INNOVATIONS INTRODUCED INTO THE SOUTH AFRICAN
CRIMINAL JUSTICE BY THE CHILD JUSTICE
ACT 75 OF 2008

By

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SUMMARY

The Child Justice Act 75 of 2008 has brought about some new elements in the South African Criminal Justice system in cases involving children in conflict with the law. The changes require that children in conflict with the law should be treated differently from adult accused persons. The Act is now regarded as a Criminal Procedure for children in conflict with the law. In other words the emphasis is on ensuring that children are diverted away from the formal Criminal Justice provided that children acknowledge responsibility.

One of the elements that is introduced by the Act is the Preliminary Inquiry that is an informal, pre-trial procedure that must be held in respect of every child that is alleged to have committed an offence. The role of the Presiding Judicial Officer is very active during this stage because he is the one that takes charge of the proceedings and the role of the Prosecutor and the Legal Representative is very minimal. The purpose of the Preliminary Inquiry is in the main to determine whether a child in conflict with the law could be diverted if the provisions of section 52 (1) of the Act are complied with.

Preliminary Inquiry if properly used will have possible benefits for the South African Criminal Justice system in that cases involving children will be timeously be finalised and the turn around time for criminal cases in general will possibly improve. Same will translate in the confidence of the citizens being improved in the Justice system.

The second element that is introduced by the Act is formalised diversion into the Criminal Justice System. Diversion had for a number of years before the coming into operation of the Child Justice Act been used in South Africa but it was informal. The diversion that is envisaged by the Act is restorative in nature in that the Act seeks to involve the child offender, the victim, the community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent recurrence of the incident and promoting reconciliation.

Restorative Justice is not a new invention in the South African legal system it is a return to traditional patterns of dealing with conflict and crime that had been present in different cultures throughout human history. Restorative Justice has been understood as Ubuntu in the African context. The Truth and Reconciliation Commission demonstrated the benefits of restorative justice in dealing with conflicts that had a potential of setting the country alight. Restorative Justice has evolved in South Africa throughout different historical epochs up to the current legal conjuncture.

It has now been endorsed with success in precedent setting cases in the High Courts of the Republic and the Child Justice Act has now fully institutionalised it into the Criminal Justice system. One hopes that it will be extended beyond cases involving children in conflict with the law but to adult accused persons. Various pieces of legislation attempt to
endorse the principles of restorative justice but are not as comprehensive as the Child Justice Act. There are 4 instances where a matter may be diverted in terms of the Act:

(i) By a Prosecutor in terms of section 41;
(ii) Diversion at Preliminary inquiry;
(iii) Diversion before the closure of state case at trial;
(iv) At any time during trial but before judgement.

There are 2 diversion options that are provided by the Act that is level one diversion option in respect of schedule 1 offences and level 2 diversion options in respect of schedule 2 and 3 which are much more serious.

The Act further entrenches Family Group Conference as well as Victim Offender Mediation which are restorative justice mechanisms. The legal consequences of diversion are that when the child has successfully complied is equivalent to an acquittal.

The last element is the multi sectoral approach to crime fighting in that all role players should work together in dispensing justice to children in conflict with the law. The days of working in silos are now over because everybody has a role to play and there has to be collaboration at all levels. The Act entrenches the public private partnerships particularly in helping to rehabilitate and reintegrate children to society. The Act provides for the establishment of One Stop Child Justice Centres. The purpose is to promote cooperation between government departments, non governmental organisations and civil society to ensure integrated and holistic approach in the implementation of the Act. The Act further provides for the development of the National Policy Framework by the Departments of Justice and Constitutional Development, Social Development, Correctional Services, South African Police Services, Education and Health within 2 months of the commencement of the Act. The purpose is to ensure uniform, coordinated and cooperative approach by all government departments, organs of state and institutions in dealing with matters of child justice and enhance service delivery.

This study seeks to examine the innovations brought about by the Child Justice Act into the South African Criminal Justice System. The study further explores the possible benefits that may accrue to the Criminal Justice System because of Preliminary Inquiry, Restorative Justice and the Multi Sectoral Approach to crime.
Chapter 1

INTRODUCTION

The treatise will traverse the innovations that are brought about by the Child Justice Act\(^1\) in the South African Criminal Justice System. The Act introduces preliminary inquiry, restorative justice and multi-sectoral approach to combating crime to the criminal justice system in cases where children in conflict with the law are involved. Our criminal procedure as we know it does not have preliminary inquiry and formalised diversion hence the Act was introduced as a way of responding adequately and appropriately to cases involving children in conflict with the law in line with International Instruments\(^2\) and the Constitution of 1996.\(^3\)

The Criminal Procedure Act\(^4\) was not designed to deal with children in conflict with the law. One argues that it is not user friendly to children because one views it as too formal both in form and in content and it fails to take into account the special needs of children.\(^5\) It does not differentiate adults from children and as such many children had suffered in a number of ways. Many children had died in custody while awaiting trial some had been sentenced to serve prison terms with adults.\(^6\) One of the unintended consequences of the system was that some of the children had graduated to become hardened criminals.\(^7\)

The accusatorial nature of the criminal justice system is in itself not suited to deal with children given their vulnerability and lack of understanding of what they are doing.\(^8\) Some children stray to criminality as part of the process of growing up and as such, a system that recognises the challenge is desired to ensure that children are rehabilitated and reconciled back to normal life.\(^9\) That will ensure that we do not breed criminals in our society. The prison system has become a university of crime,\(^10\) for anyone to survive prison life he has to join a prison gang to ensure one’s safety. By the time the child comes out of a short time in prison he has already been initiated to gang and criminal life.\(^11\)

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\(^1\) Child Justice Act 75 of 2008  
\(^3\) Constitution of the Republic of South Africa, Act 10 8 of 1996  
\(^4\) Criminal Procedure Act 51 of 1977  
\(^5\) Muller and Tait, Little witnesses: A suggestion for improving the lot of children in court. THRHR (62) 1999  
\(^6\) NICRO Diverion Manual: A history of Juvenile Justice in South Africa  
\(^7\) van Rensburg, Kenny and, Mbakaza. Draft Baseline Specification on Child Justice  
\(^8\) Coetzee, Bendle, Sloth-Nielsen, Tshiwula and Cloete, Child Justice Training Manual, Department of Justice and Constitutional Development  
\(^9\) Ibid  
\(^11\) Thomas, Violence and Child Detainees, page 437-461
The Act provides a new paradigm shift by ensuring that the system moves away from prosecution of children by placing emphasis on dealing with a child in conflict with the law outside the formal criminal justice. Preliminary Inquiry captures the inquisitorial element of the Act which is a new innovation. It is a compulsory process that has to happen immediately a child has been assessed by a Probation Officer.\textsuperscript{12} It will now become a first appearance for the child before a matter is referred to Child Justice Court for trial.\textsuperscript{13} The purpose of it is to inquire whether the child is suitable for diversion or is a child in need of care and protection. However it requires the child to acknowledge responsibility before being diverted. If it is established that the child is in need of care the matter will be transferred to Children’s Court\textsuperscript{14} to be dealt with in terms of the Children’s Act. The process is a complete break from the criminal justice system in that it is informal and the Inquiry Magistrate plays a central role in leading the inquiry\textsuperscript{15}. The manner of giving evidence is not structured and it allows the parties involved to participate in a more relaxed atmosphere\textsuperscript{16}. The court officials do not robe themselves they wear civilian clothes to give the forum a relaxed atmosphere.\textsuperscript{17}

The sitting does not have to take place in a court room and it is encouraged that it takes place in chambers.\textsuperscript{18} The child does not plead to the allegations against him but the Inquiry Magistrate informs the child of his rights and afterwards starts to inquire into whether or not the child is taking responsibility, if all requirements are met in terms of section 52(1) diversion is considered or it is determined whether the child is in need of care and protection. These are the main objectives of the preliminary inquiry.\textsuperscript{19}

Secondly chapter 6 and 8 provide for diversion of the child away from the formal Criminal Justice System.\textsuperscript{20} These chapters are the essence of the Act. The possible benefits of these are that they will ensure that children are not stigmatised as criminals,\textsuperscript{21} it ensures predictability in the manner in which children are dealt with, it will ensure that court rolls are not clogged\textsuperscript{22} with cases that could be diverted away from the courts and that children will be dealt with in an age appropriate manner. Diversion captures the restorative elements of the Act because it seeks to give children a second chance without incurring a criminal record.\textsuperscript{23} It further allows the victim an opportunity to express a view as to how the matter should be dealt with and reconciles the child with the community.\textsuperscript{24}

Diversion as envisaged by the Act is not a blank cheque to a child in conflict with the law. For a child to be diverted there are certain prescribed requirements that have to be

\begin{enumerate}
\item S 43(1)
\item S 43(3) (c)
\item Children’s Act 38 of 2005
\item S 47 (1)
\item Muller, Hollely, Introducing the Child Witness, Serember 2000 p 2-68
\item S 43(1)(b)
\item S 43 (2)
\item S 51(a)
\item S 59
\item Draft Child Justice Act, National Police Instructions 2 of 2010.
\item S 51 (j)
\item S 51 (e)
\end{enumerate}
met in terms of section 52 (1) of the Act. The child has to acknowledge responsibility and has to consent to diversion. In essence the child has to freely and voluntarily consent to diversion. Failure to meet the latter requirements will leave the Inquiry Magistrate with no option but to refer the case to a Child Justice Court for a trial in terms of the Criminal Procedure Act 51 of 1977.

The last element is the multi sectoral approach to dealing with children in conflict with the law. The Act requires that a child after arrest is assessed within 48 hours. In other words the police have to advise a probation officer immediately a child has been arrested. The Probation Officer has to assess the child before the matter is sent to a Prosecutor for either a diversion in terms of section 41 or if the matter will be enrolled at a preliminary inquiry. If the child is considered for diversion the Act requires that the victim be accorded an opportunity to express his or her views, that the service provider develops a programme that will meet the interests of the victim, offender and the community.

The Act ensures that there is collaboration between role players in dispensing justice to children in conflict with the law. The police effect arrest and have to inform a probation officer who has to assess the child before appearance at a preliminary inquiry. The inquiry magistrate has to consider the probation report, the views of the prosecutor and the views of the victim as well as the views of the community. In essence all the parties must play their respective roles in ensuring that justice is not only done but is seen to be done. All government departments have a role to play and must work together with non governmental organisations in ensuring that the Act is given its full effect. The emphasis of this Act is to first, investigate, assess, inquire, divert, role player collaboration, prosecute and rehabilitate as opposed to punishment. It requires a paradigm shift from Prosecutors to ensure that inquiry and investigation precedes prosecution when it comes to dealing with children who are alleged to have committed an offence. Police have to ensure that children are assessed and the Inquiry Magistrates must ensure that they inquire before making decisions whether to divert or refer to Children’s Court. Correctional Services have to ensure that children are not kept in cells with elderly inmates and are kept for a short period. Social Development has to ensure that there are probation officers and that service providers for diversion programmes are accredited to

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25 S 52 (1)
26 S 52 (1)
27 S 52 (6)
28 S 34 (1)
29 S 20 (4)
30 S 34 (2)
31 S 51(e)
32 S 51(e)(g)
33 S 89(3)
34 S 47 (7)
35 S 94
37 S 28 (1)(g) Constitution of the Republic of South Africa, 1996
38 S 56 (2)(ii)
ensure that the restorative justice elements of the Act are adequately applied.\textsuperscript{39} The Department of Education has to ensure that adequate education facilities are provided in Secure Youth Centres to ensure that children do not miss out on their education whilst serving time in Secure Youth Centres.\textsuperscript{40} The Department of Justice and Constitutional Development has to ensure that judicial officers are trained to handle preliminary inquiry as well as to handle cases involving children whilst the National Prosecuting Authority has to ensure that prosecutors are trained and sensitized to deal with cases involving children in conflict with the law.\textsuperscript{41} There has to be a shift in approach from prosecution to investigation, inquiring and collaboration by role players because if there is no collaboration there is a great possibility that this Act will become ineffective. Correctional Services have to be sensitized to ensure that rehabilitation programmes are implemented within the prison system.\textsuperscript{42} Non governmental organisations should play their roles in terms of providing adequate diversion programmes to children in conflict with the law.\textsuperscript{43} Therefore for the Act to be fully implemented and effective there has to be a strong collaboration to dispense justice to children both at operational and strategic levels.\textsuperscript{44} Political leaders should provide resources and play their oversight roles for the implementers to effectively apply the provisions of the Act.

The Act seems to be a good piece of legislation in that it incorporates new innovations to the Criminal Justice System in line with International standards. This is an indication that South Africa is part of the Global World and is prepared to embrace international trends in its pursuit to adhere to human rights protection particularly of vulnerable groups within its society.\textsuperscript{45} Many children rights activists have over the years advocated for a Criminal Justice System that is responsive to the needs of children in conflict with the law.\textsuperscript{46} It is possible that many lives will be saved from the reality of criminal life and death by means of providing an alternative justice system for children in conflict with the law.\textsuperscript{47}

\textsuperscript{40} South African School's Act 84 of 1996.
\textsuperscript{41} S 93(1)
\textsuperscript{42} Gallinetti and Sloth Nielsen, Child Justice in Africa, a Guide to Good Practice
\textsuperscript{43} Skelton: INGO’s and NGO’s as Role Players Ch 15, Child Justice in Africa: A Guide to Good Practice, Community Law Centre, 2004
\textsuperscript{44} S 97(1)
\textsuperscript{45} Hargovan, Restorative Approaches to Justice: “Compulsory Compassion” or Victim Empowerment, Acta Criminologica 20 (3) 2007.
2 THE INQUISITORIAL ELEMENTS OF THE CHILD JUSTICE ACT

2 1 Introduction

The Child Justice Act\(^{48}\) has brought about new innovations into the South African criminal justice system. One such innovation is the preliminary inquiry which is an informal pre-trial procedure that must be held in respect of every child who is alleged to have committed an offence.\(^{49}\) The process is inquisitorial and the Presiding Officer plays a very active role in determining the outcome of the inquiry.\(^{50}\) The latter is a complete break from the Criminal Justice system as we know it. The criminal justice system is accusatorial in nature and the role of the Presiding Officer can be likened to that of an umpire.\(^{51}\) His role is very passive\(^{52}\) in that his only duty is to listen to two contending parties that is the state prosecutor and the defence attorney and on the basis of that makes a ruling either in favour or against the contending parties. Preliminary inquiry captures the inquisitorial elements of the Child Justice Act which is absent in the Criminal Procedure Act 51 of 1977.

The Criminal Procedure Act was not designed to deal with children in conflict with the law because it does not differentiate between adult accused and children in conflict with the law\(^{53}\) save for few provisions that cater for proceedings with cases involving minors as witnesses. Other than the latter it does not in any way protect children in conflict with the law. The system is formal\(^{54}\) both in form and in content in that there are strict rules of giving evidence\(^{55}\) that have to be followed and the dress code is intimidating to say the least. It fails to take into account that children are by virtue of their youthfulness vulnerable and as such need special treatment consistent with their age.\(^{56}\) Before the advent of the Child Justice Act many children were subjected to the harshness of the...

\(^{48}\) Act 75 of 2008
\(^{49}\) S 43(1)
\(^{50}\) S 44 (1)
\(^{52}\) Ibid
\(^{53}\) Skelton, Child Justice Report
criminal justice system and many have lost their lives, some have been initiated to a life of crime because they developed an attitude towards the system others have incurred criminal records which will negatively impact on their future career prospects.

The objectives of the preliminary inquiry are to consider;

(i) The content and recommendations of the assessment report of the probation officer with specific reference to the age estimation where the child’s age is uncertain;
(ii) Consider the views of the probation officer regarding criminal capacity of the child if the child is 10 years or older but under 14 years;
(iii) Decide whether the criminal capacity of the child must be determined by a qualified person;
(iv) Establish whether a further and more detailed assessment of the child is needed;
(v) Determine whether the matter can be diverted before the plea;
(vi) Identify a suitable diversion;
(vii) Determine whether the matter should be referred to a Children’s Court;
(viii) Ensure that all available information relevant to the child, his or her circumstances and the offences are considered in order to make a decision on diversion and placement of the child;
(ix) Ensure that all the views of all persons present are considered before a decision is taken;
(x) Encourage participation of the child and his or her parent, guardian or appropriate adult in the decision concerning the child; and
(xi) Determine whether the child should be released or placed pending the conclusion of the preliminary inquiry or the appearance of the child in the Child Justice Court or whether the matter should be referred to a Children’s Court.

The latter demonstrates that the emphasis is not on prosecuting the child rather investigating and inquiring on the circumstances of the child in conflict with the law before deciding whether to divert, referring the matter to children’s court if the child in the eyes of the inquiry magistrate is a child in need of care and protection. This is consistent with obligations set by the UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD in Article 40(3) which states that: “State parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as accused of or recognised as having infringed the penal law”. One argues that being in conflict with the law is sometimes part of a phase of adolescent development, which is not permanent.

57 History of Juvenile Justice in South Africa, NICRO.
59 S 43(2) of Act 75 of 2008
60 S 50 of Act 75 of 2008
61 Article 40 (3) of United Nations Convention on the Rights of the Child
COMPARATIVE ANALYSIS

Ordinary Courts versus Preliminary Inquiry

There are basically two systems of evidence, the Anglo-American so called strict or common law and the Continental system so called civil law. The South African law of evidence belongs to the Anglo American system. Most of the principles of the Anglo-American law of evidence stem from the English system of accusatorial trials before a court as opposed to the Continental inquisitorial trial by professional judges adjudicating without the assistance of the jury. It is argued that the South African procedural criminal justice is based upon accusatorial principles and a strict system of evidence whereas the Continental system is based upon the inquisitorial principles and a relaxed system of evidence. The Child Justice Act seeks to combine the two elements. It provides for the preliminary inquiry which is inquisitorial in nature.

The hallmark of the preliminary inquiry is its attempt to break away from the accusatorial system and introduce a more inquisitive system in cases where a child is alleged to have committed an offence. One sees preliminary inquiry as a proper and acceptable solution to the current challenge of cases involving children in conflict with the law. The Criminal Justice system is hardly coping with the volume of cases on the court rolls and as such preliminary inquiry is seen as a possible solution to finalise cases much quicker and simpler in terms of the Child Justice Act.

Preliminary Inquiry is a possible solution in alleviating clogged rolls because it will not only ensure that cases involving children in conflict with the law are finalised much quicker but will ascertain that their rights are protected. The procedure seeks to protect children against the harshness of the accusatorial system of the South African criminal justice system. Clearly the Criminal Procedure Act was not meant to deal with children in conflict with the law.

Some countries have long taken similar steps in order to establish a viable and a child friendly approach in conformity with international instruments. The Act provides for a

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63 Schwikkard, Second Edition Juta 2002,6
64 Ibid
65 Muller,K, Hollely, K, Introducing the Child Witness, 2-68
66 Schwikkard , Second , Juta 2002,6
68 S 43(1)
69 S 43
70 Snyman ,Criminal Law, fifth Edition , Lexis Nexis,26
73 Umbriet, Vos , Coates and Brown, Victim Offender Dialogue in violent cases: a multi site study in the United States, University of Minenesota and Ohio Dept of Corrections.
separate new procedural system rooted in a rights based approach. Children are more susceptible to rehabilitation and treatment which can steer them away from offending behaviour.

2.3 Accusatorial Criminal Justice system versus Inquisitorial Justice Act

The accusatorial trial procedure which finds its roots from the Criminal Procedure Act 51 of 1977 has three features:

(i) The parties are in principle responsible for the presentation of evidence in support of their respective cases;
(ii) The adjudicator to play a passive role;
(iii) Much emphasis is placed upon oral presentation of evidence and cross examination of witnesses.

Central to the accusatorial system is the leading of oral evidence and cross examination by the opponent. Cross examination is referred to as the greatest engine ever intended to discover the truth. The system is regarded as according equality of arms to contending parties however the opposite is true because the powerful becomes the winner at the end of the day. Secondly the notion of opponents generates an unnecessary conflict which is not conducive for the resolution of the problem. The outcome of the case depends on the skills, ruthlessness and the ability the cross examiner might display. The selfish and partial manner in which the parties are allowed to present evidence and the fact that the presiding officer may only in limited circumstances call witnesses may inevitably lead to a situation where the procedural truth can be promoted at the expense of the material truth.

The Inquisitorial model is judge centred, and proceeds from the premise that a trial is not a contest between two opposing parties but an inquiry to establish the material truth. The judicial examination is accepted as the pivotal mechanism in the process of fact finding. It is evident from the above that the procedural innovations of the Child Justice Act were necessary in order to ensure that children in conflict with the law are protected in compliance with the Constitution of the Republic of South Africa.

The Act seeks to fuse the inquisitorial elements in the South African Criminal Procedure by invoking preliminary inquiry as the first appearance of the child in conflict with the

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75 Diversion Manual, NICRO.
77 Ibid
79 Ibid
80 Ibid
82 Muller, Hollely, Introducing the Child Witness.
83 Ibid
84 s 28 Constitution of the Republic, 1996
law. Section 47 (1) of the Act provides “The inquiry magistrate must conduct the preliminary inquiry in an informal manner by asking questions, interviewing persons at the inquiry and eliciting information, and must keep a record of the proceedings.” The latter is consistent with the continental inquisitorial system wherein the presiding officer during the preliminary inquiry plays an active role in establishing the truth.

This is refreshing because children by virtue of their vulnerability are unable to fully comprehend and equally engage in a fair contest with the prosecution during trial. Children have very little understanding of what functions personnel in the court room perform and even less knowledge of the procedures adopted in court. Children had misconceptions about certain aspects of the process, which could have dramatic implications as far as fear and stress are concerned if called to testify in court. One of the critical aims of the Act is to deal with children outside the formal criminal justice system. Preliminary inquiry is one of those mechanisms to ensure that children are not exposed to the criminal justice system. It ensures that cases involving children are expeditiously disposed without subjecting children to unnecessarily await trial in courts that are clogged with many serious cases. It is possible that this procedure will lessen the burden on the courts in terms of ensuring that petty cases involving children are not enrolled at the expense of more serious cases.

Preliminary inquiry must be held within 48 hours of arrest of the child if the child remains in detention, or within the time specified in the summons or a written notice if the child is not in custody to ensure that the matter is dealt with speedily in accordance with the rights enshrined in the constitution.

2.4 Pre-Trial Procedures

The investigation of crime is, in all legal systems a function of the police. In Continental systems the magistracy enjoys investigatory powers and has the power to instruct the police as regards investigation. In the accusatorial system by contrast the independent prosecution is given powers to institute criminal proceedings against the accused person. The Act provides “The Inquiry Magistrate must conduct the preliminary inquiry in an informal manner by asking questions, interviewing persons at

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85 S 47 (1)
88 Muller and Hollely, “I want to go home” Juvenile Offenders and their perceptions of the legal process2003 SALJ 71.
89 Ibid
90 S 51
91 Skelton and Bately, Charting progress, mapping the future: Restorative Justice in South Africa
92 S 43 (3) (b)(i) and (ii)
93 Gallinetti, Police as Role Players chapter 11, Child Justice in Africa, A guide to Good Practice.
94 van Wyk, Dugard, de Villiers and Davis: Rights and Constitutionalism The New South African Legal Order Juta.
95 Ibid
the inquiry and eliciting information, and must keep a record of the proceedings”. 96 The latter section is consistent with investigatory powers that are enjoyed by the judiciary in the inquisitorial continental system. 97 One argues that this preliminary inquiry is non existent in the criminal procedure of South Africa which is accusatorial.

This is a welcome innovation that is brought about by the Child Justice Act in the South African criminal justice system. This pre-trial procedure constitutes an important consideration in the protection of the rights of the child in conflict with the law. 98 The police as well as the prosecution had been trained to investigate and prosecute cases informed by the Criminal Procedure Act and are not capacitated to deal with children in conflict with the law, and there exists a risk that abuses could well taint the fairness of the subsequent trial. 99 Hence the judiciary is accorded the investigatory powers to ensure that the rights of the child are protected at all material times.

2 5 Arrest and detention versus arrest and assessment

The Criminal Procedure Act provides for the arrest of suspects with or without a warrant. Detention following arrest is regulated by section 50 of the Act, which stipulates that any arrested person should be charged and brought to court within 48 hours. 100 The Child Justice Act provides that a child may not be arrested for a schedule 1 offence unless there are compelling reasons justifying arrest. 101 The police are required to notify the child’s parent, guardian or an appropriate adult of the arrest. If the police are unable to notify the parent, guardian or appropriate adult they must submit a written report to the presiding officer at a preliminary inquiry. The police must immediately but not later than 24 hours after arrest inform the probation officer in whose area of jurisdiction the child was arrested of the arrest for purposes of assessment. 102

2 6 A criminal procedure for children

The Criminal Procedure Act does not effectively approach the plight of the children in conflict with the law in a comprehensive and integrated manner that takes into account the vulnerability and special needs of children. 103 The core object of the Act is to deal

96 S 47 (1)
100 S 50 of Act 51 of 1977
101 S 20 (1)
102 S 20(4)
with children in conflict with the law away from the formal criminal justice system. Preliminary inquiry is a mechanism in which the Child Justice Act seeks to take children away from the formal criminal justice system. The advantage of which children will feel less intimidated during the inquiry because of the relaxed atmosphere of the forum. Rule 4 of the Beijing Rules provides that legal systems should take into account the emotional, intellectual and mental maturity of the children. The holding of the preliminary inquiry is a central feature.

Section 28 of the Constitution of 1996 constitutes a mini charter for children’s rights and covers diverse issues in line with International Instruments, it was imperative for the state to ensure that children’s human rights are always respected and procedural protections which contribute to a fair trial are observed at all stages of the criminal process. This is an innovative provision that provides a legal framework for the obligatory rule to protect children in conflict with the law from the traumatising procedure that occur in the ordinary court. It takes into account that the different capacities of children should be taken into account and, recognise that some children will have less developed capacities and different and special techniques will have to be used.

Preliminary inquiry must assist in determining which children may be dealt with outside the criminal justice system. It is not open to the adult general public. The inquiry magistrate may exclude any person from attending the preliminary inquiry if that person’s presence is not in the best interest of the child or undermines the inquisitorial nature and objective of a preliminary inquiry. It may proceed even in the absence of the child’s parent, a guardian, an appropriate adult or probation officer if the inquiry magistrate is satisfied that to do so would be in the best interest of the child. The information adduced at the preliminary inquiry may not be used in any subsequent trial, bail, plea or sentencing proceedings. The information relating to the proceedings may not be published. The inquiry magistrate may make order that the matter be diverted if the child in conflict with the law acknowledges responsibility, refer the matter to children’s court if convinced that the child is in need of care and protection to be dealt either in terms of the Children’s Act or refer it to child justice court for trial.

104 S 51
106 Gallinetti. “Getting to know the Child Justice”, Child Justice Alliance, University of Western Cape.
108 Muller, Holley, Introducing the Child Witness, p3.
109 Mbambo, Communities as Role Players, Chapter 14, Child Justice in Africa.
110 S 44 (3)
111 Ibid
112 S 44 (4)
113 Section 45 (2)
114 Section 45 (1)
115 Section 49 (2)
2.7 Benefits of the Preliminary Inquiry in the Criminal Justice System

2.7.1 Introduction

The crime situation in South Africa is currently high and is slowly getting out of hand if unchecked.\textsuperscript{116} The South African criminal justice system, with the best will in the world, cannot be described as other than dysfunctional.\textsuperscript{117} Crime has to be fought with all the means at our disposal.\textsuperscript{118} Research has shown that a large number of crimes but theft is committed by young offenders.\textsuperscript{119} A small number of children do commit serious crimes. An attempt will be made to illustrate the extent to which the preliminary inquiry can benefit to ease the burden of clogged rolls at the courts and the benefit to the criminal justice system in general.\textsuperscript{120}

Preliminary Inquiry will assist in undoing some of the perceptions of the people on the criminal justice that it is corrupt and unable to cope with the spiralling crime in the country. This procedure is aimed at preventing children from getting lost in the system and to ensure that cases involving children in conflict with the law are finalised much quicker.

2.7.2 Children awaiting trial

Before the coming into operation of the Child Justice Act on 1 April 2010 there were a number of children awaiting trial in prison and in police cells.\textsuperscript{121} It is for that reason that the National Prosecuting Authority decided to pilot the preliminary inquiry with the view to diverting the children in conflict with the law. The pilot has assisted the KwaZulu Natal Division of the Director of Public Prosecutions in easing off the court rolls.\textsuperscript{122} The Act provides for schedules 1, 2 and 3 of offences which differentiate the seriousness of the offences.\textsuperscript{123} Schedule 1 consists of petty offences where a child can be diverted without necessarily following all the formalities prescribed by the Act. Schedule 2 and 3 requires that the child must appear in the preliminary inquiry as the court of first instance

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\textsuperscript{116} Snyman, Criminal law, fifth edition Lexis Nexis. \\
\textsuperscript{117} Snyman fifth edition Lexis Nexis, 25. \\
\textsuperscript{118} Terblanche “The guide to sentencing in South Africa” Butterworth Durban. \\
\textsuperscript{119} Ibid \\
\textsuperscript{120} Law Practice and Policy: South African Juvenile Justice Today, Community Law Centre University of the Western Cape. \\
\textsuperscript{121} A. Skelton and M. Bately, Charting progress, mapping the future: Restorative Justice in South Africa. \\
\textsuperscript{122} Ibid \\
\textsuperscript{123} 6
\end{flushright}
within 48 hours of arrest.\textsuperscript{124} The advantage is that the child does not have to await trial in custody for a long time.

Preliminary Inquiry will ensure that most cases will now be diverted or referred to Children Court for further determination in terms of the Children’s Act if the child is deemed to be a child in need of care and protection.\textsuperscript{125}

\textbf{2 7 3 Turn around time of cases}

There is a possibility that turn around times of cases will improve not only of cases involving children but of all cases because case flow will focus on more serious cases that are not worthy of being diverted. That in turn will save the state a lot of money that would have normally been spent on taking care of awaiting trial prisoners as well as children awaiting trial in the courts.\textsuperscript{126}

The courts currently spend a day on postponements and remands without finalising cases.\textsuperscript{127} Cases are postponed for a number of reasons one being further investigations. Because of this innovations that the Child Justice Act accords to Judicial Officers to investigate and inquire into the circumstances of the child,\textsuperscript{128} makes the system not to rely on police for investigations. The preliminary inquiry can make a determination much earlier than a normal court would in terms of diverting or referring the matter to child justice court for trial depending on the seriousness of the offence or whether the child acknowledges responsibility or not.\textsuperscript{129}

\textbf{2 7 4 Finalisation of cases}

It is possible that finalisation of cases will be much faster because the courts will not waste time on postponements and remands.\textsuperscript{130} The roll at reception courts will be comprised of cases that are serious and will ensure that cases are easily transferred to relevant courts with more speed and urgency.\textsuperscript{131} The possible quick finalisation rate of cases will translate in the confidence of the citizens being restored to the criminal justice system because of its efficiency.\textsuperscript{132}

\begin{footnotesize}
\begin{enumerate}
\item[124] S 43 (3)
\item[125] S 43(2)
\item[126] Skelton and Bately, Charting Progress, Mapping the Future: Restorative Justice in South Africa.
\item[127] Ibid
\item[128] Muller, Holley, Introducing the Child Witness.
\item[129] S 52
\item[130] Skelton and Bately, Charting Progress, Mapping the Future: Restorative Justice in South Africa.
\item[131] Ibid
\item[132] Ibid
\end{enumerate}
\end{footnotesize}
Prosecutors will not have any excuses in not properly planning their court rolls and the Presiding Officers will manage case flow much better. There is a possibility that the wheels of the criminal justice system will move quicker and efficiently.\(^{133}\)

### 2 7 5 Conviction rate will improve

It is possible that conviction rate in the courts will improve because investigating officers will not waste time on cases involving children in conflict with the law that will be dealt with by the preliminary inquiry.\(^{134}\). They will now be able to focus on more serious cases and devote more time to same to ensure quality investigations without stressing about docket on hand. Possibilities are great that the courts will spend more time on conducting trials rather than remanding and postponing cases. Once conviction rate improves, faith of the ordinary citizens will be restored to the criminal justice system. The ultimate test for determining the success of a system in this case the criminal justice system of South Africa will be its practical results,\(^{135}\) as the saying a tree is known by its fruits.\(^{136}\)

### 2 7 6 Prison system

The prison system is overcrowded by people awaiting trial some of whom are children in conflict with the law.\(^{137}\) Recently the Department of Correctional Services embarked on a process of releasing awaiting trial prisoners who have bail of not more than R1000 because it is unable to cope with the needs of the prison population.\(^{138}\) Some of those awaiting trial are children whose cases could have been dealt with by means of the preliminary inquiry had it been in operation before. The latter will save the Department of Correctional Services a lot of money in terms of taking care and providing for awaiting trial prisoners.\(^{139}\)

Prisons were not meant to deal with children in conflict with the law but because of lack of facilities children had to be sent to prisons to await trial.\(^{140}\) That has put a lot of strain

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\(^{133}\) Skelton and Bately, Charting Progress, Mapping the Future: Restorative Justice in South Africa.

\(^{134}\) Skelton, Bately, Charting Progress, Mapping the future: Restorative Justice in South Africa.

\(^{135}\) Ibid

\(^{136}\) Snyman, fifth edition Lexis Nexis, 27.

\(^{137}\) Hon Judge Erasmus, Inspecting Judge of Prisons and Chair of Children awaiting trial Task Team of National Inter-sectoral Child Justice Steering Committee: Presentation by Children Awaiting trial Task Team to Provincial Child Justice Forum, Gauteng: The role of the Provincial Child Justice Forum and Case Review Task Team in monitoring, tracking and prioritisation of children awaiting trial in detention.

\(^{138}\) Goyer, K C, Incarcerating and rehabilitating offenders, Private Muscule, 77-92

\(^{139}\) Ntuli, M R, Dlula, SV, Enhancement of community-based alternatives to incarceration at all stages of the criminal justice process in South Africa, 250-264

\(^{140}\) Ibid
in the system in terms of resources. Now children will be sent to a preliminary inquiry for investigation and inquiry and then diverted.\textsuperscript{141}

277 Police

Preliminary inquiry gives the Judicial Officers powers to inquire and investigate cases involving children in conflict with the law.\textsuperscript{142} The duty of the police is now to effect arrest and inform a probation officer within 24 hours before the case is sent for appearance at the preliminary inquiry.\textsuperscript{143} The role of the police is now lessened and will now be able to focus their resources on more serious cases. This will improve the level of investigation in more serious cases and will translate in improved turn around times, finalisation of cases and improved conviction rate.\textsuperscript{144}

278 Legal Aid South Africa

Nothing in the Act precludes a child in conflict with the law from being legally represented by a Legal representative during a preliminary inquiry.\textsuperscript{145} However one argues that the interests of the child in conflict with the law during the preliminary inquiry are protected by the inquisitorial role that is played by the Judicial Officer and as such the services of a legal representative are not that pertinent during the inquiry because legal representative always concur when the assessment report is favourable to their clients.\textsuperscript{.146} There is a further risk that having a legal representative at this stage might even frustrate the very purpose of the inquiry if the child invokes some of the rights enshrined in section 35 like the right to remain silent. This means that Legal Aid South Africa will not be obliged to have a legal representative during the inquiry unless there is a need.\textsuperscript{146} This will ensure that legal representation is afforded to those who are in desperate need of same in more serious and deserving cases.

In conclusion all of the above will ensure that government is saving a lot of money by ensuring that the resources that it has are spent in the correct manner. Secondly the criminal justice system that is perceived by many to be ineffective will probably show some improvements in dealing with spiralling crime in South Africa. Preliminary inquiry is a useful mechanism to alleviate the burden of the criminal justice system by facilitating the diversion of children in conflict with the law outside the formal criminal justice

\textsuperscript{141} S 43(2)
\textsuperscript{142} S 47 (1)
\textsuperscript{143} Gallinetti, Police as Role Players Chapter 11: Child Justice in Africa, A guide to good practice.
\textsuperscript{144} Skelton and M Bately, Charting Progress, Mapping the Future: Restorative Justice in South Africa.
\textsuperscript{145} S 81
\textsuperscript{146} Section 81
system. There are more benefits that are brought about by this informal pre-trial inquisitorial procedure in the criminal justice system.

28 Conclusion

South African Law has for many decades recognised youthfulness as a mitigating factor in determining an appropriate sentence for a child offender but it fell short of having a legislative framework that sought to protect the rights of many children in the criminal justice process. The Child Justice Act is a viable legislative framework in ensuring that children are protected from the brutalising effects of the criminal justice system that was not sensitive to the special needs of children in conflict with the law. It introduces three important innovations into the criminal justice system which are preliminary inquiry, formalised diversion and multi-sectoral approach to crime.

These elements are the cornerstones of the Child Justice Act because they ensure that children are decriminalised, ensure predictability in terms of how the children will be dealt with by the criminal justice system, ensure that children’s dignity is protected, consistent with international instruments and the constitution. It ensures that South Africa will no longer breed criminals that could have been avoided by having a system that is sensitive to the unique needs of the children taking into account the historical background of the country. The inquisitorial system that has now been fused in the criminal justice system will possibly lead to the reduction of crime by ensuring that restorative justice principles will benefit in rehabilitating and building a new consciousness of taking responsibility for one’s actions.

The Act provides that whenever a child is alleged to have committed an offence there has to be an inquiry conducted by the judicial officer who will make a determination whether restorative justice has to be undertaken or not. In other words there is now a paradigm shift from prosecuting a child in conflict with the law into an inquiry before prosecuting. The inquiry leads to diversion which is no longer discretionary but compulsory in respect of every child who is alleged to have committed an offence if the child acknowledges responsibility. There is a link between preliminary inquiry and diversion because there can be no diversion without a preliminary inquiry. Therefore these two innovations

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148 Ibid
150 Finnock, Skelton and Shapiro, New Juvenile Justice Legislation for South Africa: Giving children a chance, Occasional paper series 3-94.
154 S 49
155 S 52
capture the very essence of the Child Justice Act. There can be no talk of Child Justice Act without these latter innovations.

The Child Justice Act is not only a victory for children but for all those who have fought for the rights of the children for many years in South Africa. It might have taken many years since the Act was tabled in Parliament as a Bill but it is a piece of legislation that is progressive and consistent with international trends. No more will children be exposed to the harshness of the criminal justice but will now enjoy the rights enshrined in the constitution.

Chapter 3

3 Elements of Restorative Justice in the Child Justice Act

3.1 Introduction

Restorative Justice is one of the most important innovations brought about by the Child Justice Act in the South African Criminal Justice system. Before the advent of the Child Justice Act the criminal justice system has been purely retributive, formal and a coercive legal process. It understood crime as a violation of a state hence an offender is charged by the state not the individual who had been aggrieved by the commission of crime. Restorative justice understands crime not as a violation of an abstract entity called the state but also, and mainly, as a violation of people and human relationships. It is concerned not with punishing offenders, but with repairing harm caused by the crime.

The concept of restorative justice is captured in chapter 6, 8 and 10 of the Child Justice Act. The Act defines restorative justice as 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.

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161 Ibid
162 S 51 Act 75 0f 2008
Restorative justice forms a key tenet underpinning the approach taken in the Child Justice Act.\textsuperscript{163} It not only defines restorative justice and entrenches its philosophy as fundamental, but also provides directly for restorative justice outcomes such as family group conferences and victim offender mediation.\textsuperscript{164} Restorative justice has in practice been implemented in a variety of programmes and pilot projects in South Africa.\textsuperscript{165} There has been judicial approval of restorative justice outcomes in precedent setting cases.\textsuperscript{166}

Restorative justice outcomes as envisaged by the Child Justice Act encourage reparation of the harm done, involve victims in resolution of criminal incidents which have led to breaches in relationships, and provide a meaningful role for communities in the administration of justice.\textsuperscript{167}

This chapter will examine the benefits of restorative justice in the South African criminal justice system which has been brought by the Child Justice Act. The main categories of restorative justice practices envisaged by the Act are victim offender mediation, group family conferencing, restitution, compensation and reparation. There is an emphasis on victim centrality in the resolution of disputes.\textsuperscript{168} Diversion is the key feature of the Child Justice Act.\textsuperscript{169} The diversion options are fully restorative in nature.\textsuperscript{170} In essence the Child Justice Act entrenches and formalises restorative justice in the criminal justice system.\textsuperscript{171} In the past the courts had discretion\textsuperscript{172} to implement restorative justice but now the Act requires that restorative justice should be implemented whenever a child in conflict with the law is involved. The latter is premised on the provisions of section 28 (1) (g) of the Constitution of 1996 which provide that a child has a right not to be detained except as a measure of last resort and may be detained for the shortest appropriate period of time.\textsuperscript{173} Before the advent of the Constitutional democracy children had suffered under a system that was not sensitive to the needs of both the child offender as well as the victim.\textsuperscript{174} In his opening speech to parliament in 1994 the then President Mandela, pledged support for the establishment of proper laws and procedures which “rescue the children of the nation from the brutalising effect of prison and police cells and ensure that the system of criminal justice must be the very last resort in the case of

\textsuperscript{163} Hargovan, Restorative Approaches to Justice: “Compulsory Compassion” or Victim Empowerment, Acta Criminologica 20 (3) 2007.
\textsuperscript{164} Ss 61 and 62
\textsuperscript{166} Ibid
\textsuperscript{168} Mousourakis, Restorative justice: some reflections on contemporary theory and practice, Journal for Juridical Science 29 (1)1-27.
\textsuperscript{169} Skelton and Bately, Restorative Justice: A Contemporary South African Review, Acta Criminologica 21 (3).
\textsuperscript{170} Diversion Manual, NICRO.
\textsuperscript{171} Ss 61 and 62
\textsuperscript{173} Constitution of the Republic of South Africa, 1996.
\textsuperscript{174} Skelton and Bately, Acta Criminologica 21(3) 2008.
juvenile offenders”. It was within that context that the process of enacting an Act of parliament that sought to protect children in conflict with the law as well as to provide a mechanism that allows victims an opportunity to express views as to how a matter should be disposed was put into place.

The benefits of restorative justice are that the offender is confronted with a reality of his behaviour, it helps the offender to accept responsibility of his actions and offender needs are explored holistically. Restorative justice rests upon three pillars:

(i) Harms and needs of victims and communities,
(ii) Obligations to put right and
(iii) Engagement of stakeholders, offenders and community members.

Restorative justice offers a new approach through which crime and justice could be looked at. It requires a paradigm shift from all those that are involved in the administration of criminal justice especially in cases where children in conflict with the law are involved.

The emphasis is now on diverting children in conflict with the law rather than prosecuting and retributive punishments. However the Act does not create a right to diversion because diversion is only applicable in appropriate cases.

The Act provides for three schedules in order of seriousness. Schedule 1 involves petty offences, 2 involves serious cases and schedule 3 most serious offences. Section 41 of the Act provides a Prosecutor diversion in respect of schedule 1 offences. The inquiry magistrate may during preliminary inquiry order diversion, as well as a magistrate in the Child Justice Court may during trial also order diversion in respect of schedule 2 offences but the Director of Public Prosecution must authorise diversion in respect of a schedule 3 offences.

In terms of the Act it would seem that there is a direct link between diversion and restorative justice. That is correctly the case because diversion options are restorative in nature and one cannot talk of diversion without talking restorative justice in the context of the Child Justice Act. Herman proposes a parallel justice system that combines the strengths of both restorative justice and the traditional retributive approach to criminal justice.

180 Aertsen, Restorative justice through networking: a report from Europe, Catholic University of Leuven.
182 S 51(a)
183 S 6
184 S 41
185 S 52 (2) and (3)
The response of the South African criminal justice system will determine whether a successful integration takes place that harnesses the strength of both approaches, or whether restorative justice remains an awkward, added on aspect of the criminal justice system. The Child Justice Act seeks to combine restorative justice with the traditional retributive approach in appropriate cases into the criminal justice system. It does not offer a blank cheque to a child offender because the child has to play his part to be considered for diversion as well as restorative justice sentences.

3 2 The Evolution of Restorative Justice in South Africa

3 2 1 Introduction

This topic will focus on the evolution of restorative justice in different historical epochs of South Africa, the pre colonial era, colonial apartheid era as well as the current constitutional times. The practice of restorative justice will be examined, its demise as well as its reinvention in the legal system through legislation and case law. Restorative justice is not a new invention, it is a return to traditional patterns of dealing with conflict and crime that had been present in different cultures throughout human history. One argues that in the era pre-dating modern states, crime was conceptualised in personal terms and was responded to in a fashion more in line with restorative justice, with the emphasis on restitution and reconciliation. The state administered retributive response to crime that dominates today’s justice systems and governs our understanding of crime and justice as a phenomenon just a few centuries old. Africans had always used restorative justice mechanism in their traditional setting in an attempt to preserve peace and harmony amongst their societies. Even today in traditional settings it is still widely used to ensure that reconciliation, restitution and rehabilitation of the offender are emphasised and that is called ubuntu.

Desmond Tutu remarked during the Truth and Reconciliation Commission: “Africans have a thing called ubuntu; it is about the essence of being human, it is part of a gift that Africa is going to give the world. It embraces hospitality, caring about other, being willing to go that extra mile for the sake of another. We believe that a person is a person through other persons; that my humanity is caught up and bound up in yours. When I dehumanise you, I inexorably dehumanise myself. The solitary human being is a...
contradiction in terms, and therefore you seek for common good because your humanity comes into its own in community, in belonging.” 193

The punitive system of crime control evolved and achieved its full development in the second half of the eighteenth century, and as other parts were colonized by Europeans, the Western model of justice was imposed on colonized people. 194 South Africa was no exception because it was colonised by the Dutch and later the British government hence today South African law is based on Roman Dutch law and the procedural law on the English common law. 195 The ancient concept of ubuntu which is synonymous with restorative justice was placed in the periphery and considered inferior. The latter practice did not perish because in the rural areas some of these practices are still intact particularly in those where there are traditional leaders and traditional courts. 196 The challenge was that they were not recognised as part of the South African legal practice. Customary law was not given the same recognition like the western law and as such it was always in the margins of the legal practice and discourse in the country.

Since the advent of the constitutional dispensation in South Africa, customary law has gradually received recognition and has risen in leaps and bounds to the level of integrating with the western legal system. 197 Central to the African Customary law is the concept of ubuntu which captures the very essence of restorative justice. 198 It was within that context that Desmond Tutu made the famous remark about the concept of ubuntu during the Truth and Reconciliation Commission sittings with its emphasis on humaneness, social justice, fairness, rehabilitation of offenders and maintenance of law and order. 199 There is thus a marked similarity between the values of restorative justice and ubuntu as both emphasise the harmonization of damaged relationships within the community in a way in which it is to all the parties “fair” not necessarily being synonymous with “lenient” 200

One submits that restorative justice is not a new concept or a practice in the African social order but has always informed the manner of handling disputes in ancient societies. 201 The recognition of restorative justice is an attempt to revise the old method of conflict resolution. 202 South African courts have in recent years invoked restorative justice sentences in a number of precedent setting cases in the high courts. 203 The Child

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194 Margarita Restorative Justice Ideals and Realities, University of Hull, UK.
195 Snyman , Fifth Edition, Lexis Nexis, 10
196 Skelton and Bately, Charting progress, Mapping the future: Restorative Justice in South Africa.
198 Dikoko versus Mokhatla 2006 (6) SA 235 (CC
201 Naude, Prinsloo and Ladikos, Restorative Justice: A Global Overview of its functioning and effectiveness.
202 Skelton and Bately, Charting progress, Mapping the future: Restorative Justice in South Africa.
Justice Act has now institutionalised and formalised the concept of restorative justice within the South African criminal justice system.  

The role of Presiding Officers within the restorative justice legal framework is very central in terms of ensuring that restorative programmes are monitored and complied with. It encourages the cooperation of stakeholders in ensuring that justice is provided in a holistic manner. The judiciary must work closely with the prosecution, social services to provide restorative justice programmes, correctional services to ensure that monitoring is taking place and communities to ensure rehabilitation and acceptance of the offender back to the community. The latter will deepen the understanding of both accountability and deliberative democracy.  

Restorative justice owes its revival to the widely acknowledged shortcomings of modern criminal justice system, a characteristic of which is the marginal role played by those people immediately affected by a crime. The latter is correct particularly in cases where children are in conflict with the law because the criminal procedure was not designed to deal with children because of its retributive nature. The South African government has started experimenting with community based conflict resolution mechanism by introducing community courts and tribal courts with strong restorative justice emphasis.

3 2 2 The Pre-Colonial Era

One argues that in the era pre-dating modern states, crime was conceptualized in personal terms and responded to in a fashion more in line with restorative justice, with emphasis placed on restitution and reconciliation. During the latter historical epoch there was no distinction between criminal and civil law of dealing with disputes and conflicts in the society. The essence of the dispute resolution mechanism was premised on restitution, reconciliation, harmony and peace restoration. The latter is referred to as ubuntu in the African context.

It becomes clear that the concept of ubuntu has very strong resemblance to restorative justice as it is understood today. It is within that context that one argues that restorative

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204 Ss 51, 61 and 62
205 Ss 61 and 62
206 S 89 (3)
207 Sloth Nielsen, Justice as Role Players, Chapter 13, Child Justice in Africa, A guide to good practice
208 Hargovan, Knocking and Entering: Restorative Justice arrives at the courts, Acta Criminologica
210 Declan, Accountability in Restorative Justice, Oxford University Press.
212 Skelton, Bately, Charting progress, mapping the future: Restorative Justice in South.
213 Margarita Restorative Justice Ideals and Realities, University of Hull, UK
214 2006 (6) SA 235 (CC)
justice has always been part of the African system of dispute and conflict resolution mechanism. It has always been characterised by its informal and relaxed approach. The practice has survived throughout the years in South African rural societies despite it being marginalised by successive colonial governments over the years.

3.2.3 The Colonial era

The state administered retributive response to crime that dominates the criminal justice system and informs our understanding of justice was brought about by colonialism in Africa. It had evolved since the settlers arrived in 1652 and developed to its current state and had pushed the indigenous practice to the periphery. Roman Dutch common law was imported to South Africa and after the English occupation the English procedural law was merged into the Roman Dutch law which was in any event deficient in certain respects.

The establishment of organised forms of government and the development of political units known as states, made it possible to transfer traditional methods of dispute and conflict resolution to a faceless entity called the state which had resources, which could create, appropriate structures publicly to enforce justice on behalf of the society.

The essence of the criminal justice was to enforce a system in terms of which guilt of an alleged perpetrator could be established and in terms of which a punishment could be meted out without the direct involvement of the individual victim concerned. The individual relinquished to the state their rights to private vengeance, they did so on the tacit understanding that the state would prosecute crime. The duty to prosecute is vested on the prosecuting officials on behalf of the state. The manner of dealing with disputes is institutionalised and regulated by strict rules of evidence. During this period the practice of ubuntu was pushed into the margins and considered to be inferior to the western law. The practice was only adhered to in rural communities in the so called self governing territories of South Africa which were under traditional leaders. The so called independent states normally referred to as TBVC states adopted the criminal justice system of the then Republic of South Africa except for the former Transkei that used Act 24 of 1886 of the Cape, also known as the Native Panel Code.

During the colonial era restorative justice received some form of recognition because some have seen it as a form of an alternative to redress the problems within the criminal justice system. In South Africa non governmental organisations pioneered the concept of restorative justice because it emphasizes family values, interest of the victims and

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214 State versus Maluleke 2008 (1) SACR(T)
215 Skelton and Bately, Charting progress, mapping the future: Restorative Justice in South Africa
216 Snyman, fifth edition, Lexis Nexis, 10
217 Du Toit, De Jagger, Paizes, Skeen and Van Der Merwe, Commentary on the Criminal Procedure Act
218 Ibid
219 National Prosecuting Authority Act
220 Schwikkard, 2nd Edition 2002
221 Skelton and Bately, Charting progress, mapping the future: Restorative Justice in South Africa
222 Snyman, fifth edition, Lexis Nexis, 10
promised to reduce recidivism. The National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO) had always been in the forefront for the revival of restorative justice in South Africa. The reason for the above was informed by the number of deficiencies manifest in the criminal justice system because it was unable to appropriately respond to the challenge of dealing with children in conflict with the law.

Because of the involvement of children in the struggle against apartheid many were arrested and detained and unfortunately some were sucked into the life of criminality and others lost their lives. The system was never intended and designed to deal with children in conflict with the law because it did not differentiate between adults and children. There was an outcry from civic organisations for government to have a system sensitive to the needs of the children. There is a perception that children are susceptible to rehabilitation as compared to adults and as such need to be given a second chance instead of being broken by meting out heavy punishments. It was within that context that NICRO pioneered diversion programmes as a means to assisting children in conflict with the law. Diversion was introduced in the South African legal framework as early as in the eighties however it was only applied based on the discretion of the prosecution and as such it was not consistently applied. Some prosecutors applied it some did not for a number of reason because prosecutors are trained to prosecute and secure convictions.

324 The Post Apartheid South Africa

3241 Constitution

The Interim Constitution of the Republic of South African Act 200 of 1993 recognised the principle that the conflicts of the past had caused immeasurable injury and suffering to the people of South Africa and that because of the country’s legacy of hatred and fear, guilt and revenge, there is a need for understanding but not for revenge, a need for reparation but not for retaliation, a need for ubuntu not for victimisation.

The coming into operation of the Constitution of the Republic of South Africa of 1996 has had far reaching consequences in the South African criminal justice paradigm.
Chapter 2 of the constitution contains a Bill of rights which prohibits discrimination in all its forms. A culture of universal human rights has influenced many facets of our law and the jurisprudence in the field of child justice was no exception. Section 28 (1) (g) provides “a child has a right not to be detained unless as a measure of last resort, and for a shortest appropriate period of time.” The era of post democracy was followed by various laws that attempted to ensure a victim centred approach to the criminal justice system. This chapter will briefly look at various pieces of legislation and case law that entrenches the notion of restorative justice during this historical epoch.

The Inter- Ministerial Committee for young People at Risk was established and they adopted restorative justice as a principle for transformation of the child and youth care system. The National Crime Prevention Strategy was adopted in 1996 and emphasised a shift to a more victim centred criminal justice system to address the direct effects of crime on victims and the community.

3 2 4 2 The Criminal Procedure Act 51 of 1977

There are provisions in the Act that recognise elements of restorative justice however the shortcoming being that they recognise two principles restitution and compensation to the victim. The provisions do not include other restorative justice principles like reconciliation, victim, offender and community involvement in addressing the harms and needs of the victim and community as both primary and secondary victims. Sections 34 (1) provides that the judge or judicial officer presiding at a criminal proceedings shall at the conclusion of such proceedings, but subject to the provisions of this Act or any other law under which any matter shall or may be forfeited , make an order that any article:

(i) be returned to the person from whom it was seized, if such a person may lawfully posses such article;
(ii) if such person is not entitled to the article or cannot lawfully posses the article, be returned to any person entitl ed thereto, if such person may lawfully posses the article.

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236 Constitution of the Republic, 1996
237 Hargovan, Restorative Approaches to Justice: Compulsory Compassion or Victim Empowerment? Acta Criminologica 20 (3) 2007
238 Naude An Analysis of case referred to restorative justice in the Tshwane Metropolitan Area Acta Criminologica 20 (2) 2007
239 Hargovan, Restorative Approaches to Justice: Compulsory Compassion or Victim Empowerment? Acta Criminologica 20 (3) 2007
241 Ibid
242 Act 51 of 1977
(6) If the circumstances so require or if the criminal proceedings in question cannot for any reason be disposed of, the judge or judicial officer concerned may make an order referred to in paragraphs (a), (b) and (c) of subsection 1 at any stage of the proceedings.\textsuperscript{243}

Section 297 provides for postponed and suspended sentences on condition of restoration and compensation of the victim of the offence.\textsuperscript{244} Rendering a service to the victim is another condition on which a sentence may be suspended. It is important to note that the rendering of a service occurs in lieu of compensation and may not take place in addition to compensation. It should be noted that compensation usually follows a decision not to send the accused to prison to ensure that the accused is able to comply with the conditions of the compensatory order.\textsuperscript{245}

Section 300 (1) provides that a court may order a person who has been convicted of a crime causing damage to or the loss of property to another person, to effect restitution to the victim for the damages or loss suffered.\textsuperscript{246} Application must be made by the victim or by a prosecutor on behalf of the victim. If the application has not been made no such order may be granted by the court.\textsuperscript{247} Subsection 2 provides that the court may determine the quantum of the award by referring to the evidence tendered on trial either viva voce or on affidavit.\textsuperscript{248} Such an order has an effect of a civil judgement of the district court where the trial took place.\textsuperscript{249} The effect of the latter is that the victim cannot approach the civil court to claim damages on the same facts against the person to whom a compensatory order was made in respect of section 300.\textsuperscript{250}

Section 301 relates to compensation to innocent purchaser of property unlawfully obtained.\textsuperscript{251} When a person honestly buys stolen goods and has to return the goods to the real owner he can be rewarded from the money found on the accused at the time of arrest.\textsuperscript{252} Only the person who bought directly from the thief may receive an award under this section.\textsuperscript{253} An accused person who is legally represented and the prosecution may enter into a plea and sentence agreement in terms of section 105A of Act 62 of 2001.\textsuperscript{254} The prosecutor is obliged to consult with the victim of the crime, and restitution to the victim is specifically listed as a possible condition that can be set.

\textsuperscript{243} Du Toit, De Jagger, Paizes, Skeen and van der Merwe, Commentary on the Criminal Procedure Act 51 of 1977
\textsuperscript{244} Act 51 of 1977
\textsuperscript{245} Ibid
\textsuperscript{247} Ibid
\textsuperscript{248} Act 51 of 1977
\textsuperscript{249} Ibid
\textsuperscript{250} Ibid
\textsuperscript{251} Ibid
\textsuperscript{252} Ibid
\textsuperscript{253} S 301 of Act 51 of 1977
\textsuperscript{254} Act 62 of 2001
3243 The Criminal Procedure Second Amendment Act 62 of 2001

Section 105 A relates to plea bargaining and it affords the complainant, “where it is reasonable an opportunity to make representation regarding the contents of the agreement and the inclusion in the agreement of a compensation order or the rendering to the complainant of some specific benefit or service, and with due regard to the nature and circumstances relating not only to the offence and the accused, but also the interest of the community”. 255

3244 Probation Services Act 35 of 2002

Section 1 (d) stipulates that “Restorative justice means the promotion of reconciliation, restitution and responsibility through the involvement of a child, and the child’s parents, family members, victims and the community concerned”. 256 Batley criticizes the Act because it limits restorative justice to children and is not in line with the international views of restorative justice as it focuses on reconciliation rather than attempting to correct the wrongs caused by the criminal incident, which is central to restorative justice. 257

3245 The Services Charter for Victims of Crime

The Charter embodies responsibilities on the part of all criminal justices agencies acting on behalf of victims and focuses mainly on how secondary victimisation may be avoided. 258 These include the right to be treated with fairness and with respect, dignity and privacy, the right to receive and offer information, the right to protection, the right to assistance, the right to compensation and the right to restitution. 259 The Department of Justice and Constitutional Development is the lead government agency in coordinating the implementation of the Victim Charter, while the Department of Social Development is the lead agency for the provision of victim support services. 260 The criticism against the victim charter is that it is unable to be enforced when public officials fail to give effect to its provision. This is because the charter does not necessarily have the same legal effect like the Constitution or an Act of parliament.

255 Act 62 of 2001
256 Act 35 of 2002
258 The Service Charter for Victims of Crime in South Africa
259 Service Charter for Victims of Crime 2004
260 Naude and Nation, An Analysis of Cases referred to Restorative Justice in Tshwane Metropolitan Area
3 2 4 6 The International Co-operation in Criminal Matters Act 75 of 1996

The Act provides for mutual recognition between South Africa and foreign states of sentences and restitutionary orders. South African Authorities may request the assistance of a foreign state in recovering a fine or restitutionary order made by a South African criminal court where the offender does not have sufficient local property to satisfy it. A foreign sentence or restitutionary order may be registered provided that it complies with the following requirements:
(i) It must be final and not subject to review or appeal;
(ii) The court must have had jurisdiction;
(iii) The person against whom the order was made, must have had the opportunity of defending himself or herself;
(iv) The order must be capable of complete fulfilment in the country in which it was imposed;
(v) The person concerned must own property in South Africa.

Once registered a foreign order will have the effect of civil judgement of the South African court where it has been registered.

3 2 4 7 The Sentencing Framework Bill

In section 3 of the Bill the sentencing principles state that the following considerations should be optimised when imposing a sentence:
(i) the restitution of damages to the victim of a crime;
(ii) the protection of the community from the offender; and
(iii) the creation of an opportunity for the offender to lead a crime free life in future.

Article 33(1)(j) of the Bill provides for victim offender mediation and family group conferencing as part of the conditions that can be attached to the community sentences of correctional supervision and community service. Article 37 (2) (a),(b), (c) of the Bill provides for reparation in the form of restitution by the offender to the victim and may be imposed for either physical or psychological damages, or other injury and loss of income or support. The Bill recognises restorative justice as a means of dealing with victims and offenders by focusing on the settlement of conflicts arising from crime and resolving the underlying problems that caused it.

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261 Ss 13-18 of International Co-operation in Criminal Matters Act 75 of 1996
263 S 15(1) of Act 75 of 1996
264 Act 75 of 1996
265 The Sentencing Framework Bill
266 Ibid
267 Sentencing Framework Bill
268 Ibid
3 2 4 8 Judicial Precedents

In the recent past there have been a number of judicial precedents which have endorsed the use of restorative justice in the South African Jurisprudence. Restorative justice has been slow to get underway in practice in South Africa, but a study conducted in 2006 showed that there is some work conducted in all the provinces of the country. In October 2003 the Association of Regional Court Magistrates of South Africa arranged a two day conference on restorative justice, at the conclusion of which restorative justice was endorsed.

The case of State versus Shilubane endorsed restorative justice in the South African jurisprudence where Bosielo J and Shongwe J concurring set aside the sentence of imprisonment and replaced it with a suspended sentence. The court remarked “restorative justice should be considered as an alternative to direct imprisonment, the complainant would have been more pleased to receive compensation for his loss. Presiding Officers should be innovative and proactive in opting for alternative sentences to direct imprisonment sentences and should be humane and balanced. Retributive justice has failed to curb the wave of crime and has been counter productive and self defeating to expose first offenders to corrosive and brutalising effects of prison life for trifling offences. Sentences such as community service should be seriously considered where an accused is not such a threat to society.”

The latter was followed in S v Maluleke in which Bertelsman J remarked “eventually, legislative intervention may be required to recognise aspects of customary law but this should not deter courts from investigating the possibility of introducing exciting and vibrant potential alternative sentences into our criminal justice system.”

In the case of State vs Saayman the court remarked “restorative justice must be applied only in appropriate circumstances and be developed in constitutionally acceptable manner. It is desirable that there should be an encounter between offender and victim enabling former to apologise personally to victims. This not achieved by requiring accused to stand holding a placard publicly proclaiming her guilt. Active and willing participation of victim is also required.”

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271 S vs Shilubane 2008, (1) SACR 925(T)
272 2008, (1) SACR 925(T)
273 Ibid
274 Ibid
275 Ibid
276 2008(1) SACR (T)
277 Ibid
278 State vs Saayman 2008 (1) SACR (E)
This emerging jurisprudence proves beyond any doubt that restorative justice is no longer an academic debate on the margins of South African society. It is a living issue in our criminal justice system, and is being dealt with and developed by our courts.\textsuperscript{278}

3.2.4.9 Child Justice Act 75 of 2008

The Act defines restorative justice as the promotion of reconciliation, restitution and responsibility through the involvement of a child, child’s parent, guardian, appropriate adult, victims and community.\textsuperscript{279} The objective of the act is to promote ubuntu in the child justice system through:

(i) fostering of children’s sense of dignity and worth;
(ii) reinforcing children’s respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safeguarding the interest of victims and community; supporting reconciliation by means of a restorative response;
(iii) supporting reconciliation by means of a restorative response; and

involving parents, families, victims and communities in child justice processes in order to encourage reintegration of children in conflict with the law.

Diversion is the essence of the Child Justice Act and it provides for two levels.\textsuperscript{280} Level 1 diversion option relates to schedule 1 offences which are by definition considered petty and can be done by Prosecutors in terms of section 41.\textsuperscript{281} Level 2 diversion option relates to more serious offences.\textsuperscript{282}

3.3 Examining Restorative Justice Concept in South Africa

The concept of restorative justice has no single definition and meaning.\textsuperscript{283} There has been a debate amongst proponents of same as to how it has to be understood and defined.\textsuperscript{284} In this topic an attempt will be made to examine the different meanings and definitions particularly within the South African Criminal Justice System.

Marshall defines restorative justice as “a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of

\begin{footnotes}
\item[278] Skelton & Batley, Restorative justice : Contemporary South African Review
\item[279] S 1 Act 75 of 2008
\item[280] S 53 (2)
\item[281] S53 (3)
\item[282] S 53 (4)
\item[283] Roach, Changing punishment at the turn of the Century: Restorative on the rise, Canadian Journal of Criminology 2000
\item[284] Ibid
\end{footnotes}
the offence and its implications for the future.”

Roach defines it as “a circular model of justice because of the common approach of bringing participants together in the less hierarchical and more informal setting of a circle and their common attempt to restore the equality that has been disturbed by the commission of a crime to take a holistic approach to the experiences of both the offending and victimisation.”

Zehr defines restorative justice as follows “restitution, atonement, community, victim, accountability, victim involvement in outcome, re-intergrative shaming, repairing damage and problem solving.”

Ubuntu is also known as embracing restorative justice elements because it is synonymous with social justice, humaneness, fairness. Traditionally African families took collective responsibility for each other and in some rural areas that is still being practised.

Various legislation have defined restorative justice notably the Probation Services Act and the Child Justice Act. Some other legislation in South Africa has embraced some of the elements of restorative justice. However there is some criticism that could be levelled to the pieces of legislation that embraced the concept. One such criticism relates to the provisions of the Criminal Procedure Act 51 of 1977 sections 34, 297, 300 and 301. The latter sections are sparingly invoked in practice because they are perceived as being soft and depend largely on the attitude of both the Prosecutor and the Judicial Officer in the case in question. In the case between State versus Mark Scott Crossly the opportunity was missed in the case where the accused offered to build a house for the dependants of the deceased and to pay a sum of money as compensation for the killing of the deceased. The state considered the provisions of section 297 to be too lenient for the offence for which he was convicted.

For the court to make a compensatory order in respect of the victim, the victim has to make an application and failure to do so the provisions of section 300 will not be invoked.

Diversion has always been part of the criminal justice system before the advent of the Child Justice Act however the manner in which it had been used leaves much to be desired because it is informal and depends on the discretion of the Prosecutor and is regulated by Prosecutorial guidelines. The application of the discretion has been to a large extent inconsistent because in rural areas where there are no service providers Prosecutors unfortunately prosecute cases that could have been diverted. The latter was evident in the case between M versus Senior Public Prosecutor Randburg 3284/2000 unreported case in which the discretion of the Prosecutor was challenged for not

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287 Zehr .2002 The little book of restorative justice
288 Ibid
290 State versus Scott Crossly ,unreported case
291 Act 51 of 1977
292 Gallinetti, Diversion , Chapter 6, Child Justice in Africa, A Guide to Good Practice
293 Ibid
considering diversion at the time he was making a decision to prosecute a young and first offender who was charged and convicted for a crime of theft.

Child Justice Act embraces the restorative justice concept in its pre colonial and modern content with emphasis on all the elements that have evolved over the years up to its current form that include victim offender mediation, family group conference and diversion. Not only has the Act embraced the concept but it has institutionalised and entrenched it within the South African Criminal Justice System in cases involving children in conflict with the law. This will ensure certainty, predictability and consistency in cases involving children in conflict with the law. This must be seen within the context of an attempt to reverse the historical process and revive ancient conflict resolution mechanism into the criminal justice system.

3 4 Restorative Justice in the context of Child Justice in South Africa

Restorative justice has emerged clearly in the Child Justice Act because it not only captures it but conforms to international experiences and analysis of the concept. It promotes and entrenches a new way of doing justice which ensures consistency, certainty and predictability. It is a catalyst to create possibilities for a crime free life for the offender, and by so doing create a safer country for all. As mentioned previously the core of the Act is diversion which captures the restorative justice elements in the Act. It institutionalises and entrenches diversion in the South African Criminal Justice System. The essence of which is that the Prosecutor has to consider diversion whenever confronted with a case involving a child in conflict with the law. Diversion must be considered prior the pre-trial stage of preliminary inquiry, during the preliminary inquiry, trial and sentence stages. The Act does not create a right to diversion in that it should be considered in appropriate cases. The court may make an order of diversion from the options contained in the Act, or may develop an individual diversion option that meets the requirements of a particular matter.

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294 *M versus Senior Public Prosecutor Randburg 3284/2000 unreported case.*
299 Gallinetti, *Diversion chapter 6, Child Justice in Africa, A Good to Good Practice*
300 Ss 41,49 and 67
301 S 51
302 S 54 (3)
3 4 1 The Objectives of the Diversion

(i) To deal with a child outside the criminal justice system in appropriate cases;
(ii) Encourage the child to be accountable for the harm caused by him or her;
(iii) Meet the particular needs of the individual child;
(iv) Promote reintegration of the child into his or her family and community;
(v) Provide an opportunity to those affected by the harm to express their views on its impact on them;
(vi) Encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for them;
(vii) Promote reconciliation between the child and the person or community affected by the harm caused by the child;
(viii) Prevent stigmatising the child and prevent the adverse consequences flowing from being subject to the criminal justice system;
(ix) Reduce the potential for re-offending;
(x) Prevent the child from having a criminal record; and
(xi) 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. 303

Diversion may be considered provided all relevant information is considered, including previous diversions. 304 It may be considered if the provisions of section 52(1) are met:
(i) The child acknowledges responsibility for the offence;
(ii) The child has not been duly influenced to acknowledge responsibility;
(iii) There is a prima facie case against the child;
(iv) The child and if available, his or her parent, guardian, or appropriate adult consent to diversion; and
(v) The prosecutor or the Director of Public Prosecutions consents to diversion. 305

3 4 2 Diversion by Prosecutor prior preliminary inquiry

The Act provides for prosecutor diversion in terms of section 41 in respect of schedule 1 offence before preliminary inquiry takes place. 306 After the arrest the child must be assessed by the probation officer within 48 hours. However if the child for some reason has not been assessed the prosecutor may dispense with the assessment and if it is in the best interest of the child to do so. 307 If assessment has been dispensed with reasons must

303 51
304 75 of 2008
305 Ibid
306 75 of 2008
307 Ibid
be entered on the record of the proceedings by the magistrate in chambers. The child and his or her parent, guardian or appropriate adult must appear before the magistrate in chambers, in order to have the diversion option that has been selected by the prosecutor made an order of court.

In an instance where the prosecutor is of the opinion that the child is in need of care he has to refer the matter to preliminary inquiry to refer same to children’s court to be dealt with in terms of the Children’s Act. Where the child has failed to comply with the provisions of section 52 (1) the prosecutor has to refer the matter to preliminary inquiry to do the inquiry to determine if the child could be diverted or sent for trial in child justice court or children’s court if a child is in the eyes of the inquiry magistrate in need of care.

### 3 4 3 Diversion at Preliminary inquiry

The Act provides for a child in conflict with the law to be afforded a second chance to diversion if it has not succeeded in terms of section 41. The inquiry magistrate may order diversion of the child in conflict with the law if the child:

- (i) acknowledges responsibility for the offence;
- (ii) has not been unduly influenced to acknowledge responsibility;
- (iii) there is a prima facie case;
- (iv) the child and, if available parent, guardian, or appropriate adult consent to diversion; and
- (v) Prosecutor or Director of Public Prosecutions consent to diversion.

The prosecutor must consider the views of the victim in respect of schedule 1 and 2 offences before consenting to diversion. In respect of schedule 3 the authorisation must be granted by the Director of Public Prosecution in writing if exceptional circumstances exist for the matter to be diverted. Once more the victim must in both instances be afforded an opportunity to express his views regarding the diversion option that is considered for the child in conflict with the law. The investigating officer must also be consulted to express an opinion regarding diversion if it is considered to ensure harmony. When the Director of Prosecution has consented in writing to diversion same

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308 S 41 (3)
309 S 41
310 Act 38 of 2005
311 S 53
312 S 52 (1)
313 S 52 (2)
314 S 52 (3)(a)
315 S 52
316 Ibid
344 Diversion at trial

The child may be diverted at any stage during trial, however the state can only initiate diversion before the close of state case provided all provisions for diversion are met.\(^{318}\) After the closure of state case it is only the defence that can initiate diversion or the court.\(^{319}\) Once more the provisions for diversion have to be met for the order to be successfully made.\(^{320}\) The court may impose an order for victim offender mediation and or family group conference as part of a diversion order.\(^{321}\)

345 Different diversion options

The Act creates a legislative framework for many diversion options.\(^{322}\) There are two levels of diversion namely level 1 and 2. Level 1 is applicable in respect of schedule 1 offences which are considered petty\(^{323}\) and level 2 in respect of schedule 2 and 3 which are more serious in nature.\(^{324}\) The difference between the levels is in respect of the durations. Level 1 option may not exceed a period of 12 months if the child is under the age of 14 years\(^{325}\) but if the child is more than 14 years it may not exceed 24 months\(^{326}\) unless reasons are provided in writing as to why time period has been exceeded.\(^{327}\) Level 2 may not exceed 24 months if the child in conflict with the law is under the age of 14 years and 48 months if the child is over the age of 14 years unless reasons are provided in writing why the period has been exceeded\(^{328}\).

Level 1 diversion option includes the following:

(i) An oral or written apology to a specified person or institution;

\(^{317}\) Ibid
\(^{318}\) S 67(1)
\(^{319}\) S 52
\(^{320}\) Ibid
\(^{321}\) Ss 61 and 62
\(^{322}\) S 53 (2)
\(^{323}\) S 53 (3)
\(^{324}\) S 53 (4)
\(^{325}\) S 53 (5) (a)(i)
\(^{326}\) S 53 (5) (a)(ii)
\(^{327}\) S 53 (5) (b)
\(^{328}\) S 53 (6)
(ii) A formal caution, with or without conditions;
(iii) Placement under a supervision and guidance order;
(iv) Placement under a reporting order;
(v) A compulsory school attendance order;
(vi) A family time order;
(vii) A peer association order;
(viii) A good behaviour order;
(ix) An order prohibiting the child from visiting, frequenting at a specified place;
(x) Referral to counselling or therapy;
(xi) Compulsory attendance to a specified centre or place for a specified vocational, educational or therapeutic purpose;
(xii) Symbolic restitution to a specified victim or victims of the alleged offence where the object concerned can be returned or restored;
(xiii) Community service under the supervision or control of an organisation or institution, or a specified person, persons or group of persons identified by the probation officer;
(xiv) Provision of some service or benefit by the child to a specified victim or victims
(xv) Payment of compensation to a specified person, persons or group of persons or community, charity or welfare organisation or institution where the child or his or her family is able to afford this; and
(xvi) Where there is no identifiable person, persons or group of persons to whom restitution or compensation can be made, provision of some service or benefit or payment of compensation to a community, charity or welfare organisation or civic organisation.329

The court may order any of the above diversion options or any combination thereof depending on the circumstances of each case.330

Level 2 option includes all level 1 options including:
(i) Referral to an intensive therapy to treat or manage problems that have been identified as a cause of the child coming into conflict with the law, which may include a period or periods of temporary residence; and
(ii) Placement under supervision of a probation officer on conditions which may include restriction of the child’s movement outside the magisterial district in which the child usually resides without prior approval of the probation officer331.

In addition to the diversion options, a prosecutor, an inquiry magistrate, or a presiding officer may develop an individual diversion option for a child in conflict with the law in certain circumstances.332

329 S 53(3) (a) –(q)
330 S 53 (7)
331 S 53(4)
332 S 54 (3)
3 4 6 Monitoring and compliance

The inquiry magistrate in chambers in respect of prosecutor diversion, or during preliminary inquiry, or presiding officer during trial at child justice court when making an order for diversion will appoint a suitable person to monitor the compliance or non compliance by the child. The person appointed at the expiry of the duration of the order will have to come back to court with a compliance or non compliance certificate. The magistrate must conduct an inquiry for non compliance and take further steps to ensure compliance.

3 4 7 Failure to comply

In the event of non compliance with any diversion order, the magistrate, inquiry magistrate may on being notified of non compliance issue warrant of arrest for the child or cause summons to be issued in respect of the child to appear before the court. The court must inquire into the reasons for the failure to comply with the diversion order and make a determination whether failure was due to the fault of the child or not. If the court finds that the child was not at fault it will continue with the diversion order, other diversion option without altered conditions, or add any if necessary or make an order that will assist the child to comply. If the child is found to be at fault:

(i) The prosecutor may decide to proceed with prosecution;
(ii) The child justice court may record the acknowledgement of responsibility made by the child as a formal admission in terms of section 220 of act 51 of 1977 and proceed with trial;
(iii) The court or prosecutor may decide on a more onerous diversion option than the original option.

3 4 8 Legal consequences of diversion

When diversion order has been successfully complied with the matter is deemed as finalised and no subsequent diversion or trial may arise on the same facts by the same

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333 S 57 (1)
334 S 57
335 S 57 (2)
336 Ibid
337 S 57(3)
338 S 58(3)
339 S 58 (4)
340 S 58 (4)(b)
child in respect of whom an order was made. Diversion order does not amount to a previous conviction.

3 4 9 Victim offender mediation and Family group conference

The Act defines both processes as informal procedures intended to bring a child who is alleged to have committed an offence and the victim together to address the harms and the effects of the offence. The parties affected must consent to both victim offender mediation and family group conference. Both forums must be facilitated by trained probation officers or suitable persons. The Act sets out procedures for the setting and running of both forums and must be managed by the Department of Social Development. If the department is unable to do so, they must appoint a suitable service provider to ensure that whoever has to facilitate the forum is fully accredited by the Department.

Even after conviction the court may refer the child in conflict with the law to a victim offender mediation or family group conference to determine a suitable plan which can be made a court order for purposes of sentence. Obviously the successful implantation of these two processes requires the full participation of the Department of Social Development as well as non-governmental service providers who are fully accredited to implement the programmes with the criminal justice system. However it remains to be seen if these will be fully realized in rural areas because many do not even have fully trained probation officers. Secondly, service providers are only available in urban centres of South Africa. There are few non-governmental organisations that are running these programmes in South Africa, National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO) and Khulisa and as alluded above are only active in urban centres.

It is hoped that since the coming into operation of the act on the 1st of April 2010 that NICRO will provide services in the rural areas to ensure that children in rural South Africa reap the same benefits as children in urban centres. Secondly, there has been an outcry of a shortage of probation officers in rural areas and the Department of Social

341 S 59
342 Ibid
343 S 61 (1) (a)
344 Ss 61(1) (b) and 62(1) (b)
345 Ss 61 (3) and 62(4)
347 Ibid
348 S 73(1) (a) and (b) of Act 75 of 2008
350 Law Practice and Policy: South African Juvenile Justice Today, Community Law Centre University of the Western Cape
Services will ensure that probation officers will be employed to ensure the successful implementation of the diversion programme in all corners of the country.

3.5 Conclusion

The Act is a welcome relief in the South African criminal justice system because it not only recognises restorative justice but entrenches and institutionalises it by focusing on the universally excepted principles of restitution, reconciliation, responsibility and participation. The application of restorative justice within the criminal justice system requires support from a wide variety of institutions and people. There is no way that the successful implementation can be realized by the courts alone, other departments, non governmental organisation and the community need to come to the party to ensure a successful implementation.

It is evident that South Africa is also moving from a retributive criminal justice to a restorative justice system. It is argued that diversion is the core of the Child Justice Act and clearly it is now a permanent feature in the criminal justice process and as such requires a multi – sectoral approach in its implementation. The public private partnerships become very important because in the main service providers will be drawn from non governmental organisations. There has to be strong cooperation to ensure that there is successful implementation. The case of the murdered Eugene Terblanche will provide us with the insight whether the Act will become a success or not.

There has to be a paradigm shift from all involved in the criminal justice system because all have been socialised and trained to punish offenders for the harm they have caused and now are expected to consider diversion as an option whenever a child in conflict with the law is involved. NICRO has to play a critical role because they have been propagating diversion for a number of years to be considered as an option when dealing with children. It is now clear that the time of dispensing justice in silos is over.

The United Nations Basic Principles on the Use of Restorative Justice Programmes emphasise that restorative justice programmes complement rather than replace the

352 Mbambo, Communities as Role Players chapter 14, Child Justice in Africa, A guide to good Practice
353 Crawford, Situating Restorative Youth Justice in Crime Control and Prevention, University of Leeds
355 Ibid
356 Skelton and . Bately, Charting progress, mapping the future: Restorative Justice in South Africa
357 Diversion Manual, NICRO
existing criminal justice system. Recent developments in South indicate a shift from a parallel track, where restorative justice initiatives originally functioned completely independent from the criminal justice system to a parallel but interlinked track where restorative justice approaches may be adopted at various stages of the process. The latter is the innovative that has been brought by the Child Justice Act into the criminal justice system. However monitoring and evaluation of programmes brought about by the Act, victim satisfaction with processes and outcomes should be undertaken taking into account the demographics of South Africa.

Chapter 4

4 Multi-sectoral approach to child justice

4.1 Introduction

One of the important innovations brought about by the Child Justice Act into the criminal justice system is its inter-sectoral approach to responding to crime. The latter approach to justice is not only recognised by the Act but it is entrenched. The multi-sectoral approach conforms to the ideal of cooperation between the public service and private sector working together to address the problem of crime and community safety. The Act provides for the establishment of One Stop Child Justice Centre. Each One Stop Child Justice Centre must establish a management committee, consisting of senior officials of the Departments of Justice and Constitutional Development, Social Development and Correctional Services and the South African Police Service, the Legal Aid Board and other relevant organs of state. It further provides for the establishment of an Inter-sectoral Committee to be known as the Inter-sectoral Committee for Child Justice.

There is a direct link between restorative justice, inquisitorial system and the inter-sectoral approach to child justice in that there can be no talk of restorative justice and inquisitorial preliminary inquiry without the other role players in the criminal justice system. This requires a paradigm shift from all the role players to work together to

359 Hargovan, Knocking and entering: Restorative justice arrives at the Courts
360 Skelton and Bately, Charting progress, mapping the future: Restorative Justice in South Africa
361 S 89 (1)
362 Ibid
363 Ibid
364 Guidelines for One Stop Centre, Department of Justice and Constitutional Development
365 S 89 (5)
366 Gallinetti and Sloth Nielsen, Child Justice in Africa, A guide to Good Practice
ensure the successful implementation of the Child Justice Act.\textsuperscript{367} In the past the cooperation was not structured and it was informal between government and non governmental organisations.\textsuperscript{368} The pre trial assessment of children in conflict with the law was dependant on the attitude and the discretion of the Prosecutor if he or she desires same or not.\textsuperscript{369} The pre sentence report was dependant on the attitude and discretion of the Probation Officer and in the main the courts struggled to get same.\textsuperscript{370}

The Act now requires that a child in conflict with the law be assessed by the Probation Officer within 48 hours of arrest by the police.\textsuperscript{371} This in essence suggests that the police must inform a probation officer of any arrest of a child to ensure assessment takes place before the matter is sent to a prosecutor for a decision.\textsuperscript{372}

Diversion programmes were provided by National Institute for Crime Prevention and Rehabilitation of Offenders and there was no accreditation and monitoring of such services by the Department of Social Department.\textsuperscript{373} A child would be referred to NICRO by the court and the child will be given a letter to a service provider and will come back with the letter to court to say he had complied with the programme and the charges will then be withdrawn by the Prosecutor in court.\textsuperscript{374}

Before the child justice court can impose a sentence the probation officer must complete a pre sentence report to determine a just and suitable sentence for the child who has been convicted of an offence.\textsuperscript{375} The Probation Officer must submit same to court to assist the judicial officer to impose an appropriate sentence.\textsuperscript{376} Correctional Services must provide suitable facilities that are child friendly for children who have been convicted of an offence.\textsuperscript{377} The Department of Education must ensure that children who are detained in Child Youth Centres have access to education whilst in detention.\textsuperscript{378} Clearly the latter demonstrates the relations that exist between government departments in ensuring that justice is provided to children in conflict with the law whilst ensuring that they do not lose their childhood because of the harshness of the criminal justice system and prison life. South Africa has now followed the trend that has been in existence in other countries especially England, New Zealand and Canada.\textsuperscript{379}

\textsuperscript{367} Skelton and Bately, Restorative Justice: A Contemporary South African Review, Acta Criminologica 21(3)2008
\textsuperscript{368} Law Practice and Policy: South African Juvenile Justice Today, Community Law Centre University of the Western Cape
\textsuperscript{369} Ibid
\textsuperscript{370} Ibid
\textsuperscript{371} Section 34
\textsuperscript{372} Section 34 (2)
\textsuperscript{373} NICRO, History of Juvenile Justice
\textsuperscript{374} Ibid
\textsuperscript{375} S 71(1)
\textsuperscript{376} Ibid
\textsuperscript{377} S 89
\textsuperscript{378} Ibid
\textsuperscript{379} Naude, Prinsloo and Ladikos, Restorative Mediation Practices, Acta Criminologica 16(5) 2003
For South Africa to be able to give effect to restorative justice it has to strengthen the relations between government and the non governmental sector from the pre trial to the post sentence stage. The Act now regulates this inter sectoral approach to child justice and takes away the discretion from role players.

412 Pre Trial Stage

There are various processes that take place during the pre trial stage. These processes are interlinked and are undertaken by different role players. The first stage is arrest and is done by the police, second stage is the assessment and is done by probation officers, the third is the decision whether to prosecute, divert ,refer to preliminary inquiry and or refer to children’s court and this is done by prosecution, the fourth is age estimation that is normally done by either a medical doctor or psychologist and an order for diversion that is done by the magistrate in chambers in respect of a prosecutor diversion and lastly diversion service that is provided by non governmental service providers.

4121 Arrest by Police

The police arrest the child whenever it is alleged that he has committed an offence. The Act provides that the police must not arrest if the child is below the age of 10 years the child must be handed over to a parent, guardian, appropriate adult or a care giver. If the child is 10 years and over the police must immediately advise the probation officer for purposes of an assessment. The police must determine under which schedule is the offence alleged to have been committed by the child. If the child is alleged to have committed a schedule 1 offence the police may release the child and issue a written notice or summon to the child to appear in court. In the event of schedule 2 and 3 the police may not release but must locate the parents of the child, advise them before the child is summoned to appear at a preliminary inquiry. The police must further inform the probation officer for purposes of an assessment within 48 hours before the matter is sent to a preliminary inquiry. The police must in terms of police instructions ensure that he explains the process to the child, parent, guardian, appropriate adult and or care

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381 S 89
383 Act 75 of 2008
384 S 9(1)
385 S 9 (2)
386 S 18
387 S 19
388 S 20 (4)
The police roles are regarded as very essential in any justice system. The police are the child’s first encounter with the criminal justice system and shapes his impression of an interaction with the process that follows. The Act provides clear roles and responsibilities for the police service in order to ensure the protection of children who are alleged to have committed offences. The South African Police Service has in line with the requirements of the Act drafted National Instructions to inform police officers about the manner in which they should execute their duties.

### 4.1.2.2 Assessment by Probation Officer

The Probation Services Act details the powers and functions and duties of Probation Officers. It provides for the establishment and implementation of programmes aimed at combating crime, and the rendering of assistance to and treatment of certain persons involved in crime and certain matters. Probation Officers are social workers employed by the department of Social Development to render probation services prescribed by Acts 116 of 1991 and 75 of 2008. The powers and duties of probation officer include:

- (i) Investigating the circumstances of the accused;
- (ii) Helping a probationer to comply with his or her probation conditions in order to improve social functioning;
- (iii) Immediately reporting to courts where a probationer fails to comply with his condition;
- (iv) Reporting to the court on the progress and supervision of, and compliance with, conditions by approbation officer;
- (v) Conducting information classes, and
- (vi) Planning and implementing programmes.

Before the advent of the Child Justice Act the prosecutor had discretion whether or not to prosecute in a particular case involving a child who is alleged to have committed an offence. The Act provides that every child who is alleged to have committed an offence and is under the age of 10 years must be referred to a Probation Officer. This in essence means the police must work closely with the Department of Social Development to ensure that assessment takes place. A child who is 10 years or older must be sent to probation officer for assessment before the matter can be sent to a Prosecutor for

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389 National Police Instructions
390 Gallinetti, Child justice in Africa, Community Law Centre 2004
391 Gallinetti and Sloth Nielsen, Child Justice in Africa, A guide to Good Practice
392 Draft Police National Instructions on Child Justice 2 of 2010
393 Act 116 of 1991
394 Ibid
395 Ibid
396 Law Practice and Policy: South African Juvenile Justice Today. Community Law Centre University of Western Cape
397 s 9 (1) (b)
decision. The assessment will assist the prosecutor in making an appropriate decision whether to divert, refer the matter to preliminary inquiry or to children’s court if he is of the view that the child is in need of care. There has to be a close cooperation amongst the role players at this stage to ensure that justice is seen to be done. If assessment is dispensed with reasons should be noted in the record as to why the child in conflict with the law has not been assessed.

### 4.2.2.1 Purpose of Assessment

The purpose of an assessment is to:

(i) Establish whether the child may be in need of care and protection in order to refer to a children’s court;
(ii) Estimate the age of the child if the age is uncertain;
(iii) Gather information relating to any previous conviction, previous diversion or pending charge in respect of the child;
(iv) Formulate recommendations regarding the release or detention and placement of the child;
(v) Where appropriate establish the prospects of diversion of the matter;
(vi) In the case of a child under the age of 10 years or a child whose criminal capacity is unlikely to be proved, establish what measures needed to be taken;
(vii) In the case of a child who is 10 years or over but under the age of 14 years express a view whether an expert evidence would required;
(viii) Determine whether the child has been used by an adult to commit the crime in question; and
(ix) Provide any other relevant information regarding the child which the probation officer may regard to be in the best interest of the child or which may further any object which this Act intends to achieve.

Probation services are essential to the management of children in conflict with the law within the criminal justice system. It is the Probation Officer that assists the prosecutor to arrive at a decision during the pre trial stage whether to divert or refer the child to children’s court or to prosecute and then assist the child in conflict with the law to become a rehabilitated and responsible law abiding citizen in the event of a prosecutor diversion.

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398 S 34  
399 S41(3)  
400 S 35  
401 Kassan, Probation Officers as Role Players, chapter 12, Child Justice in Africa  
402 Ibid
4222 Age estimation

In the event where the age of the child who is alleged to have committed an offence the probation officer may always refer the child to a medical doctor or psychologist to assist in the estimation of the child’s age using scientifically proven methods.403 The Probation Officer is not on her own qualified to make age estimation and relies on the services of medical practitioners from the department of Health.404 It is apparent from the above that role players must work together immediately the child enters the criminal justice process and failure to do so may lead to miscarriage of justice to a child who is alleged to have committed an offence.405

4223 Preliminary Inquiry

Preliminary inquiry has been discussed previously in chapter 2 however in this chapter it will be briefly canvassed, how a multi sectoral approach manifests itself during this pre trial stage. The child in conflict with the law must have committed a schedule 2 or 3 offence for him to be summoned in a preliminary inquiry as a court of first instance406 and must have been in detention and assessed by the Probation Officer. It is an informal pre trial procedure which is inquisitorial in nature407. At this stage the Inquiry Magistrate plays a very central role in the inquiry and the prosecutor’s role is limited at this stage. The inquiry magistrate will consider the Probation Officer’s report and enquire whether the child should be released, diverted, referred to children’s court or referred to child justice court for trial. For the Inquiry Magistrate to make an informed decision he must have looked at the pre trial assessment report compiled by the Probation Officer, secondly the Prosecutor must inform the Inquiry Magistrate of the schedule of the crime the child is facing and lastly the information from the child, child’s parent, guardian, appropriate adult or a care giver.

4224 Prosecutor Diversion

This topic has been canvassed in chapter 3 however it must be noted that at this stage the Prosecutor must consult the Investigating Officer before making a decision whether to divert in terms of section 41 or prosecute and must consider the Probation Officer’s pre trial assessment report, the views of the victim and the community affected by the crime.408 In other words the Prosecutor cannot make a unilateral decision regarding diversion at this stage. For the diversion to become a court order the Prosecutor must take

403 Gallinetti and. Sloth Nielsen, Child Justice in Africa, A guide to good practice
404 Ibid
405 Ibid
406 S 43 (3)
407 S 43 (1)
408 S 52 (3)
the matter to a magistrate in chambers\textsuperscript{409} to make the diversion an order of the court to ensure monitoring by a suitable person appointed by the court and compliance by the child in conflict with the law.\textsuperscript{410}

The Prosecutor must have consulted with the probation officer to determine a suitable diversion programme for the child.\textsuperscript{411} The probation officer will assist the prosecutor in identifying a suitable service provider that will provide the diversion programme for the child.\textsuperscript{412} Once the court has made an order in chambers the child will be required to undergo the programme and a suitable person appointed by the court will monitor compliance. Subsequent to the successful compliance the person appointed by the court is required to submit a compliance certificate to the court and thereafter the matter will be deemed as finalised.\textsuperscript{413} In the event of non-compliance the same person appointed by the court will submit a no compliance certificate whereupon the court will make an inquiry to the non-compliance. If fault is not due to the child, the court will not alter the diversion order and may adjust the order to ensure compliance. In the event of the failure attributed to the child’s fault the court may alter the diversion by adding additional orders or may make an onerous diversion order. In some cases the matter may be referred to child justice court for trial if the child was in wilful default.\textsuperscript{414}

\section*{4 2 2 5 Trial stage}

The trial of a child in conflict with the law takes place in child justice court. A child justice court is any court where the child in conflict with the law appears. It may be a District, Regional or High Court.\textsuperscript{415} The constitution of the court is such that no person is allowed to sit during the trial unless the presence of such person is necessary in connection with the proceedings.\textsuperscript{416} The court must ensure that the child is legally represented by an Attorney of his choice failing which the court must refer the child to Legal Aid South Africa for the matter to be evaluated by them and provide legal representation if the child or his parent cannot afford their own legal representative.\textsuperscript{417}

\section*{4 2 2 6 Duties of Legal Representative}

A legal representative representing a child in child justice court must:
(i) Allow the child, as far as is reasonably possible, to give independent instructions concerning the case;
(ii) Explain the child’s rights and duties in a manner appropriate to the age and

\textsuperscript{409} S 41
\textsuperscript{410} S 57
\textsuperscript{411} S 54
\textsuperscript{412} S 57
\textsuperscript{413} S 57
\textsuperscript{414} S 58
\textsuperscript{415} S 63
\textsuperscript{416} S 63 (5)
\textsuperscript{417} S 80 (1)
intellectual development of the child;

(iii) Promote diversion where appropriate, but may not unduly influence the child to acknowledge responsibility;

(iv) Ensure that the assessment, preliminary inquiry, trial or any other proceedings in which the child is involved, are concluded without delay and deal with the matter in a manner to ensure that best interests of the child are at all times of paramount importance; and

(iv) Uphold the highest standards of ethical behaviour and professional conduct.418

4 2 2 7 Parental Assistance

The court must ensure that the child is assisted by a parent, guardian or an appropriate adult in the proceeding in a Child Justice Court.419 In the absence of the above the court, at the request of the child in exceptional circumstances appoint an independent observer to assist the child.420 Having regard to all the role players within the child justice system it is imperative that they work together to ensure a seamless and effective way of providing justice to children in conflict with the law. The time for operating in silos is now over because that has not assisted children who have found themselves on the wrong side of the law.421

South African law has for many years recognised that youthfulness should be a mitigating factor in determining an appropriate sentence for a child offender.422 This was confirmed in numerous judgements of the High Courts. The best interest principle requires423 that interventions in children’s lives be orientated towards assisting them to play a constructive role in society rather than destroying them. That requires all the role players to work together in an attempt to help children to become better citizens.424

4 2 2 8 Non Governmental Service Providers

Apart from the intra-governmental co-operation in dispensing justice to children in conflict with the law, it is however critical for non governmental organisations and civil society to play their role.425 The role of NICRO in providing diversion programmes to

418 Ibid
419 S 65
420 S 65
421 Gallinetti and Sloth Nielsen, Child Justice in Africa, A guide to Good Practice
422 Skelton and Bately, Charting progress, mapping the future, Restorative Justice in South Africa
424 S 89
425 Guidelines to Establishing One Stop Centre, Department of Justice and Constitutional Development.
young offenders is well documented in South Africa since 1992.\textsuperscript{426} Non governmental organisation role is both critical at strategic and operational level. NICRO has been providing the diversion services in the country and it is assumed that it will extend to rural areas where NICRO is not active.\textsuperscript{427} Many children have benefited from the NICRO programmes and that has helped in reducing the clogging of court rolls.\textsuperscript{428}

\section*{4 2 2 9 Pre sentence and sentencing stage}

Once a child in conflict with the law has been convicted the court is empowered to request a pre sentence report to assist it to impose a just and appropriate sentence.\textsuperscript{429} Once more the role of a probation officer becomes relevant because the court relies on the expertise of the probation officer to prepare a report.\textsuperscript{430} In the report the probation officer is at liberty to make various restorative justice sentence recommendations to assist the court.\textsuperscript{431} The Child Justice Act provides for victim offender mediation and family group conference as sentence options in terms of section 73.\textsuperscript{432} The advantage of invoking restorative justice sentence is that it enables the role players to contribute in determining the outcome of the decision in the final analysis.\textsuperscript{433}

\section*{4 2 3 0 Post sentence stage}

After the court had imposed a restorative justice sentence to the child in conflict with the law obviously it will require the monitoring of compliance with such a sentence and the role of Correctional Officers becomes very important.\textsuperscript{434} The Department of Correctional Services had adopted restorative justice approach not only to children but across the board.\textsuperscript{435}

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\item \textsuperscript{426} NICRO, History of Juvenile Justice
\item \textsuperscript{427} Ibid
\item \textsuperscript{428} Ibid
\item \textsuperscript{429} S 71 (1)
\item \textsuperscript{430} Kassan, Probation Officers as Role Players, Chapter 12, Child Justice In Africa, A guide to Good Practice
\item \textsuperscript{431} Ibid
\item \textsuperscript{432} S 73 (1)
\item \textsuperscript{433} Ibid
\item \textsuperscript{434} Gallinetti, Police as Role Players , chapter 11, Child Justice in Africa
\item \textsuperscript{435} Muntingh, Monitoring and Evaluation: Promoting the Documentation and Evaluation of Programmes, Child Justice in Africa
\end{itemize}
4 2 3 1 Establishment of One Stop Child Justice Centres

The Act provides for the establishment of One Stop Child Justice Centres.\textsuperscript{436} The centres will function with members of each disciplinary team involved in the administration of child justice. The various role players not only participate but contribute resources for the smooth running of the centre.\textsuperscript{437}

4 2 3 2 The objective of One Stop Child Justice Centres

The objective is to promote co-operation between government departments, and government and non governmental organisations and civil society to ensure an integrated and holistic approach in the implementation of the act.\textsuperscript{438} The Child Justice Centre must have the following:

(i) Offices for use by members of South African Police Services;
(ii) Offices for use by probation officers
(iii) Facilities to accommodate children temporarily, pending the conclusion of a preliminary inquiry;
(iv) Offices for use by legal representatives;
(v) Offices for use by persons who are able to provide diversion services;
(vi) Offices for use for persons authorised to trace the relatives of the child;
(vii) Offices for use for persons who are able to provide for correctional supervision;
(viii) A children’s court, and any other relevant facility.\textsuperscript{439}

4 2 3 3 Management of the Centre

The Centre must establish a management committee.\textsuperscript{440} This committee must be comprised of senior officials of the Department of Justice and Constitutional Development, Social Development, Correctional Services, South African Police Service, Legal Aid South Africa and other relevant organs of state. The committee must manage the services at the centre and ensure that it is adequately and properly administered.\textsuperscript{441} There are 2 Centres in the Republic at the moment Nerina One Stop Child Justice Centre at Port Elizabeth and Mangaung One Stop Child Justice Centre at Bloemfontein.

\textsuperscript{436} S 89 (1)
\textsuperscript{437} Ibid
\textsuperscript{438} Ibid
\textsuperscript{439} S 89 (4)
\textsuperscript{440} S 89 (5) Act 75 of 2008
\textsuperscript{441} Ibid
4 2 3 4 National Policy Framework

The Act provides for the development of a National Policy framework by the Department of Justice and Constitutional Development in consultation with the Ministry of Safety and Security, Correctional Services, Social Development, Education and Health within 2 months of the commencement of the Act.\textsuperscript{442} The purpose of the policy framework is to:

(i) Ensure uniform, coordinated and cooperative approach by all government departments, organs of state and institutions in dealing with matters relating to child justice;
(ii) Guide the implementation and administration of the act;
(iii) Promote cooperation and communication with non governmental sector and Civil society in order to ensure effective partnerships for the strengthening of the child justice system; and
(iv) Enhance service delivery.\textsuperscript{443}

4 2 3 5 Conclusion

Intersectoral cooperation is critical in the successful implementation of the child justice act. The cooperation by stakeholders\textsuperscript{444} will obviously translate to a number of benefits which are:

(i) Each role player will understand its role within the model;
(ii) The Act will be understood by the role players more clearly;
(iii) The principle of restorative justice will be reinforced;
(iv) Cases will be dealt with timeously;
(v) Number of children awaiting trial will be reduced;
(vi) Cooperation between role players will be much improved.
(vii) Enhancing the capacity and use of programmes for diversion and appropriate sentencing;
(viii) Raising awareness about the transformation of child justice amongst the Professionals in the criminal justice system and the general public;
(ix) Increasing the protection of young offenders in detention; and
(x) Establishing a monitoring process for child justice.

The latter approach provides an opportunity for engagement amongst role players in an attempt to put restorative justice mechanism to test within the South African

\textsuperscript{442} S 93 (1)
\textsuperscript{443} Ibid
\textsuperscript{444} S 89 (3)
criminal justice system that is retributive. This then translates into a hybrid model of both restorative and retributive justice existing side by side as advocated by Herman.\textsuperscript{445}

A number of initiatives in Africa and elsewhere in the world have shown that good juvenile justice systems thrive where there are strong partnerships between government and the non governmental sector.\textsuperscript{446} Thus indeed juvenile justice is a truly intersectoral field. The enactment of the Child Justice Act is testimony that South Africa is now part of the global world in that it not only has ratified international instruments but has taken upon itself to domesticate them in ensuring its compliance to international standards and trends.\textsuperscript{447}

The implementation of the Child Justice Act is ground breaking and a victory for advocates of children’s rights in South Africa. Many children have lost their lives and some have been initiated to crime life because of a system that was not responsive to their needs.\textsuperscript{448} The Department of Justice has been given a mandate to monitor and coordinate Child Justice Fora in all the provinces to ensure compliance and consistency in the application of the Act.\textsuperscript{449}

\section*{Chapter 5}

\section*{5 Conclusion}

Child Justice Act offers something that has been lacking in the criminal justice system in South Africa for many years. It is argued that even though there were some elements of restorative justice in the criminal justice system they were not adequate enough to be on the same level with international trends.\textsuperscript{450} The Act not only recognises restorative justice, but embraces it in an unprecedented way. The Act incorporates restorative justice in the criminal justice system in a way that other pieces of legislation have not done.

\begin{thebibliography}{99}

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\bibitem{Skelton} Skelton, \textit{INGOs and NGO\textsetminus s as RolePlayers}
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Restorative justice requires an informal, integrated and multi sectoral approach where all the role players cooperate in an attempt to respond to crime in a coordinated and holistic manner. It is argued that the act does that with success in ensuring that all the role players collaborate in an integrated way. The prevailing justice paradigm has now been enriched by the enactment of the Child Justice Act because the face of the criminal justice system has now been altered to be reflective of a dual approach to justice.451

It is hoped that this is the beginning and restorative justice will be extended to cases that involve adults.452 This must be seen as a beginning of a gradual positive march into a more restorative approach to all cases in the criminal justice system.453 Restorative mediation can be applied in a variety of context, at both the formal and informal levels. At the formal level the criminal justice system can apply restorative mediation at the pre trial process, at the pre sentence process, as part of a condition for sentence or pre release programmes.454

In South Africa there is every reason to embrace and celebrate restorative justice because the Truth and Reconciliation Commission demonstrated to everyone that it is an effective way of solving and dealing with the most difficult of all differences when everybody was not giving peace a chance in the country but people were able to forgive the most heinous of crimes and sixteen years later the people are still living side by side despite the past.

Child Justice Act is a breath of fresh air into the criminal justice system and as such it has to be welcome. There may be some teething problems at the initial stages but it is argued that it must be given a chance and obviously in the process the teething problems will be rectified going forward. It is indeed a good piece of legislation whose main purpose is to protect children in conflict with the law against the harshness of the retributive system and prison life.455

The three elements that have been introduced to the criminal justice system by the Child Justice Act are interdependent and will enrich the jurisprudence in ensuring that there is consistency, predictability and certainty in cases involving children in the criminal process. They now strip the discretion that has been enjoyed by the role players in the criminal process.456 For one the prosecutor has to consider diversion before exercising his discretion to prosecute and secondly the judicial officer has to consider restorative justice as sentence options in cases involving children in conflict with the law.457

452 Hargovan, Restorative Approaches to Justice: Compulsory Compassion or Victim Empowerment, Acta Criminologica 20 (3) 2007
453 Hargovan, Restorative Approaches to Justice: Compulsory Compassion or Victim Empowerment, Acta Criminologica 20(3) 2007
454 Nuade , Prinsloo and Ladikos , Restorative Mediation Practices
455 NICRO, Diversion Manual
456 Hargovan, Restorative Approaches to Justice: Compulsory Compassion or Victim of Empowerment
457 Ibid
Restorative justice in all its forms requires participation by all those affected by the commission of the crime in order to address the harms and needs of victims occasioned by the crime.\textsuperscript{458} The offender has to acknowledge responsibility in order for the community to forgive.\textsuperscript{459} All role players will play their rightful roles in an integrated manner in realizing the principles of restorative justice.\textsuperscript{460}

\textsuperscript{458} A, Crawford, Situating Restorative Youth Justice in Crime Control and Prevention, University of Leeds
\textsuperscript{459} Section 52 (1) of Act 75 of 2008
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