THE CHILD ACCUSED IN THE CRIMINAL JUSTICE SYSTEM

by

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In accordance with Rule G4.6.3, I declare that The Child Accused in the Criminal Justice System is my work and that it has not been submitted for any degree or examination in any other university. All the sources used or quoted have been duly acknowledged.

SIGNED......................................

DATE........................................
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SUMMARY

The high level of crime in South Africa raises the question about the failures of the criminal justice system on the one hand, and South Africa’s social policies on the other. Young people in South Africa can disproportionately be both victims and perpetrators of crime in the Republic of South Africa.

The child accused in conflict with the law is dealt with in much the same way as their adult counterparts, as the criminal justice system was designed by adults for adults.

South Africa became a signatory to the United Nations Convention on the Rights of the Child 1989¹ (hereinafter referred to as UNCRC) on 16 June 1995. The UNCRC provides a backdrop to section 28 of the Constitution of the Republic of South Africa Act.² Article 3(1) of the UNCRC provides as follows:

“in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be primary consideration.”

South Africa is therefore according to article 40(3) of the UNCRC obliged to

“establish laws, procedures, authorities and institutions specifically applicable to children in conflict with the law”.³

In terms of article 40(1) of the UNCRC

“State Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.”⁴

¹ Adopted by the General Assembly resolution 44/25 on 20 November 1989.
Synopsis 2003 states that “the Ratification of the UNCRC by the South African government in 1995 set the scene for broad-reaching policy and legislative change”.

The Constitution includes a section protecting children’s rights, which includes the statement that children have the right not to be detained except as a measure of last resort and then for the shortest appropriate period of time, separate from adults and in conditions that take account of his/her age.

After being off Parliament’s agenda since 2003, the Child Justice Act has recently been reintroduced. The Act aims to ensure consistent, fair and appropriate treatment of the child accused in conflict with the law.

The question arises whether the South African Criminal Justice system involving the child accused adequately recognises and protects the interests of the child accused, particularly in view of the present international legal position.

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7 Act 75 of 2008. Hereinafter referred to as “the Act”.

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CHAPTER 1
INTRODUCTION AND OVERVIEW OF STUDY

1.1 INTRODUCTION

South Africa does not have a cohesive juvenile justice system. The management of the child accused in the criminal justice system is found in a broad spectrum of legislative acts, namely, the Criminal Procedure Act 51 of 1977, the Probation Services Act 116 of 1991, The Child Care Act 74 of 1983, and the Correctional Services Act 111 of 1998. These Acts contain limited provisions addressing this issue.

In addition to the UNCRC, there are three sets of other international rules governing juvenile justice:

- The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) – provides guidance on social policies to be applied to prevent and protect young people.


- The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the “JDL Rules”) - it safeguards fundamental rights and establishes measures for young persons once they are deprived of their liberty.

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8 The whole of this Act has been repealed by s 313 of the Children’s Act 38 of 2005, which in respect of this Act will come into operation on a date to be fixed by the President by proclamation in the Gazette.
The United Nations Standard Minimum Rules for the Administration of Juvenile Justice,\textsuperscript{13} provides guidance to the signatories for the protection of children’s rights and respect for the development of a separate and specialised system of juvenile justice. The “Beijing Rules” was the first international legal instrument to comprehensively detail norms for the administration of juvenile justice with a child rights focus and development oriented approach.

A court that deals with matters involving children are at all times obliged to consider the best interests of the child. This principle is part of our common law and is included in section 28(2) of the Constitution.

The best interests’ principle is also set out in Article 4(1) of the 1999 African Charter on the Rights and Welfare of the Child\textsuperscript{14} and it states that “in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration”.

“A growing number of children are committing serious crimes including murder and rape.” This problem was highlighted by the recent “ninja rampage by a Krugersdorp school boy who allegedly murdered a fellow pupil and seriously injured others”.\textsuperscript{15}

A “fair and effective criminal justice system which ensures respect for the human rights of all those involved is a prerequisite for combating crime and for building societies based on the rule of law”.\textsuperscript{16}

When children are exposed to the criminal justice system a whole range of needs come into play which is different to that of an adult. The term “juvenile” and “child” are sometimes used intertwined; however, “juvenile” may differ from that of “child”. For purposes of this dissertation child and juvenile are one and the same.

\textsuperscript{13} United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereinafter referred to as “the Beijing Rules”) Adopted by General Assembly resolution 40/33 of 29 November 1985.


\textsuperscript{15} Webb “Boyd Rising Number of Under Age Killers include Young Girls” in Pretoria News.

1.2 AIMS OF THE STUDY

The aim of the study is to analyse and establish whether the South African criminal justice system involving the child accused adequately recognises and protects the interests of the child accused, particularly in view of current international trends. The researcher will also examine the Act, which changes the criminal justice system, by allowing alternatives to jail when it comes to child offenders in the way of diversion.

1.3 METHODOLOGY

The research involves a threefold process. Firstly, the situation of the child accused in South Africa criminal justice system prior to the implementation of the Act will be identified. The common law as well as legislative aspects applicable to the child accused will be researched.

Secondly, the researcher will investigate the legal position set out in international instruments such as the UNCRC. Finally, an analysis will be made of the Act which changes the criminal justice system dealing with children.

1.4 OUTLINE OF THE STUDY

The present chapter sets out the background of the study, its aims, methodology and scope.

Chapter two entails a discussion of age, proof of age and criminal capacity in South Africa as well as which children are subject to the child justice system and how it relates to the international legal position.

Chapter 3 considers pre-trial issues including arrest and detention, assessment, diversion, legal representation and assistance.

Chapter 4 deals with trial issues including the preliminary trial, the right to privacy, and child justice courts.

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17 Supra.
18 Supra.
Chapter 5 will be dedicated to sentencing and chapter 6 entails a discussion appeals of and reviews.

Each of the above chapters will include a discussion of the legal position prior to the implementation of the Act in South Africa, the legal position as set out in the international instruments and the position as proposed in the Act. This will be used to determine whether South Africa’s child justice system complies with international standards.

Chapter 7 summarizes the research and draws conclusions and recommendations on the preceding chapters.

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19 Act 75 of 2008.
CHAPTER 2
AGE AND CRIMINAL CAPACITY

2.1 INTRODUCTION

Four questions come up when dealing with issues concerning the age of children. They are:

- The age until which children should fall under the provisions of the Bill.
- The minimum age for prosecution of a child.
- The age until which criminal incapacity is presumed but may be rebutted.
- Problems around determining the age of a child.²⁰

At the outset it would seem appropriate to attempt to define the concept of “child”. An analysis of age, proof of age and criminal capacity is essential to determine which category of children fall under the regime of a juvenile justice system. Below is an exposition of the position relating to age and criminal capacity in South Africa and a discussion of international trends as set out in international legal instruments. Reference will also be made to the Act and how the legislature attempts to change the current common law position.

The term “every child” referred to in section 28 of the Constitution, includes by definition, all South African children as well as non-South African children.

2.2 AGE

2.2.1 THE LEGAL POSITION PRIOR TO THE IMPLEMENTATION OF THE ACT

Before, children as young as seven could be tried in a court, although it did not happen often. Section 28 of the Constitution, defines a child as a person below the age of 18. Section 50(4) of the Criminal Procedure Act, 51 of 1977 provides for special procedures in instances where children under 18 are dealt with after arrest. Section 50(5) of the Criminal Procedure Act 51 of 1977 imposes a duty on the police officer to inform a probation officer of the arrest of a person under 18 years of age.

Section 72(1)(b) of the Criminal Procedure Act, 51 of 1977 provides that a court may place an accused under 18 years of age in the care of the person in whose custody the child accused is. Section 73(3) of the Criminal Procedure Act 51 of 1977 provides that an accused under the age of 18 is entitled to be assisted at criminal proceedings by a parent or a guardian. Section 153(4) of the Criminal Procedure Act 51 of 1977 provides that proceedings are to be held in camera where the accused is under the age of 18 years. Section 154(3) of the Criminal Procedure Act 51 of 1977 prohibits the publication of any information that reveals or may reveal the identity of the child accused.

Section 1 of the Correctional Services Act 111 of 1998 defines a child as a person under the age of 18 years. The Correctional Services Act 8 of 1959 makes provision for the detention of the child accused under 18 years.

The Child Care Act 74 of 1983 defines “child” as any person under the age of 18 years.

2.2.2 THE INTERNATIONAL LEGAL POSITION

Article 1 of the UNCRC defines a child as every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier.

Rule 2.2(a) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”)[21] defines a juvenile as a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult. Rule 2.2(c) of the same rules defines a juvenile offender as a child or young person who is alleged to have committed or who has been found to have committed an offence. No specific age limits are mentioned and it seems as if age limits will depend on, and are explicitly made dependent on, each respective legal system, thus fully respecting the economic, social, political, cultural and legal systems of Member States. This makes for a wide variety of ages coming under the definition of “juvenile”, ranging from 7 years to 18 years or above.[22]

The later “JDL Rules” defines a juvenile to be any person under the age of 18, which is consistent with the definition of a child given in Article 1 of the UNCRC.

2.2.3 THE PROVISIONS OF THE ACT

In terms of the section 1 of the Act, “child” means any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4(2).

2.3 PROOF OF AGE
2.3.1 THE LEGAL POSITION PRIOR TO THE IMPLEMENTATION OF THE ACT

Section 337 of the Criminal Procedure Act 51 of 1977 states that where there is insufficient evidence available as to the age of the child and it is relevant in criminal proceedings the presiding officer may estimate the age of the child and such age will be deemed correct until otherwise proven. The presiding officer may base it on the appearance of the child and/or any other information which is available.

In S v Dial\textsuperscript{23} the court held that the presiding officer should when interpreting the provisions of section 337 of Criminal Procedure Act 51 of 1977, estimate the age of the accused only as a last resort. Where no district surgeon is available at the seat of the court, the accused is to be referred to the nearest district surgeon or State hospital. The consequences of estimating age can be significant, in that an estimate of 19 years, rather than 17 years of age could deprive a child of the special protection of section 28 of Constitution of the Republic of South Africa, Act 108 of 1996.

In S v W\textsuperscript{24} the court held that when interpreting section 294(1)(b) of the Criminal Procedure Act 51 of 1977 the relevant date on which the offence was committed (and the age of the accused on that date), and not the date of the sentence is to be taken into account.

\textsuperscript{23} 2006 (1) SACR 395 (E).
\textsuperscript{24} 1990 (1) SACR 262 (NC).
2.3.2 THE INTERNATIONAL LEGAL POSITION

In terms of the UNCRC if there is no proof of age of the accused and it cannot be established that the child is at or above the Minimum Age of Criminal Responsibility, the child shall not be held criminally responsible. To counter this it is recommended that every child shall be registered immediately after birth to set age-limits one way or another. A child without a provable date of birth is extremely vulnerable to all kinds of abuse and injustice regarding the family, work, education and labour, particularly within the juvenile justice system. Every child must be provided with a birth certificate free of charge whenever he/she needs it to prove his/her age. If there is no proof of age, the child is entitled to a reliable medical or social investigation that may establish his/her age and, in the case of conflict or inconclusive evidence, the child shall have the right to the rule of the benefit of the doubt.25

Article 12 of the UNCRC provides that States should ensure that their birth registration processes are effective. Where child’s age is unknown, effective measures should be taken to determine the true age of a child. This should be an independent and objective assessment.

2.3.3 THE PROVISIONS OF THE ACT

The Act makes provision for various persons to determine the age of a child. Section 12 of the Act prescribes how a police official must deal with a child accused suspected to be under 10 years of age and/or children 10 years or older but under 14 years of age.

A probation officer must in terms of section 13(1) of the Act make an estimation of the child’s age and must complete the prescribed forms if the age of the child is uncertain. The probation officer must consider various available information prescribed by section 13(2) of the Act. The information to consider is as follows:

- A previous determination of age by a magistrate under this Act or under the Criminal Procedure Act 51 of 1977 or an estimation of age in terms of the Children's Act;

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• statements made by a parent, an appropriate adult, guardian or any other person, including a religious or community leader, likely to have direct knowledge of the age of the child;

• a statement made by the child concerned;

• a school registration form, school report, other document of a similar nature, a baptismal or other similar religious certificate; or

• an estimation of age by a medical practitioner.

Section 14 determines that if a presiding officer is uncertain of the age of a child accused, the presiding officer must determine the child’s age. The presiding officer may consider the form and any documentation submitted by the probation officer and may require any relevant documentation, information or statement from any person, subpoena any person to produce the documentation, information or statements and/or refer the child to a medical practitioner for an estimation of age.

2.4 CRIMINAL CAPACITY

Criminal capacity is present where the perpetrator possesses the mental ability to realise the nature of his/her conduct and further ability to act in accordance with this realisation of unlawfulness.26

2.4.1 THE LEGAL POSITION PRIOR TO THE IMPLEMENTATION OF THE ACT

In South Africa the minimum age of criminal capacity was determined by the doli capax/doli incapax rule. Children below the age of 7 years are irrebuttably presumed to lack criminal capacity.27 There was a rebuttable presumption that children under 14 years, but 7 years or older were deemed to lack criminal capacity unless the State proved that the child in question

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26 Le Roux Juvenile Offenders in the South African Criminal Law in Bezuidenhout and Joubert Child and Youth Misbehaviour in South Africa (2008)172
27 It has been pointed out that this is one of the lowest ages of commencement of criminal capacity in the world. See Skelton “Developing a juvenile justice system for South Africa: International Instruments and Restorative Justice” (1996) Acta Juridica 186.
could distinguish between right and wrong and knew the wrongfulness of the conduct at the
time of the commission of the offence.\textsuperscript{28}

It appears that the presumption was designed to protect children. But it could easily be
rebutted. Furthermore it did not present an impediment to the prosecution and conviction of
young people.\textsuperscript{29} For instance; mothers of children were asked to indicate whether their
children could understand the difference between right and wrong. An answer in the
affirmative was quite often considered a sufficient ground to rebut the presumption of \textit{doli
incapax}. The courts have noted that caution should be exercised where child accuseds are
illiterate, unsophisticated, and moreover are children "with limited grasp of the proceedings."\textsuperscript{30}

Prosecutors often led evidence of the mother of the child to prove that the child understands
the difference between right and wrong. This was however only part of the inquiry. The
second leg of the inquiry was whether the child accused could act in accordance with that
knowledge at the time of the commission of the offence. Van Oosten and Louw\textsuperscript{31} have
observed that “in practice … the courts have more often than not paid mere lip service to the
criminal capacity test by making the inquiry turn on the child’s actual knowledge and
appreciation of the wrongfulness of his or her conduct in specific circumstances and at the
time of his or her act, or on the presence or absence of malicious intent or evil motive”. They
have stated that the mother of the child is not an expert in child development.

was suggested that a report of a suitably qualified professional who should testify on the
criminal responsibility of the child at the trial would be very useful. This was very helpful
where the child faced serious charges and where a custodial sentence may be imposed.\textsuperscript{32}
2.4.2 THE INTERNATIONAL LEGAL POSITION

“International law incorporates a number of basic principles upon which a juvenile justice system should be based. The first purpose is the encouragement of the well-being of children; the second goal is that children should be dealt with in a manner proportionate both to their circumstances and to the offence. Another principle ... is that the concept of criminal responsibility should be related to the age at which children are able to understand the consequences of their actions.”

Article 40(3) of UNCRC requires State parties to seek to promote, *inter alia*, the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law, but does not mention a specific minimum age in this regard. Various States show the existence of a wide range of minimum ages of criminal capacity. They range from a very low level of age 7 or 8 to a high level of 14 or 16.

The UNCRC places a duty on state parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe penal law. The Beijing Rules (Rule 4) recommends that when states establish an age of criminal responsibility, “the beginning of that age shall not be fixed at too low an age level bearing in mind the facts of emotional mental and intellectual maturity”. The Commentary to the Rules points out that if the age were set too low or was non-existent, the concept of responsibility would become meaningless.

There are wide differences internationally in relation to when criminal capacity is deemed to commence. Within Europe, for example, the lowest is Ireland (7 years), while in Sweden it is 15 years. In the USA, different states have adopted different ages, with the lowest reportedly being 10 years.

State parties are encouraged to increase their minimum age for criminal capacity to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.

34 Adopted by the General Assembly resolution 44/25 on 20 November 1989.
2.4.3 THE PROVISIONS OF THE ACT

The Act provides for profound changes in the way the child accused will be dealt with. Section 7(1) establishes a new age of criminal capacity. It proposes that children under the age of 10 be exempt from prosecution (in other words they are *doli incapax*). Children between the ages of 10 and 14 years are presumed to lack criminal capacity (*doli capax*) and must be evaluated by social workers before a decision to prosecute them is made. The prosecution can however bring evidence to show that a particular child has criminal capacity. Section 7(2) of the Act has changed the common law pertaining to criminal capacity of children under 14 years of age.

In terms of section 11(1) the State must prove beyond a reasonable doubt that the child has the capacity to appreciate the difference between right and wrong at the time of the commission of an alleged offence and to act in accordance with that appreciation. This is applicable to children who are 10 years or older but under the age of 14 years.

2.5 CONCLUSION

It is clear that South African legislation, which includes the Constitution, the Children’s Act, the Correctional Services Act 111 of 1998 and the  Act have adopted the definition of child as denoting a person under the age of 18 years. It is clear that as far as the recognition of a child who will fall under the regime of a criminal justice system is concerned, South Africa law is consistent with international conventions. The Act has brought clarity on this issue.

The common law presumption of incapacity for children under 14 is retained and a child under 14 years can in terms of the Act only be prosecuted if it is shown that such child can appreciate the difference between right and wrong and act accordingly. It is only then that the presumption will be rebutted.

38  Act 108 of 1996.
It is clear that age can have a profound impact on a child if the wrong age is attributed to a child. Our law did not previously provide us with adequate guidelines concerning what procedures must be followed and what information must be used when determining the age of a child. It is clear that the Act brings about a shift in the way that proof of age will be dealt with. The probation officer will be obliged to consider all the factors listed in section 13(2) of the Act. The prosecutorial authority or the child’s attorney can in future request that a child be evaluated at the state’s expense and to determine the cognitive development ability of the child. Where there is doubt the child should get the benefit of the doubt.

The Act brings about a shift from the very low age level of criminal capacity of 7 years of age to a higher level of 10 years. As stated before, international conventions do not specify a minimum age of criminal capacity. However 10 years is still a very low age. Until then, children as young as 10 years of age may be prosecuted which is a very unfortunate situation.
CHAPTER 3
PRE-TRIAL ISSUES

3.1 INTRODUCTION

Once it is decided that there is a *prima facie* case against the child and that such case will be referred to a formal court, a decision has to be made as to what method will be used to bring the child before court. A child who has committed an offence and who is served with a summons, a written notice and/or who is arrested appears in a criminal court in much the same way as adults do. Once a child is arrested a decision has to be made whether to release the child into the custody of his/her parents or legal guardian or to detain the child. Section 28(1)(g) of the Constitution states that a child has a right not to be detained except as a measure of last resort. At present child offenders await trial in abysmal conditions in prisons and police cells in South Africa. This can often be for months at a time. Often parents and guardians have not known their whereabouts. Numerous problems are experienced when the child accused is arrested. The special difficulties involving the present system are that the child is arrested by the police in most cases without informing the parents or legal guardians of the child.

This chapter sets out the position relating to arrest and detention, assessment, diversion and legal representation and assistance in South Africa and a discussion of the requirements set out in international legal instruments. The discussion will refer to the Act and how the legislature attempts to change and set out clear guidelines to clarify and improve the current legal position.

3.2 ARREST AND DETENTION

An arrest is the act of depriving a person of his or her *liberty* and it usually relates to the *investigation* and prevention of *crime*.\(^{40}\) Due to the problematic nature of arrest and detention only this aspect will be fully dealt with here.

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3.2.1 THE LEGAL POSITION PRIOR TO THE IMPLEMENTATION OF THE ACT

Section 28(1)(g) of the Constitution enshrines the international principle that children should not be detained except as a measure of last resort.\(^{41}\) Despite this many children are held in detention for various offences.

Section 29\(^{42}\) of the Correctional Services Act 8 of 1959 deals with the arrest of children but this section has been repealed by section 99 the Act. However, the Act is only due to come into operation on 1 April 2010. Until then, Section 29 of Correctional Services Act\(^{43}\) remains current law.

Section 29 of the Correctional Services Act 8 of 1959 deals with the detention of unconvicted young persons and women. It states that a person under 18 years but 14 years and older may not be detained in prison, a police cell or lock up. However, such a person may under certain circumstances be detained, once arrested, for a period of 24 hours where the child is under 14 years and 48 hours where the child is under 18 years of age but older than 14 years of age. The child may only be detained where the detention is necessary and in the interests of justice and where it is not possible to place the child in the care of his or her parent or guardian, any other suitable person or any institution or place of safety as defined in section 1 of the Child Care Act 74, for the period in question.

Where children are detained in a police cell or lock-up the police official responsible for ordering the detention must provide the court with a written report setting out the reasons for the detention and an explanation as to why it was necessary to detain the child. The report must be submitted to the magistrate not later than one court day of the child being released from detention.

Where a child is detained, the trial of the child so detained shall be processed as expeditiously as possible.

\(^{41}\) Act 108 of 1996.
\(^{42}\) S 29 of the Correctional Services Act 8 of 1959 was retained, despite the bulk of the Act having been repealed and replaced by the Correctional Services Act 111 of 1998.
\(^{43}\) Act 8 of 1959.
A person who is detained in a prison or a police cell or lock-up shall be kept separate from any person over the age of 18 years who is in custody. This applies even when the child is transported from one place to another.\textsuperscript{44}

Skelton says that the Criminal Procedure Act 51 of 1977 must be read together with section 29 of the Correctional Services Act when dealing with the arrest of children and detention.\textsuperscript{45}

A child that has been arrested and charged with a less serious crime,\textsuperscript{46} may be released by a police official on bail or into the care of the person in whose custody he or she is with a written warning and may also place a child in a place of safety or under the supervision of a probation officer or correctional official. If the child is not released as stated above, he/she may be held for 24 hours in police cells provided that the child must be released into the care of his or her parents or guardian thereafter. Where the police cannot do this the child may be held in a place of safety. Where the child is 14 years or older and there is no secure place of safety within a reasonable distance from the court and if the child is charged with an offence listed in a Schedule to the Correctional Services Act, then the child may be sent to prison where he/she will await trial.\textsuperscript{47}

The magistrate can send a child over the age of 14 years to prison if the child is charged with any other offence, and if the magistrate is of the view that the circumstances are serious enough to warrant detention. A magistrate can set bail for children who are so detained. The placement of the child in a particular facility is at the discretion of the magistrate. A child that is detained in prison must be brought back before the court every 14 days.

\textsuperscript{44} S 29 has been repealed by s. 99(1) of the Child Justice Act 75 of 2008, a provision which will come into operation on 1 April 2010.


\textsuperscript{46} A crime referred to in Part II or Part III of Schedule 2 to the Criminal Procedure Act 51 of 1977.

3.2.2 THE INTERNATIONAL LEGAL POSITION

Article 37(b) of the UNCRC provides that the *imprisonment* of a child is to be used “only as a measure of last resort and for the shortest appropriate period of time”. Rule 13.1 of the Beijing Rules, reiterates that “detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time. Rule 1 of the JDL Rules clearly states that “imprisonment should be used as a last resort”. In addition, rule 17 states that children that are detained under arrest or awaiting trial are presumed to be innocent and shall be treated accordingly. Detention before trial must as far as possible be avoided and should be limited to extraordinary circumstances.

When detention is applied, the most expeditious processing of cases must be applied to ensure the shortest possible period of detention. Convicted and unconvicted children should be kept separately.48

Rule 13.4 of the “Beijing Rules” states that children “under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults”.49

3.2.3 THE PROVISIONS OF THE ACT

Section 20 of the Act states that a child that has committed a schedule 1 offence may not be arrested, unless there are compelling reasons justifying the arrest.

Chapter 4 of the Act deals with the release or detention and placement of children prior to being sentenced.

If the child has committed a less serious offence,50 the child should be released on police bail or into the care of a parent or an appropriate adult unless the child’s parent or an appropriate adult or guardian cannot be located or is not available and all reasonable efforts have been

50  Schedule 1 Offence.
made to locate the parent or appropriate adult or guardian or there is a substantial risk that the child may be a danger to any other person or to himself or herself.\textsuperscript{51}

A presiding officer may authorise the release of a child into the care of a parent, an appropriate adult or guardian or if the child is alleged to have committed an offence referred to in Schedule 1 or 2, on the child's own recognisance, if it is in the interests of justice to release the child.\textsuperscript{52}

Bail must be considered in three stages: first, whether the interests of justice permits the release of a child on bail; second, if so, a separate inquiry must be held into the ability of the child or his/her parents to pay the bail amount; and third, if after an inquiry it is found that there is an inability to pay the bail amount, consideration must be given to setting conditions which do not include payment of money.\textsuperscript{53}

Section 26 of the Act states that if a decision has been made not to release the child after arrest and before the child’s first appearance, preference must be given to the placement of the child in a suitable child and youth care centre or, if that is not appropriate, placement in a police cell. The inquiry magistrate may consider the placement of a child who has been detained in a police cell, in a child and youth care centre, or in a prison. Section 30 of the Act states that placement in a prison may only be considered if the child is 14 years or older, bail has been refused or the conditions have not been complied with, the child committed a schedule offence, it is in the interests of the administration of justice or for the protection of the public or other children and/or that the child may be sentenced to life imprisonment, if convicted.

The Act gives effect to the international convention that detention of children should be a measure of last resort.

\textsuperscript{51} S 22 of the Child Justice Act 75 of 2008.
\textsuperscript{52} S 24(2) of the Child Justice Act 75 of 2008.
\textsuperscript{53} S 25(2) of the Child Justice Act 75 of 2008.
The Act is silent on a constitutional imperative, namely that “detention should be for the shortest period of time”.54

Once a child is detained, the case must be completed within a period of six months from the taking of the plea, as children will not be able to be detained for longer than this unless they are charged with murder, rape, car high-jacking or aggravated robbery.55

3.3 ASSESSMENT

“Assessment is an evaluation process, occurring after the arrest of a child, which is designed to evaluate the circumstances of the child and the circumstances of the child’s alleged commission of an offence, with a view to formulating appropriate recommendations.”56

The probation officer plays a leading role with regard to the child accused and is indeed essential. The probation officer is often the contact between the persons in the legal system on one hand and the accused and his or her family on the other, and also between the victims as well.

The duty of the probation officer is to gather information about the child’s personal situation, namely the child’s family and upbringing, schooling, personality, etcetera. The probation officer will make written recommendations in the form of proposals to assist the judicial authority.57

The importance of individual assessment of each child who comes in contact with the criminal justice system cannot be stressed. It has gained recognition over the past few years in South Africa.

3.3.1 THE LEGAL POSITION PRIOR TO THE IMPLEMENTATION OF THE ACT

The Criminal Procedure Act58 states that a police officer must inform a probation officer within 48 hours of the arrest of a child. The assessment of the child accused by probation officers before the first appearance in court is practised in most of urban centres. This usually

57 Juveniles in Conflict with the Law: The Probation officer at all Stages of the Procedure.
58 Act 51 of 1977.
occurs within 48 hours of the arrest of the child. This is however only true of the major urban areas. The smaller towns and rural areas do not have sufficient staff to undertake these assessments or the probation officer is required to cover a large geographical area. The Probation Services Act 116 of 1991 introduces assessment of children by probation officers as a legal requirement for the first time in South African law. The Criminal Procedure Act 51 of 1977 does not stipulate what the probation officer is required to do after being informed of the arrest of the child. The Correctional Services Act 59 defines assessment as “a process of developmental assessment or evaluation of a person, the family circumstances of the person, the nature and circumstances surrounding the alleged commission of the offence, its impact on the victim, the attitude of the alleged offender in relation to the offence and any other relevant factor”. The Correctional Services Act 60 requires that all arrested children that are not released must be assessed by a probation officer as soon as is reasonably possible, but before his or her first appearance in court. The Correctional Act 61 also provides that if a child has not been assessed by the time he or she is brought to court, the court may extend the time for the child to be assessed by periods not exceeding seven days at a time following his or her first court appearance.

3.3.2 THE INTERNATIONAL LEGAL POSITION

Article 40(1) of the UNCRC provides that States should

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

The fundamental goal here is that child should be reintegrated into the community. Article 40(4) provides that a “variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a

60 Ibid.
61 Ibid.
62 Adopted by the General Assembly resolution 44/25 on 20 November 1989.
manner appropriate to their well-being and proportionate both to their circumstances and the
offence.\textsuperscript{63}

The “Beijing Rules” encourages States to obtain social inquiry reports and they are an
indispensable aid in legal proceedings involving children.

Courts should be informed of the social and family background, school career and educational
experiences. The rule therefore requires that adequate “social services should be available to
deliver social inquiry reports of a qualified nature”.\textsuperscript{64}

\subsection*{3.3.3 THE PROVISIONS OF THE ACT}

The Act reinforces the duty of probation officers to assess all child offenders soon after arrest
of a person thought to be a child and before a preliminary enquiry is held.

Every child who is alleged to have committed an offence must be assessed.\textsuperscript{65} Section 9 of the
Act deals with the way in which children under the age of ten years and who therefore have
no criminal capacity should be dealt with. The section states that children under the age of
ten years must be assessed within seven days after the probation officer has been notified by a
police official that an offence has been committed. Assessing this group of children does not
imply that the child is criminally liable for the incident that led to the assessment. Children
older than 10 years but under 14 years of age must be assessed before their first appearance in
court.\textsuperscript{66}

The purposes of assessment are to establish the age of the child, whether a child may be in
need of care in order to refer the child to a children’s court, to establish which placement
option is best suited to the child, gather information relating to any previous conviction,
previous diversion or pending charges in respect of a child, establish the prospect of diversion
of the matter, determine whether the child has been used by an adult to commit the crime in
question and must formulate recommendations for the release of the child to prevent pre trial
detention.

\textsuperscript{63} \textit{Ibid.}  
\textsuperscript{64} United Nations Standard Minimum Rules for the Administration of Juvenile Justice.  
\textsuperscript{65} S 5 and 34 of the Child Justice Act 75 of 2008.  
\textsuperscript{66} S 5(2) of the Child Justice Act 75 of 2008.
Chapter 5 of the Act contains provisions relating to the powers and duties of probation officers at assessment, the places where assessments are to be conducted, the persons who are permitted to attend an assessment, confidentiality of information obtained during an assessment and assessment reports of the probation officer.

The idea is that all children in conflict with the law will be assessed. It is clear that the Act complements the provisions of the Probation Services Act 116 of 1991.

3.4 DIVERSION

Diversion is the process whereby children are channelled away from the formal criminal justice system into reintegrative programmes. In other words the criminal case is disposed of in a manner other than through the normal court procedure. It can happen at any stage of the criminal justice system. The result of a decision to divert a matter where a child is accused of committing a certain offence is the avoidance prosecution and the detrimental effects of a criminal trial. This in effect means that the charges against the child are withdrawn on condition that the child participates in structured programmes and/or makes reparation to the complainant.

Diversion is also closely linked to the concept of restorative justice. Restorative justice involves that the offender must make amends for what he/she have done and must initiate a healing process for themselves, their families, the victims and the community at large. The goal of restorative justice is mainly to prevent re-offending and for offenders to rejoin the law-abiding community. Some think that diversion is a soft option but this is not the case.

3.4.1 THE LEGAL POSITION PRIOR TO THE IMPLEMENTATION OF THE ACT

Diversion was commonly practised on an informal basis in our legal system as there was no legal framework for diversion practised in South Africa. The requirements before diversion could be considered is that the child must freely acknowledge responsibility for the alleged offence consent to diversion, there should be a *prima facie* case against the child and a parent.

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or guardian must be willing to take responsibility for his or her attendance and must be present in court.

The process of diversion was as follows:

- A child is identified as a candidate for diversion;

- he or she has to be assessed by a probation officer to determine whether a child is a suitable candidate for a diversion programme;

- the probation officer has to advise the prosecutor, in writing, on whether the child is a suitable candidate but the final decision lies with the Prosecutor;

- where a probation officer is not available the prosecutor still has the discretion to divert the matter;

- in addition a legal representative can request the prosecutor to consider diversion, but this must be done prior to plea;

- upon successful completion of the programme the charges against the child is withdrawn;

- no formal plea is entered;

- there is no criminal record; and

- if the child fails to complete the diversion programme and cannot provide a reasonable explanation for such a failure, prosecution will be instituted.

Despite the absence of a legal framework our courts have recognised and held that when children are involved in minor offences such cases should be dealt with outside the criminal
justice system where possible.\textsuperscript{68} The courts have on occasion also considered diversion as a sentencing option in the matters before it.\textsuperscript{69}

The National Prosecuting Authority have published a Policy Directive guiding the implementation of diversion.\textsuperscript{70} Part 7 paragraph 3 of the Policy Manual states that diversion is inappropriate where a charge of murder, robbery with aggravating circumstances, rape or a similarly serious offence is involved. In general re-offenders do not qualify for diversion.

\subsection*{3.4.2 THE INTERNATIONAL LEGAL POSITION}

The UNCRC requires State Parties to promote and establish laws or procedures and to make available programmes and other alternatives to institutional care for children in trouble with the law.

Rule 11.1 of the “Beijing Rules” endorses this principle and provides that:

\begin{quote}
  “Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority.”
\end{quote}

In terms of Rule 11.2 of the “Beijing Rules” the prosecution or other agencies have a discretion when dealing with child cases and have the power to dispose of such cases without having recourse to formal hearings. Diversion may be used at any point of decision-making process by any competent authority. It should not be limited to petty cases.

Rule 11.3 of the Beijing Rules provides that any diversion involving referral to appropriate community or other services shall require the consent of the child, or his or her parents or guardian.

Rule 11.4 provides that “in order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims”.

\begin{flushright}
\textsuperscript{68} S \textit{v} D 1997 (2) SACR 673 (C).
\textsuperscript{69} S \textit{v} Z \textit{en vier andere sake} 1999 (1) SACR 427 (E).
\textsuperscript{70} NPA Policy Manual.
\end{flushright}
3.4.3 THE PROVISIONS OF THE ACT

In terms of the Act diversion is a central feature of the child justice system. Section 61 of the Act lists family group conferences as a diversion option and section 62 lists victim offender mediation as another diversion option. This is in addition to the wide range of life skills programmes that can be utilised for developing the competencies of children. The purposes or objectives of diversion are set out in section 51 of the Act and promotes accountability, dignity and well being of the child, promote the reintegration of the child into the community and family, encourages symbolic restitution, promotes reconciliation, prevents stigmatisation of the child, encourages victims to express their views, reduces the risk of re-offending, deals with a child outside the formal criminal justice system in some cases and prevent the child from having a criminal record.

The Act introduces a range of innovative diversion options such as a “compulsory school attendance order”, “a family time order,” a positive peer association order,” “a good behaviour order,” “a peer association order,” “a reporting order” and “a supervision and guidance order”. The aim of the orders are to allow children to remain in their homes and at the same time to provide support to parents and families that have difficulties in guiding their children through adolescence.72

The Act builds in a number of safeguards to protect children’s procedural rights. A child must “be considered for diversion only if he or she voluntarily acknowledges responsibility for the offence, if the child understands his or her right to remain silent and has not been unduly influenced to acknowledge responsibility, if there is sufficient evidence to prosecute, if the child and his or her parent consent to the diversion option, and if the prosecutor or the Director of Public Prosecutions indicates that the matter may be diverted”.73 It is requirement that a child makes an informed choice. The child must not be pressurised to admit to something he or she has not done. The probation officer must thus be skilled enough to minimise the risk of “coercion”, or to prevent children from being pressured into admitting guilt.

73 Ibid.
The Department of Social Development has the responsibility to ensure that there are sufficient diversion options available. However any other department or organisations may develop diversion programmes. The Department will also be responsible for keeping records of diversion orders made.

The Act provides that probation officers must assess all children arrested and make appropriate recommendations with regard to diversion at a preliminary inquiry. They must also monitor compliance with diversion, and if a child fails to comply with any condition of a diversion option, inform the inquiry magistrate of that non-compliance.74

3.5 CONCLUSION

There was no acceptable legislative framework for the detention of children. The Act will, however bring about alternatives procedures to arrest. The Act enshrines the international convention that detention of children should be a measure of last resort. Clear guidelines are set out in the Act when dealing with children that are detained.

Although assessment is already part of the child justice system, legislation was needed to ensure consistency and clarity to all role-players in the system. Compulsory assessment of each child and appearance at a preliminary inquiry within 48 hours of the arrest (or its alternative) is a new feature of the Act.

Our criminal justice system recognised and practiced diversion but there was no legislative framework dealing with this issue. The prosecutor had the final say concerning whether a case can be diverted or not. The Act promotes the use of diversion but s 41 of the Act still empowers the prosecutor with the final say on the question whether or not the case is to be diverted. The consent of the child and its parent is also a requisite.

It is clear that the position prior to the implementation of the Act clearly did not comply with the standards set out by the international conventions. However, the Act brings us closer to complying with our international obligations.

CHAPTER 4
TRIAL ISSUES

4.1 INTRODUCTION

Section 28(2) of the Constitution states that the best interests of the child is of paramount importance. This should apply to all aspects of the criminal justice system.

It very often occurs that children choose not to be legally represented due to many reasons. The privacy of children is very often not respected by the media. Many of the child offenders have not had access to social workers in the form of probation officers. This is however about to change with the introduction of the Child Justice Act.\(^75\)

Below is an exposition of the position relating to the new concept of the preliminary enquiry, legal representation, the right to privacy and child justice courts in South Africa and a discussion of international trends as set out in international legal instruments. A brief discussion on the Act\(^76\) will be set out in this chapter and how the legislature attempts to change these new concepts in our law.

4.2 THE COURT PROCESS

4.2.1 PRELIMINARY INQUIRY

4.2.1.1 THE LEGAL POSITION PRIOR TO THE IMPLEMENTATION OF THE ACT

The legal position prior to the implementation of the Act legal made no provision for preliminary enquiries to be held for the child accused in our criminal justice system and the child was treated in much the same way as his/her adult counterpart.

\(^75\) Act 75 of 2008.
\(^76\) Act 75 of 2008.
4.2.1.2 THE INTERNATIONAL LEGAL POSITION

Rule 14.1 of the Beijing Rules\textsuperscript{77} merely states that “where the case of a juvenile offender has not been diverted, she or he shall be dealt with by the competent authority according to the principles of a fair and just trial”.

No specific reference is made to the preliminary enquiry but this is in accordance with rule 14.2 which determines that the “proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely”.

4.2.1.3 THE PROVISIONS OF THE ACT

The Act makes provision for the introduction of a new system to manage the child accused, namely, the preliminary inquiry. Section 43(1)\textsuperscript{78} describes a preliminary enquiry as an informal, pre-trial procedure which is inquisitorial in nature. In terms of section 43(2) the objectives of the preliminary inquiry are to consider the probation officer’s assessment report, establish whether the matter can be diverted before plea and what diversion options are suitable and whether the matter must be referred to a children’s court. The presiding officer must take into account all relevant information relating to the child and the offence, the views of all persons present are considered and ensure that the child and his or her parents participate in decisions concerning the child.

In terms of the Act all child accused will first have to appear at a preliminary inquiry before an inquiry magistrate, irrespective of the nature of the offence committed, unless the prosecutor has withdrawn the charges or diverted the matter in the case of Schedule 1 offences.

After conclusion of the preliminary inquiry the prosecutor has to decide whether the matter may be diverted away from the formal criminal justice system.


\textsuperscript{78} Act 75 of 2008.
Skelton submits that “the idea of a preliminary inquiry is to act as a sifting mechanism so that only serious cases where diversion is not an option end up in the criminal courts”.  

4.3 CHILD JUSTICE COURTS

If the prosecutor indicates that the matter may not be diverted, such matter will be referred to a child justice court, which is an ordinary criminal court but which has to apply the provisions of the Act.

4.3.1 THE LEGAL POSITION PRIOR TO THE IMPLEMENTATION OF THE ACT

As a general rule there was no separate criminal court for children in South Africa. The courts at all three levels, namely the District Court, Regional Court and the High Courts, did have jurisdiction over cases where children are accused of committing criminal offences. The choice of which court should preside over the matter was dependant on the seriousness of the charge and the sentencing powers of the courts. In some urban areas a court is set aside to deal with juvenile cases and these courts are referred to administratively as “juvenile courts”. In smaller areas criminal cases of children were channelled through the same courts used for their adult counterparts.

In South Africa there are two dedicated criminal justice court centres specifically established to deal with the child accused. “Stepping Stone” in Port Elizabeth has been operating since 1996 and has dedicated staff that is permanently appointed. A similar Child Justice Centre exists in Bloemfontein. No other similar courts exist in the country. These courts appear in the metropolitan and urban areas only with no such courts in the rural areas.

The courts are aimed at streamlining the whole criminal justice process from the arrest of the child accused to the formal court process, with all the major services in one place. The idea is that all the services should be under one roof.

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80 S 153(3) of the Criminal Procedure Act 51 of 1977.
4.3.2 THE INTERNATIONAL LEGAL POSITION

According to article 14.1 of the UNCRC a juvenile offender that has not been diverted shall be dealt with by a competent authority according to the principles of a fair and just trial.

When dealing with a child accused the minimum standards of procedure for any criminal accused shall be applied. This means that the procedure known as due process of law shall be applied. Fundamental principles of a fair and just trial includes basic rights such as the “presumption of innocence, the presentation and examination of witnesses, the common legal defences, the right to remain silent, the right to have the last word in a hearing, the right to appeal, etc” 81

4.3.3 THE PROVISIONS OF THE ACT

It is envisaged that all cases involving children are to be dealt with at one stop centres except when the child is charged with treason, murder or rape. It seems as if the aim of such courts is to ensure an appropriate environment for child offenders.

In terms of the Act 82 once a case involving a child has been diverted it will not proceed to trial. Thus if a case involving a child has not been diverted by a prosecutor or during a preliminary trial, it will be referred to trial.

In terms of the Act, trials will be conducted in more specialised child justice courts. As an interim measure any court before which a child appears as an accused will be constituted as a child justice court and will have to apply the provisions of the Child Justice Act. This however does not require the establishment of new courts. Instead, a specific court in every magisterial district will be designated as a child justice court, and regional one-stop centres will also be established.

82 Act 75 of 2008.
A child justice court may consider diversion of the matter afresh despite the fact that a child was not diverted at the preliminary trial and may make a diversion order if it is found to be appropriate.

It is envisaged that all child justice courts should in effect have two presiding officers. The first presiding officer will preside over matters involving the child accused during the preliminary enquiry and the second presiding officer should preside over trial issues involving children.

The Act provides that the location and design of the courtroom of a child justice court as well as the proceedings must be conducive to the dignity and well being of children: proceedings will be conducted in a language that the child understands; questions and responses will be framed in a way appropriate to the child’s developmental level; and the proceedings will be informal to encourage the maximum participation of the child. No leg irons will be permitted, and handcuffs allowed only in exceptional circumstances. No child will be held in a cell at court or transported to court with adults.

4.4 LEGAL REPRESENTATION

In South Africa all persons have the right to be represented by an Attorney or Advocate in criminal court proceedings. In terms section 28(1)(h) of the Constitution all children have a right to have a legal practitioner assigned to the child by the state.

4.4.1 THE LEGAL POSITION PRIOR TO THE IMPLEMENTATION OF THE ACT

Ann Skelton states that “children have a right to legal assistance in South Africa in cases where a substantial injustice would otherwise occur, and where a child or his or her family cannot afford to pay for the services of a lawyer”.83 In South Africa all State funded legal representation for criminal matters can be obtained through the Legal Aid South Africa. It was decided that “substantial injustice” would result where an accused is not provided legal representation at the State’s expense where the child cannot afford the cost of his or her own legal representation, the child would receive a prison sentence if convicted or where the legal

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representation would make a material difference to the prospects of the accused receiving a fair trial.84

In South Africa almost all children qualify for legal assistance at state expense but they are not obliged to be legally represented. Legal assistance at state expense for children was however only available once the child has made his/her first appearance in court.

In S v D85 it was held that the failure to advise the accused of their rights to legal representation resulted in a material failure of justice.

4.4.2 THE INTERNATIONAL LEGAL POSITION

Rule 15.1 of the “Beijing Rules” provides that the child has the right to be represented by a legal adviser at any stage of the legal proceedings or to apply for legal aid where it is available.86 As international law stipulates that legal representation should be available from the commencement of the proceedings this will have to include even the preliminary enquiry.

Article 40(2)(b)(ii) proposes that State Parties must ensure that every child should have certain basic guarantees. This includes the right to be informed promptly and directly of the charges against him or her and the right to have legal or other appropriate assistance in the preparation and presentation of his or her defence.

International law requires that legal representation should be available from the commencement of the criminal proceedings. Paragraph 49 of General Comment no 1087 (Children’s Rights in juvenile justice) states that the child must be guaranteed legal or other appropriate assistance in the preparation and presentation of his/her defence. The UNCRC does require that the child be provided with assistance, which is not necessarily under all circumstances legal but it must be appropriate. It is left to the discretion of States parties to determine how this assistance is provided but it should be free of charge. The Committee recommends the State parties provide as much as possible for adequate trained legal

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85  1997 (2) SACR 671 (C).
assistance, such as expert lawyers or paralegal professionals. Other appropriate assistance is possible (eg social worker), but that person must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice and must be trained to work with children in conflict with the law.

Paragraph 50 requires that the child and his/her assistant must have adequate time and facilities for the preparation of his/her defence. The communication between the child and his/her assistance can be in writing and/or orally and the confidentiality and privacy of such communications must be fully respected.

4.4.3 THE PROVISIONS OF THE ACT

Section 80 provides compulsory duties which a legal representative must comply with when representing a child. A presiding officer is obliged to make an order which may include appropriate remedial action or sanction and report any contravention of the duties listed in section 80(1) to the relevant authorised bodies.

In terms of section 81 legal aid assistance to a child may also be granted for a preliminary enquiry. A presiding officer will be obliged to refer a child to the Legal Aid Board where a child cannot afford the services of a legal representative. A child may not waive his or her right to legal representation.

Therefore, legal assistance may be provided for in the preliminary proceedings as well as for the trial proceedings.

All legal representatives acting on behalf of children should have specialised knowledge when dealing with children in the criminal justice system.

It is in the best interests of the child to be represented by a lawyer who specialises in these issues.

88 Act 75 of 2008.
89 Ibid.
90 Ibid.
91 S 83(1) of the Child Justice Act 75 of 2008.
4.5 THE RIGHT TO PRIVACY

The right to privacy is a right guaranteed in the Constitution and applies to all persons and not only children. However, due to the child’s vulnerability, extra protection was extended to protect children in the criminal justice system.

4.5.1 THE LEGAL POSITION PRIOR TO THE IMPLEMENTATION OF THE ACT

Section 153(4) of the Criminal Procedure Act\(^92\) states that where an accused person in criminal proceedings is under 18 years of age, the court must sit in camera and “no person other than such accused, his legal representative and parent or guardian or a person in loco parentis, shall be present at such proceedings, unless such person’s presence is necessary in connection with such proceedings or is authorised by the court”.

Section 153 of the Criminal Procedure Act\(^93\) makes provision for the child complainant and the child accused. They are however not on the same footing. The child accused has to remain in court throughout the whole of the criminal proceedings.

Section 154(3)\(^94\) prohibits the publication of the child accused’s name and particulars, and others if he or she is under the age of eighteen years of age. The presiding officer may however authorise the publication of information as he/she may deem fit if such publication would be just and equitable and in the interests of any particular person.

Section 154(3) allows a presiding officer to authorise publication in limited circumstances. A presiding officer must exercise his or her discretion in the best interests of the child. The discretion granted to presiding officer falls short of the protection granted to children in terms of section 28(2) of the Constitution.

The court in *S v Citizen Newspapers (Pty) Ltd and another; S v Perskorporasie van Suid-Afrika Bpk and another*\(^95\) rightly held that “the proper approach to be adopted in determining

\(^{92}\) Act 51 of 1977.

\(^{93}\) Act 51 of 1977.

\(^{94}\) Act 51 of 1955.

\(^{95}\) 1980 (3) 889 (T).
whether the section had been contravened was to inquire whether the articles in question either revealed or might reveal the identity of H as the accused person to a hypothetical ordinary, average reader of the articles in question who had no prior or special knowledge of any of the incidents or persons referred to in the article, and who therefore read each article as a separate news item divorced from anything which might previously have been published about such incidents or persons”.

4.5.2 THE INTERNATIONAL LEGAL POSITION

The United Nations lays down clear guidelines which makes provision that a child accused should have their privacy relating to his/her involvement in the justice process protected. This can be achieved through maintaining confidentiality and restricting disclosure of information that may lead to identification of a child who is involved in the criminal justice process.

As far as possible measures should be taken to protect children from undue exposure to the public and thus it may entail excluding the public and the media from the courtroom during the child’s testimony, where permitted by national law.96

4.5.3 THE PROVISIONS OF THE ACT

The right to privacy in the Act is similar to the provisions dealing with the issue in the Criminal Procedure Act.97 Section 63(5)98 provides that “no person may be present at any sitting of a child justice court, unless his or her presence is necessary in connection with the proceedings of the child justice court or the presiding officer has granted him or her permission to be present”.

Furthermore section 63(6)99 specifically states that section 154(3) of the Criminal Procedure Act100 applies “with the changes required by the context regarding the publication of information”.

97 Act 51 of 1977.
98 Act 75 of 2008.
99 Ibid.
100 Act 51 of 2008.
4.6 CONCLUSION

The preliminary trial is a new and central feature that will be implemented when the Child Justice Act 75 of 2008 comes into operation. At the preliminary enquiry, “a magistrate will make decisions about diversion, release or placement of the child based on a probation officer’s assessment report”.¹⁰¹

There are only two one stop centres in South Africa. The biggest obstacle in establishing more of these one stop centres is the lack of financial and human resources. The Act empowers the Minister of Justice & Constitutional Development to establish one stop child justice centres that will provide a wide range of integrated services under one roof he will be able to monitor this at all levels. The Act will provide a comprehensive legislative framework for the establishment of these one stop centres in line with our Constitution and international instruments.

Legal representation is a fundamental right entrenched in the Bill of rights. Presiding officers must ensure that the child and parent or guardian is fully aware of the right to legal representation and if they are unable to appoint a private attorney that they be informed of their right to be assisted by the Legal Aid Board. The Act will provide that children will not be able to waive this important right. It appears that some sort of specialisation will be required when dealing with child accused. However at present a child may choose not to be legally represented. At the present moment procedural constraints prevent children obtaining legal representation at state costs once they are arrested.

CHAPTER 5
SENTENCING

5.1 INTRODUCTION

Once a person has been convicted, a magistrate is empowered to request any information that will assist in the determination of a suitable sentence, as provided for in section 274 of the Criminal Procedure Act. The court in *DPP v P*\(^\text{102}\) acknowledged that sentencing children is more complex than sentencing adult offenders. South Africa has no separate child justice system, but youthfulness has always been considered a mitigating factor. At present there are various sentencing options which can be imposed upon a child accused.

It is undesirable to treat children in the same way as adults when dealing with sentencing issues.

Section 28(1)(g) of the Constitution provides that a child has the “right not to be detained except as a measure of last resort”. In addition to the rights the child enjoys under sections 12 and 35 of the Constitution, the “child may be detained only for the shortest appropriate period of time and has the right to be (i) kept separately from other detained persons over the age of 18 years and (ii) treated in a manner, and kept in conditions, that take account of the child’s age”.

Section 28(1)(g) of the Constitution of South Africa applies to pre-trial detention, pre-conviction detention and custodial sentencing after conviction and that a child has the right not to be sentenced to a term of imprisonment except as a measure of last resort, and then only for the shortest period.

Section 28(2) of the Constitution states that “a child’s best interests are of paramount importance in every matter concerning the child”.

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\(^{102}\) 2001 (1) SACR 243 (SCA).
The first part of this chapter will briefly deal with the various sentencing options that can be imposed upon a child accused once convicted. The second part of the chapter will deal with imprisonment as a sentencing option for the child accused and lastly some restorative justice principles will be highlighted.

5.2 THE VARIOUS SENTENCING OPTIONS

5.2.1 THE LEGAL POSITION PRIOR TO THE IMPLEMENTATION OF THE ACT

Section 28(2) of the Constitution reflects the common-law standard of the best interests of the child. The shortest period possible’ is, by itself, not an objective standard. Without further guidance it will be a personal standard of the court imposing the sentence. 103

At present the Criminal Procedure Act,104 in section 276, lists the following sentencing options:

- imprisonment, including imprisonment for life or imprisonment for an indefinite period;
- periodical imprisonment;
- declaration as an habitual criminal;
- committal to any institution established by law;
- a fine;
- correctional supervision; and
- imprisonment from which such a person may be placed under correctional supervision in the discretion of a Commissioner or a parole board.

Sentences may also be postponed or suspended in terms of section 297 of the Criminal Procedure Act 51 of 1977. The court can impose such a sentence with or without conditions,

103 Chapter 47 NPA Intranet.
104 Act 51 of 1977.
and the conditions may make provision for compensation and/or “the rendering of a service of benefit”.

Section 290 of the Criminal Procedure Act\textsuperscript{105} is the only legislation that describes the manner in which the court should deal with convicted persons who are below the age of 18. This section provides that a child accused may be:

- placed under the supervision of a probation officer or a correctional official; or

- order that he/she be placed in the custody of any suitable person designated in the order; or

- deal with him/her both in terms of the latter two paragraphs; or

- order that he/she be sent to a reform school as defined in section 1 of the Child Care Act, 1983 (Act 74 of 1983). A court which in terms of this section orders that any person be sent to a reform school, may direct that such person be kept in a place of safety as defined in section 1 of the Child Care Act, 1983, until such time as the order can be put into effect.\textsuperscript{106}

\subsection*{5.2.2 THE INTERNATIONAL LEGAL POSITION}

In terms of rule 16 of the Beijing Rules, the background and personal circumstances of the child accused should be taken into account before sentencing. It is necessary to consider the personal circumstances of the child accused when passing sentence and the report of a probation officer is seen as the integral mechanism to assist the court to determine the appropriate sentence. The Beijing Rules thus make proportionality a requirement in sentencing a child accused.

\textsuperscript{105} Act 51 of 1977.

\textsuperscript{106} \textit{S v Z \& 23 Similar Cases} (2004) (4) BCLR 410 (E). This case highlighted the fact that because of the lack of reform schools in the Eastern Cape and various other administrative complications, children sentenced to a term in reform school wait inordinately long periods of time before being sent there. The consequence is that they spend this time in places of safety, in police cells or in prison. This was found to be unacceptable. \textit{S v Felix} and two similar cases 2007 (2) SACR 129 (E).
According to article 40 of the UNCRC children found to have contravened the criminal law must be treated in a manner that is consistent with the promotion of the child's sense of dignity and worth, reinforce the child's respect for human rights and fundamental freedoms of others and take into account the child's age and the desirability of promoting his/her reintegration and encouraging him/her to assume a constructive role in society. Article 37 of the UNCRC requires detention to be used only as a last resort. It requires priority to be given to the use of non-custodial or community-based measures as an alternative to detention.

Article 40(1) of the UNCRC reflects the objective of sentencing the child accused which is apparent from international law and also reflects the desirability of “promoting the child’s reintegration and assuming a constructive role in society”.

Article 40(4) of the UNCRC requires that “a variety of dispositions such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care” shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence. “Rule 18.1 of the Beijing Rules calls for a “large variety of disposition measures…allowing for flexibility so as to avoid institutionalization to the greatest extent possible”.

5.2.3 THE PROVISIONS OF THE ACT

The aim of the Act is to ensure that children who are in conflict with the law are assisted and not condemned to a prison life. A court must, after convicting a child, pass sentence in accordance with the Act.

A court imposing a sentence must request a pre-sentence report before imposing a sentence. The court must record reasons for deviation from recommendations made in the probation officer’s report where the court imposes a sentence other than that recommended in the report.

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107 S 71.
108 S 71(4).
The Act contains provisions regarding the objectives of sentencing and factors to be considered during sentencing. The Act provides that the objectives of sentencing child offenders are to encourage the child to be accountable for the harm caused, promote an individualised response appropriate to the child’s circumstances, promote the reintegration into the family and community, ensure that the sentence assist the child in the process of reintegration and use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.\(^\text{109}\)

The Act provides for the following sentence which may be used in combination:

- Community-based sentences, including level two diversion options (orders over a maximum of 6 months, such as family time orders, requiring the child to spend a certain amount of time with his or her family) and orders such as community service to a maximum of 250 hours over a period of 12 months;\(^\text{110}\) and

- Restorative justice sentences, such as family group conferences\(^\text{111}\) (the goal of a family group conference is to establish a plan to deal with the child. The plan can include diversion) and victim-offender mediation,\(^\text{112}\) which can result in a recommendation which may be confirmed or altered by the court;

- a fine or alternatives to a fine;\(^\text{113}\) and

- Suspended sentences, with or without conditions, for a period not exceeding five years;

- A fine or penalties in lieu of a fine or imprisonment, such as symbolic restitution or the payment of compensation;

- Correctional supervision for not more than three years for children over the age of 14 only;\(^\text{114}\) and


\(^{110}\) S 72.

\(^{111}\) S 73(1)(a).

\(^{112}\) S 73(1)(b).

\(^{113}\) S 74.
• Residential sentences in child and youth care centres;\textsuperscript{115} (such a sentence can only be ordered if the seriousness of the crime, the protection of the community and the severity of the impact of the offence on the victim warrants it or if the child was previously given a non-residential sentence, but he did not respond positively to that alternative; and

• Prison sentences may only be imposed on children older than 14 and substantial and compelling reasons must exist for imprisonment, such as conviction on a serious offence or previous failure to respond to alternative sentences. Prison sentences may not be imposed for minor offences such as trespassing, contained in Schedule 1;\textsuperscript{116}

• Postponed sentences, with or without conditions, for a period not exceeding three years. The court may request the probation officer to supply regular reports regarding the child compliance with any conditions imposed.

There are two limitations on sentencing, namely no child may be sentenced to life imprisonment and, if a child has been sentenced to a residential facility, he may not be kept in jail until a vacancy arises.\textsuperscript{117}

5.3 IMPRISONMENT AS A SENTENCE OPTION

5.3.1 THE LEGAL POSITION PRIOR TO THE IMPLEMENTATION OF THE ACT

Until recently no limit regarding a minimum age for imprisonment of sentenced children existed. Life imprisonment existed as a sentence option for children.\textsuperscript{118}

In \textit{DPP, KwaZulu-Natal v P}\textsuperscript{119} the court held that despite the principle of incarceration as a last resort, the heinous nature of the crime could warrant the incarceration of a child.

\textsuperscript{114} S 75.
\textsuperscript{115} S 76.
\textsuperscript{116} S 77.
\textsuperscript{117} S 72 Act 75 of 2008.
\textsuperscript{119} In \textit{DPP v P} 2001 (1) SACR 243 (SCA) the accused approached two men and requested that they kill her grandmother. In return she promised the men that she would provide them with valuables from the home of the deceased. The deceased was killed in a brutal manner. The men were convicted of the murder and
In *S v Nkosi*\(^{120}\) the court held that the following principles are applicable in guiding a court's discretion in deciding on the suitability of an appropriate form of punishment for a child offender:

- Wherever possible a sentence of imprisonment should be avoided, especially in the case of a first offender.

- Imprisonment should be considered as a measure of last resort, where no other sentence can be considered appropriate. Serious violent crimes would fall into this category.

- Where imprisonment is considered appropriate it should be for the shortest possible period of time, having regard to the nature and gravity of the offence and the needs of society as well as the particular needs and interests of the child offender.

- If at all possible the judicial officer must structure the punishment in such a way as to promote the rehabilitation and reintegration of the child concerned into her or his family or community.

- The sentence of life imprisonment may only be considered in exceptional circumstances. Such circumstances would be present where the offender is a danger to society and there is no reasonable prospect of his or her rehabilitation.

In the case of *S v Z*\(^{121}\) the court laid down three guidelines that should be followed when sentencing a child:

- the younger the child, the more inappropriate the use of imprisonment would be; and

- imprisonment is particularly unsuitable for first offenders; and

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\(^{120}\) 2002 (1) SA 494 (W).

\(^{121}\) 1999 (1) SACR 427 (ECD).
even if the sentence of imprisonment is only of short duration, this shortness does not render it appropriate.

The issue of proportionality was dealt with in *S v Kwalase*\(^{122}\) and the court stressed the importance of an individualised approach to sentencing children.

The Criminal Law Amendment Act 38 of 2007 amended the Criminal Law Amendment Act 105 of 1997 and made minimum sentences applicable to child offenders who were 16 or 17 years old at the time of commission of the offence. The court in the case of the *Centre for Child Law v Minister for Justice and Constitutional Development and others (National Institute for crime prevention and the reintegration of offenders, as Amicus curiae)*\(^{123}\) declared that section 51(1) and (2) of the Criminal Law Amendment Act 105 of 1997 is unconstitutional and therefore invalid to the extent that they apply to persons who were under 18 years of age at the time of the commission of the offence. Furthermore section 51(6) of the Criminal Law Amendment Act 105 of 1997 was also declared unconstitutional and invalid. The section is to read as follows:

“This section does not apply in respect of an accused person who is under the age of 18 years at the time of the commission of the offence contemplated in ss (1) and (2).”

### 5.3.2 THE INTERNATIONAL LEGAL POSITION

Imprisonment of children is not forbidden by international instruments. Rule 17 of the Beijing Rules however prescribes that the following principles should govern the sentencing process in cases dealing with children:

- The action taken must be in proportion to the circumstances and the gravity of the offence, the circumstances and the needs of the child and the needs of the society;

- Deprivation of the liberty of the child must be limited to the possible minimum;

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\(^{122}\) 2000 (2) SACR 135 (CPD).

\(^{123}\) 2009 (2) SACR 477 (CC).
• Deprivation of the liberty of the child must only be imposed for serious acts involving violence against another person or of persistence in committing other serious offences; and

• The guiding factor in the consideration of the case of the child is her or his well being.

Furthermore the UNCRC prohibits the imposition of capital punishment on children, corporal punishment and life imprisonment without the possibility of parole.

5.3.3 THE PROVISIONS OF THE ACT

The Act reflects the constitutional and international standard that detention is a measure of last resort. Section 77 of the Act places substantial limits on the ability of a court to sentence a child to imprisonment.

Imprisonment of children, who are under the age of 14 years at the time of being sentenced for the offence, are prohibited. Furthermore, it prescribes that when sentencing children 14 years or older to imprisonment, such imprisonment may only be done as a measure of last resort and for the shortest appropriate period of time.

According to section 77(3)(c) a child who is 14 years or older may only be sentenced to imprisonment for a Schedule 1 offence if such accused has a record of relevant previous convictions and substantial and compelling reasons exist for imposing a sentence of imprisonment, and in the case of a Schedule 2 offence, if substantial and compelling reasons exist. For Schedule 3 offence no similar criteria exists.124

Chapter 10 of the Act prescribes that section 51 of the Criminal Law Amendment Act 105 of 1997 is applicable to children. In Centre for Child Law v Minister for Justice and Constitutional Development and others (National Institute for crime prevention and the reintegration of offenders, as Amicus curiae)125 the relevant section of the minimum

125 2009 (2) SACR 477 (CC).
sentencing regime, which make minimum sentences applicable to children, was declared unconstitutional and invalid.

5.4 RESTORATIVE JUSTICE

“Restorative Justice is an approach to justice where offenders are encouraged to take responsibility for their actions and to repair the harm they've done. It is based on a theory of justice that focuses on crime and wrong doing as acted against the individual or community rather than the state. In restorative justice processes the justice system make the person who has done harm and the person who has been harmed, take an active role. The victim may receive an apology, direct reparation or indirect action to restore or fix the damage. Restorative Justice can involve a fostering of dialogue between the offender and the victim and shows the highest rates of victim satisfaction, true accountability by the offender, and reduced recidivism.”

5.4.1 THE LEGAL POSITION PRIOR TO THE IMPLEMENTATION OF THE ACT

Despite the fact that international instruments emphasise reintegration into society when it comes to sentencing child offenders, our courts have been very hesitant to apply restorative justice principles as a sentencing option. The concept of restorative justice is however not new to South Africa. In many communities, this includes outcomes such as an apology, restitution and reparation, and restoring relationships between offender and victim.

The use of restorative justice at the pre-trial stage in South Africa is not limited to child offenders. The following procedure is followed:

- The prosecutor identifies a matter that can be resolved by means of a restorative justice process.
- The prosecutor informs both the offender and the victim.
- The matter is remanded for a suitable period (typically 6-8 weeks) and kept on the role for this period.
- Only less serious offences will be referred for restorative justice processes.

• The case is referred to a suitable service provider, which is usually a probation officer employed by the Department of Social Development, for further assessment.

• The service provider makes a finding as to whether the matter is suitable for a restorative justice process.

• Preparation and facilitation takes place.127

In these cases, restorative justice intervention takes the place of prosecution and is mainly a pre-trial process. The requirements are that the offender must admit guilt and no formal plea is entered. Once the facilitation has been completed successfully the charge is withdrawn and there is no criminal record.

Restorative justice can also be applied where the offender tenders a guilty plea. Under South African law this usually happens when the accused enters into a plea and sentence agreement in terms of section 105A of Criminal Procedure Act 51 of 1977. The victim directly participates in the process.

Furthermore, restorative justice process can be convened during the serving of a sentence of imprisonment or correctional supervision. The process of restorative justice looks very promising in South Africa.

5.4.2 THE INTERNATIONAL LEGAL POSITION

The UNCRC in article 39 states that

“States parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim ... Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”

The UNCRC stresses the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. Reintegration into the community is a central feature

of restorative justice. Signatories to the convention are thus obliged to ensure that they implement programmes dealing with restorative justice.

5.4.3 THE PROVISIONS OF THE ACT

The aim of the Act is “to entrench the notion of restorative justice in the criminal justice system in respect of children who are in conflict with the law”. Rehabilitation as an aim of sentencing weighs heavily, and the court should utilise a sentencing option that will improve a child’s ability to lead a crime-free life in future. Deterrence is accorded a lesser status, and a wide discretion is of vital importance.

Two distinct formal restorative justice processes are provided for in the Act, namely victim-offender mediations and family group conferences. The latter two types are however not a numerous clauses. The Act emphasises that children should be tried separate from adults and the system. This is consistent with our Constitution, the present criminal justice system and international instruments.

In the case of victim-offender mediation there is a clear role definition between victims and offenders. The issue of guilt/innocence not debated. The process is settlement driven.\(^{128}\)

Family group conferencing “is utilized as a decision making forum that promote a restorative justice principal of rebuilding disruptive relationships where the focus is on putting things right and not punishment”.\(^{129}\)

5.5 CONCLUSION

The courts are obliged to consider international law when interpreting its provisions. Therefore section 28(1)(g) of the Constitution must be interpreted in the light of the Convention on the Rights of Children and other instruments such as the Beijing rules.

The requirement that the best interests of the child be taken into account in the sentencing process should be expressly provided for by law.

\(^{128}\) Alternative sentencing options, NICRO.
\(^{129}\) Ibid.
The process of sentencing must be flexible and tailored to respond to each individual case and ensure that detention is a last resort.

The sentencing process is a very challenging and onerous task and presiding officers should be provided with training to ensure that they are equipped to undertake the task of sentencing children. The law on sentence was previously not clearly drafted and was not coherent.\textsuperscript{130} Courts had no guidance on determining when imprisonment could be avoided or what would be regarded as ‘the shortest period of time’ and the SCA made no attempt to lay down some guidelines on this issue.\textsuperscript{131} It is clear that the previous system did not comply with international standards.

Although South Africa incorporated restorative justice measures into the criminal justice system it is still considered to be at a developmental stage and that further possibilities need to be explored and developed. The time has thus arrived for the implementation of further sentencing options based on a restorative justice approach from which victims of crime can benefit to a much greater extent.

The aim of sentencing must be to equip children to play a more constructive role in society through education, training and employment and enhance his/her sense of responsibility towards his/her family and community.

It is clear that the imprisonment of children is ineffective in addressing offending behaviour. South Africa should take steps to ensure that non-custodial measures are the norm in cases involving children and reduce the number of children who receive a custodial sentence. Only child offenders will benefit from the range of innovative sentencing options contained in the Act. The Act allows presiding officers to employ community-based programmes to reform child offenders. Criminal offences are divided into “three schedules” in the Act with punishment meted out in relation to the age of the child and the seriousness of the offence. According to the Act the sentencing judicial officer must structure the punishment in such a way as to promote the reintegration of the child concerned into his or her family and community.

\textsuperscript{130} DPP, KZN v P 2001 (1) SACR 243 (SCA).
\textsuperscript{131} Ibid.
Restorative justice can make a difference in the lives of many child accused’s but we need co-operation between the various role-players to make it work.

The attempt by the legislature to provide comprehensive guidelines for protecting the rights of the child accused in the Act is commendable. The various mechanisms adopted in the Act to keep children out of jail are to be applauded.
CHAPTER 6
POST-TRIAL ISSUES

6.1 INTRODUCTION

In terms of section 35(3)(o) of the Constitution every accused has a to a fair trial and includes the “right of appeal to, or review by a higher court”. Du Toit states that “review and appeal are institutions available to a party dissatisfied with the outcome of a criminal trial”.\(^\text{132}\)

The Criminal Procedure Act 51 of 1977 allows for different procedures to be followed in the case of child appellants when dealing with appeals against sentence or convictions from a lower court.

6.2 APPEALS

In law, an appeal is a process for requesting a formal change to an official decision.\(^\text{133}\)

6.2.1 THE LEGAL POSITION PRIOR TO THE IMPLEMENTATION OF THE ACT

The first step when an appellant wishes to appeal a lower or high court decision is to apply for leave to appeal. However, in terms of section 309(1)(a) of the Criminal Procedure Act “an accused that is sentenced to imprisonment may note an appeal without having to apply for leave to do so, who, at the time of the commission of the offence, was below 16 years, or was at least 16 years but below 18 years and was not legally represented”.\(^\text{134}\)

An appeal of a child accused from a High Court, only needs to be noted and it is not necessary to apply for leave to appeal. Accordingly, section 316 of the Criminal Procedure Act\(^\text{135}\) reads as follows:

\(^{132}\) Du Toit Commentary on the Criminal Procedure Act (Service 42 2009) 30-22.
\(^{133}\) en.wikipedia.org/wiki/Appeals.
\(^{135}\) Act 51 of 1977.
1. If an accused was below the age of 14 at the time of the offence; or

2. an accused was 14 but younger than 15 years old at the time of the offence, and

3. was unrepresented at the time of conviction and was sentenced to any form of imprisonment as set out in section 276(1) of the Act which was not wholly suspended.

If an appeal has been noted in terms of section 309(1)(a) of the Criminal Procedure Act,136 reviews of certain sentences imposed by magistrate courts must be suspended.

This procedure provides for a speedy way to deal with appeals with regards to convicted children as it eliminates the procedure of first having to obtain leave to appeal, which applies to all other persons.

6.2.2 THE INTERNATIONAL LEGAL POSITION

In terms of Article 40(2)(b)(v) of the UNCRC States Parties must ensure that if a child is convicted of an offence, such convicted child must have the right to have this decision and any measures imposed in consequence thereof reviewed by a higher independent court. This article is quite clear and needs no further explanation.

6.2.3 THE PROVISIONS OF THE ACT

The Act merely adopted the present position regarding the noting of appeals. The Act repeals the relevant provisions in the Criminal Procedure Act137 pertaining to children and incorporates it into the Child Justice Act. The presiding officer will in future have to inform the child of his or her rights in respect of appeal and legal representation and of the correct procedures to give effect to these rights.

136 Ibid.
137 Act 51 of 1977.
6.3 REVIEWS

6.3.1 LEGAL POSITION PRIOR TO THE IMPLEMENTATION OF THE ACT

The South African criminal justice system has an efficient and prompt review system. The High Court is allowed inspect the judgment of lower court and decide on the correctness. The judgment may be confirm, set aside and overturn the conviction or change the sentence.

According to section 302 of the Criminal Procedure Act 51 of 1977 the rule is that “where a magistrate has held the substantive rank of magistrate for less than seven years, any sentence longer than three months imprisonment will automatically be reviewed by a High Court judge, and where a magistrate has held the substantive rank of magistrate for longer than seven years, then any sentence longer than six months imprisonment will go on automatic review”. This process is called automatic review.

Special review occurs if cases are brought to the attention of the High Court. The requirement is that the case be brought to the notice of the judge. No other requirements are necessary.

6.3.2 THE INTERNATIONAL LEGAL POSITION

In terms of Article 40(2)(b)(v) States Parties must ensure must ensure that if a child is convicted of an offence, such convicted child must have the right to have this decision and any measures imposed in consequence thereof reviewed by a higher independent court.

6.3.3 THE PROVISIONS OF THE ACT

As far as review is concerned, the Act retains the position regarding the automatic review of criminal proceedings in lower courts as embodied in the Criminal Procedure Act but extends the protections afforded children. It provides that where an accused was under the age of 16 years at the time of commission of the alleged offence, any sentence imposed on him or her is automatically reviewed, irrespective of the duration of the sentence. If the accused was at

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139 Adopted by the General Assembly resolution 44/25 on 20 November 1989.
least 16 years but below 18 years of age, and the sentence involved imprisonment that was not wholly suspended or involved compulsory residence in a child and youth care centre, such sentence is automatically reviewed, again irrespective of the duration of the sentence.140

6.4 CONCLUSION

The only change in the Act is that it proposes a slight expansion of grounds for automatic review in that any sentence involving correctional supervision with a residential component is also now made subject to automatic review.

The treatise sets out the extent to which the criminal justice system in South Africa protects the best interests of the child accused when he/she commits an offence/crime and whether such system complies with the international legal position as set out in the various international instruments.

Upon considering the various views, the national legislation, the international instruments and the Criminal Justice Act 75 of 2008, one comes to the conclusion that our previous child justice system was far from adequate. The Child Justice Act 75 of 2008 will, however, revolutionise the previous child justice system and bring South Africa closer to compliance with its obligations in terms of the international instruments.

The child justice system in South Africa has never been a unified one. The position prior to the implementation of the Child Justice Act 75 of 2008 indicated that there was no clear guidelines for dealing with any person under the age of 18 years who is in conflict with the law. The introduction of the Child Justice Act 75 of 2008 will unify the child justice system. The UNCRC has encouraged the establishment of a distinct system for the administration of juvenile justice for all signatory states. It is clear that South is compliant with the international legal position in this regard.

Previously the minimum age of criminal capacity was seven and was considered to be very low. The Child Justice Act 75 of 2008 raises the minimum age of criminal capacity to 10 years. Even though this has been an attempt to comply with the international instruments the minimum age is still very low. This is still clearly in conflict with the legal position as proposed by the international instruments.

Prosecuting children as adults is not productive and creates more crime. A decision to divert the child away from the formal court procedure to a suitable programme is at present in the sole discretion of the prosecutor. Diversion will become a pivotal method of dealing with the child accused and the Child Justice Act 75 of 2008 sets out a range of diversion options. The
international instruments to which South Africa is a signatory emphasise the reintegration of the child into the community and shows its commitment to adhering to international trends. The Criminal Justice Act 75 of 2008 lays down guidelines that guide the courts on this aspect. The Act encourages the release of children into the care of their parents or legal guardians and entrenches the constitutional requirement that detention should be a measure of last resort for a child.\textsuperscript{141} With restorative justice principles, the family and community is strengthened. The Act provides for mechanisms that ensure that a child respects the rights of others.

The Child Justice Act 75 of 2008 fully reflects the standards and norms in juvenile justice of the UNCRC and other international instruments. The Act in particular establishes a child-oriented juvenile justice system that guarantees the rights of children, prevents the violation of the rights of children, promotes a child's sense of dignity and worth, and fully respects their age, stage of development and their right to participate meaningfully in, and contribute to, society.

In short, “implementing the Convention doesn't just alter the status of children. It also alters the status of adults. Respecting the rights of young children changes the way we think about ourselves!”\textsuperscript{142}

\footnotesize{\textsuperscript{141} Act 75 of 2008.  
\textsuperscript{142} Woodhead “Early Childhood Development: A Question of Rights” (November 2005) \textit{International Journal of Early Childhood}.}
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