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**DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

**PUBLICATION OF NATIONAL POLICY FRAMEWORK ON CHILD JUSTICE, IN TERMS OF THE CHILD JUSTICE ACT, 2008**

I. Jeffrey Thamsanga Radebe, Minister of Justice and Constitutional Development, in terms of section 93(2) (b) of the Child Justice Act, 2008 (Act No 75 of 2008), hereby publish the National Policy Framework on Child Justice for public comment.

Comment on the National Policy Framework on Child Justice, are requested to be submitted by 1 October 2010 and may be addressed to:

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**MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

Child Justice Act National Policy Framework

(Logo)

**CHILD JUSTICE ACT, 2008**  
**(Act No 75 of 2008)**

**NATIONAL POLICY FRAMEWORK**

**Department of Justice & Constitutional Development May 2010**

**The National Policy Framework for Child Justice**

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## Background to the Child Justice Act

The Child Justice Act, 75 of 2008 (hereinafter the Act) is the result of work by government and activists in the children's rights and child justice fields going back as far as 1996. It is important to recognize the nearly 15 year development process since during that time, despite the absence of a legislative framework, there have been numerous incremental improvements within the system. Over the years a myriad of services, policies and interventions around child related criminal justice have been initiated and sustained. This means that the Act is being introduced into an environment which has anticipated its implementation and one in which many of the obligations of the Act have already been established as part of day to day service delivery.

Key steps in the development of the Act included:

- In 1996 an Inter-Ministerial Committee (IMC) was established which recognised the need for a specialised child justice system in their Interim Policy Recommendations.
- In 1997 the South African Law Reform Commission published an Issue Paper on Child Justice,<sup>1</sup> which proposed that a separate Bill be drafted in order to provide for a cohesive set of procedures for the management of cases in which children are accused of crimes.
- In 1998 a comprehensive Discussion Paper, accompanied by a draft Child Justice Bill<sup>2</sup>, was produced in consultation with key government departments and non-governmental organisations (NGOs). This was submitted to the Minister of Justice and Constitutional Development in August 2000.
- In 2000 a national Inter-Sectoral Steering Committee on Child Justice comprising of the Departments of Justice and Constitutional Development, Safety and Security (Police), Social Development, Correctional Services, Education, Health and the National Director of Public Prosecutions was established.
- In 2001 an Interim National Protocol for the Management of Children Awaiting Trial<sup>3</sup> was developed as part of a Child Justice Project
- In August 2002 the Child Justice Bill, 2002 (Bill 49 of 2002) <sup>4</sup> was tabled in Parliament.
- Public hearings were conducted on the Bill in February 2003 and deliberations on the Bill by the Portfolio Committee on Justice and Constitutional Development followed in March 2003.<sup>5</sup>
- In late 2003 processing of the Bill through Parliament was suspended for a variety of reasons.
- In December 2007 amendments were proposed to the Bill by the Minister of Justice and Constitutional Development.
- The Portfolio Committee on Justice and Constitutional Development extensively deliberated on the Child Justice Bill during 2008.
- The Bill was adopted by the National Assembly on 25 June 2008; adopted by the National Council of Provinces during September 2008; and passed in September 2008.
- The President signed the Bill into law in May 2009 and the Act was published in Government Gazette number 32225 on 11 May 2009.
- The Act, implemented with effect from 1 April 2010, represents a rights-based approach to

children in conflict with the law

The Act creates a new child justice system with a procedural framework for dealing with children who are accused of committing an offence.

### **The Context and Vision of the Act**

One of the main principles of the Act is to minimise children's contact with the criminal justice system, and to use detention only as a measure of last resort and for the shortest appropriate period of time. The Act places a focus on how children are managed in the first 48 hours following the child coming into contact with the system. Provisions encourage the avoidance of arrest, and where children are arrested; encourage their release as soon as possible into the care of their parents, guardians or other suitable adults. In the year leading up to the promulgation of the Act, between 9 000 and 13 000 children were arrested each month. Soon after arrest, almost 48% of the children exit the system because they are either released into their parents' or guardians' care; released on warning or without charge; were found to have given the wrong ages and were then processed as adults through the courts; had their cases withdrawn by the National Prosecuting Authority; or had their cases converted into Children's Court inquiries in terms of the Child Care Act, 1983 (Act No 74 of 1983), as children in need of care and protection.

The preliminary inquiry is a key new process introduced by the Act. It aims to ensure that a collective, determined effort is made to consider what should be done in the case of each child, and that the inquiry occurs within 48 hours of arrest if the child is detained. The preliminary inquiry is designed to avoid children slipping through the intended safeguards and to change negative practices from the past where insufficient attention was paid to children in the early stages of their case being processed, sometimes causing them to languish in detention for several weeks or even months.

In line with the avoidance of prolonged contact with the criminal justice system, the Act has, as one of its main areas of focus, the diversion of children away from formal criminal court procedures into a diversion option or programme. This alternative to the formal criminal justice system is one where the child is held accountable for his or her actions throughout the process. Of the approximately 5 000 children whose cases were heard in the courts on a monthly basis in 2009/10, between 1 300 and 1 900 per month were diverted from the mainstream criminal justice system into diversion programmes.

The benefits of choosing a diversion option include ensuring that the child receives an intervention based on his or her individual circumstances aimed at preventing him or her from re-offending and producing the best outcome for the child, considering the needs of the victim and promoting public safety. In addition, the child does not incur a criminal record, thereby allowing him or her to become a productive member of society without the stigma attached to having a criminal record and the limitation of occupational opportunities that this would entail. However, precisely because diversion represents an alternative to the formal criminal justice system, the Act carefully regulates the issue, creating a system of checks and balances to ensure that diversion is not a 'soft option' for children who commit crime. In the event of the child not complying with the diversion option, his or her case reverts to court.

The Act ensures that diversion will not widen the door to adults more readily using children to commit crimes and specific provisions are included to hold adults accountable for using children to commit crimes.

It is worth noting that the Act in particular requires the monitoring of the safety of children being held in police cells upon arrest as this is an area of potential danger for a child which is not regulated in any other piece of legislation.

The Act also addresses the issue of re-offending among child offenders which has been attributed, at least in part, to the corrupting and damaging effect that incarceration has on children in conflict with the law. It is in response to this, as well as the Constitutional injunction of section 28(1)(g), that the Act provides for the incarceration of children only as a response of the last resort and for the shortest possible time.

### **Introduction to the National Policy Framework**

The Act requires that the Cabinet member responsible for the administration of justice must, after consultation with those Cabinet members responsible for safety and security, correctional services, social development, education and health, adopt a National Policy Framework (NPF) in order to: --

- (a) ensure a uniform, co-ordinated and co-operative approach by all government departments, organs of state and institutions in dealing with matters relating to child justice;
- (b) guide the implementation and administration of this Act;

- (c) promote cooperation and communication with the non-governmental sector and civil society in order to ensure effective partnerships for the strengthening of the child justice system; and,
- (d) enhance service delivery as envisaged by this Act by the development of a plan within available resources.

The responsibility for developing this draft national policy framework<sup>6</sup> lies with the Inter- Sectoral Committee for Child Justice (ISCCJ) whose membership consists of the relevant Directors-General in the criminal justice system (Social Development, Health, and Education), the National Director of Public Prosecutions, the National Commissioner of South African Police Service (SAPS) and the Commissioner of Correctional Services. This committee, chaired by the Director-General of Justice and Constitutional Development, is the primary structure responsible for co-ordination and implementation of the Act.

This policy must be adopted by the Minister and tabled in Parliament within two months of the commencement of the Act and be reviewed within three years of its publication in the *Gazette* and at least once every five years thereafter.

In terms of the above, the Minister for Justice and Constitutional Development consequently set in motion a process to develop this National Policy Framework (NPF). Under the guidance of the Minister a series of consultative meetings facilitated via the ISCCJ were held and input was sought from the various relevant departments and civil society role players. This policy framework is a result of that process.

The National Policy Framework contains the overarching framework for co-ordinated implementation of the Act concerned and will be supported by the directives, instructions, guidelines and circulars of the relevant Government Departments concerned.

As this is a new Act, implemented on 1 April 2010, some of the details concerned, may manifest itself as we implement the Act.

Therefore, the National Policy Framework will be regularly reviewed and amended when necessary.

### **Objectives of the Policy Framework**

The NPF, as per the requirements of section 96 (1), include guidelines for:

- (a) the implementation of the priorities and strategies contained in the NPF;
- (b) measuring progress on the achievement of the NPF;
- (c) ensuring that the different organs of state comply with the primary and supporting roles and responsibilities allocated to them in terms of the NPF and this Act;
- (d) monitoring the implementation of the NPF and this Act; and
- (e) the establishment of an integrated information management system to enable effective monitoring, analysis of trends and interventions, to map the flow of children through the child justice system and to provide quantitative and qualitative data (*relating to a range of relative factors*).

This NPF is further located within the broad objectives of the Act which include:

- protecting the rights of children as provided for in the Constitution, 1996,
- promoting the spirit of *ubuntu* in the Child Justice System,
- providing special treatment for children in the child justice system designed to break the cycle of crime, which will contribute to safer communities, and encourage these children to become law-abiding and productive adults,
- preventing children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children and in accordance with the Constitution, including the use of diversion, and
- promoting co-operation amongst government departments and between Government departments and the non-governmental sector and civil society to ensure an integrated and

holistic approach in the implementation of the Act.

### **Implementing the Child Justice Act**

The successful implementation of the Act depends on some important conditions: -

- Firstly, that service delivery is based on the priorities identified (Priorities of the Act);
- Secondly, that each department fulfils its mandate, and partners with civil society and NGO's in implementing the Act, (Roles and Responsibilities); and
- Thirdly, that the handover of responsibility towards children in conflict with the law between departments is regulated and well-managed (Managing Inter- sectoral Co-ordination).

These imperatives *are* discussed in more detail in the three sections that follow.

### **Priorities of the Act**

The nine key priorities of the Act are as follows: -

#### **1. Building Capacity in the Sector:**

The implementation of the Act requires capacity building within the Child Justice System (CJS) both in terms of human resource skills and knowledge, as well as availability in terms of physical infrastructure.

Capacity building in terms of human resources, further implies that the various Departments will prioritise the allocation of additional resources and budgets, where necessary, to appoint, train and capacitate the dedicated personnel and officials necessary to ensure the protection of the rights of such vulnerable children.

Awareness raising, education and training must be provided for all role players within the system to ensure an understanding of the Act and its requirements. In support of this, an Intersectoral Child Justice Training Reference Committee has been established and a training manual to be used intersectorally has been developed under the auspices of this committee.

This training manual has been tested in a series of provincial workshops attended by inter-sectoral participants held under the auspices of the provincial Child Justice Forums and is available on-line.

This committee is mandated to ensure that training is co-ordinated and that information is widely distributed throughout the sector. Ongoing training, both within individual departments and intersectorally is a key national priority and must be prioritised by all the relevant departments as per sections 97 (4) (e), (5) (e) and (8) of the Act.

Intersectoral training and capacity building must also be included on the agenda of both the ISCCJ and Provincial Child Justice Forum-meetings. Training will be an ongoing issue since with the implementation of the Act, the law of child justice will no doubt evolve due to legal precedents and departments will be required to update their training accordingly.

The provisions in the Act relating to training on child justice issues are in line with the International Instruments. Rule 12 of the Beijing Rules for example draws attention to the need for specialised training for all law enforcement officials who are involved in the administration of child justice. There is a general opinion that some degree of specialisation amongst legal representatives representing children in conflict with the law will ensure a good overall standard of representation<sup>7</sup> for children.

The establishment of a specialised criminal justice system for children also creates a need for specialisation in child justice. A key mechanism for ensuring this will be to provide specialised career-pathing for prospective and existing professionals in the child justice system. Such a mechanism will go a long way towards ensuring capacity in the field of child justice to the benefit of both the system and children in conflict with the law.

Training and capacity building is not only the preserve of government departments. Diversion services providers will also require training in respect of evolving child justice law in relation to both diversion and sentencing options and this will be ensured via the Diversion Accreditation process.

The establishment and building of separate child-friendly infrastructure, such as courts and facilities for awaiting trial and sentenced children, will further receive priority attention by Departments, within the

available resources of the State.

Where separate facilities cannot be built specifically for children, Departments will do all in their power to ensure that children are managed separately from adults and that in terms of case flow management principles, children's cases will be fast-tracked and prioritised.

## **2. Ensuring assessment of children**

The Act provides that every child alleged to have committed an offence must be assessed within a prescribed time frame. This obligation requires the active participation of the South African Police Service (SAPS) in notifying the probation officer and the Department of Social Development (DSD) must ensure that probation officers are available and accessible as required by the Act. During the medium term expenditure framework (MTEF) period, DSD planned to incrementally increase the staff capacity to meet the requirements of the Act.

## **3. Preliminary Inquiries**

A preliminary inquiry is an informal inquisitorial pre-trial procedure which must be held in respect of every child who is alleged to have committed an offence, except in a matter which has been diverted or withdrawn by the Prosecutor, or the child is under the age of 10 years.

The objectives of this inquiry are to: -

- Consider the assessment report of the probation officer, with specific reference to-
  - The age estimation of the child, if the age is uncertain;
  - The view of the probation officer regarding the criminal capacity of the child if the child is 10 years or older but under the age of 14 years and a decision whether an evaluation of the criminal capacity of the child by a suitably qualified person, is necessary; and
  - Whether a further and more detailed assessment of the child is needed;
- establish if the matter can be diverted before plea;
- identify suitable diversion options, where applicable;
- establish if the matter should be referred to a children's court for a children's court inquiry if the child seems to be in need of care and protection;
- ensure that all available information relevant to the matter is considered;
- ensure that the views of all persons present are considered before a decision is made;
- encourage the participation of the child and his or her parent, guardian or appropriate adult; and
- determine the release or placement of a child, pending-
  - the conclusion of the preliminary inquiry;
  - the appearance of the child in a child justice court; or
  - the referral of the matter to a children's court, where applicable.

One of the most important decisions emanating from the preliminary inquiry relates to the release or detention of the child and thus demands a very high level of co-operation among key role-players. The Act very clearly defines both the role-players and the mechanism for holding a preliminary inquiry. Since these requirements must be met by a diverse range of departments and individuals, establishing a court level mechanism for co-operation and co-ordination is key. In this respect, the protocols for court case flow management can be utilised for child justice matters.

Guidelines to ensure that provisions in this regard are uniformly implemented will be developed out of a series of National workshops.

## **4. Sentencing**

The Act creates an effective sentencing framework for children to give effect to the constitutional mandate that detention of children should be a last resort and for the shortest appropriate period of time. This is evident from, amongst others, section 3 on the general principles of the Act and section 69 which sets out the objectives of sentencing. The sentencing framework in the Act prioritises the use of alternative or non-custodial sentences and creates a framework to ensure that residential sentences are a last resort.

In addition, inter-departmental co-operation is required on account of the fact that sentencing is not just the responsibility of the presiding officer. Probation officers are responsible for pre-sentence reports and monitoring non-custodial sentences and the prosecution is responsible for victim impact statements where appropriate. In addition the new sentence created in section 76(3) requires considerable co-ordination between Child and Youth Care Centres and the courts in the review of that sentence.

In addition managers of Child and Youth Care Centers where children are sentenced to a section 76(3) sentence, have to ensure that they perform their responsibilities towards the child with the utmost care in order to give effect to section 28(1)(g) of the Constitution. This is because if they do not provide quality interventions and service for a section 76(3) child, the child runs the risk of a sentence of imprisonment at the end of the Child and Youth Care Centre component of the sentence.

All departmental role-players will ensure that systems are put in place to ensure that monitoring of non-custodial sentences; the execution of a section 76(3) sentence and the designation of a Child and Youth Care Centre in terms of section 76(4) are effected as expeditiously as possible in the best interests of the affected children.

## **5. Provision of Diversion and Alternative Sentencing -Services**

The implementation of the Act heralds in a new era in the regulation of diversion service providers and programmes. In this regard, the Act, particularly in section 56 (2)(a), places the responsibility of developing such a system on the Cabinet member for social development.

The Act introduces the requirement that a child may only be referred to a service provider or programme that is accredited in terms of the Act. These service providers include government, non-governmental and educational bodies. It is envisaged that accreditation will ensure that service providers meet minimum standards and facilitate meaningful outcomes in diversion programmes. In addition to accreditation of diversion programmes being a requirement of the Act, the Act also provides for quality assurance, and the monitoring and evaluation of programmes and service providers.

Consequently, the DSD has developed a national policy framework and system for accreditation of diversion service providers and programmes in South Africa. This DSD policy outlines a management framework for the accreditation, quality monitoring and quality improvement of diversion service providers and programmes. It addresses the accreditation of:-

- service providers that provide rehabilitation and developmental services and programmes as diversion and sentence options to children at risk and children in conflict with the law; as well as
- content for diversion programmes and alternative sentences (offered either by government departments or service providers).

The accreditation of service providers will be incrementally effected over the MTEF period following the promulgation of the Act.

A key priority will also be to ensure that the diversion services are equitably provided to children in both urban and rural areas. To this end section 56 (2) (a)(iii) requires that the DSD is to ensure the availability of resources to implement diversion programmes.

## **6. Establishment of Child and Youth Care Centres**

The DSD is responsible for the provision and management, in terms of Chapter 13 of the Children's Amendment Act, 2007 (Act No 41 of 2007), for Child and Youth Care Facilities. This Act, together with the main Children's Act, 2005 (Act No 38 of 2005), also came into operation on 1 April 2010. All Secure *Care* Facilities and Reform Schools will, from 1 April 2010, become Child and Youth Care Centres, designated for awaiting trial and sentenced children. The existing 4 Reform Schools and 17 Schools of Industry, which are administered by the Department of Basic Education at the moment, will be transferred to the Department of Social Development within the next two (2) years.

In addition a priority for the DSD is the building of an additional 18 Child and Youth Care Centres in provinces (previously known as Secure Care Facilities) within this MTEF cycle.

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

#### **7. Establishment of One Stop Child Justice Centres (OSCJC)**

The Act enables the establishment of OSCJCs. In terms of the Act these OSCJCs are to be managed by a committee of senior officials from DOJ&CD, DSD, DCS, SAPS, Legal Aid South Africa (Legal Aid SA) and any other relevant organ of state and resourced and serviced by those departments. While the establishment of these centres is intended to bring all services required by a child in conflict with the law under one roof, they will have to be incrementally realised in line with funding constraints and available resources. A guide to establishing OSCJCs, which recommends that the recommendation and planning for the establishment of such centres be placed within the mandate of Provincial Child Justice Forums, has been developed.

The Provincial Child Justice Forums will submit business plans with recommendations to the National ISCCJ, which will recommend establishment in terms of section 89 of the Child Justice Act, 2008, to the Minister of Justice and Constitutional Development, read with section 2 of the Magistrates' Courts Act, 1944 (Act No 32 of 1944).

The identification of the necessary additional resources required, and how such resources will be obtained and optimally utilised, will form a major part of the recommendations concerned.

In terms of the existing budgetary constraints, the funding of such Centres during the first few financial years, will primarily have to be done through requesting donor funding.

#### **8. Resources and Budgets**

The implementation of the Act places increased demands on the fiscus. In the absence of sufficient funding courts and officials are strained to provide the services required, particularly in the more rural and outlying areas. South Africa, given its obligations under treaty law, is compelled to increasingly give credence to the domestic legislation and measures it undertakes to meet the implementation priorities it sets out for itself.

The Departments are implementing the Act with existing budgets and reprioritising within budget allocations, to ensure prioritization of services to children in conflict with the law.

#### **9. Public Education and Communication**

The Act requires extensive consultation in terms of *ubuntu* and Batho Pele-principles, with civil society, children, their families and communities. The Government Departments and civil society will therefore prioritise the awareness-raising and communication to all those affected regarding the priorities, achievements and obligations of the new Child Justice System.

#### **10. Development of necessary IT and IJS-systems to support information management systems:**

In order to support the information management requirements of the Act, through the Integrated Justice System but also through the individual Departments' Information Management Systems, necessary IT systems will be developed.

#### **Roles and Responsibilities**

Each role player in the Child Justice environment has a set of particular responsibilities for which it is accountable in terms of the Act as per the brief summary below: -

##### ***South African Police Service (SAPS)***

The South African Police Service is the first point of contact for a child in conflict with the law and they have a wide range of responsibilities in this respect. The SAPS are responsible for:

1. Ensuring the child's appearance at a preliminary inquiry, primarily through the use of alternatives to arrest but through arrest as a matter of last resort.
2. Explaining to the child offender and the child's parent / guardian/ appropriate adult that the child offender has a right to legal representation, and if the family does not have their own

legal representative, then Legal Aid SA will assign a legal representative to the child.

3. The police must inform the nearest Legal Aid SA office that they have arrested a child who requires or has requested legal representation
4. Informing a probation officer immediately, but if that is not possible, not later than 24 hours after apprehension (through written notice, summons or arrest), in order for an assessment to be undertaken.
5. Notifying the parent, appropriate adult or guardian of the child of the child's arrest and where he or she is being taken (this is the responsibility of the affected police officer and the relevant police station)
6. Attending to all aspects of finding the child's family, appropriate adult or guardian in liaison with the probation officer.
7. Releasing, where appropriate, children charged with offences other than offences in Schedule 3 into the care of their parents/guardian/appropriate adult. With regard to children below the age of 14, who may not be held in police cells, the police have the extra duty of ensuring that such children are held at a place of safety. Children below the age of 10 are not to be arrested, and the police have a duty to take them home or to a probation officer.
8. The safety and care of the child whilst in the SAPS holding cell. The station commissioner of each police station must keep a register in which prescribed details regarding the detention of all children in police cells or lock-ups must be recorded in a manner that such entries regarding the detention of children are clearly distinguishable from those of adults.
9. Treating the child in SAPS custody in a manner and in conditions that take account of the child's age and gender. This includes the provision of a mattress, blanket, food and a cell equipped with toilets and showers. Children should be kept separately from adults and boys should be kept separately from girls.
10. Providing basic medical care although the child may be taken to a district surgeon or hospital for necessary medical treatment. This includes medical care when the child shows psychological stress or other signs of mental health problems.
11. The transportation of a child offender to and from the various detention facilities, such as the Correctional Services Awaiting Trial Centres or Department of Social Development's Child and Youth Care Centres, Reform Schools and the court.
12. Providing services in relation to appearances at court such as the detention of detainees, the transfer of the child from the holding cells to the court, maintaining order and safety in court, investigation and presentation of criminal cases, and the performance of court orderly duties.
13. Issuing of a certificate expunging the criminal record of a child referred to in Section 87 (5) (b).

#### ***Department of Social Development (DSD)***

The provincial DSD is responsible for: -

1. Providing a probation officer to conduct an assessment of all children apprehended on allegations of having committed a criminal offence, as well as presenting the recommendations following that assessment regarding the possible referral of a child to the children's court and/or counselling, the placement of a child should he or she not be released; and on the appropriateness of diversion including a particular service provider or particular diversion options.
2. Probation officers will also express a view on the criminal capacity of a child between 10 and 14 as well as enquiring whether a child has been used by an adult to commit the crime.
3. Ensuring the availability of a probation officer to perform duties in court such as giving oral evidence, submitting assessment and pre-sentence reports and participating in the preliminary inquiry. The probation officer should also furnish the inquiry magistrate with an estimation of the child's age if applicable.

4. The management of children placed under probation, home-based supervision or released under pre-trial supervision orders.
5. Providing support, where possible, to the SAPS in family finding duties if a child is brought to assessment or the preliminary inquiry or court without a parent or guardian. The probation officer will instruct the assistant probation officer, or a designated family finder, to trace the parent or guardian and to bring them to court to assist the child in the case before court.
6. The delivery of all diversion programmes which have been accredited: either directly and/ or through the contracting of external service providers. This includes monitoring and reporting on compliance, and making recommendations in the event of non-compliance by the child.
7. Ensuring the quality of such programmes *via* the Accreditation of Service Providers and Programs.
8. Managing and monitoring children serving community-based sentences and diversion orders.
9. Establishing and maintaining two registers, one for children under 10 years of age and one for diversions. (Described more fully in the Chapter: Monitoring and Evaluation)
10. Providing a pre-sentence report within 6 weeks, when requested by the child justice court prior to the imposition of sentence.
11. The provision and management of Child and Youth Care Centres for children awaiting trial under the Children's Act (38 of 2005) and will by 2012 have taken transfer of Reform Schools from the Department of Basic Education, as facilities for sentenced children. From time to time a list with all the information relevant to the location of all Child and Youth Care Centres in South Africa, the amenities and features of each centre and the level of security offered by each centre must be provided by DSD to the SAPS and to the Department of Justice and Constitutional Development (DoJ&CD).
12. The submission of a report by the Head of the Child and Youth Care Centre on the child's completion of a compulsory residential sentence in such Centre to the child justice court which imposed the sentence in terms of section 76.
13. The provision of educational programs to children awaiting trial is the responsibility of the Department of Social Development.

In addition the Director-General: DSD must, in the prescribed manner, expunge the record of any diversion order made in respect of a child in terms of this Act on the date on which that child turns 21 years of age, unless the child has been convicted of any other offence before that date or has failed to comply with the diversion order in question.

***Department of Justice and Constitutional Development (DoJ&CD):***

The DOJ&CD is responsible for the application of the Act and therefore has to provide for a range of resources and services, which include: -

1. The provision of human resources within the courts to ensure service delivery and which includes-
  - 1.1. Magistrates to preside over the preliminary inquiry and the trial;
  - 1.2. An interpreter; and
  - 1.3. A court manager and clerical staff to maintain the records of the preliminary inquiry and trial.
2. Ensuring that children who are sentenced to Child and Youth Care Centres are transferred within 30 days in terms of section 76.
3. Establishment of a court in any One Stop Child Justice Centre established as prescribed in section 2 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and read with section 89 of the Act and the OSCJC Guidelines. One Stop Child Justice Centres are not an essential feature required to run the child justice system, but rather an optimal service delivery model which the

Minister is empowered to initiate, within available resources.

4. Providing a Secretariat for the DG's ISCCJ, National Operational ISCCJ and provincial child justice forums.
5. Maintaining and reviewing the Act, in consultation with the other relevant government departments and civil society stakeholders.
6. Monitoring and reporting upon the impact of the implementation of the Child Justice Act, 2008, in consultation with the other relevant government departments and civil society stakeholders.

#### ***National Prosecuting Authority (NPA)***

The NPA is responsible for:

1. The appointment and management of prosecutors in respect of the Act.
2. Decision making, as *dominus litis*, with regards to whether to prosecute or to divert the child offender. If the child is charged with an offence listed in Schedule 1, the prosecutor may decide to divert the matter, and the diversion order is made an order of court in chambers. If no diversion decision is made at this stage, the matter proceeds to the preliminary inquiry. The prosecutor participates in the preliminary inquiry, and gives an indication at the end of the inquiry, whether he or she supports diversion in such matters.<sup>8</sup> If the matter is not diverted at the preliminary inquiry, the matter proceeds to plea and trial in the Child Justice Court.
3. Ensuring that the required input is received from victims and relevant others during the preliminary inquiry.
4. Reviewing the recommendations of the probation officer in agreeing to divert to appropriate diversion programmes.
5. Making a decision as to whether or not to prosecute a child 10 years or older but below the age of 14 years and who is presumed to lack criminal capacity with regards to the special responsibilities described in section 10, in relation to the proof of criminal capacity of such children.
6. Only the Director of Public Prosecutions of each province can decide on the diversion of a child who has allegedly committed a serious Schedule 3-offence.

#### ***Department of Correctional Services (DCS)***

The role of DCS is: -

1. To detain and manage children awaiting trial and sentenced children separately from adults in DCS facilities appropriate to their age (CSA s 7).
2. To provide food (of a nutritional value as per sec 8 (2) of the Correctional Service Act and Regulation 4 (10(c)), basic health care services, medical treatment and to ensure the safety of the child.
3. To provide both sentenced and awaiting trial children with care services such as social work services, religious care, recreational programmes and psychological services.
4. The provision of education for sentenced children is provided by the Department of Correctional Services.
5. To monitor child offenders on probation or serving correctional supervision sentences.
6. To inform the appropriate state authorities who have statutory responsibility for the education and welfare of children as well as the parents, legal guardians or next of kin of the child when the child is transferred from one facility to another.
7. To allow legal representatives to consult with the child/children who are awaiting trial as well as those who are sentenced to imprisonment.

#### ***Department of Basic Education (DOBE):***

The Department of Basic Education is responsible for participating in the handover of reform schools to DSD within this MTEF cycle as well as for managing those schools in the period prior to that handover

#### Child Justice Act National Policy Framework

The Department of Basic Education is further responsible to assist the Department of Social Development, with the monitoring of compulsory school attendance orders, which can be imposed by a child justice court as either a diversion or a non-custodial sanction.

The Department of Basic Education should further be co-responsible for awareness- raising amongst school-going children, of the dangers of crime to support crime prevention, as well as what children's rights and responsibilities are when they are involved with crime.

#### **Legal Aid South Africa (LASA)**

Legal Aid South Africa provides legal assistance to children and has a Legal Aid Guide which can be accessed online<sup>9</sup>. In terms of the Child Justice Act, 1998, the Legal Aid South Africa, has the following responsibilities:

1. According to the Act, all children in conflict with the law are entitled to legal representation and children cannot waive legal representation when appearing before a child justice court.
2. The legal representative should allow the child, as far as possible to give independent instructions regarding the case, explain the child's rights and duties and promote diversion, where appropriate, without unduly influencing the child.
3. Assist the child at a preliminary inquiry and with negotiations regarding diversion.
4. Ensuring that the assessment, preliminary inquiry, trial or other proceedings in which the child is involved, are conducted without delay and deal with the matter in a manner to ensure that that the best interests of the child are at all times of paramount importance.
5. Assisting the child in plea proceedings and trial matters, and where necessary in appeal or review procedures.
6. Appointing (subject to the provisions in the Legal Aid Guide) a legal representative to assist the court if the child refuses legal representation, does not wish to have a legal representative or **declines** to give instructions to an appointed legal representative.

Legal Aid SA is further of the view that: -

*"The question is whether legal aid is to be granted for a preliminary inquiry. Section 43 (3) (c) states that a child's appearance at a preliminary inquiry is regarded as his or her first appearance before a lower court, in terms of section 50 of the Criminal Procedure Act. It therefore forms part of a criminal trial and in terms of section 35 (3) of the Constitution every accused person has a right to a fair trial which includes the right to legal representation at state expense where substantial injustice would otherwise result.*

*Substantial injustice would almost always result in the case of a child in conflict with the law. Legal aid should therefore be extended."*

Where these appearances occur in a normal trial court, Legal Aid SA has indicated that they should not have any resource constraints as the practitioner that normally covers the court will have to deal with the preliminary inquiries.

LASA has further indicated that they have now found that in certain areas, additional courts are being used to conduct the preliminary inquiries. This will necessitate additional practitioners to be appointed, and requires additional resources.

#### **Department of Home Affairs (DoHA)**

The Department of Home Affairs has a responsibility in terms of issuing identification documents.

1. In cases where the inquiry magistrate, child justice court or any other court makes a determination of the age of a child offender a copy of the determination must be referred to the DoHA for consideration of issuing an identification document for the child.

2. The DoHA must report back to the inquiry magistrate or child justice court, the probation officer, the child and his or her parent, appropriate adult or guardian once the age has been registered.

### ***Department of Health (DoH)***

It is the Department of Health's responsibility to provide mental health-facilities for children who are referred to mental health-facilities for observation, or who are declared as State patients because of a mental health-challenge.

It is further the Department of Health's responsibility to assist with the provision of expert evidence regarding whether a child has criminal capacity, if the child is between 10 and 14 years of age and the State has to prove criminal capacity.

### ***Non-governmental sector and civil society***

The role of the NGO sector and civil society is of great importance in strengthening the child justice system through effective partnerships with government and through ongoing communication, co-operation and collaboration. They have a role to play in:

1. Offering a range of diversion programmes or community-based sentencing options. While it is the responsibility of DSD to develop, implement and manage diversion and treatment programmes, they also work co-operatively and provide funding for a wide range of NGO's offering diversion and community-based programmes.
2. All NGO service providers must meet the requirements for the *Minimum Norms and Standards for Diversion Programmes* and should be accredited according to the Accreditation Framework managed by DSD. Section 56(2)(f) of the Act stipulates that a certificate of accreditation will be valid for a maximum of four years and a policy decision has been taken to have this accreditation process implemented progressively over a two year period.
3. Provide information and assistance through their experience and research activities, to monitor the implementation of the NPF and the Act.
4. Sharing information when different organs of state fail to comply with their primary roles and responsibilities allocated to them in terms of the NPF and the Act.

### **Intersectoral Co-ordination Mechanisms**

The responsibility for ensuring compliance and supporting a uniform, co-ordinated and co-operative approach by all government departments, organs of state and lies squarely within the mandate of the ISCCJ.

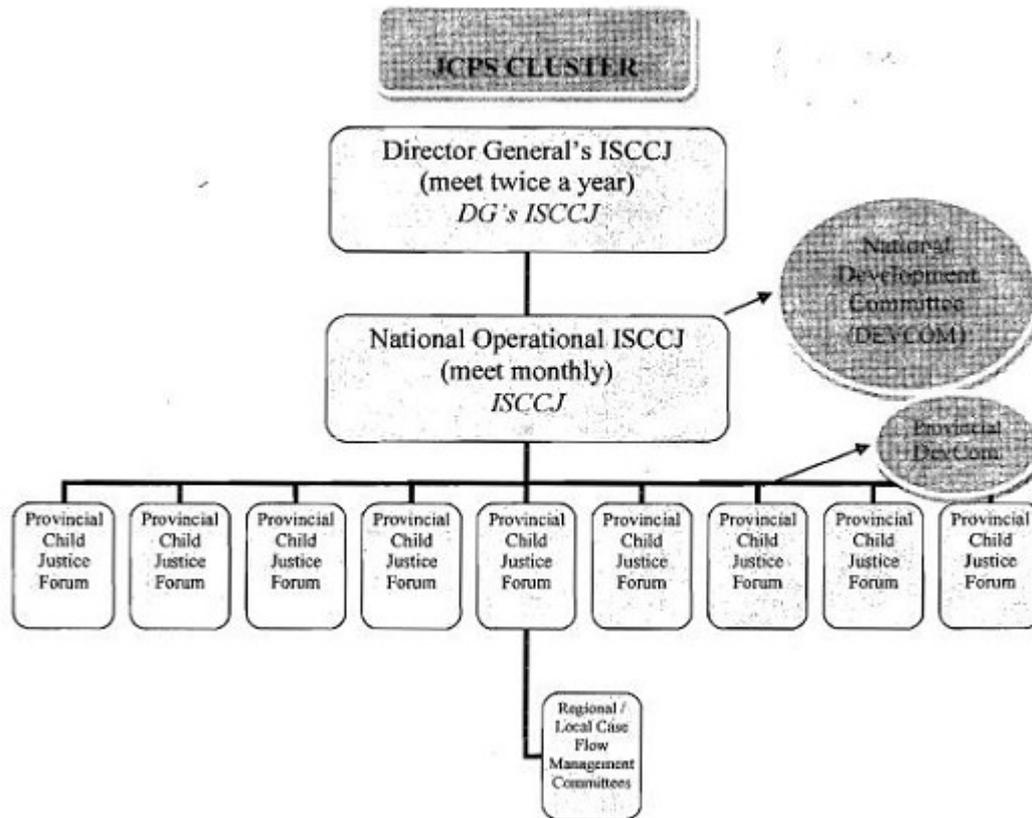
This committee is provided for in section 94 of the Act. The section prescribes the establishment of "a Committee to be known as the Intersectoral Committee for Child Justice which must meet at least twice a year and is responsible for developing the draft NPF and then measuring progress and monitoring compliance against this framework and the Act". The committee comprises of: -

- (a) the Director-General: Justice and Constitutional Development, who is the chairperson of the Committee;
- (b) the National Director of Public Prosecutions;
- (c) the National Commissioner of the South African Police Service;
- (d) the National Commissioner of Correctional Services;
- (e) the Director-General: Social Development;
- (f) the Director-General: Education; and
- (g) the Director-General: Health."

The DG's ISCCJ is the most senior structure in a series of inter-sectoral committees which are in place at national, provincial and regional/ local levels in order to provide a vehicle for communication on and the co-ordination of services to children in conflict with the law. The DG's ISCCJ Chair reports directly to the JCPS

Cluster meetings.

The DG's ISCCJ will commission research on the matters which are provided for in the Act, such as the review of the age of criminal capacity; which may further be identified for research and which need to be reported upon; and will ensure that the detailed reports required in terms of the Act, are received, approved and submitted timeously.



**The National Operational ISCCJ**

While the Act provides for the establishment of a DG's ISCCJ which is comprised of Directors- General and which meets twice a year, there is an acknowledgement that in practice there is a need for an ISCCJ which is comprised of senior departmental officials and which meets monthly. It is envisioned that this committee will remain in operation, and report to the DG's ISCCJ, until the obligations of the Act are fully achieved. This committee should comprise of a senior official designated by the Directors-General of:

- (a) Justice and Constitutional Development, who is to Chair the Committee;
- (b) National Prosecuting Authority;
- (c) South African Police Service;
- (d) Department of Correctional Services;
- (e) Department of Social Development;
- (f) Department of Basic Education; and
- (g) Department of Health.

As well as a senior representative from: -

- (h) Department of Home Affairs;
- (i) Legal Aid South Africa;
- (j) The Chief Magistrates' Forum of the Judiciary; as well as

(k) Each of the 9 provincial child justice fora<sup>10</sup>. (PCJF)

The committee should be chaired by the Department of Justice and Constitutional Development with a Deputy Chairperson designated by the committee from one of its members. The deputy chairperson shall preside at meetings of the committee in the absence of the chairperson and shall assist the chair in his/her functions.

In the absence of both the chair and deputy chair, the members present at a meeting must elect a person from among their numbers to preside at the meeting.

The mandate of the Committee is to ensure the full implementation of the Act and should focus on: -

1. Co-ordinating, monitoring and supporting activities carried out in respect of the Act,
2. Interventions where necessary to ensure procedures and roles identified are adhered to,
3. Identifying problem areas and recommending solutions to ensure the smooth running of processes,
4. Monitoring the implementation of said solutions,
5. Making decisions in respect of matters in dispute,
6. Receiving progress reports from provincial structures and NGO's
7. Compilation of submissions to the JCPS Development Committee with a view to obtaining direction in respect of unresolved issues,
8. Reporting to the DG's ISCCJ Committee which must make policy and strategy decisions in terms of sections 94 to 97 of the Child Justice Act, 2008; and
9. Reporting to the Ministers on progress regarding the implementation of the Act.

Each meeting therefore should have an agenda which allows for discussion around the above issues.

The Department of Justice and Constitutional Development will provide the secretariat for meetings of the committee. The secretariat will be responsible for:

- (a) Preparing a draft agenda to be circulated seven (7) days before the meeting;
- (b) Receipt of Departmental and Provincial reports required for meetings;
- (c) Distribution of reports / documents to be read in preparation for the meeting;
- (d) Preparation of minutes and draft report to DevComm and the DG's ISCCJ, to be circulated seven (7) working days after meeting;
- (e) Maintaining the attendance list to be circulated at each meeting;
- (f) Following up on decisions taken at each meeting or requesting members of the meeting to report upon the implementation of decisions taken; and
- (g) Meeting logistics.

The quorum for a meeting would therefore be at least 10 of the 18 participants as identified above. In the absence of a quorum, the meeting may be adjourned and the minutes should record the reasons for the absence of a quorum together with the names of those present. No decision shall be taken at a meeting in the absence of a quorum.

Decisions of the committee shall be taken by consensus.

It is taken that the ISCCJ is a committee of equals in which members are held accountable by their peers. Each Department is considered the lead department in respect of ensuring compliance, within their own departments, of their primary and supporting roles as allocated to them in terms of the NPF and the Act. Reports should therefore reflect on performance against agreed-upon deliverables.

**Provincial representatives** should provide minutes and reports detailing progress within

their respective provinces and escalating those issues which require the intervention of the ISCCJ.

- Each **national department** should provide statistics as per the agreed upon templates and reports in order to measure progress on the achievement of the NPF and the Act.
- The **ISCCJ secretariat** should provide an overview of the statistical analysis and progress against achievement of the NPF and the Act as well as escalate issues which cannot be resolved to DevComm and/or the DG's ISCCJ.

The Act (section 93 (1) (c)) requires that the ISCCJ promotes co-operation and communication with the non-governmental sector and civil society in order to ensure effective partnerships for the strengthening of the child justice system. In order to facilitate this, the National Operational ISCCJ will invite representatives to its meetings from:

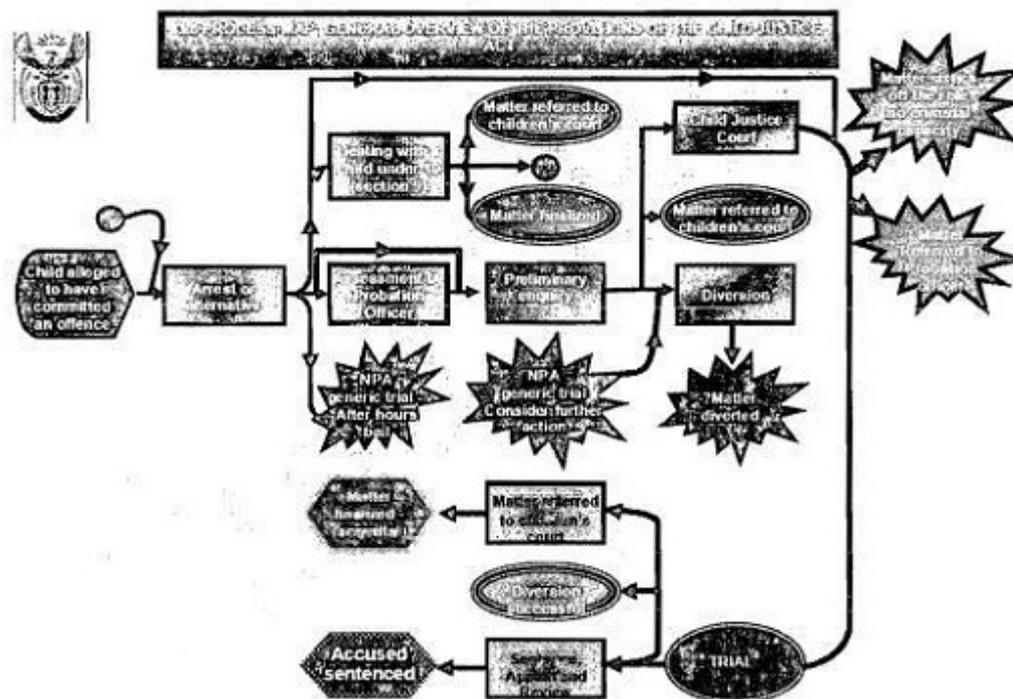
- (a) The Child Justice Alliance;
- (b) The Chapter 9 Institutions; and
- (c) Specific NGO's who might be required to give expert/technical input or advice.

While the implementation of the Act requires the services of a number of NGO's in terms of diversion, restorative justice, etc, engagement with those NGO's who render a direct service to one or more of the Departments should be through bilateral meetings rather than via the ISCCJ.

Provincial Forums are directly responsible for managing service delivery and for monitoring compliance against the Act at the regional level. They will define their own rules of engagement in respect of provincial NGOs.

### Managing the Flow of Children through the System

The Child Justice system, like the rest of the criminal justice system, involves moving a child, or person, through a range of sequential processes all managed by different departments. A process flow map which describes the route followed by children through the child justice system shows the various transitional and decision making points.



In any system which involves the movement of a case from one department to another, there is the risk that there will be a gap in service during this transition. In the child justice system this could negatively impact on the appropriate handling of the child's case. This NPF thus aims to improve inter-departmental co-ordination in order to improve the transition of the child's case between those departments.

There are several non-negotiable principles of intersectoral co-operation: -

- There is a need for regular operational meetings between role-players in order to ensure that each department not only takes ownership of their own area of responsibility but also ensures that the interface between departments is well managed.
- It is essential that the child is at the centre of this process, and there should be acute awareness of all role-players that delays, particularly those which cause children to remain in detention, are extremely detrimental to the child's well-being.
- The child should be moving through the system in a manner that promotes his or her safety and well-being as a priority.
- The changing of shifts or the allocation of different responsibilities to arresting officers and investigating officers should all be managed in such a way as to have minimum negative impact on children in the system.
- Case flow management principles should be utilised in support of this.

As can be seen below, there are numerous areas where decision making and services overlap and require co-operation and interaction between the various role-players all in respect of a single child!



The PCJF should take primary responsibility for identifying and resolving problems which occur at the interface between departments. Issues which cannot be resolved regionally should be escalated to the National Operational ISCCJ.

Various interdepartmental and intersectoral Protocols will be developed and implemented, to ensure proper co-ordination, such as the Interim National Protocol for the Management of Children Awaiting Trial and the Guidelines on the Establishment and Management of One Stop Child Justice Centers.

**Maximum time-frames for management of cases involving children in conflict with the law:**

In line with the principle that children's contact with the criminal justice system, should be kept to a minimum and that children should be detained as a measure of last resort and only for the shortest appropriate period of time, the Act prescribes certain time periods as follows:

Section	Matter dealt with	Responsibility	Prescribed time period
Section 18	Written notice to child to appear in court; and notification of probation officer	Police official.	Immediately but not later than 24 hours after handing written notice to child.
Section 19	Summons to child to appear in court; and notification of probation	Police official.	Immediately but not later than 24 hours after handing summons to child.

	officer		
Section 20(4)	Notification to probation officer of arrest of child	Police official, where possible the police official child	Immediately but not later than 24 hours after arrest
Section 20(5)	Child to be taken to court who has been arrested and who remains in custody	Police official	As soon as possible but not later than 48 hours after arrest
Section 22	Release of child on written notice into care of parent, appropriate adult or guardian, if the child is in detention in police custody i.r.o. an offence referred to in Schedule 1, unless certain the parents cannot be located or there is a substantial risk that the child may harm him/herself or any other person.	Police official	As soon as possible and before the child appears at the preliminary inquiry.
Section 26	Consider the placement of the child in a suitable child and youth care centre	Police official	Prior to a child's first appearance at a preliminary inquiry within 48 hours after arrest
Section 30	Reconsideration of placement of child in a prison	Presiding officer ordering the detention of the child in prison	Direct that the child be brought before him or her or any other court every 14 days to reconsider the order.
Section 31	Error regarding placement	Person admitting the child where a child is placed in a child and youth care centre, police cell or lock-up or a person, to whose attention it comes that an error has been made regarding placement.	Commit the child as per the court order, but must, as soon as practicable, but not later than the next court day, refer the child back to the presiding officer in question for the error to be corrected.
Section 33(2)(c)	Where a child is transported to or from the preliminary inquiry or child justice court, the child must be transported separately from adults. <sup>11</sup>	Police Official	Within 48 hours
Section 34(2)	Assessment of child older than 10 years of age	Probation Officer	Assessment of child before the child appears at a preliminary inquiry within the time periods provided for in section 43(3)(b).
Section 34(3)	Assessment of child younger than 10 years of age	Probation Officer	Make arrangements to assess the child within seven days of the notification
Section 40(5)	Submission of assessment report to prosecutor	Probation Officer	Before the commencement of a preliminary inquiry, within time periods referred to in section 43(3)(b)
Section 41(2)	Diversion by prosecutor before preliminary inquiry in respect of offences referred to in Schedule 1	Prosecutor	After assessment of the child, except if the prosecutor has dispensed with the assessment if it is in the best interests of the child to do so; and before a preliminary inquiry.
Section 43(3)(b)	Preliminary Inquiry	Presiding Officer,	PI must be held within 48 hours

		supported by prosecutor, police and probation officer	of arrest if a child is arrested and remains in detention; or within the time periods specified in the written notice or summons.
Section 53	Duration of diversion orders	Presiding officer	* Level 1-diversion option: <a href="#">12</a>
Section 53	Duration of diversion orders	Presiding officer	* Level 2 diversion-order: <a href="#">13</a>
Section 66	Time limits relating to postponements of trial in child justice court	Presiding officer of child justice court	* Must conclude all trials of children as speedily as possible and must ensure that postponements in terms of this Act are limited in number and duration. Prior to the commencement of a trial the court may not postpone proceedings for longer than: * 14 days at a time if a child is in detention in prison * 30 days at a time if a child is in detention in a child and youth care centre * 60 days at a time if a child has been released
Section 71	Pre-sentence reports	Probation officer	Must complete the report as soon as possible but no later than six weeks following the date on which the report was requested.
Section 76	Sentence of compulsory residence in child and youth care centre	Child justice court; and police (transport of child).	* For a period not exceeding five years or for a period which may not exceed the date on which the child turns 21 years of age, whichever date is the earliest. * Child sentenced in terms of this section, must be taken to the centre specified as soon as possible, but not later than 1 month after the order was made. * Presiding officer must cause the matter to be retained on the court roll for one month, and must, at the re-appearance of the matter, inquire whether the child has been admitted to the child and youth care centre.
Section 77	Sentence of imprisonment	Child justice court	Sentenced child may be sentenced to imprisonment for a period not exceeding 25 years.

In addition, the members of the DG's and National Operational ISCCJ have agreed on the following maximum time-frames for the management of children in conflict with the law, but have also agreed that children's cases should be completed as soon as possible:

- For cases involving children heard in District Courts: 3-6 months;
- For cases involving children heard in Regional Courts: 6-9 months; and
- For cases involving children heard in High Courts: 9-12 months. These case cycle and turn-around times, will also be monitored by the ISCCJ.

#### **Monitoring, Evaluation and Information Management:**

The Act requires a monitoring and evaluation component in support of the implementation of the Act. This

is in line with international trends which note that "when government officials and the institutions making up the child (juvenile (sic)) justice system do not have information either about the functioning of the system or the children who are in contact with it, abuse, violence and exploitation can occur with impunity, and the experience of the child is unlikely to be in his or her best interests. A child may spend long periods deprived of liberty or be sentenced to a measure that is inappropriate for ensuring his or her welfare. A delay in a child's case before the courts may go unnoticed for months or even years. Government officials may find it difficult to assess the impact of new child (juvenile (sic)) justice policies or guidelines. In short, a failure to carefully record and strategically make use of child (juvenile (sic)) justice related information contributes to a failure to ensure the protection of the child in conflict with the law"14

The Act addresses this need by providing for the establishment of an integrated information management system which should: -

- enable effective monitoring,
- allow for the analysis of trends and interventions, to map the flow of children through the child justice system and,
- provide quantitative and qualitative data relating to, at least, the following:
  - Arrest or methods of securing attendance at criminal proceedings;
  - Assessment;
  - Preliminary inquiries;
  - Diversion;
  - Children awaiting trial;
  - Bail and placement;
  - Trials;
  - Sentencing;
  - Appeals and reviews;
  - Sexual offences committed by children; and
  - Children who lack criminal capacity.

The Key Performance Indicators which will be developed to monitor and evaluate the implementation of the Act will be in line with the 15 key indicators as developed by UNICEF

Indicator		Definition
<b>Quantitative Indicators</b>		
1	Children in conflict with the law	· Number of children arrested during a 12 month period per 100,000 child population
2	Children in detention (CORE)	· Number of children in detention per 100.000 child population
3	Children in pre-sentence detention (CORE)	· Number of children in <u>pre-sentence</u> detention per 100.000 child population
4	Duration of pre-sentence detention	· Time spent in detention by children before sentencing
5	Duration of sentenced detention	· Time spent in detention by children after sentencing
6	Child deaths in detention	· Number of child \\\ in detention during a 12 month period per 1,000 children detained
7	Separation from adults	· Percentage of children in detention not \\\ separated from adults
8	Contact with parents and family	· Percentage of Children in detention who have been visted by or visited parents, guardian or an adult family member in the last 3 months
9	Custodial sentencing (CORE)	· Percentage of children- sentenced receiving a custodial sentence
10	Pre-sentence diversion (CORE)	· Percentage of children diverted or sentenced who enter a pre-sentence diversion scheme

11	Aftercare	·	Percentage of children released from detention receiving aftercare
<b>Policy Indicators</b>			
12	Regular independent inspections	·	Existence of a system guaranteeing regular independent inspection of places of detention
		·	Percentage of places of detention that have received an independent inspection visit in the last 12 months
13	Complaints mechanism	·	Existence of a complaints system for children in detention
		·	Percentage of places of detention operating a <u>complaints system</u>
14	Specialised juvenile justice system (CORE)	·	Existence of a specialised juvenile justice system
15	Prevention	·	Existence of a national plan for the prevention of child involvement in crime

in response to the requirements around monitoring and evaluation the DOJ&CD will: -

1. Utilise the National Operational ISCCJ, which collects and analyses data via a set of data collection templates which are given to each department, to analyse trends in the flow of children through the child justice system. This will be measured against an initial base line set of data which will be collected during the first three months of the Act's implementation.
2. Through the ISCCJ secretariat, maintain this data base of quantitative and qualitative data relating to the requirements of the Act.
3. Facilitate the establishment of an integrated information system via two electronic tools. In the short term the DOJ&CD National Operations Center (NOC) has incorporated a number of the relevant indicators into a reporting tool which will be tested, refined and operationalised. Over the longer term indicators developed for Child Justice System will be incorporated into the data collection tools of the Integrated Justice System (IJS)<sup>15</sup>.
4. Commission research to respond to particular issues in the Act, with specific attention to the requirement that not later than five years after the commencement of this Act, a report must be submitted in order to review the minimum age of criminal capacity of children, from the present 10 years of age.

The processes above will allow the Cabinet member responsible for the administration of justice, as per section 96 (3), to co-ordinate the submission of reports to Parliament, by each Department or institution that is represented in the ISCCJ on the implementation of the Act, within one year after the commencement of the Act and annually thereafter.

#### Registers:

The Act also provides for certain departments to keep records around specific aspects of the Act as follows:

**Department of Social Development**, in terms of section 60 (1), is to establish and maintain a national register of children in respect of whom a diversion order has been made, with information provided by the clerk of the child justice court. The Director-General: Social Development must on a regular basis inspect the register with a view to identifying possible interventions and issuing the necessary instructions.

In terms of Section 97 (6)(a), the Director General - DSD must keep a register, as prescribed, of children under 10 years of age in respect of whom a decision has been made and recorded by a probation officer in terms of section 9(6) regarding the outcome of the assessment. This register should also contain information regarding children older than 10 but younger than 14 who have been referred by the prosecutor due to the unlikelihood of proving criminal capacity as per section 10(2) (b).

**SAPS** is required in terms of section 28 (3), to ensure that the station commissioner of each police station must keep a register in which prescribed details regarding the detention of all children in police cells or lock-ups must be recorded in a manner that entries regarding the detention of children are clearly distinguishable from those of adults. (SAPS 14).

The SAPS Station Commissioner must also in terms of section 28 (2) (a), submit a report to

the National Commissioner of Police, detailing all complaints or observations about an injury sustained or severe psychological trauma suffered by a child while in custody in police cells.

Monitoring to ensure that these requirements are being met will be done by the National Operations ISCCJ via reports from National Departments, NGO's and Provincial Child Justice Forums.

Systems and programmes which will be revised and further developed overtime will be designed in such a way that they do not dissuade people from utilising the provisions of the Act i.e. information management tools must be calibrated to encourage usage. In addition the ISCCJ will over time make recommendations regarding joint targets and indicators where this is practical. A comprehensive Act such as this, which requires intersectoral co-operation, can best be implemented and administered through joint targets and indicators which are measured by the system as a whole rather than by individual departments. This avoids the common pitfall of setting contradictory objectives which often result in competition rather than supporting co-operation and collaboration.

The commencement of the Act on 1 April 2010 means that a number of new procedures and processes have been initiated and for many of these the data collections systems are not yet in place or have not yet been tested. For this reason monitoring of the Act will, in some instances, be implemented incrementally over the first year.

### **The Legal Framework**

While the recently promulgated Child Justice Act (Act 75 of 2008) is the primary piece of legislation regulating and informing the management of children at risk and children in conflict with the law, within the criminal justice system, various other pieces of legislation and policies are also significant in regulating services provided to these children. Hence this NPF must be read in conjunction with the following legislation, policies, procedures, guidelines and international instruments that relate to children at risk and children in conflict with the law.

In this respect South Africa has certain obligations as party to international and regional instruments relating to children, with particular reference to the following:-

- The United Nations Convention on the Rights of the Child (CRC)
- The African Charter on the Rights and Welfare of the Child (ACRWC)
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL)
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules).
- The UN Committee on the Rights of the Child General Comment No 10 on Juvenile Justice
- LIN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines);
- UN Resolution on the Administration of Human Rights in Particular Juvenile Justice (A/HRC/10/L.15 on 20 March 2009);
- Declaration of the Rights of the Child. General Assembly Resolution 1386 (XIV) on 20 November 1959; and
- Unicef Indicators for Juvenile Justice

In addition the following South African legislation has a bearing on the Act:

- The Constitution of the Republic of South Africa (108 of 1996) which sets out the rights of children in general and in the child justice system in particular.
- The Criminal Procedure Act (51 of 1977) which applies to all persons in the criminal justice system, including children. However a number of areas are affected including:-
  - The CJA amends section 7 of the CPA by providing that a private prosecution may not be instituted against a child in respect of whom a matter has been diverted in terms of section 59(2) of the CJA.
  - The CJA amends section 38 of the CPA by providing for new methods of securing

the attendance of an accused child at a preliminary inquiry or in a child justice court.

- The CJA amends section 153 of the CPA by providing that, in terms of section 65 (5) of the CJA, no person may be present at the 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 permission for the person to be there.
- The CJA amends section 302 of the CPA by changing the reference to a "reform school" to the term "child and youth care centre" in accordance with section 191 (2)(j) of the Children's Act, 2005.
- The CJA amends sections 309 and 316 of the CPA by aligning it with the provisions of section 84 of the CJA.

The Children's Act (38 of 2005) deals with the establishment of child and youth care centres which are facilities for the provision of residential care to more than six children outside the child's environment, in accordance with a residential care programme.<sup>16</sup> It is important to note that the Child Justice Act, 2008 has amended section 191(2) and no longer refers to the Criminal Procedure Act, but now provides for the reception, development and safe care of children in terms of an order under Chapter 10 of the Child Justice Act, 2008. On a practical level one should note that in line with the Children's Act, 2005 (No. 38 of 2005), a policy decision has now been reached between the Departments of Social Development and Basic Education that the Department of Social Development will also take over the responsibility for the infrastructure of the Reform Schools, within the next 2 years.<sup>17</sup> The Department of Basic Education will only be responsible for the educational programmes of the children detained at such institutions.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007) is relevant in terms of the child who has allegedly committed a sexual offence. There are three aspects of the Act which may impact on child offenders. The first aspect concerns the case of children between the ages of 12 and 16 who commit consensual sexual acts. The prosecution of such an offence now requires written authorisation by the National Director of Public Prosecutions. The second aspect is concerned with the application for HIV testing of a child allegedly having committed a sexual offence. The third aspect concerns the inclusion into the National Register of Sexual Offences of children who have been convicted of a sexual offence.

The Correctional Services Act (111 of 1998) contains provisions which deal specifically with children and provides that detainees who are children must be kept separately from adults and in accommodation appropriate to their needs.<sup>18</sup> The Act also provides significant detail around education and training opportunities which have to be provided as well a wide range of stipulations relating to the well-being of the child in correctional facilities. The White Paper on Corrections states that children under the age of 14 years should not be detained in correctional centres but that diversion, alternative sentences and detention facilities and centres, as administered by the Departments of Social Development and Basic Education, should be used for such children. In addition section 43 (4) notes that the National Commissioner may, in consultation with the Director- General of the Department of Social Development, transfer a sentenced offender who is a child to a reform school as contemplated in the Child Care Act, 1983 (Act No. 74 of 1983), and from the date of such transfer, the provisions of section 290 of the Criminal Procedure Act will apply."

There are also provisions in the Child Justice Act, which impact on either the mandate of the Department of Correctional Services or which amend provisions of the Correctional Services Act.

The Probation Services Act (Act 116 of 1991) (as amended) contains important provisions relating to child justice, such as those relating to assessment, diversion and restorative justice. In addition to specific provisions in the Child Justice Act, 2008, which spell out the various additional powers, duties and functions of probation officers, the Act also has amended several definitions contained in section 1 of the Probation Services Act, so as to more clearly reflect the intention contemplated in the Child Justice Act.

## Conclusion

As has been highlighted in the preceding chapters the vision underpinning the Child Justice Act is that if child offenders are dealt with appropriately, the vast majority of them will grow up to become law-abiding, effective citizens. Childhood and particularly adolescence is a time of exploration and discovery. As children grow older they gradually gain autonomy and reach a stage where approval of peers becomes as or more important than approval of parents. Although this is a normal part of development, it presents risks to children as they push boundaries and engage in rule breaking, often along with their peers. Prevention programmes should therefore target pre-adolescents and adolescents.

If a child comes in conflict with the law this can be seen as an opportunity to effect meaningful change in that child's life and set him or her back on the path of conformity with the legally accepted rules and norms. An over-reaction can have the effect of the child seeing himself or herself as a victim of the system, and therefore failing to take responsibility for his or her actions.

The Act aims to ensure that the response to each child's offence is individualised and proportionate, not only to the offence, but also to the reality that the offender is not a fully responsible adult. Thus the Act recognises that children who commit crimes can and should be given a chance to change their ways.

In some cases this can be achieved through the opportunity of diversion. This ensures that the child takes responsibility for his or her behaviour and is linked with services that address identified risk factors for that individual child. The advantage of diversion is that it avoids stigmatisation of the child as a criminal and does not result in a criminal record. In other cases, it is necessary for children to go through a court process, and if found guilty, he or she will obtain a criminal record. In those cases, the sentencing provisions of the Act again provide scope for 'a second chance' through a range of options, which can be creatively applied.

The Act aims to limit the use of custodial sentencing, and particularly imprisonment, so that it is only applied as a last resort, and for the shortest appropriate period of time. This is based on the idea that young offenders are very amenable to change. As children mature and grow older, they may be able to be reintegrated into society as law-abiding citizens.

### Abbreviations

CA	Children's Act
CJA	Child Justice Alliance
CJS	Child Justice System or Criminal Justice System
DoBE	Department of Basic Education
DCS	Department of Correctional Services
DG	Director General
DHA	Department of Home Affairs
DOH	Department of Health
DOJ&CD	Department of Justice and Correctional Services
DSD	Department of Social Development
ISCCJ	Intersectoral Committee on Child Justice
NGO	Non Government Organisation
NPA	National Prosecuting Authority
NPF	National Policy Framework
SAPS	South African Police Service

### Glossary of Terms

**"Policy Framework"** is a description of an interlinked and interdependent set of statements established as a policy guide to action to support the achievement of the goal of a high quality of services.

**"Children in Conflict with the Law"** refers to anyone under 18 who comes into contact with the judicial system, as a result of being suspected or accused of committing an offence<sup>19</sup>.

**NPA (National Prosecuting Authority)** means the National Prosecuting Authority established in terms of section 179 of the Constitution and regulated by the National Prosecuting Authority Act, 1998 (Act No 32 of 1998)

**SAPS (South African Police Service)** means the single Police Service established as provided for in section 199 (1) of the Constitution. The Service is regulated by the South African Police Service Act, 1995 (Act No 68 of 1995)

**National Treasury** means National Treasury as established and regulated by the Public Finance and Management Act, 1999 (Act No 1 of 1999) (as amended)

An important aspect of the evolution of child justice over time has been the change of language and terminology. Some key changes include:

- Juvenile justice to child justice
- Secure care facilities to Child and Youth Care Centres
- Juveniles to children
- Prisons to correctional facilities

This National Policy Framework will be implemented and monitored by the various partners of the DG's ISCCJ and National Operational ISCCJ, to ensure that the best interests and rights of children in conflict with the law are promoted and protected.

The Policy will be reviewed after 3 years and on 5-year periods there-after, to ensure that such policies are kept updated and relevant to children's practical situation.

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**Footnotes**