

Deprivation of children's liberty 'as a last resort' and 'for the shortest period of time': How far have we come? And can we do better?

JULIA SLOTH-NIELSEN*

ABSTRACT

Commencing with a brief historical overview of detention of children in South Africa, and legislative attempts to curb its use, this article reviews all forms of deprivation of liberty under the Child Justice Act 75 of 2008 and attempts to assess at a practical level whether – or not – progress is being made in the quest for the minimal use of deprivation of liberty.

1. Introduction

'The government will, as a matter of urgency, attend to the tragic and complex question of children and juveniles in detention and prison. The basic principle from which we will proceed from now onwards is that we must rescue children of the nation and ensure that the system of criminal justice must be the very last resort in the case of juvenile offenders.'¹

Providing alternatives for children in prison was one of the very earliest policy objectives of Government of National Unity that took office in 1994, and one the first enactments of the new government at the start of democracy concerned the release of children from prisons.² The implementation of the measure was a failure, however, due to a lack of appreciation of the inadequacy of alternatives to custodial confinement in prison (places of safety usually reserved for children in need of care and protection), a somewhat intransigent magistracy used to wholly unfettered discretion in matters relating to detention, and a loss of public sympathy when released child offenders committed serial offences.

* BA LLB (Stell); LLM (UCT); LLD (UWC); Professor, Faculty of Law, University of the Western Cape and Faculty of Law, University of Leiden.

¹ Nelson Mandela on the occasion of the opening of the first Parliament after the elections in 1994. See A Skelton 'Children locked up: Towards detention as a matter of last resort' in M Carnelley and S Hoctor *Law Order and Liberty: Essays in Honour of Tony Mathews* (2011) 207, 213.

² J Sloth-Nielsen 'No child should be caged – closing doors on the detention of children' (1995) 8 *SACJ* 47.

The Correctional Services Act 8 of 1959 was re-amended shortly afterwards, to once again permit detention of juveniles in prisons, albeit with some restrictions. These limitations related to the nature of the offence, the age of the child (which was set at 14 years or older), and a list of factors to be taken into account by the presiding officer (such as the health status of the child, the risk of the child causing harm to other persons awaiting trial in a place of safety, and the disposition of the accused to commit offences).³

The dust having settled after this initial foray into (piecemeal) juvenile justice reform, practical steps towards putting in place the building blocks for a new juvenile justice system began to take off, coinciding (deliberately) with the reform process towards developing a comprehensive juvenile justice⁴ system being pursued under the auspices of the South African Law Commission (now South African Law Reform Commission). As is well known, the Law Commission completed the drafting process such that a Bill could be introduced to Parliament in 2002 although the parliamentary progress with the Bill stalled for some years after trenchant parliamentary debates during 2003. (The Bill was completed in 2008, and promulgated with effect from 1 April 2010 as the Child Justice Act 75 of 2008.)

In 2006, the Community Law Centre and Open Society Foundation for South Africa hosted a conference⁵ to explore what progress had been made, and what challenges remained, with the aim to spur policy makers and Parliamentarians to re-start the evidently stalled process of deliberating upon the Child Justice Bill that had been discussed last in 2003. A review of developments relevant to the deprivation of liberty of children was a core theme at this conference. One contribution in particular dwelt on children deprived of their liberty in prisons and in secure care centres, which had by then emerged as the institutions destined to house awaiting trial children,⁶ and which fell under the auspices of the Department of Social Development.⁷ As at March

³ J Sloth-Nielsen 'Pre-trial detention of children revisited: amending section 29 of the Correctional Services Act' (1996) 9 *SACJ* 60. See also J Sloth-Nielsen 'The influence of international law on South Africa's juvenile justice reform process' unpublished LLD thesis, (University of the Western Cape) (2001), for a comprehensive analysis of developments between 1994 and 2001.

⁴ This article uses the terms 'juvenile justice' and 'child justice interchangeably', although the final decision was to use the less labelling term 'child justice' as the title of the Act.

⁵ Child Justice Alliance and Open Society Foundation for South Africa *Conference Report: Child Justice in South Africa: Children's Rights Under Construction* (2006).

⁶ This is discussed in more detail infra.

⁷ A Dissel 'Children in detention pending trial and sentence' in Conference Report op cit (n5) 113 -125. For a more detailed overview of developments during the period 1998 – 2006, see Skelton op cit (n1).

2006, it was recorded that there were 1173 children awaiting trial in prisons around the country, and a further 1556 awaiting trial in secure care facilities.⁸

With the position as at 2006 as a starting point, this article takes forward the theme of deprivation of liberty in the context of child justice. The intention is to locate the bland constitutional injunction to use deprivation of liberty only ‘as a last resort and if so, for the shortest appropriate period of time’⁹ in a what, in global terms, is a contextually sensitive and relativist space: the respective meanings of ‘last resort’ and ‘shortest appropriate period’ are by no account axiomatic.¹⁰

The section that follows describes the array of settings in which deprivation of liberty relative to child justice in South Africa is to be situated and conceptualised, and details the legislative context. A fourth section reviews progress and challenges, before concluding.

2. The deprivation of liberty landscape

2.1 Police custody

Contact with the police and potential detention in police custody (where children are arguably most at risk)¹¹ constitutes a given in virtually every country in the world as it is normally the entry point to the child justice system. Minimal use of pre-trial detention in police custody has long been furthered by provisions under criminal procedural law requiring that a detained person be brought to court before the expiry of 48 hours, in order that the legality of the detention be confirmed and options for release on bail or otherwise considered.

The Law Commission was alert to the dangers children face whilst in police custody, as also of the fact that services are not available to children detained in police cells: access to education, health care services, and visits by parents and families to mention the most obvious, are wholly lacking. The 1994 amendments to the Correctional Services Act 8 of 1959 implemented in May 1995 prohibited the referral

⁸ Comprehensive data on children deprived of their liberty as a sentence at the same date is not readily available.

⁹ Section 28(1)(g), drawn substantially from art 37(b) of the Convention on the Rights of the Child (1989).

¹⁰ Skelton op cit (n1) 218 details how constitutional drafters balked at the suggestion that the phrase be framed as detention for the shortest *possible* period of time as likely to be too restrictive, and opted instead for shortest *appropriate* period of time.

¹¹ The death of young Neville Snyman at the hands of an adult whilst being detained in police custody for a petty offence led to a public outcry and is described by Skelton op cit (n1) 212 as ‘a watershed moment’ for child justice reform.

of a child to await trial in police custody after first appearance in court, and introduced shorter detention limits in police custody even before first appearance in court for younger children (those aged below 14 years could be detained only for 24 hours). Further, the 1996 re-amendments to the Correctional Services Act (which permitted once again the pre-trial detention of children in prison) continued to outlaw the referral of a child back to police custody after a first appearance in court (albeit that this legal rule was all too frequently breached, and had to be trenchantly motivated for in order to be retained).¹² The Child Justice Act steadfastly maintains this position: s 26(3) which provides for placement of a child after first appearance does not list placement in police custody as an option, referring only to referral to a child and youth care centre or to a prison.

As real time data on the detention of children in police custody is not kept or made available, it is unclear whether the decade old prohibition on post-appearance detention of children in police custody is still adhered to.¹³ In the late 1990s and even thereafter, monitoring visits to police cells took place in various parts of South Africa to ascertain whether children were being illegally detained as awaiting trial prisoners there, and inspections revealed all too often that this was indeed the case.¹⁴ There is potentially a need for such ad hoc monitoring to be resumed by an independent body to ensure that children are not detained post first appearance in police custody in contravention of the law.

Four further provisions seek to give effect to the 'last resort' and 'shortest period of time' principle in the context of deprivation of

¹² Personal observations: the author was for a while contracted by the Department of Justice and Constitutional Development to monitor the pre-trial detention of children around the country, including detention in police cells. At the time, regular reports were provided to the Department of children found awaiting trial in police custody.

¹³ No data collection method is in place to distinguish children in police cells prior to, and after, first appearance in court, and the length of time spent in police custody. Nor is current police data useful as is illustrated by the presentation of the Department of Justice and Constitutional Development's *2nd Annual Report on the Inter-sectoral Implementation of the Child Justice Act (April 2011 - March 2012)* (2012). This is because police data does not distinguish the number of children taken into custody from the number of charges against children recorded. Since a child could be arrested for multiple charges, the data proved wholly inadequate (see Badenhorst *Second Year of the Child Justice Act Implementation: Dwindling Numbers* (2012). Child Justice Alliance Research Report 8).

¹⁴ Various reasons were given: ignorance of justice officials as to the content of the law, convenience as police cells are often located close to the court where the child must next appear, whereas alternative care facilities required sometimes extensive transport and sometimes vast distances to be travelled, and arguments that the child could be closer to his or home and family, juxtaposed against the possibility of awaiting trial periods being spent sometimes in a different town altogether.

liberty and police custody. The first of these relates to the use of arrest in the first place. The Act restricts the use of arrest for certain minor offences,¹⁵ providing that specified compelling reasons must be present justifying an arrest before a child accused of one of these offences is deprived of liberty via arrest.¹⁶

Second, the general principle is affirmed that even where an arrest has been effected for a schedule 1 offence, the police official must (where appropriate) release the child into the care of a parent, guardian or appropriate adult before the child's first appearance at a preliminary inquiry.¹⁷ Where the offence is more serious, the police may still release the child before first appearance into the custody of a suitable adult with the consent of the prosecutor.

Third, the release of the child arrested for a schedule 1 offence from police custody as specified above is 'incentivised' via the mechanism of s 22(2). This section requires the investigating officer, in the instance that the child has not been released prior to first appearance, to provide the inquiry magistrate with a written report giving reasons

¹⁵ Section 20. The offences are set out in sch 1 to the Act. The use of a summons or a written notice to appear in court are provided as alternatives to securing attendance by means of an arrest.

¹⁶ These are: where the police official has reason to believe that the child has no fixed address; where the police official has reason to believe that the child will continue to commit offences unless he or she is arrested; where the police official has reason to believe that the child poses a danger to any person; where the offence is in the process of being committed; or where the offence is committed in circumstance as set out in National Instruction (s 29(1)(a)-(e)) of the Child Justice Act. The National Instruction (no. 17) (published under GN 759 GG 33508, 2010/9/2 adds three further circumstances justifying an arrest, namely where the child has absconded from foster care, from a child and youth care centre, or from temporary safe care; where the child is likely to destroy or tamper with evidential material relating to the offence; and where the child is deemed likely to interfere with the investigation into the offences unless arrested (par 8(3)(ii), (v) and (vi)).

¹⁷ Section 21(2)(a). In respect of offences referred to in schedule 1 or 2, a prosecutor may release the child on bail prior to first appearance thereby limiting the period of detention in police custody: s 21(2)(b). Strangely, s 21(2)(a) is to all intents and purposes repeated in s 22(1) though there are minor differences. The heading of s 21 is titled '*Approach*' to be followed when considering the release or detention of a child after arrest, whilst s 22 is the more substantive 'Release of child on written notice into the care of a parent, appropriate adult or guardian before first appearance at the preliminary inquiry; further, s 22 adds the requirement that release be considered 'as soon as possible' (unless the parent, an appropriate adult or guardian cannot be found or is not available and all reasonable efforts have been made to locate the parent or appropriate adult or guardian or unless there is a substantial risk that the child may be a danger to any other person or to himself or herself). A similar schema is deployed at s 26 and 27 in part 2 of this chapter of the Act, dealing with pre-first appearance placement out from police custody to a child and youth care centre. Again the division into two sections ('Approach to be followed' and 'Placement of a child who has not been released before first appearance') is evident.

why the child could not be released and the legislatively grounded factors preventing the release that were at play. The South African Police Service National Instruction (hereafter 'National Instruction') provide for this,¹⁸ requiring that Form SAP 583(c) be filed in the police docket. The etiquette 'disincentive' relates to the additional paperwork that the police have to complete where they fail to release a child charged with a schedule 1 offence before first appearance in court.¹⁹

Fourth, the police official must, prior to first appearance, consider placing a child who is in detention in police custody in a suitable child and youth care centre (depending on the age of the child and the offence for which he or she is charged).²⁰ Note that the language of this section is peremptory: the police official *must* consider this possibility, in lieu of keeping the child in police custody. The underlying principle²¹ is that where deprivation of liberty is necessitated, the least restrictive form of such detention must be employed, and that detention in a child and youth centre is preferable to detention in a police cell or lock-up.²²

On analysis, there appear to be stringent legal provisions curbing the use of deprivation of liberty by the police,²³ bolstered by a National Instruction in which the parameters of dealing with children to avoid police custody, or restrict its length, are meticulously spelt out (veritably in bold, underline and italic in the published text!). An analysis of the efficacy of this highly regimented legislative approach to police detention is discussed in conclusion.

¹⁸ See para 10(6)(a)(iv).

¹⁹ Badenhorst op cit (n13) ascribes this as one factor that has led to dwindling number of children being taken into custody.

²⁰ Section 26(2).

²¹ Stated upfront in s 26(1).

²² This legislative scheme is substantially augmented in the National Instruction as regards the duty to establish whether there is a child and youth care centre within a reasonable distance of the police station, whether there is a vacancy at the centre, transporting the child to the centre, handing over the child to the person receiving the child at the child and youth care centre, providing listed documentation, and filling in certain forms: see National Instruction 10(6)(a) and some of the Forms referred to therein.

²³ The analysis here does not deal with the inclusion of alternative methods of securing the appearance of the (child) accused in court, such as summons or written notice to appear, mainly because these methods are 'optional extras' and not incentivised as alternatives to arrest in any way.

2.2 Child and youth care centres

2.2.1 *Places of safety and secure care facilities*

The drafting of the Children's Act 38 of 2005 and the Child Justice Act 75 of 2008 ultimately occurred almost in parallel, although two separate projects committees of the Law Commission spearheaded the processes, and two different parliamentary Portfolio Committees ultimately oversaw finalisation of the legislation. There was substantial interplay between the two processes and for the most part, at least as regards the specifics of the Child Justice Act, the provisions (on paper) mesh neatly. A major intersecting fulcrum is around the alternatives to deprivation of liberty in prisons and police cells.

Earlier, mention was made of places of safety, designated to house mostly children in the care and protection system, but also designated as alternative facilities which were able to receive awaiting trial children since the time of the Criminal Procedure Act 51 of 1977.²⁴ The saga of ill-equipped places of safety being used for the detention of children who could not await trial in prison after legislative changes limited this possibility early in the democratic era was referred to above.

The concept of 'secure care centres' for awaiting trial children was an explicit outcome of the reintroduction of the possibility of detention of awaiting trial children in prisons in 1996. Secure care was conceptualised as an alternative to detention in so-called adult prisons, and became a policy objective of the Department of Social Development, which was regarded as the lead government department responsible for awaiting trial children. It could be seen as a face-saving response to the volte-face that the return of awaiting trial children to prison necessitated. Indeed, the regulations to the then Child Care Act 74 of 1983 were amended in February 1998 to provide for a definition of a 'secure care facility' so as to create a (tenuous) legislative basis for their designation and/or development.²⁵ Even after the demise of the Inter-Ministerial Committee on Youth at Risk (IMC), an inter-sectoral cabinet committee set up to deal with the crisis of the children released from prison in 1995, the goal of developing a reasonably equitably geographically spread suite of secure care facilities in all

²⁴ See s 71, now repealed.

²⁵ A 'secure care facility' was intended to be a secure therapeutic environment and not a 'kiddie prison'; in the view of the then Inter-Ministerial Committee on Youth at Risk (IMC) they were not necessarily to be developed only for awaiting trial children but for children generally in need of a secure care environment. See J Sloth-Nielsen 'A short history of time: charting the contribution of social development service delivery to enhance child justice 1996-2006' in *Child Justice in South Africa: Children's Rights Under Construction* op cit (n5) 17, 22; see also Skelton op cit (n1) 216.

nine provinces of South Africa remained at the forefront of policy, as this would provide answer to the political concerns about detaining children in (adult) prisons. The location of the duty to identify and fund these was also cemented at this time: it would be the Department of Social Development's responsibility rather than Correctional Services, Justice or any other potential stakeholder.²⁶

Secure care facilities have generally been commissioned through two routes:

- (1) identifying dedicated (departmental) places of safety as secure care facilities for the reception and accommodation of awaiting trial youth and ensuring that their physical security was fit for purpose;²⁷ and
- (2) commissioning of facilities, all built by provincial departments, and either managed by provincial departments or managed by private contractors.²⁸

The nomenclature 'secure care facility' has in the intervening decade to an extent been superceded by developments related to the Children's Act 38 of 2005, as alluded to above. The Children's Act contains a dedicated chapter on child and youth care centres, a term which includes the full range of residential care facilities for children (orphanages, children's homes, places of safety, drug rehabilitation centres and so forth), in order to minimise the often labelling terminology sometimes previously encountered (the AB home for abandoned girls, the CD centre for adolescents with mental health problems ...). The distinguishing factors between all the many forms of residential care in child and youth care facilities, according to the Children's Act, is the programme or programme mix for which the facility is registered. Amongst the programmes for which registration can be granted is for the 'reception, development and secure care of

²⁶ Although policy formulation would take place at national level, the sourcing of funding, commissioning and management of facilities would lie with the provincial departments.

²⁷ Concerns had been, and are, regularly raised about the physical security arrangements necessary to minimise the risk of absconding or escape.

²⁸ That this raises the spectre of what for adults are 'privatised prisons' is noted, but fall beyond the scope of this article. Badenhorst op cit (n13) 13-14 advises that the private company BOSASA (in Northern Sotho, the word Bosasa means "the future") was operating 11 secure care facilities as at 2012. Skelton op cit (n1) 219 notes that by the time the National Development Plan was released for public comment in 2010, each province had at least one secure care facility.

children awaiting trial or sentence.²⁹ Hence, any discussion of the ‘deprivation of liberty landscape’ necessarily requires an examination of the provisions of the Children’s Act, in addition to the Child Justice Act, the latter spelling out when deprivation of liberty in a child and youth care centre may be ordered, and the former identifying the minimum norms and standards applicable to governance and management of these facilities.³⁰ The Child Justice Act does not differentiate between places of safety, secure care facilities and child and youth care facilities, but uses the nomenclature of the Children’s Act: thus s 29, titled ‘Placement in a child and youth care centre’, enables a decision to be made by the presiding officer to remand a child alleged to have committed an offence to a child and youth care centre to await trial, and in doing so he or she must have regard to the appropriateness of the level of security of the child and youth care centre when regard is had to the seriousness of the offence. This actually permits referral to any child and youth care centre mentioned in the Children’s Act, albeit that the specific centre would notionally have had to be registered as a facility offering a programme for the reception, development and secure care of children in terms of an order under s 29 or Chapter 10 of the Child Justice Act.

The Department of Justice and Constitutional Development reported in 2011 that there are 28 child and youth care centres offering a secure care programme in South Africa. They reported that three additional facilities had been completed at the time of the report (June 2011), but were then not fully operational.³¹

2.2.2 Reformatory schools

The 1996 IMC study ‘In Whose Best Interests’ opened up for scrutiny the entire alternative care system, including institutions relevant to the

²⁹ Section 191(2)(b) of the Children’s Act 38 of 2005. Sections 191(2) of this Act provide that, “(2) A child and youth care centre must offer a therapeutic programme designed for the residential care of children outside the family environment, which may include a programme designed for ... (i) the reception, development and secure care of children with behavioural, psychological and emotional difficulties; (j) the reception, development and secure care of children in terms of an order — (i) under section 29 or Chapter 10 of the Child Justice Act, 2008; [or] (ii) in terms of section 156(1)(i) placing the child in a child and youth care centre which provides a secure care programme; ...”.

³⁰ Along the lines of the United Nations *Standard Minimum Rules for Juveniles Deprived of Their Liberty* (1990).

³¹ Op cit (n13).

juvenile justice system as sentencing options, and so-called industrial schools (or schools of industry).³²

Industrial schools were not used directly for sentenced children, but often recommended by probation officers as a residential option in criminal cases involving children (especially younger children). The criminal matters would then be 'converted' into a care and protection inquiry under the then Child Care Act 74 of 1983, so that the desired residential 'sentence' could be made an order of the children's court via the Child Care Act. This complicated scheme, which also saw the respective facilities fall under the jurisdiction of provincial education departments for historical reasons, was overhauled in its entirety in the process of designing an alternative residential care system for the Children's Act 38 of 2005.

It was further agreed at executive level, in around 2005, that control of what had been termed industrial schools and reform schools would shift from the Department of Education to the Department of Social Development.³³ The Children's Act encapsulates this policy decision, by requiring the transfer of facilities from the Department of (now) Basic Education within two years of the Children's Act coming into force.³⁴

Both reformatories³⁵ and schools of industry, now being termed child and youth care centres in accordance with the terminology of the Children's Act, are relevant to deprivation of liberty insofar as they are residential sentencing options which fall squarely under the rubric of deprivation of liberty (highlighted by the use of the word '*compulsory* residence' in s 76 of the Child Justice Act, which concerns the imposition of a sentence to a child and youth care centre). Indeed, in *S v CKM*³⁶ the court noted that such referrals 'amount to an involuntary compulsory admission to a facility' and that they constitute 'a serious invasion of the child's rights to freedom of movement and decision making'.³⁷

³² Government of the Republic of South Africa, 1996. This study was undertaken by the IMC, and was a watershed for revealing all manner of abuses in the alternative residential care system. See Sloth-Nielsen op cit (n5) 17-26.

³³ The policy drivers of this included that they were 'cinderella' institutions in the large Department of Education, that the reformatory programmes, based on dubious educational foundations, did not serve the desired (or any) purposes, that norms and standards of care and of social reintegration were not optimal and so forth.

³⁴ In terms of s 196(3). The applicable date was 1 April 2012.

³⁵ Committal to a reform school could be imposed on child offenders in terms of s 290 of the Criminal Procedure Act 51 of 1977, until its repeal by the Child Justice Act.

³⁶ 2013 (2) SACR 303 (GNP) at paras 7, 15.

³⁷ Rule 19 of the United Nations Standard Rules for the Administration of Juvenile Justice (the 'Beijing Rules') are to similar effect regarding the deprivation of liberty of children in treatment facilities.

2.2.3 The legislative scheme for alternative residential care in the Child Justice Act

The Child Justice Act (for the most part)³⁸ conceives of alternatives to release as constituting deprivation of liberty, quite correctly if regard is had to international standards and definitions, and to the reality that children are not free to leave when placed in residential care. However, different approaches characterise the legislative scheme for pre-trial detention in child and youth care centres (read: secure care facilities and possibly other institutions) and for sentencing (read: reformatory schools and possibly the old schools of industry).³⁹

In relation to pre-trial detention, detention in child and youth care centres is posited as the alternative to prison and to detention in police custody (where the child cannot be, or is not, released). This is evident from the requirement that the police consider placement in a child and youth care centre even before the preliminary inquiry in preference to placement in a policy cell or lock up.⁴⁰ It is further implicit in s 29, which, although it lists factors⁴¹ that a presiding officer must consider before ordering such placement, does not restrict such deprivation to any list of offences, or set a minimum age limit on referral to residential care whilst awaiting trial (as is the case with a remand to prison to await trial). It can therefore be concluded that pre-trial detention in alternative residential care is couched in permissive terms in the Child Justice Act.

In contrast, residential sentences are governed by both principles and implicit restrictions related to the seriousness of the offence. The principle is stated in s 69(3), namely that a sentence involving compulsory residence in a child and youth care centre must be preceded by consideration of:

- (a) the seriousness of the offence indicating that the child has a tendency towards harmful activities;
- (b) whether the harm caused by the offence indicates that a residential sentence is appropriate;
- (c) the extent to which the harm caused by the offence can be apportioned to the culpability of the child in causing or risking the harm; and

³⁸ This will be explained infra.

³⁹ This author returns to this allusion in conclusion.

⁴⁰ Section 27.

⁴¹ These are the age and maturity of the child, the seriousness of the offence in question, the risk that the child may be a danger to himself or others, the appropriateness of the level of security of the child and youth care centre when regard is had to the seriousness of the offence allegedly committed by the child, and the availability of accommodation in an appropriate child and youth care centre.

- (d) whether the child is in need of a particular service provided at the child and youth care centre.

Although not listed, the above tends to indicate that deprivation of liberty in residential care as a sentence is restricted to offences deemed serious, and tends to suggest that the kind of offence contemplated is one involving violence (deduced from the words 'harm', as opposed to 'loss' which would suggest economic offences).

Further, a sentence involving compulsory residence in a child and youth care centre may not be imposed without a pre-sentence report being provided to court.⁴² The specific centre to which the child is being sentenced must be specified by the child justice court.⁴³ An implicit restriction to using residential sentences is evident from s 85, which requires automatic judicial review of any sentence of compulsory residence by a high court judge. As review of reformatory schools sentences was previously compulsory under the Criminal Procedure Act, there is copious judicial authority for the proposition that residential sentencing be reserved for serious offences only. It is evident that the provisions for the imposition of a sentence to residential care are by and large restrictive, although patently less so than is the case with a sentence of imprisonment.⁴⁴

It is proposed that the differential treatment of deprivation of liberty in residential care in the pre-trial setting as opposed to post conviction in the Child Justice Act (permissive versus rather more restrictive) is premised (not necessarily advertently or consciously) on the historical differences in the institutions themselves (places of safety and secure care facilities versus reformatories)⁴⁵ and perceptions about them by policy makers. Hence, reformatories were cast in an extremely negative light as 'universities of crime', confirmed in the adverse appraisal of the 1996 IMC report 'In whose best interests? Places of safety historically had not had much to do with juvenile offenders – the precise cause of the failure of the 1996 amendments to free children from prison – so could be perceived in a more benign light.⁴⁶ Also, the newness of secure care facilities, which only began to become a reality around 2000, coincided with the end of the Law Commission process, and there was hope and expectation that these too would be fairly benign therapeutic environments. A final explanation for the differential

⁴² Section 71(1)(b).

⁴³ Section 76(4)(b)(1).

⁴⁴ See s 77 which contains both age and offence limitations, seen together with a set of limiting principles in s 69(4).

⁴⁵ Schools of industry, as mentioned, were never directly utilisable as sentencing options.

⁴⁶ Despite the many other failings identified by the IMC in its report.

treatment of residential care pre-trial and post-conviction lies in the decade of concentrated advocacy on limiting imprisonment (at all costs?) in the pre-trial phase particularly.

2.3 Prisons

Given the early activism around the detention of children in prisons, both awaiting trial and as a sentence, it is not surprising that the deprivation of liberty in prisons is highly regulated in the Child Justice Act.⁴⁷ Limitations relate both to the minimum age of admission and to specific offences. Factors for presiding officers to weigh when ordering or deciding to further detain a child pre-trial in prison are additionally provided, and the likelihood of an eventual sentence of imprisonment being imposed must be present.⁴⁸

As regards sentencing, the principle of last resort and shortest period of time finds expression in the body of the Act.⁴⁹ It is also a principle of sentencing.⁵⁰ Suffice it to say, then, that the legislative framework in the Child Justice Act undoubtedly puts appropriate flesh on the bones of the constitutional principle that deprivation of liberty in prisons be restricted to a last resort. It remains to turn to practice to discern progress and challenges.

3. Where are we now?

3.1 Deprivation of liberty in police custody

According to all available information, the present picture can reliably be presented: far fewer children are being arrested and thus being deprived of their liberty in police custody in the first place.⁵¹ Regarding the 'shortest period of time' principle, on the assumption that appearance before a preliminary inquiry must occur within 48 hours of the initial detention; and that detention thereafter is permitted only in a child and youth care centre or a prison if the child is not released;⁵² and (again this is assumed) that no illegal detention in

⁴⁷ Substantially following the model of the 1996 Amendments to the Correctional Services Act via introducing age limits, offence limits and various additional criteria or factors to be considered.

⁴⁸ See s 30(1) and 30(3).

⁴⁹ Section 77(1)(b).

⁵⁰ Section 69(1). A further list of factors militating against imprisonment as a sentence is evident from s 69(4), including the 'desirability of keeping the child out of prison'.

⁵¹ Department of Justice and Constitution Development op cit (n13); Badenhorst op cit (n13).

⁵² See s 26(3)(a) and (b). Referral (even pending the conclusion of the preliminary inquiry) back to police custody is not an option provided by law, as previously stated.

police custody is taking place after the conclusion of the preliminary inquiry, it can be concluded that the Child Justice Act's legislative barriers to post-first-appearance- referral back to detention in police custody have indeed given life to this constitutional requirement.

The Department of Justice and Constitutional Development⁵³ gives no police statistics concerning deprivation of children's liberty. However, 'dwindling numbers' of children referred for diversion indicate a lower incidence of the use of arrest.

3.2 Deprivation of liberty in prisons

At the other end of the spectrum as seen from the vantage point of the most restrictive form of deprivation of liberty, the numbers of children awaiting trial in prison have dropped dramatically (to less than 600 per annum, it would appear).⁵⁴ Further, the numbers of children serving sentences of imprisonment have also declined markedly.⁵⁵ Indeed, it is contended that the Child Justice Act cannot take sole credit for this latter state of affairs, as the jurisprudence of the Constitutional Court⁵⁶ and other superior courts⁵⁷ has surely played a role in curbing the imposition of imprisonment as a sentence, and as Muntingh points out, the rate of imprisonment has been in

⁵³ Op cit (n13).

⁵⁴ Department of Justice and Constitution Development op cit (n13).

⁵⁵ L Muntingh and C Ballard *Report on Children in Prison in South Africa* (2012) 71; see too the annexures attached to the Department of Justice and Constitutional Development Report op cit (n13), which indicates just at one point 550 children sentenced to corrections (p 44) but at another point slightly over 700 children sentenced to imprisonment in the period of the review.

⁵⁶ *Centre for Child Law v Minister of Justice* 2009 (2) SACR 477 (CC) at para 31: 'If there is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen. In this sense, incarceration must be the sole appropriate option. But if incarceration is unavoidable, its form and duration must also be tempered, so as to ensure detention for the shortest possible period of time'. These influential remarks of the highest court of the land clearly apply outside of minimum sentencing legislation, the striking down of which was the primary objective of the application, and have influenced lower court decision-making. As Skelton op cit (n1) 223 writes, the judgment 'pointed out that the Constitution does not prohibit Parliament from dealing effectively with such [child] offenders – the fact that detention must be used only as a last resort in itself implies that imprisonment is sometimes necessary. However, the Bill of Rights mitigates the circumstances in which such imprisonment can happen – it must be a last (not first or intermediate) resort, and it must be for the shortest appropriate period.'

⁵⁷ *S v N* 2008 (2) SACR 135 (SCA) at para 39, 'if there is a legitimate option other than prison we must choose it, but if prison is unavoidable, its form and durationshould be tempered. Every day he spends in prison must be because there is no alternative' (per Cameron JA).

decline generally.⁵⁸ Nevertheless a commendable reduction has been achieved, in line with the principle that the most restrictive form of liberty is to be used the most sparingly.

3.3 Deprivation of liberty in alternative residential facilities (child and youth care centres)

3.3.1 *Pre-trial deprivation of liberty for children in conflict with the law*

Regarding pre-trial detention in alternative residential care facilities, information is sparse. This is partly because the information is not centrally available but kept by departments at provincial level, and because the reporting to Parliament required by the Act, which could shed further light on recourse to deprivation of liberty in alternative care, has been tardy.⁵⁹ The 2011 (first) *Annual Report on the Implementation of the Child Justice Act* records the admission of 8879 children to the 3272 beds in the 28 secure care facilities in the year reviewed. This information is not provided in the 2012 Report, which only provides data on children sentenced to a child and youth care centre.⁶⁰

Given that this is legislatively the preferred option where release is not ordered, as described above, given that numbers of children in prisons has declined, and given that the numbers of available child and youth care facilities with programmes that meet the criteria of providing secure care have risen, it is not unreasonable to conclude that recourse to deprivation of liberty in alternative residential facilities has grown since 2006. This, in turn, may mean that there has not been reduced recourse to deprivation of liberty, but that it has been displaced from prisons to other facilities in the child justice system. It may even mean (and this cannot be proven one way or another) that overall, the deprivation of liberty of children in conflict with the law has increased, both in relation to the numbers of children deprived of their liberty, and the duration of such deprivation: pre-trial detention in prison has (since the 1996 amendments referred to in the introduction) been subjected to a requirement that the matter be remanded for no more than 14 days at a time, with the goal that the presiding officer enquire on a regular basis whether continued incarceration remains

⁵⁸ Muntingh, L 'Punishment and deterrence: don't expect prisons to reduce crime' (2008) 26 *SA Crime Q* 3 at 5.

⁵⁹ The latest available report is for the period April 2011 – March 2012.

⁶⁰ A number of 353 children, a vast increase over the previous year: Department of Justice and Constitutional Development op cit (n13) 34.

required.⁶¹ No such enforced limitation on deprivation of liberty in the alternative care system existed, nor does it feature in the Child Justice Act. Therefore, it is possible to speculate that children might be spending far longer in custody in child and youth care facilities with no barrier to this in place.⁶²

In addition, the statistic of 8879 admissions to child and youth care centres⁶³ (of whom only 110 were sentenced to a child and youth care centre in that year according to the 2012 report) do seem to indicate rather large numbers: at the height of detention of children in prison, the total was less than 2800,⁶⁴ and at that point secure care had yet to take off so that there were then far fewer admissions to the alternative care system. Crudely put, deprivation of liberty (albeit now in child and youth care facilities) seems to have at least doubled.⁶⁵

3.3.2 Deprivation of liberty in child and youth care centres as a sentence

Facilities that were initially called secure care facilities (initially conceptualised as an alternative to prison for awaiting trial children) are evidently now increasingly being utilised as facilities for sentenced children. Badenhorst⁶⁶ provides data showing that all the facilities managed by BOSASA have admitted sentenced children for the period 1 April 2011 – 31 March 2012. Based on information supplied by BOSASA, she notes that difficulties include that the current infrastructure in the facilities does not allow for total separation of sentenced children from those awaiting trial. Children share the same amenities such as dormitories, classes and recreational programmes although the content of their programmes supposedly differs. She also records that children who have been sentenced to imprisonment are, instead, delivered to BOSASA facilities to serve their sentence. As mentioned above, the 2012 Annual Report shows a dramatic escalation in the imposition of sentences to child and youth care centres, albeit off a low base.

⁶¹ Now s 30(4) of the Child Justice Act.

⁶² This assertion is somewhat supported by the facts in *S v CKM* 2013 (2) SACR 303 (GNP) – see (n36) *supra* and (n68) *infra*.

⁶³ 2011 Annual Report, cited in Muntingh and Ballard *op cit* (n55) 15.

⁶⁴ Skelton *op cit* (n1) 219, citing the peak in 2000.

⁶⁵ The statement must of course be read with the necessary caveats, for instance the reliability of the 2011 data may be suspect, and of course in 2000 it is suspected that many children would have been detained in police custody pending trial, as earlier indicated.

⁶⁶ *Op cit* (n13) 28-29.

3.3.3 Deprivation of liberty in child and youth care centres for children not facing criminal charges

It has now emerged that secure care facilities have been used as facilities for children not facing criminal charges but in the care system. As highlighted above, the initial conception of secure care facilities did not envisage that they would be restricted to children facing criminal charges but would be available to accommodate all children in need of a secure therapeutic environment; legally there does not appear to be an obvious or direct impediment to mixing awaiting trial and sentenced children with those not facing criminal charges, insofar as the Children's Act is concerned;⁶⁷ though it is arguable that this position might be constitutionally suspect, as a possible violation of s 12(1)(b) of the Constitution, since the deprivation of liberty of children not facing criminal charges is conceivably a form of detention without trial, irrespective of it being dressed up as 'treatment'.⁶⁸

Nevertheless, a recent incident at a child and youth care facility (a secure care facility) raises alarm bells, and calls into question the

⁶⁷ See s 191(2)(i) and (j) discussed earlier. Paragraph 14 of the National Norms and Standards issued in terms of the Children's Act provides somewhat for the separation of certain children groups from others. It reads as follows: '(a) Children in secure care programmes must as far as reasonably possible be kept separately from children in other programmes. Such children must be separated at night, and where they are not separated during the day this must be managed as part of a residential care programme that provides appropriate containment. (b) Children in secure care programmes who are awaiting trial and children in secure care programmes who have been sentenced may be housed in the same facility, provided that the child and youth care centre is registered to provide appropriate programmes for such children, and that the residential care programmes provide for appropriate containment.'

⁶⁸ The matter of *S v CKM* 2013 (2) SACR 303 (GNP). The case concerned three boys sentenced to a reform school from whence they repeatedly escaped. They were then transferred administratively to a secure care facility for awaiting trial youth without any court order and without charges having been laid against them in respect of which they were then awaiting trial. The first accused had been originally sentenced to a reformatory for an extremely minor offence of common assault, on the basis that the child was without parental supervision and had developed into a difficult child. That he might have been a child in need of care was not considered, and the court opined that the sentence imposed was 'clearly, indubitably and self-evidently' unjustified (at para 18), given that deprivation of liberty is constitutionally a last resort. In contravention of the then provisions of s 302 of the Criminal Procedure Act, the original sentence to a reform school was not sent on automatic review. After C ran away, and was apprehended and transferred to the awaiting trial facility, he was detained for 6 months (without a warrant of detention being in place) before the matter was placed before a high court judge for special review. The second accused was convicted of assault with intent to do grievous bodily harm and sentenced to the reform school from where he absconded and ended up in secure care for awaiting trial children, whilst the third accused, who had failed to participate in a diversion programme, was initially sentenced on the basis that he too was a troublesome child (the original charge was housebreaking with intent to commit an unknown

wisdom of this initial thinking. An investigation report has confirmed that⁶⁹

'on 26 and 27 August 2013 as a result of a full scale riot at Horizon Child and Youth Care Centre, the facility was in complete chaos. Most of the residents were involved and enormous damage was caused to the building, vehicles and equipment. They climbed on to the roof, broke several windows, damaged the electric fences, broke the CCTV cameras, threatened to assault staff and stabbed one staff member in the hand to get hold of a key. They lifted the paving bricks in the courtyard and used them to damage the premises and to keep the staff at bay. Mfuleni police as well as the Department of Correctional Services were called to assist to stabilise the situation.'

It is alleged that tasers were used to subdue the children.⁷⁰ In an action brought against the Department of Social Development that had transferred a number of children in the care system to this facility, it is alleged that this has resulted in, among other things:⁷¹

- ‘6.1. the unnecessary stigmatisation of children, not sentenced or awaiting trial, but detained at facilities designed and known for that purpose;
- 6.2. children being unnecessarily exposed to the influence of gangs;
- 6.3. children being placed at a greater risk of exposure to violence compared to the risk at one of the Centres; including the risk of full scale riots; and
- 6.4. children being geographically detained away from their communities and families when one of the [care] Centres is located near family and friends’.

The reasons for the increased accommodation of children in the care system in facilities intended initially to replace pre-trial detention in prisons are threefold, it is suggested. First, as noted, there were no

crime.) Setting aside the original sentence in respect of two of the children as inappropriate given that they were in need of care and the constitutional principle of deprivation of liberty as a last resort was not adhered to, and bearing in mind the deprivation of liberty already endured by the third accused, the original sentence as set aside and replaced with a caution and discharge. The judge is further scathing about the detention all three children in an awaiting trial facility, in contravention of the original order of the court, and that they were being held there without a valid warrant of detention (at para 36).

⁶⁹ Founding affidavit of John Smythe in *Justice Alliance of South Africa v Minister of Social Development Western Cape and others*, launched on 16 December 2013, and set down for hearing in March 2014. The papers for the applicants are available on the Justice Alliance for South Africa website (www.justicealliance.co.za).

⁷⁰ See too "Children who were allegedly shocked with electrified riot gear at a Cape Town facility were not all juvenile detainees but placed there by the state for care and protection", the chief magistrate at Wynberg Magistrate's Court said on Monday "The children who made complaints, and who were subsequently referred to Ottery Youth and Education Centre, were ... not facing criminal charges". (*Legalbrief* 16 October 2013). The magistrate referred the matter to the South African Human Rights Commission.

⁷¹ Founding affidavit supra (n69) at para 6. The incident is linked to a vast escalation in violence amongst street gangs currently sweeping through the Cape Flats.

barriers or hurdles to accommodating such children in the generic ‘child and youth care centre’ framework drafted in the Children’s Act (not even a minimum age for admission). Second, the process of transfer of those institutions that formerly resided under the Department of Education to the Department of Social Development has been contentious and, if the papers in the *Justice Alliance of South Africa* court action⁷² are to be believed, bordering on mischievous.⁷³ Third, the ‘myth’ that the children in secure care are just the same as the ones in the care system continues to hold dominance, and provides a convenient justification for placing both groups in the same institution.

3.3.4 Deprivation of liberty of children who have been ‘diverted’

It is apparent that children who have been diverted from the criminal justice system are also being admitted to secure care facilities. Badenhorst⁷⁴ provides information from the 11 BOSASA operated facilities (from amongst the 28 facilities operating secure care programmes) indicating that these numbers too are on the increase, having risen from 179 admissions in the year 1 April 2010 to 31 March 2011, to 429 admissions in the period from 1 April 2011 to 31 March 2012 (211 of these in Gauteng alone).⁷⁵

How could this be, one asks? Diversion, in its pure form, means channelling children *away* from the criminal justice system and the institutions linked to it (to avoid deprivation of liberty and contamination by other more hardened and seasoned youngsters in the criminal justice system), not steering children *into* it! But the seeds of this seemingly improbable development lie in the text of the Child Justice Act itself. Provision was made⁷⁶ for the possibility of ‘referral to intensive therapy to treat or manage problems that have been identified

⁷² Supra (n69).

⁷³ It is averred that only the functions are to be transferred but that the facilities themselves will remain with the Department of Education (presumably to be used for other purposes).

⁷⁴ Op cit (n13).

⁷⁵ This admission of children whose cases were diverted is confirmed in the founding affidavit in *JASA v Minister of Social Development* (n69 above). Badenhorst notes ironically that the number of children diverted to BOSASA offered programmes (a for-profit organisation and residential in nature) have increased during 2011/2012 as opposed to the decreases in the number of non-residential diversions being experienced by the non-profit organisations. She laments that the long standing service providers (not-for-profit) providing community services and non-residential programmes are being allowed to disintegrate.

⁷⁶ In s 53(4)(c) – emphasis added.

as a cause of the child coming into conflict with the law, which may include a period or periods of *temporary* residence'. (This type of diversion was indeed proposed already during the deliberations of the Law Commission, which was cognisant of programmes where such short term periods were required (such as allied to adventure therapy programmes and wilderness skills development programmes being developed or in existence at the time)).

However, by the time the parliamentary process had been concluded, the 'temporary' nature of the residence had become a period of up to two years where the child was aged below 14 years, and a period of up to four years where the child was aged between 14 and 18 years.⁷⁷

Given that this deprivation of liberty is ordered without the safeguards of a criminal trial and a formal sentencing process, which culminates in a high court review where the same period is imposed as a sentence in terms of s 76, this development must give cause for high concern, and its legality subjected to careful scrutiny and, if needs be, legal challenge. Also, there will likely have been no guarantee of legal representation for the child who is deprived of liberty via diversion, as is more or less compulsory in trials involving children likely to be deprived of their liberty as a sentence.

Lest the rose-tinted spectacles still remain in place, suffice it refer to the recent closure of a new multi-million rand Bhisho maximum security facility after allegations of rape, drug abuse, suicide and delinquency at the centre. It was closed after an urgent court bid by a children's court magistrate, assisted by Legal Aid SA.⁷⁸

4. Can we do better?

The founding affidavit in JASA describes an on-site inspection to a secure care facility thus:

'To obtain access to the facility where the children were, we were frisked twice, and taken through another three locked gates, the first being rotating bars as in Pollsmoor. In fact, the security procedures for entering seemed to me substantially more onerous than those required to visit a detainee in the Pollsmoor Youth Wing for men over 18 years of age ... the outside fence, which had a green tubular roll and electric cables on top, extended 1 metre below the surface to prevent tunneling We were shown the Security Control room linked to 16 CCTV cameras, which were currently being upgraded with 40 more cameras, 8 of them infra-red cameras which work in the dark Every classroom is locked and barred separately. When we were shown the classrooms and children, the teacher had physically to open the

⁷⁷ Section 53(6)(a)(i) and (ii). The Act does not indicate how a consecutive period of this length could at the same time be considered 'temporary'.

⁷⁸ *Legalbrief* 23 August 2013; see *S v Goliath* unreported, case number (CA&R36/2014) [2014] ZAECGH 4 (17 February 2014).

security gate to allow us to enter the classroom . . . In the dormitories there are no toilet doors. The dormitories are also locked and barred every night at bedtime . . . The buildings, exercise courtyard, and surrounds are all made out of brick and concrete, with high security fencing and spikes. There is a field adjacent to the facility, but we were not told if and when the children use it. Children are dressed in identical uniforms and escorted when they move between areas of the building by guards and childcare workers...[the] general impression of Horizon is that it is a prison-like lock down facility similar to the Pollsmoor Youth wing for over eighteens.⁷⁹

It seems that in the quest to limit detention in police custody and prisons in the child justice reform movement, the leeway was left for the development of prison-like institutions to take their place. Moreover, the tried and tested controls to limit unfettered discretion to admit children into detention facilities were jettisoned in relation to deprivation of liberty in child and youth care centres, the reformers having been lulled by promises of therapeutic environments that would be the polar opposite of prisons. Finally, deprivation of liberty in these institutions appears to be even less subject to judicial scrutiny and other forms of accountability (such as inspectorates and independent visitors), than the alternatives, which gives cause for great concern.

In short, both the 'last resort' and the 'shortest period of time' principle appear to be in jeopardy. With a further 18 facilities envisaged for the next medium term expenditure framework according to the National Development Plan as cited in Skelton,⁸⁰ there is a likelihood that this risk will escalate, rather than abate.⁸¹

⁷⁹ Founding affidavit supra (n69) at paras 94-105. The author has visited the facility and broadly speaking confirms this assessment.

⁸⁰ Op cit (n1).

⁸¹ Noting too that less than 600 children currently awaiting trial in prison require alternative accommodation; hence 18 new facilities must, to operate at capacity, draw in children for whom deprivation of liberty would not otherwise have occurred.