers.

According to section 34(2), a probation officer, who has been notified by a police official that a child has been handed a written notice, served with a summons or arrested, must assess the child before the child appears at a preliminary inquiry within the time periods provided for in the CJA. A probation officer interviewed stated that:

> *The assessment looks at a number of issues such as family background, cause of crime, substance abuse history and recommendations for suitability to a particular programme.*

According to the Provincial DSD statistics the number of assessments increased from 3270 during 2013/2014 as compared to 4 050 assessments that were recorded in 2014/15. In 2015 the statistics show that 3 993 children were arrested. However, there is still a variance between the number of charges against children reported by SAPS and the number of assessments conducted

by DSD. A Probation Officer interviewed stated that the assessments also include children below the age of 10 who are presumed to lack criminal capacity.

In terms of section 9 of the CJA these children are assessed within seven days of notification. It has also been noted that the use of different information systems by the SAPS and DSD could be the major contributor to this variance. For as long as SAPS registers the number of charges, whilst DSD uses a head count in all assessments, discrepancies are always inevitable. It is however anticipated that this anomaly will be addressed by the establishment of interconnectivity in information systems between SAPS and DSD.

Another noted challenge is the unavailability of probation officers to assess on weekends for the CJA. Section 34(2) requires that children should be assessed immediately by the probation officer before the preliminary inquiry. One official stated that there were no probation officers to assess children on time especially during weekends. This impedes the process of justice for children.

Although DSD provided SAPS with a list of probation officers per police station with contact details, there is still need to improve coordination with SAPS, particularly in the areas of notification and sharing of information regarding arrested children. Most stakeholders interviewed reviewed that there is still a need to appoint additional probation officers. On this regard, DSD has developed a plan for the progressive appointment of such probation officers. In an effort to increase its numerical human resource capacity, DSD continues to recruit and provide scholarships to students interested in making social work a profession.

Another notable findings is that the Eastern Cape Provincial Child Justice Forum reports (2014), shows a request to the Department of Health to assist with the assessment of criminal capacity of children who are 10 years or older, but under 14 years of age. Suitably qualified persons in terms of the CJA have been identified as psychiatrists and psychologists registered with the Health

Professions Council. To mitigate the shortage of psychiatrists and psychologists in the public sector, private psychologists and psychiatrists will also be requested to conduct such evaluations and be remunerated according to the tariffs that are established by the Department of Justice and Constitutional Development. A further challenge experienced in this regard is a limited budget made available in the coming years for this purpose. This finding implies that additional budgetary allocations to cover these costs are constantly needed. There is need for dedicated funding for the evaluation of the criminal capacity of children from the ages of 10 to 13 years as they appear at the preliminary inquiry.

4.4.3 Preliminary Inquiries

Children in conflict with the law appear before Preliminary Inquiry (PI). The study reviewed that there are delays in conducting preliminary inquiries for children in conflict with the law. One child confirmed that, he appeared at court a few weeks after arrest. This has been echoed by other respondents who indicated that it took them weeks to appear before the court. Section 43 CJA prescribes that all children in conflict with the law must attend a preliminary inquiry within 48 hours of arrest. PI forms have been developed and are utilized in courts to guide and monitor the process so as to ensure compliance with the CJA. Child Justice reports from the Eastern Cape (2014) show that preliminary inquiries decreased from 1 445 in the 2010/2011 period to less than 1 400 in 2014/2015. The decrease in the number of preliminary inquiries is attributed to structural problems at the court. One interviewee stated that:

> *Currently there are no specialized rooms to hold Preliminary Inquiries; and available courtrooms not designed to conduct Preliminary Inquiries.*

Social workers interviewed also highlighted delays by the magistrates and prosecutors to hold the preliminary inquiries for children as a result of staff shortage. This can delay the finalization of cases for children.

The PI is one of the most important innovations brought to the criminal justice system by the CJA. It seems lack of implementation of this provision hinders the progress of the new child justice system to ensure that children are diverted.

4.4.4. Provision of diversion services

Diversion means the removal of a child in conflict with law from the formal criminal justice system, mainly to encourage the child to be accountable for the harm caused by him or her in a manner that takes account of his or her age and individual needs. Steyn (2011) states that it is a form of response to child-offending that promotes the reintegration of a child into his or her family and community so as to increase the opportunities of growing up to be socially responsible citizen as a way of preventing stigmatization that is often drawn from being labelled as a criminal. Diversion is also intended to reduce recidivism**.** One social worker indicated that:

> *Diversion prevents a child from having a criminal record that could have serious repercussions to his or her future.*

The CJA, in outlining the objectives of diversion, also indicate that diversion is designed to build the character of the child, promotes his or her well-being, and develops the child's sense of self-worth, whilst teaching him or her to be accountable for his/her actions. It is an intervention that also gives the child an opportunity to interact with the victims, and also understand how his or her offence has affected them. Evidence from the study shows that none of the children who attended rehabilitative programmes at NICRO in East London knew about the programmes. With regard to the personal value of the diversion programmes, one of the six respondents who attended the life skills programme made him realize thathe had to stop crime if he did not want to go to jail.

Another participant who also attended the same life skills programme stated that it was worthwhile talking to the social worker, for he learnt a lot about himself and

life in general. Two other respondents concurred with him and also emphasized that the programme gave them time to think about the effects of what they had done.

According to the DSD statistics report (2014), a total of 1 377 children have been diverted during the period 2014/15. According to the available information, there is a decrease in the number of children being diverted out of the formal criminal justice system since 2010. The Department of Justice and Constitutional Development annual report (2013/14) indicated that a comparative analysis of the periods since 2010 shows a decrease of 34 percent. Although the reasons for the above decline are not clear. According to respondents the following may have been contributing factors:-

- The impact of the implementation of the CJA from 1 April 2010 (with particular reference to the provisions that stipulate that children may only be arrested and charged as a measure of last resort);
- The resulting decrease in the number of children arrested, thus reducing the number of potential diversions;
- The seasonal effect and a cyclical decrease of crimes, arrests and diversions during the winter months.

4.4.4.1 Challenges associated with beneficiaries of diversion programmes

The role of parents in diversion programmes was frequently highlighted as a major challenge to effective diversion outcomes. A social worker mentioned that children can easily recidivate due to the lack of parental insight into what an intervention expects of participants. Parents are often contributors to the criminal behaviour of their children and when they do not meaningfully participate in programmes, interventions have little meaning. Moreover, some parents proclaim their children's innocence despite the diversion order as the social worker stated:

> *Sometimes you can see that the child is willing to take responsibility for the offence, but the parent is leading him away from that*.

When parents do not participate in the intervention, they do not have a thorough understanding of what the intervention entails. Consequently, it is doubtful whether parents appreciate what their children experience in the programme. Some parents reportedly show very little interest in their children. Another social worker stated that,

> *We get parents who say that, because the court referred the child to us, they don't have responsibility anymore*.

Yuan *et al*. (1998:28-30) indicated that parents decrease their level of emotional presence and physical involvement with their children after their children's altercation with the law. This contributes to the lack of parental guidance and support when the child is attending the programme.

Abdullah (2014) noted that most of the parents are employed and they had to take time off from work to transport their children to the programme sessions. They also had to invest more effort in closely monitoring the children's movements or activities. Similar findings were made by Ashbourne and Daly (2010:1428), with parents in their study reporting that problem behaviour by children required parental control and focus from them. Research by Mankayi (2007) noted that diverted children tend to challenge parental authority, but also accepted their parents' increased monitoring as a consequence of their own clash with the law.

Linked to the above, the environment in which many child offenders live is not conducive for behavioural change. Often their criminal behaviour stems from the situation at home (Seiffgeet al., 2009:259-279). As such, for many children it is difficult to return to their environments following the intervention and being

expected not to fall back into crime. Some diverted children reportedly tell service providers that their households make it difficult to implement what they have learnt in the diversion programme. One respondent noted:

> *From a holistic point a view, a child cannot be subjected to an intervention programme only to return to the same criminogenic environment.*

Another respondent stated that diverted children learn new skills in a supportive environment with the input of a facilitator, but that these resources are absent when the child is back in the real world.

Some diversion strategies require certain literacy levels to meaningfully participate in programme activities. In the case of life skills training, for example, participants must be able to read and write as they have to submit written tasks for some of the sessions. To this, a social worker responded that:

> *Their underdeveloped cognitive abilities make it very difficult to fully verbalize and express emotions and thoughts, even more so if they have to write it down*.

When asked about the role of the community in diversion, it was stated that community members who mostly participate in diversion, for example a police officer are not necessarily community members who are severely affected by crime. Muntingh (2001) stated that reintegrating a child offender with the community seems difficult because the community must start trusting the child again, a process which requires much time. Some diversion strategies do not actively involve the victims of crime. In life skills training, for example, participants write letters to their victims, but it is their choice whether they want to compensate victims for the damages their offences caused. With some crimes, it is difficult to put a face to the victim, especially when a child commits shoplifting from a large retail store. One social worker mentioned that victim involvement

demands additional resources and effort, which diversion services do not necessarily have.

The prescriptive nature of the CJA, particularly for diversion service providers and programmes requires children to be referred to accredited service providers and programmes. Lack of diversion service providers remains a critical challenge in the Eastern Cape and DSD programmes are not accredited. Hence, government needs to work with non-governmental organizations to ensure effective service delivery. Currently NICRO is the only service provider rendering services for children given non-custodial sentencing. There is a need for accreditation of more diversion programmes and to ensure that more service providers are capacitated to effectively render services to children in conflict with law.

4.4.5 Sentencing

In establishing a child justice system, the CJA provides for a number of sentencing options that take account of the child's age. In compliance with section 28 of the Constitution, the CJA requires that the imprisonment sentence be imposed on a child only as a measure of last resort and for the shortest appropriate period of time. One magistrate interviewed stated that:

> *children are given a range of sentencing options including community-based compulsory placement in child and youth care centre sentences, depending with the nature of offence, imprisonment (only as a last resort.*

Table 3: Sentencing options for children in conflict with law

Type of sentence	Number of Children
Suspended sentence	48
Postponed sentence	55
Reform School	30
Home based Supervision	134

Source: DSD Provincial statistics 2014/15

The table above depicts that there is a growing achievement of the goals of the CJA, which primarily promotes the imposition of non-custodial sentences as against the imposition of imprisonment sentences. The statistics provided in this study by DSD indicates that only 30 children were in prison as at 31 December 2014 as compared to 171 placed in child and youth care centers. The Department of Justice and Constitutional Development annual reports since 2010/11 shows a total number of 5 120 non-custodial sentences were imposed on children, whilst a total of 728 custodial sentences were served by children in South Africa. These figures may be construed as indicative of the improved implementation of the CJA, which promotes the imposition of non-custodial sentences against children. It is clear that there have been a low number of children sentenced to imprisonment, and an increase in the number of children sentenced to compulsory residence in child and youth care centers.

4.4.6 Compulsory residence in a child and youth care centre

In terms of section 29 of the CJA, children not released into the care of their parents or care-givers, may be placed in child and youth care facilities managed by DSD. Section 76 of the CJA also provides for the sentencing of children to compulsory residence in a child and youth care facility. The purpose of these provisions is to prevent children from being detained in prisons.

Table 4: Eastern Cape Child & Youth Care Centers

Centre	Capacity	Occupancy
Enkuselweni	50	35
Qumbu	48	30
John X Merrimen	100	72
Bhisho	320	34
Sikhuselekile	50	closed

Source: DSD Provincial office statistics 2015

The table shows that in the Eastern Cape Province, five child and youth care centres exist for youth in conflict with the law. Only Sikhuselekile is closed at the moment since it was taken over from a service provider called Bosasa by DSD at the end of 2014. According to reports from the Eastern Cape Provincial Child Justice Forum (2014), John X Merriman Child and Youth Care Centre and the Bisho Child and Youth Care Centre both in the Eastern Cape Province were successfully upgraded to meet the requirements, as outlined by the blueprint for the establishment and management of child and youth care centres. There are 5 child and youth care centres for children in conflict with the law in the Eastern Cape. The minimum norms and standards require each child and youth care centre to have a bed capacity of 60 to 120 beds, depending on the size of the infrastructure and the resource capacity. This is to avoid overcrowding that may defeat the optimal achievement of the objectives of the child and youth care centres. DSD has put mechanisms in place to ensure compliance with the minimum norms and standards.

The social worker's interviewed agreed that placing children in a residential care is important for rehabilitation purposes. One of the children at the child and youth care centre added:

> *Ever since I arrived at this centre, I have learnt to take responsibility and not to go back to crime again.*

Besides these achievements, various challenges are noted in the study. Most respondents indicated a lack of monitoring at the centres as a major challenge. It is reported that children abscond in most of these centres as a result of poor security and monitoring. Reports from the Eastern Cape Provincial Child Justice Forum show that the Eastern Cape experience problems of children absconding at the above mentioned centers.

Another challenge in the implementation of the CJA in the Eastern Cape is the transfer of the reform schools from the Department of Basic Education to DSD. There are strategic and logistical considerations to be made in the transfer of facilities such as whether the whole facility or only a portion thereof will be transferred to DSD. These considerations will be guided by the broader issues of governance including accountability arrangements for the facility to be transferred. Equally, the practicality of access for the use of the facility will be taken into account when final decisions are made. This implies that a delay in the transfer of these facilities from Department of Basic Education to DSD can affect the availability of the facilities to be used as secure care for children in conflict with law. This can also mean children at these facilities will not receive education due to logistical challenges as a result of transfer procedures from one department to another. The lack of education is a violation on the right to basic education for children in conflict with the law who are deprived of their liberty and this affect the functioning of the child and youth care centers. The next section discusses the feasibility of one stop child justice centres.

4.4.7 Establishment of One Stop Child Justice Centres

Section 89 of the Act provides that the Minister of Justice and Constitutional Development, (after consultation with the Ministers responsible for social development, safety and security may establish One Stop Child Justice Centers (OSCJC) to ensure a holistic, one stop service for children in conflict with the law. The objective of OSCJC is to promote co-operation between government departments and the non-governmental sector to ensure an integrated and holistic approach in the implementation of the CJA. The only OSCJC in the Eastern Cape is Nerina in Port Elizabeth. One respondent states that:

> *Young people need speedy justice. One-stop justice centres have been set up where arrested juveniles are given immediate hearings and sent as quickly as possible to youth centres for rehabilitation programmes. If*

necessary, they are held overnight at cells linked to police stations at the centre.

Another respondent added:

Children have hearings immediately is wonderful. It's never a case of no social worker, or no lawyer. They get an immediate diversion out of the criminal justice centre into a rehabilitation programme.

The implications for service delivery is that children need to be transported to and back from the police station, the probation officer, the court and the place of detention or back to their parents, where applicable, and the transportation of these children poses challenges. Another government official stated that:

The continued establishment of the OSCJCs has been halted in view of the hurdles experienced in the process. There is no existing Government owned buildings that could be converted into OSCJCs with affordable costs.

This means that the Eastern Cape needs additional OSCJC to meet the objective of the CJA. Reports from the Eastern Cape Provincial Child Justice Forum show that the Department of Justice and Constitutional Development planned to convert the Khayalethembachildren's home in the Eastern Cape into an OSCJC, but could not succeed because costs for refurbishment were increased to R28 million. The Department of Justice and Constitutional Development annual reports (2011-2014) shows that to date, there are three OSCJ's that are fully operational in three provinces, namely Eastern Cape, Free State and North West. However, budgetary constraints have confined the establishment of more centres in provinces to meet the objective of the CJA. The next section discusses the implications of budget and resources in the implementation of the CJA.

4.4.8 Lack of resources and budgets

As indicated earlier, all implementing departments and institutions have experienced lack of or insufficient resources and budgets in many areas, which consequently reduced the capacity of deliverables in the implementation process. However, recognizing the depressed economic climate, it is clear that the limited resources have to be utilized optimally. One government official stated that:

> *Better partnerships and pooling of resources in certain areas will assist us to deliver the services mandated by the CJA.*

Social workers have also expressed concern that the diversion programmes are not costed which makes it difficult for service providers to effectively render services. An annual report from the Department of Justice and Constitutional Development shows that the relevant departments have been implementing the CJA mostly within the existing budget baselines. The justice, crime prevention and security cluster requested from the National Treasury a budget of R 338 272 299for the period 2010/11, and R2 216 547 400for the period 2011/12 to 2013/14. However, an amount of R30 millionwas received to implement the CJA during 2010/11, and this was distributed to the Department of Justice and Constitutional Development for the appointment of dedicated child justice court clerks, the effective functioning of intersectoral governance structures, training and public education and awareness-raising, NPA for the appointment of additional dedicated prosecutors; and Legal Aid South Africa for the appointment of dedicated child justice attorneys. The other cluster departments will report separately upon the budgets received and spent in this regard, from their strategic plans and annual reports (Annual Report Department of Justice and Constitutional Development, 2010-2011).

This is no exception to Eastern Cape Province and clearly shows that adequate funding remains a challenge in the implementation of the CJA. However, the Department of Justice and Constitutional Development, as chair of the justice,

crime prevention and security cluster should devise ways and means to ensure funding for the stakeholders implementing the CJA.

4.4.9 Public Education and Communication

The CJA established a separate child justice system in South Africa and radically changed the way in which children in conflict with the law are being treated in the criminal justice system. Badenhorst (2011) states that it creates opportunities which afford children in conflict with the law a second chance to become constructive and valued contributing members of the community. One of the central objectives of the CJA is to effectively rehabilitate and reintegrate children in conflict with the law back into their families and communities. An integral part of achieving this objective depends on the co-operation of and acceptance of children in conflict with the law by their families, communities and society in general.

The Reports from the Eastern Cape Provincial Child Justice Forum reveals that, in the Eastern Cape Province, a total of 622crime prevention initiatives were implemented since 2010 to address crimes. A total of 54 176 people were reached through these integrated social crime prevention initiatives. These programmes included public awareness-raising on CJA in 2010. The Eastern Cape held an awareness campaign during Crime Victims' Rights Week at Mount Ayliff. The event was aimed at educating communities on their rights and included learners from 8 schools in that locality. About 380 community members and learners attended the event. The perceived impact is that the information given dispelled some of the negative perceptions that people have about the CJA. Most respondents indicated that the community does not understand the importance of the CJA.[17]

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[17] *The Reports from the Eastern Cape Provincial Child Justice Forum, 2010-2011.*

This shows that effective public education is a necessity. This is echoed by Badenhorst (2011) who noted that ongoing communication and awareness-raising on the new child justice system are essential and its benefits, not only to the children but to society in general, becomes an ongoing imperative for the achievement of significant success in the implementation of the CJA.

The lack of public awareness is highlighted in the annual reports from the Department of Justice and Constitutional Development. It is reported that there is a need for a more intensive communication strategy for all sectoral partners, especially in light of several high profile cases which brought the CJA under public scrutiny, such as the Jules High School sex or rape case in Johannesburg and the Terre'Blanche murder case in the North West Province (Badenhorst (2011).

4.10 Summary

The problem of children in conflict with the law is still persisting. The CJA came at the right time and introduced new innovations and a separate system to deal with cases of children offences. In the Eastern Cape Province, many provisions of the CJA found implementation with favourable results, in the midst of trial and error. A multi-sectoral approach is evident in the implementation process. However, the implementation process was not without teething challenges. This chapter has highlighted a number of challenges in service delivery, and the coordinated and joint approach that the cluster departments and the non-governmental organizations need to foster for greater achievements in the future. The noted challenges above clearly show that there are still inconsistencies in the implementation of the CJA. The next chapter summarizes and gives conclusion to the findings of the study and provides recommendations emerging from the study for effective multi-sectoral implementation of the CJA. The chapter also gives recommendations for future research.

CHAPTER 5: SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter will, first,summarize the overall findings, draw conclusions in relation to the goal and objectives of the study, as stated in Chapter one and reiterated below. Secondly, the chapter will make recommendations based on the findings from the study and also present recommendations for future research. The goal of the study was to explore the extent of children in conflict with the law and assess efforts made by various stakeholders involved in the implementation of the Child Justice Act (CJA). The objectives of the research study were to find the extent of juvenile crime, the importance of the CJA, identify stakeholders involved in the implementation of the CJA and check progress that has been made, lessonsthat can be learnt and what recommendations can be made on the implementation of the CJA since its inception in 2010. The findings show that, although the CJA brought progress and new developments in the criminal justice system, there have been challenges and inconsistencies in the implementation of the CJA in the Eastern Cape Province. Another core argument in the study is that children are indeed in conflict with law and this behaviour is attributed to a variety of factors.

5.2 Summary and Conclusions

It emerged from the study that the problem of juvenile delinquency remains a social problem. They are various offences committed by children. The children interviewed have been charged for various offences which range from serious, violent and non-violent crimes. This is characteristic of most children arrested in the Eastern Cape Province. The study shows that the arrest of children has dropped since the inception of the CJA in 2010. This is reportedly due to lack of capacity on the part of the police to handle cases of children in conflict with the law. The study noted that the introduction of the CJA brought new administrative procedures to the police when they are handling cases of children. Due to this administrative function, police are failing to handle the procedures very well.

Some of the children are cautioned and not charged. This is causing disparities in statistics of children in conflict with the law in the Eastern Cape Province. The respondents cited causes of crime among children as a combination of physical, social, and psychological factors. This is consistent with Siegel et al (2003:59) who states that juvenile delinquency can be explained through a variety of socio-theoretical constructs. The dysfunctional family system has been cited as a major contributor of juvenile delinquency. According to social workers interviewed, family problems such as inadequate parenting, disruptive family bonds, unemployment, substance abuse and poverty have been identified as key factors that predispose children to criminal behavior.[18]

Reflecting major findings on multi-sectoral implementation and key priority areas, it can be shown thatthe CJA has brought about some new elements in the South African criminal justice system in cases involving children in conflict with the law. The study has shown that the CJA is important because it addresses the ills of the past, which forced children in conflict with the law to face the hard conditions of the criminal justice system which were primarily designed for adult offenders. The CJA introduced certain reforms in the criminal justice system to ensure that children in conflict with the law were treated in a manner that took into account their age, vulnerability and special needs, such as developmental needs. It gives children a chance to benefit from intervention programmes and sentencing options aimed at rehabilitating them for the purposes of ensuring that they are ultimately reintegrated back into families and communities where they could become law-abiding citizens. Another important thing about the CJA is that it promotes a collaborative and coordinated approach by all sectors in the establishment and management of a child justice system in the Eastern Cape. The Provincial Child Justice Forum is established to ensure effective monitoring of the implementation of the CJA.

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[18] *Interviews with social workers on 24-25 March 2015.*

The assessment of the implementation of the CJA is essential to give insight into the progress made in establishing a child justice system that respects the values and ethos of constitutional commitments in South Africa, especially in relation to the protection of the rights of children in conflict with the law. This study has reflected on successes realized thus far, whilst exploring challenges noted for successful on-going implementation. The implementing departments and institutions have, once again, delivered commendable performance on many of the key priority areas or provisions of the CJA. As indicated in the above chapter, the implementation process is not without challenges.

The study shows the need to build capacity in the sector to ensure successful implementation of the CJA. Lack of training has been identified as a challenge in the implementation of the CJA. Most government officials' interviewed cited training as a need in the Eastern Cape Province. So far training has been provided to a limited number of personnel working with children in conflict with the law. It is reported in the study that the gap and need for training still exist to the new personnel involved with matters of children in conflict with the law. As the years of the implementation of the CJA are progressing, many implementing Departments must focus on their resources on improving skills of personnel dedicated to child justice, mainly to strengthen their knowledge and skills on the CJA. Coaching and mentorship through on-the-job training is what the child justice value chain requires in order to reach optimal performance in the implementation of the CJA.

The study also reveals the assessment of children as an important aspect in the CJA. The Probation Officers play a good role to ensure assessment of children immediately after being notified of the arrest. The number of assessments fluctuates from year to year and is not consistent. The respondents cited various challenges in this provision. There are delays in the assessment of children and in some instances Probation Officers are not always available to assess the arrested children on time. The shortage of Probation Officers is highlighted as a

factor that also delays the process of dealing with cases of arrested children. Most stakeholders interviewed echoed the need to appoint additional probation officers, and DSD has developed a plan for the progressive appointment of such Probation Officers. Another notable challenge is the assessment of criminal capacity of children who are 10 years or older, but under 14 years of age. It is reported that there is limited funding for criminal capacity of children as ordered through the preliminary inquiry.

Preliminary Inquiries are held as reflected in the study. This is a new innovation brought into the criminal justice system through the introduction of the CJA. This ought to be viewed in a positive light as it means that many children are saved from the harsh realities embedded in the criminal justice system so as to ensure that the system respects and protects their constitutional rights. Although results show that Preliminary Inquiries are being conducted in most areas in the Eastern Cape Province, non-compliance is noted is some areas. There are delays in conducting preliminary inquiries for children in conflict with the law. The CJA section 43 prescribes that all children in conflict with the law must attend a preliminary inquiry within 48 hours of arrest .The decrease in the number of preliminary inquiries is also attributed to structural problems at the court. This will delay cases of children to be diverted.

According to the available information in the study, there is a decrease in the number of children being diverted out of the formal criminal justice system since 2010. The study noted that the CJA allows for a rich variety of strategies to cater for the intervention needs of child offenders through a number of diversion options. The strategies demonstrate varying potential to meet the diversion objectives of the CJA. Nevertheless, diversion strategies present some unique challenges to effective service delivery, with some shortfalls appearing prominent across all types of interventions. A pertinent matter is the ability of parents to monitor the diversion orders of their children. Parents, in particular, ought to become more involved in diversion programmes but they lack monitoring of the

children after completion of the programme. This often results in reoffending by children. The unavailability of service providers to render diversion programme is also noted. NICRO is the only accredited service provider for diversion programmes in the Eastern Cape. This non-governmental organization only benefits diverted children in urban areas and this leaves a huge gap for the diverted rural children to have a proper service. The Department of Social development (DSD) lacks capacity to render the programmes since their programmes are not yet accredited. There is need to accredit more diversion service providers in the Eastern Cape Province including accrediting DSD programmes to meet the diversion objectives of the CJA.

The CJA promotes the imposition of non-custodial sentences against children convicted of criminal offences. This study shows a decrease in the number of imprisonment sentences imposed upon children since 2010. This is a drastic change in the justice system that indicates that our courts are indeed effectively achieving the goals of the CJA. Before the CJA was enacted, they were many children placed in various prisons in the Eastern Cape Province. The significant increase in the number of children sentenced to compulsory residence in child and youth care centres in the Eastern Cape Province is further viewed as a positive move towards achieving the child justice system that respects the constitutional rights of children.

The study shows that there are five established child and youth care centres for children in conflict with the law in the Eastern Cape Province. It is reported that, only one centre is closed at the moment since it took over from Bosasa by DSD at the end of 2014. According to respondents two of the centres, John X Merriman and Bisho are both in the Eastern Cape Province, were successfully upgraded to meet the minimum norms and standards for child and youth care centers in South Africa. Various challenges such as the abscondment of children, lack of education and vocational skills and the bureaucratic delays in the transfer of child and youth care centers from the Department of Education to DSD

hamper the functioning of the centers in terms of meeting the objective of the CJA.

The establishment of the One Stop Child Justice Centres (OSCJC's) is a critical factor in the CJA. Amidst challenging circumstances, Department of Justice and Constitutional Development succeeded to establish the Nerina OSCJC in Port Elizabeth, which is now fully operational. However, this was not a full achievement as the second OSCJC could not be established, as planned due to limited budget. Eastern Cape Provincial Child Justice Forum reported that the Department of Justice and Constitutional Development wanted to convert the Khayalethemba children's home in the Eastern Cape into an OSCJC, but could not succeed because costs for refurbishment were increased to R28 million. The National Operational Inter-Sectoral Committee is currently investigating the viability of the continued establishment of these centres since no existing Government -owned building could be found so as to be converted into OSCJC. The study noted that there is need for establishment of more OSCJC to meet the objective of the CJA. Resources need to be made available for the viability.

Another finding is that the implementing departments have been operating on a limited budget and resources since 2010. Respondents state that without dedicated budget allocations, limited achievements will continue to define progress in the implementation of the CJA. It is important that the Inter-Sectoral Committee on Child Justice ensure that the CJA has a dedicated budget allocation from all implementing Government stakeholders. The general consensus among respondents is that since the CJA requires the establishment of special infrastructure and personnel adequate resources should be made available in order to achieve the goals of the CJA.

Furthermore, the study showed that it is through robust public education initiatives that government can successfully receive the support of parents, guardians and the civil society in the re-integration of children back into their

communities. The study also shows that in the Eastern Cape Province an integrated social crime prevention strategy is in place, many campaigns and prevention programmes were carried out by various stakeholders since the inception of the CJA in 2010. Through these initiatives, the public is gradually showing support to the realization of the goals of the CJA, which stand against creating a hardened criminal out of a child.

Therefore, the fate of children in conflict with the law remains a social ill in the Eastern Cape Province. The CJA brought important innovations in dealing with the matters of children. It established a separate child justice system in South Africa. With these significant achievements, not only one conclusion can be drawn from the last years of implementation of the CJA. The study reflected that this period brought not only the progressive accomplishments by the implementing stakeholders, but challenges were noted during this period. Although it might be too soon to decide as to whether the CJA works or not, the footprints of recorded achievements speak for themselves.

There were limitations noted in the study. The respondents were reluctant to be interviewed as they thought and feared that the researcher was a Government representative and that the research has political implications. Hence, there was a need for good communication with relevant respondents' in-order to establish trust. Official documents such as reports on multi-sectoral implementation of the CJA, were not easily available or accessible (the problem of securing information) from one role player to another. Some stakeholders' delayed to send the information. The researcher had to fully explain the purpose of the study in-order to get the relevant information from the respondents. However, despite these limitations of the study, it is clear from the findings that there is still a need to work on various challenges and recommendations emerge.

5.3 Recommendations from the Study

- There is need to develop mechanisms and tools to monitor and evaluate the effectiveness of the implementation of the CJA. From the findings, it can be noted that not all departments or organizations involved in the implementation of the CJA have monitoring tools. Lack of monitoring can hamper the application of the CJA.The child justice sector needs to have a monitoring and evaluation tool to measure the impact of public education in crime response and prevention. Although campaigns have been waged to educate the public on the CJA. There is still need to consistently educate the public for them to understand the child justice system and play a role to reduce the causes of juvenile delinquency.

- There is need to review the CJA. After five years of implementation the CJA must be reviewed. The challenges experienced by various stakeholders are such that certain provisions in the CJA make it practically impossible to implement it effectively. The CJA is prescriptive in nature. Some respondents identified them as flawed so as to determine the need to request amendments to the legislation, regulations and/ or National Policy Framework on Child Justice, where necessary.

- Ensuring improved and continued training of the service providers on the provisions of the CJA and related matters. From the findings, lack of training has affected successful implementation of the CJA in the Eastern Cape Province.

- There is a need to increase and accredit more service providers in diversion programmes. The results from the study show that NICRO is the only accredited service provider for diversion programmes. This leaves many children especially those in rural areas not accessing the services required for them. DSD lacks capacity to render diversion programmes since most of their programmes are not accredited. There is a need to

mentor and fund more service providers to render diversion programmes in the Eastern Cape Province.

- Increasing the number of designatedOne Stop Child Justice Centre (OSCJC's). The study has shown that Nerina is the only OSCJC in the Eastern Cape. One of the biggest challenges facing the Department of Justice and Correctional Services at present is the unavailability of existing buildings that could be converted into OSCJC. There is a need to have more of these centers to meet the objectives of the CJA.

5.4 Recommendations for Future Research

The following areas for future research have been identified:

- Further research is needed to confirm or dispute the qualitative claims made in the present investigation. Quantitative approaches, and especially longer term and comparative designs, are needed to assess the value and impact of the CJA.
- Studies exploring the effectiveness of diversion programmes in reducing re-offending behaviour of children.
- Studies to measure the impact of public education on crime response and prevention.
- Studies on the availability and suitability of child and youth care centres for children in conflict with the law.

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APPENDIX A: INDEPTH INTERVIEW QUESTIONS FOR CHILDREN IN CONFLICT WITH THE LAW

Hello, my name is Antony Kapesi Chakuwamba and I am a postgraduate student studying Master of Philosophy in Human Rights at the University of Fort Hare. I am conducting a study on children in conflict with the law, assessing the implementation of the Child Justice Act 75 of 2008. The main aim of the study is to explore efforts made by various stakeholders involved in the implementation of the Child Justice Act. It will be essential to get insight on the roles of stakeholders and view how their efforts could or do not warranty an effective coordination of the child justice system. The study is significant because it can be used as a yardstick to measure the government's response to sectional needs of its beneficiaries who are, in this case, children in conflict with law. The information you provide is highly confidential and will be used for academic purposes only. I would like to ask you some questions about the current situation on the implementation of the Child Justice Act.

SECTION A: PERSONAL INFORMATION

Gender : _____ Age Group: _____

Education Level : _____ Population Group: _____

Nationality : _____

RESEARCH QUESTIONS

1) Are you aware of the Child Justice Act 75 of 2008?

2) If yes, what did you know about it?

3) What were you arrested for?

4) Describe what happened when you were arrested?

5) How long did it take for you to be assessed?

6) How long did it take for you to appear in court?

7) Describe what happened when you were in court?

8) How was the experience of appearing in court?

9) What support did you receive after your appearance in court?

10) What do you think are the causes for children to commit crime?

11) Describe your relationship with your family?

12) Do you think the community is doing enough to protect and prevent crime by children?

13) If Yes or No, please explain?

14) Do you think the government is doing enough to protect the rights of children in conflict with the law?

15) If yes, please explain?

16) If no, what are the challenges experienced by children who are arrested?

17) What suggestions do you have regarding children who are arrested?

NB*Is there anything more you would like to add?
I will be analyzing the information you and others gave me.

Thank you for your time.

APPENDIX B: INDEPTH INTERVIEW QUESTIONS FOR STAKEHOLDRES INVOLVED IN IMPLEMENTATION OF THE CHILD JUSTICE ACT 75 OF 2008

Hello, my name is Antony Kapesi Chakuwamba and I am a postgraduate student studying Master of Philosophy in Human Rights at the University of Fort Hare. I am conducting a study on children in conflict with the law, assessing the implementation of the Child Justice Act 75 of 2008. The main aim of the study is to explore efforts made by various stakeholders involved in the implementation of the Child Justice Act. It will be essential to get insight on the roles of stakeholders and view how their efforts could or do not warranty an effective coordination of the child justice system. The study is significant because it can be used as a yardstick to measure the government's response to sectional needs of its beneficiaries who are, in this case, children in conflict with law. The information you provide is highly confidential and will be used for academic purposes only. I would like to ask you some questions about the current situation on the implementation of the Child Justice Act.

SECTION A: PERSONAL INFORMATION

Gender : _____ Age Group: _____

Education Level : _____ Occupation: _____

Nationality : _____ Population Group: _____

RESEARCH QUESTIONS

1. What could be the causes of crime by children?
2. Describe the nature of crimes committed by children?
3. Do you think government has done enough to protect the rights of children in conflict with the law? Please provide a justification for your answer.
4. What is the importance of the Child Justice Act 75 of 2008?
5. What changes has the Child Justice Act brought in the criminal justice system?
6. Which stakeholders are involved in the implementation of the Child Justice Act?
7. Do you think the family and other community members are aware of the Child Justice Act?
8. Do you think they are challenges experienced in the implementation of the Child Justice Act?
9. If yes, please explain?
10. What strategies do you think should be put in place to improve the implementation of the Child justice Act? Please provide a justification for your answer.
11. What recommendations do you have for successful implementation of the Child Justice Act?

NB*Is there anything more you would like to add?
I will be analyzing the information you and others gave me.

Thank you for your time.

APPENDIX C: ETHICAL CLEARANCE LETTER

University of Fort Hare
Together in Excellence

ETHICAL CLEARANCE CERTIFICATE
REC-270710-028-RA Level 01

Certificate Reference Number:	REM0141SCHA01
Project title:	**Children in conflict with Law: An assessment of the implementation of Child Justice Act 75 0f 2008 in the Eastern Cape Province**
Nature of Project:	Honours
Principal Researcher:	Kapesi antony Chakuwamba
Supervisor:	Prof S Rembe
Co-supervisor:	Dr K Moyo

On behalf of the University of Fort Hare's Research Ethics Committee (UREC) I hereby give ethical approval in respect of the undertakings contained in the above-mentioned project and research instrument(s). Should any other instruments be used, these require separate authorization. The Researcher may therefore commence with the research as from the date of this certificate, using the reference number indicated above.

Please note that the UREC must be informed immediately of

- Any material change in the conditions or undertakings mentioned in the document
- Any material breaches of ethical undertakings or events that impact upon the ethical conduct of the research

The Principal Researcher must report to the UREC in the prescribed format, where applicable, annually, and at the end of the project, in respect of ethical compliance.

Special conditions: Research that includes children as per the official regulations of the act must take the following into account:

Note: The UREC is aware of the provisions of s71 of the National Health Act 61 of 2003 and that matters pertaining to obtaining the Minister's consent are under discussion and remain unresolved. Nonetheless, as was decided at a meeting between the National Health Research Ethics Committee and stakeholders on 6 June 2013, university ethics committees may continue to grant ethical clearance for research involving children without the Minister's consent, provided that the prescripts of the previous rules have been met. This certificate is granted in terms of this agreement.

The UREC retains the right to

- Withdraw or amend this Ethical Clearance Certificate if
  - Any unethical principal or practices are revealed or suspected
  - Relevant information has been withheld or misrepresented
  - Regulatory changes of whatsoever nature so require
  - The conditions contained in the Certificate have not been adhered to
- Request access to any information or data at any time during the course or after completion of the project.
- In addition to the need to comply with the highest level of ethical conduct principle investigators must report back annually as an evaluation and monitoring mechanism on the progress being made by the research. Such a report must be sent to the Dean of Research's office

The Ethics Committee wished you well in your research.

Yours sincerely

Professor Gideon de Wet
Dean of Research

09 February 2015