

**The Implementation of the Child Justice Act 75 of 2008: A case study of the diversion programme (vocational, educational or therapeutic) offered by Khulisa in the Ugu District**

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## **Abstract**

The dawn of democracy in South Africa saw a commitment from the African National Congress (ANC) government to address the ills of apartheid through establishing policies that would acknowledge children in conflict with the law as having agency and a voice that must be listened to. The Child Justice Act 75 of 2008 makes several provisions to deal with children in conflict with the law; diversion is one provision. This approach is not new, but previously there was no legal framework guiding it and programmes were implemented unevenly. The introduction of the Child Justice Act 75 of 2008 has provided a more structured approach.

The study analyses the implementation of the Child Justice Act 75 of 2008, by using a case study of the diversion programme (vocational, educational or therapeutic) offered by Khulisa in the Ugu district. In so doing, it explored the service provider's concepts and understandings of the Act and diversion programmes within the context of restorative justice. It also looks at the experiences, content and process of implementation/delivery of diversion programmes for children in conflict with the law by service providers. The study explored the nature of partnerships between service providers and the state in implementing diversion programmes of the Child Justice Act 75 of 2008.

The study employed a qualitative research methodology, relying on interviews that were conducted, as well as secondary written sources of data on the Child Justice System. These sources included journal articles, books, internet sources, government legislation, research and theses. The focus of the study was on Ugu District Municipality, on the south coast of KwaZulu-Natal. The study focused on implementation of the Child Justice Act 75 of 2008 with specific reference to diversion programmes (vocational, educational or therapeutic) offered by Khulisa. To analyse the data the study used qualitative and data analytical techniques, in particular content analysis.

One of the emerging conceptualisations from the findings is that the Child Justice Act 75 of 2008 calls for the entrenchment of restorative justice because this paradigm considers crime to be harmful, not only to the victims but to society. Hence strategies should involve the offender, victim and community, collectively, to identify and address the damage caused by the offence. This is so because children in conflict with the law are socio-economic victims

who have normalised crime as they are denied care and protection. Furthermore, the political, administrative, economic, technological, cultural and social environments in which implementation take place should be conducive to rehabilitation. Of equal importance is the co-operation between government departments and other organisations and agencies working with children in conflict with the law, to implement the Act.

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I dedicate this thesis to my late father, Sibusiso Stanley Doncabe.

## DECLARATION

Submitted in partial fulfilment of the requirements for the degree of Master of Social Science,  
in the Graduate Programme in Public Policy.

University of KwaZulu-Natal, Durban, South Africa.

I, Sithembiso Promise Doncabe, declare that:

1. The research reported in this thesis, except where otherwise indicated, is my original research.
2. This thesis has not been submitted for any degree or examination at any other university.
3. This thesis does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
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Student Name

\_\_\_\_\_  
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\_\_\_\_\_  
Name of Supervisor

\_\_\_\_\_  
Signature

## **List of Abbreviations**

ANC	African National Congress
CJS	Child Justice System
CSIR	Council for Scientific and Industrial Research
DCS	Department of Correctional Services
DSD	Department of Social Development
DOJ	Department of Justice
FGC	Family Group Conferencing
NGO	Non-Governmental Organisation
NPA	National Prosecuting Authority
PPP	Public Private Partnerships
RDP	Reconstruction and Development Plan
RJ	Restorative Justice
STS	Social Transformation System
STV	Silence the Violence
VOM	Victim Offender Mediation

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## **Chapter 1**

### **Introduction**

#### **1.1 Background to the Study**

Safodien (2010) notes that in South Africa the number of children involved in crime has increased significantly. Cilliers and Du Preez (in Safodien 2010: 251) state that, in some countries, 'juvenile offences currently account for 60-70% of all recorded crimes'. In South Africa, the Child Justice Act 75 of 2008 was passed on 1 April 2010 to protect the rights of children, as provided for in the Constitution (Department of Social Development, 2010). It uses a restorative justice approach in dealing with children in conflict with the law. Restorative justice is defined by Hargovan (2011: 67) as "a set of values and vision of social reform (that) places emphasis on the offender's personal accountability to those harmed by the offence directly or indirectly... an inclusive decision-making process that encourages active involvement of key participants with the goal of remedying the harm caused by the offence". According to Steyn (2003: 75), "by applying the principles of restorative justice, various initiatives and alternatives to imprisonment, such as diversion programmes, have been designed and implemented to deal more effectively with South Africa's young offenders".

Some studies have already been conducted in South Africa around diversion programmes. Maepa (2007: 48) conducted a study that explored magistrates' and prosecutors' views on restorative justice. He found that in all the nine provinces of South Africa, diversion programmes that use the diversion option of educational, therapeutic and vocational programmes provided by service providers have grown to such an extent that the criminal target of 10 000 was surpassed in 2006. In the 2007 financial year 13 785 individual beneficiaries were served and 9 820 youths reached through interactive workshops. A diversion follow-up study conducted in 2007 in the nine provinces of South Africa found that 93.3% of participants did not re-offend within the first 12 months following completion of the diversion option. Maepa (2007: 48) pointed out that a further follow up study, 84% of programme participants did not re-offend within a three-year period. These findings point to the effectiveness of this kind of diversion programme in rehabilitating children in conflict with the law.

In another study, Steyn's (2010:7) research on approaches to diversion of child offenders in the Free State found that, although diversion is not a new concept and initiative in South

Africa, over the past two decades programmes were introduced and implemented in quite a haphazard and disjointed manner. This was because there was no legal framework that guided the implementation or the quality of diversion interventions. However with the introduction of the Child Justice Act 75 of 2008 in April 2010 a more regulated and structured legal response was provided for children in conflict with the law. The research explored the theoretical assumptions, methods and strategies, value/benefits, challenges/limitations of four local South African diversion strategies. He found that children are subjected to a standardised programme, regardless of the type of offence they have committed. Also in poverty-stricken environments, it appears that life skills training struggles to address economically motivated offences. Practice suggests that children with hardened negative attitudes and chronic offending do not benefit from the approach. Parents feature as a facilitating and inhibiting factor in diversion practices (Steyn 2010).

Khumalo (2010:1), in her study conducted at Port Shepstone in the Ugu District, explored the various elements of the diversion programme and, more specifically, asked: what are the criteria used by prosecutors and probation officers for diverting a juvenile offender within the justice system? How is a juvenile offender placed in the appropriate diversion programme? What are the different diversion programmes within the justice system? The study interrogated the discursive processes that have shaped the diversion programme, by way of closely examining the processes and criteria used for diverting juvenile offenders. The findings of the study, through interviews with probation officers and prosecutors, revealed that most of the justice personnel, the probation officers and the prosecutors find diversion to be the best way of punishing and rehabilitating the juvenile offender. The reasons they gave for being in favour of diversion are that the juvenile offender is given the chance to re-learn and re-evaluate what are acceptable values and actions within society. Often, the idea of the difference between “right” and “wrong” is used to capture this view. Diversion for them represents a “second chance” for a “normal life”, “an opportunity” to (re)learn accepted societal values and conducts. There is a discourse that affirms diversion programmes as spaces where juvenile offenders are taught societal values and norms afresh (Khumalo 2010:118).

This study therefore seeks to add to these studies on the implementation of diversion programmes, specifically focusing on the experience of service providers in implementing one type of diversion programme of the Child Justice Act 75 of 2008: A case study of the

diversion programmes (vocational, educational or therapeutic) offered by Khulisa in the Ugu District will be researched. The study seeks to explore the experiences of the service providers' in implementing their diversion programme in relation to its benefits and limitations to child offenders, as well as their partnership experiences with other departments and organisations in carrying out their mandate.

The broader objectives of the study are to critically analyse:

- a. Service providers' conceptions and understandings of the Child Justice Act 75 of 2008 and diversion programmes within the context of restorative justice
- b. The experiences, content and process of implementation/delivery of diversion programmes for children in conflict with the law by service providers
- c. The nature of partnerships between service providers and the State in implementing diversion programmes of the Child Justice Act 75 of 2008

Key questions to be asked:

- a. What are the conceptions of the service providers of the Child Justice Act 75 of 2008?
- b. What are the understandings of service providers of diversion programmes?
- c. How do service providers implement diversion programmes?
- d. What is the content and processes of Khulisa's diversion programme?
- e. What are the experiences of Khulisa in delivering their programme to children in conflict with the law?
- f. What are the experiences of Khulisa in their partnership with other departments and NGOs in implementing diversion programme?
- g. What are some of the successes and challenges of Khulisa in implementing the diversion programmes?

## 1.2 Research design

The present study employs a qualitative research methodology which is naturalistic, holistic and inductive, meaning that phenomena are studied in their natural settings, without manipulation, and as interrelated wholes (Terre Blanche & Durrheim, 1999:43). A qualitative method gave a rich, thick and in-depth interpretation (ibid). This approach was appropriate for this research as it seeks to gain insight from the service providers' experiences from an insider perspective.

Ugu district and the service provider Khulisa were the cases in this study. Case study designs are used when attention is focused on the in-depth examination of one or a few cases (Maxfield & Babbie 2009: 133). It used in-depth exploration of examples of a phenomenon and drew on a variety of sources of data. Case studies had specific importance in researching policy matters as they examined practices. This design was useful to extend and validate theory (De Vos *et al.*, 2005: 273), in this case the resulting methods of local approaches to diversion programmes.

Non-probability sampling was used in this study. According to Terre Blanche, Durrheim & Painter (2006: 139), non-probability sampling refers to "any kind of sampling where the selection of elements is not determined by the statistical principle of randomness". Specifically, purposive sampling was used in this study which, according to Singleton *et al.*, (cited in De Vos, 2005: 207) is the "type of sample based entirely on the judgement of the researcher, in that a sample is composed of elements that contain the most characteristic, representative or typical attributes of the population". The study focused on Ugu district municipality. Khulisa was the only service provider in the district that delivers an accredited diversion programme. The people in Khulisa who were interviewed were those who have been implementing Khulisa's diversion programme for a minimum of two years, because it has been three years since the implementation of the Child Justice Act 75 of 2008.

Semi-structured interviews were used to collect data. According to De Vos (2005), semi-structured interviews are defined as those organised around the areas of particular interest, while still allowing considerable flexibility in scope and depth. The people that were interviewed are those who are involved in delivery of the diversion programme in Khulisa. The Ugu district office has two social workers, three programme facilitators and a service

office manager, who were interviewed. An interview schedule was used (Appendix 1). These interviews were recorded to ensure accuracy and validity as the researcher sought to capture the exact meanings, experiences and interpretation of the respondents from their own perspective.

The interviews were transcribed and analysed using content analysis. According to Webber (1990:9), content analysis is “a research method that uses a set of procedures to make valid inferences from text”. In this research, particularly, it was used to describe themes in content. Potentially, content analysis is one of the most important research techniques in social sciences as “it views data as representations not of physical events, but of texts, images, and expressions that are created to be seen, read, interpreted and acted on for their meanings and must therefore be analysed with such uses in mind” (Webber, 1990:9).

### **1.3 Overview of the research report**

Chapter 1 of this study covers the introduction and background to the study. Chapter 2 focuses on the legislative framework of the Child Justice System in South Africa and internationally, in general, and the Child Justice Act 75 of 2008, in particular. Chapter 3 covers the case study: Khulisa and Ugu District, where the research took place. Chapter 4 presents the theoretical framework upon which the study is based. It looks at the definitions of public policy and public policy implementation. It explores the 5C protocol in order to understand implementation. It looks at the partnership of Khulisa, which is a voluntary sector, partnering with government to deliver a service of diversion and at, Restorative Justice, which underpins the Child Justice Act 75 of 2008. Chapter 5 presents the findings and the analysis. Chapter 6 is the discussion and conclusion. It summarises the main findings of the study in relation to the broad questions of the study.

## **Chapter 2**

### **Legislative Framework of the Child Justice Act 75 of 2008**

#### **2.1 Introduction**

This chapter focuses on the legislative framework and guidelines that inform the Child Justice System in South Africa, broadly, and specifically in relation to the implementation of the diversion programmes of the Child Justice Act 75 of 2008. Different elements of legislation from international agreements, guidelines and conventions on child justice will be used e.g. The United Nations Convention on the Rights of the Child and The Riyadh Guidelines. The African Charter on the Rights and Welfare of the Child will be used. South African legislation on child justice starts with the Constitution of South Africa, the White Paper for Social Welfare on children and partnerships, the White Paper on Correction in south Africa on child justice and partnerships, the Criminal Procedure Act 51 of 1977, the Probation Services Amendment Act 35 of 2002, Children's Act 38 of 2005, Correctional Services Act 111 of 1998 and the Child Justice Act 75 of 2008. All this legislation is related to child justice and partnership with NGOs to implement child justice and diversion programmes, underpinned with restorative justice. They will also be used for analysis.

#### **2.2 International Agreements, Guidelines and Conventions on Child Justice**

Up until the 18th century, children in conflict with the law, were not recognised as having any special status and their age did not afford them any special protection. During the 1600s and 1700s in England, young offenders were kept in the same prisons and subjected to the same punishments as adult offenders (Peacock, 2008: 61). The first legislation that established a separate child justice system for children in conflict with the law was the 1899 Illinois Juvenile Court Act (1899 Ill Laws 131 et Seq). This family court stated that “the delinquent child had ceased to be a criminal and had the status of a child in need of care, protection, and discipline directed toward rehabilitation” (Cox cited in Cox, Allen, Hanser & Conrad, 2007).

Since then, much jurisdiction has followed the Illinois example and enacted legislation that deals with aspects of child justice, as well as establishing separate institutions for the treatment of children in conflict with the law (September, 2006: 65). This has set the stage for an authentic international overhaul of child justice (September, 2006: 65). Together with many regional and international treaties, conventions and charters, state parties have been

obliged to examine existing provisions at the national level, with a view to getting into alignment with international good practice, with the overriding guiding principle being “the best interest of the child”, within a human rights framework (September, 2006: 65). This means that ultimately, children in conflict with the law should be seen as children, tried as children, and punished as children (ibid). Children’s rights have been formally recognised and there is no longer a legal question as to whether or not the rights and fundamental freedoms in the United Nations Declaration of Human Rights also applies to children (September, 2006: 65).

The Child Justice Act 75 of 2008 complies with a number of international agreements and conventions of which the South African government is a signatory. Some of these are the 1985 United Nations’ Standard Minimum Rules on the Administration of Juvenile Justice (Beijing Rules), the 1990 United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), which were aimed at emphasising the need for progressive delinquency prevention policies, and the 1989 United Nations Convention on the Rights of the Child (UNCRC) of 1989 (Gallinetti 2009:648). This was the first time in international law that children were treated as subjects and beneficiaries of recognisable sets of human rights. The Convention stated that children should be acknowledged as having agency and as having a voice that must be listened to. The South African Constitution of 1996 sets out principles that are applicable to children in conflict with the law in Chapter 2 Section 28 (1)(g) in the section on the Bill of Rights (South African Government 1996:14). The Child Justice Act 75 of 2008 is “arguably a pre-eminent example of legislation that gives effect to the requirements of Article 40 of the UNCRC. It creates a separate criminal justice system for children; it ensures alternative dispositions to the formal system and it sets norms and standards for processes such as diversion, legal representation and sentencing, to name a few” (Gallinetti, 2009:648).

### **2.2.1. The United Nations Convention on the Rights of the Child (UNCRC)**

The United Nations Convention on the Rights of the Child (1989) (Convention) sets out guidelines for creating and maintaining human rights within child justice systems, as well as dealing with the administration of child justice itself. The Convention assists countries in the creation and delivery of children’s rights-based programmes and services. Government and state agencies have an obligation to develop laws and procedures that deal specifically with

youth offenders. In South Africa, these laws and procedures have influenced decisions regarding diversion programmes (Sloth-Nielson in Sloth-Nielson & Gallinetti, 2004: 22, 26).

The Convention is based on four primary principles: best interests of the child, non-discrimination, child participation and the right to survival and development. The best interest of the child principle aims to serve as a guideline in all matters involving children, and all matters that are relevant to child justice, affecting decisions relating to administration, policy formation and diversion. The non-discrimination principle is considered to be central to the Convention and states that no child should be discriminated against. The principle of child participation (Article 12) has given children a chance to have their say in decisions concerning them, whilst ensuring and providing for competent legal representation for children who appear in court. The right to survival and development principle applies to all children, especially those that have been deprived of their freedom. It focuses on the health and well-being of children, as well as on their rights to recreation, leisure and health, social and welfare services (UNCRC, 1989: 10-13).

Article 40 of the UNCRC states that:

*2. To this end, and having regard to the relevant provisions of international instruments, State parties shall, in particular, ensure that:*

*(a) No child shall be alleged as, be accused of, or recognised as having infringed the penal law by reasons of acts or omissions that were not prohibited by national or international law at the time they were committed;*

*(b) Every child alleged as, or accused of, having infringed the penal law has at least the following guarantees:*

*(i) To be presumed innocent until proven guilty, according to law;*

*(ii) To be informed promptly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents, or legal guardian*

*3. State parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as, having infringed the penal law, and, in particular:*



- (a) The establishment of a minimum age which children shall be presumed not to have the capacity to infringe the penal law;*
- (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.*
- 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.*

(UNCR, 1989:21)

Article 40 of the Convention deals mainly with the administration of child justice and states that state responses to child offending have to treat children in a way that will not only promote their sense of self-worth and dignity, but also promote the reintegration of children into society. Various practices have been designed in South Africa that are non-punitive and reintegrative. An important example of such a practice is diversion (UNCRC, 1989: 20). The reintegration of children into a community can be successful with the help of restorative justice programmes such as Family Group Conferencing and Victim Offender Mediation.

Important aspects regarding child justice are mentioned in Article 40(3) of the Convention. Firstly, government and state agencies are encouraged to develop laws and procedures that deal specifically with child offenders. In South Africa, these laws and procedures influence decisions regarding diversion programmes and pre-trial community services. The second aspect can be found in Article 40(3)(a), which states that there should be a minimum age and that all children who are younger than specified cannot be recognised as having criminal capacity. In South Africa, the minimum age used to be seven years, but with the implementation of the Act has been raised to 10 years. A third and very important aspect deals with the diversion of child offenders. Article 40(3)(b) states that, wherever possible, government agencies should use judicial proceedings as a last resort and that in such cases the human and legal rights of the child should be safeguarded. Due to this provision, concepts of diversion are no longer seen as discretionary services provided for by welfare and private organisations. The diversion of a child however, can only take place once he or she has

accepted responsibility and guilt for the offence committed. This aspect has had a major influence on

South African practice and policy; the Act dedicates an entire chapter to the diversion of child offenders (UNCRC, 1989:21).

### **Other relevant guidelines**

Other relevant guidelines and rules can be found in the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) and the United Nations Standard Minimum Rules for the Protection of Juveniles Deprived of their Liberty (Minimum Standards). The Riyadh Guidelines deal mainly with children and sets out strategies that will prevent them from committing crimes. Based on social policies that focus on children, their families, and their communities, some of the most important principles are the importance of family involvement, education and more attention being paid to the emotional, cultural and psychological life of the child, as well as the importance of community involvement, community-based solutions, financial support by governments and NGOs offering services to young people.

Fundamental principles, as stated in the Riyadh Guidelines (1990)

- 1. The prevention of juvenile delinquency is an essential part of crime prevention in society. By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes.*
- 2. The successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for, and promotion of, their personality from early childhood.*
- 3. For the purposes of the interpretation of the present Guidelines, a child-centred orientation should be pursued. Young persons should have an active role and partnership within society and should not be considered as mere objects of socialisation or control.*
- 4. In the implementation of the present Guidelines, in accordance with national legal systems, the well-being of young persons from their early childhood should be the focus of any preventive programme.*

*5. The need for, and importance of, progressive delinquency prevention policies and the systematic study and the elaboration of measures should be recognised. These should avoid criminalising and penalising a child for behaviour that does not cause serious damage to the development of the child or harm to others.*

(Riyadh Guidelines, 1990:721)

The Beijing Rules of 1985 set out the most fundamental elements in an effective juvenile justice system, including aspects such as the minimum age of criminal capacity, the aims of juvenile justice, the scope of discretion, diversion and adjudication and the sentencing of offenders. The Minimum Rules are mainly responsible for the management of child offenders and deal with children who have been deprived of their liberty. As far as possible, children under the age of 18 years should not be deprived of their liberty and, where this is done, it should be done as a measure of last resort. These rules are applicable, without any form of discrimination as to race, colour, age, sex, language, religion, cultural belief or practices. All children should be respected and treated equally (Beijing Rules, 1985:1).

### **International Child Justice Reform Initiatives**

Canada's Juvenile Justice Act of 1965 indirectly set the legal foundation for court-ordered mediation between victims and young offenders. During the 1980s and 1990s, Canadian aboriginal sentencing and healing circles developed and aimed to empower the community affected by the offending behaviour. The Belgian federal government also introduced modifications to the Juvenile Justice Act in 2005, which gave prominence to restorative approaches such as mediation and conferencing (Miers cited in Roche, 2004: 451, 455).

With the passing of the Children, Young Persons and Their Families Act in 1989, New Zealand became the forerunner in juvenile justice reform efforts internationally; setting out the general principles that dealt with government intervention, the lives of children and youth that came into conflict with the law, as well as the management of youth justice. This system was strongly influenced by aboriginal models (such as Maori concepts of conflict resolution), and an attempt to shift towards a justice approach that would have positive outcomes for children who come into conflict with the law (Morris & Maxwell in Roche, 2004: 84). The main principle of this Act is to "encourage and support the family as the principal arbiter of decisions affecting its members" (Miers cited in Roche, 2004: 459), whilst also promoting the

use of diversion in both courts and institutions. The most popular approach is FGC that directly involves the individuals affected by the crime (Muncie, *et al.*, 2006: 244).

Diversion of youth offenders, such as court cautions, were first initiated in Britain from the 1960s onwards (Koffman & Dingwall, 2007). With the Children and Young Persons Act of 1969, the notion of using diversion was introduced as a means of keeping child offenders out of the formal Child Justice System (Newburn in Maguire *et al.*, 1997: 641). Various other countries such as New Zealand, Australia, Canada and the USA also make use of diversion for this purpose as well as rehabilitating children and encouraging reintegration back into their families and communities. When diversion was first practised, interventions were based within institutions and mainly designed to provide moral re-education and treatment in order to prevent recidivism. Today, however, there is a move towards more community-based interventions (Monyatsi, 2008: 8).

The international instruments and reforms that have been discussed concur in their desire to control the treatment of child offenders, to reduce their chances of coming into contact with the Child Justice System and to involve members of the family and community in restorative justice-type programmes. Thus it is evident that diversion and the involvement of families when dealing with children in conflict with the law is quickly becoming an essential feature of child justice systems, both nationally and internationally.

## **2.3 African Legislation on Child Justice**

### **2.3.1 African Charter on the Rights and Welfare of the Child**

The Convention also heavily influenced the African Charter on the Rights and Welfare of the Child (African Charter) implemented in 1999. It is used to supplement and enhance the Convention. The African Charter also promotes restorative justice values in all aspects of children's rights and welfare. It has had an exceptional influence and impact on the way that the government and its agencies deal with the punishment of child offenders. "Diversion", "restorative justice" and "reintegration" are just some of the key concepts that have been integrated into South African child justice systems (Gallinetti, Muntingh & Skelton in Sloth-Nielson & Gallinetti, 2004: 32).

The Child Justice Act 75 of 2008 (herein referred to as the Act) commits itself to the provisions made in the African Charter by incorporating indigenous values in terms of the

treatment of youth offenders, as well as including restorative justice elements such as diversion and Family Group Conferencing. In addition, *ubuntu* has been mentioned as a key aim of the Act. Deeply embedded in African values and beliefs, the theory of *ubuntu* reinforces communitarianism and states that “one’s personhood depends on one’s relationship with others” (Sloth-Nielson & Gallinetti, 2011: 70). Thus youth offenders are seen as rooted in their families and communities. *Ubuntu* values incorporated into the Act include the protection of youth offender human rights, as well as fostering their sense of dignity and self-worth. Lastly, the Act moves away from retributive procedures to make way for more rehabilitative practices to take place. The Act can therefore be seen as an “Africanised statute, based on the prominence given to restorative justice and *ubuntu*” (Sloth-Nielson & Gallinetti, 2011: 71, 85).

Thus all the international instruments discussed strive towards one goal and that is to create an “ideal” child justice system. A top priority is the promotion of the well-being of children and the protection of their rights (Skelton & Tshehla, 2008: 26). The main focus of any child justice system, however, should be to divert child offenders away from formal criminal procedures. In cases of diversion, children should be treated according to their individual needs, with the involvement of parents, families and communities. If the child cannot be diverted and must be processed through the Child Justice System, he or she must have legal representation and be encouraged to participate in the decision-making process (Skelton & Tshehla, 2008: 26). Presiding officials should be guided by the principles of proportionality and always act in the best interests of the child. Any hearings involving children should take place in an “atmosphere of understanding” (Skelton & Tshehla, 2008: 26).

Efforts to establish a separate child justice system in South Africa can be traced back to the 1980s. However, it was only with the ratification of the Convention on 16 June 1995 that South Africa embarked on the journey to develop separate legislation for children that come into conflict with the law (Monyatsi, 2008: 22). As of 2009, 193 countries have ratified and accepted the Convention, including Australia, Canada, India, Iran, New Zealand, Saudi Arabia, Ireland and the United Kingdom. There are only two countries that have yet to sign the treaties - Somalia and the United States.

## **2.4 South African Legislation and Children, Child Justice and Partnerships**

### **Background**

In South Africa, while child justice reform has a long history dating back to the pre-colonial era, it is intricately linked to social and political developments at various points in the country's history. During the 1970s and 1980s, thousands of children were subjected to torture, detention without trial and arbitrary and political arrests. Ultimately, the realisation that children have to be dealt with differently is apparent in the many reform movements both in South Africa and internationally, with the turning point in South Africa dating from the country's democratic transition, ushering in a new era in child justice reform efforts (Botha, 2007).

In South Africa large numbers of children in conflict with the law are socio-economic victims denied their rights to education, health, shelter, care and protection. Many of them have had little or no education; some have left their homes and taken to the streets to escape from violence and abuse at the hands of their families. Pelsler (2008:1) explains that these negatively socialised, excluded youth, who constitute a significant proportion of South Africa's population have normalised violence and crime (illegitimate pathways) because they cannot access legitimate pathways. Irrespective of the absence of criminal intent in status offences, they can lead to confrontational contact with the Criminal Justice System (Pelsler, 2008:1).

In his opening speech to the first democratically elected parliament in 1994, Nelson Mandela set the stage for juvenile justice reform in South Africa:

*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 the children of the nation and ensure that the system of criminal justice must be the very last resort in the case of juvenile offenders (Skelton, 2002).*

### **2.4.1 The Constitution of the Republic of South Africa and Child Justice**

The Constitution recognises that children are particularly vulnerable to violations of their rights and that they have specific and unique interests (RSA, 1996). A child, according to the Constitution, is defined:

*'child' means a person under the age of 18 years*

Provision is made in section 28 of the Constitution, therefore, for the protection of specific rights of children. However, they are also entitled as ordinary inhabitants of the country to the general protection and rights afforded by the Constitution to all citizens of the country. In this regard they are guaranteed the right to equality, the right to education and the right to personal autonomy, constructed from the rights to privacy, freedom of religion, freedom of expression and freedom of association which, read together, are the most important (RSA, 1996).

With regard to the relevant child-specific rights in Section 28 of the Constitution

*(1) Every child has the right -*

*a) to a name and a nationality from birth;*

*b) to family care or parental care, or to appropriate alternative care when removed from the family environment;*

*c) to basic nutrition, shelter, basic health care services and social services;*

*d) to be protected from maltreatment, neglect, abuse and degradation;*

*e) to be protected from exploitative labour practices;*

*f) not to be required or permitted to perform work or provide services that -*

*i) are inappropriate for a person of that child's age; or*

*ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development.*

More specifically, with regard to Child Justice Section 28 of the Constitution, children should:

*g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate time, and has the right to be -*

*i) kept separately from detained persons over the age of 18 years; and*

*ii) treated in a manner, and kept in conditions, that take account of the child's age;*

*h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result;*

#### **2.4.2 White Paper for Social Welfare and Children, Child Justice and Partnerships**

The vision put forward in the White Paper (Ministry for Welfare & Population Development, 1997:7) for Social Welfare is the creation of “a welfare system that facilitates the

development of human capacity and self-reliance within a caring and enabling socio-economic environment". The mission of the social welfare strategy is "to serve and build a self-reliant nation in partnership with all stakeholders through an integrated social welfare system which maximizes its existing potential, and which is equitable, sustainable, accessible, people-centred and developmental".

According to the White Paper the social security system of South Africa is fairly developed with a rich institutional framework of welfare services being delivered by Non-Governmental Organisations, such as voluntary welfare organisations and community-based organisations, to name a few (Ministry for Welfare & Population Development, 1997:7). Khulisa is an NGO that partners with the Department of Social Development to deliver diversion services to children in conflict with the law.

According to the White Paper (Ministry for Welfare & Population Development, 1997:8), the goals of the new social welfare system, with regard to partnerships in delivering welfare services, are:

- *To facilitate the provision of appropriate social welfare services to all South Africans, especially those living in poverty, those who are vulnerable and those who have special needs. These services should include rehabilitative, preventative, developmental and protective services and facilities, as well as social security, including social relief programmes, social care programmes and the enhancement of social functioning;*
- *To promote and strengthen the partnership between government, the community and organisations in civil society and in the private sector who are involved with the delivery of social services;*
- *To promote social development inter-sectorally, both within social development departments and in collaboration with other government departments and non-governmental stakeholders;*
- *To give effect to those international conventions of the United Nations that have been ratified by government and are pertinent to developmental social welfare; and*
- *To realise the relevant objectives of the Constitution of the Republic of South Africa and the RDP.*

The White Paper (*ibid*:8-9) puts forward the following eleven principles that should inform all social welfare delivery (including social welfare services):



- *Securing basic welfare rights*: Commitment to creating the conditions necessary for the progressive achievement of every citizen's rights to social security and social welfare services, through a combination of private and public financing;
- *Equity*: Distributing resources equitably and in a way that addresses racial, gender, geographical, urban/rural and sector disparities;
- *Non-discrimination*: Service delivery that promotes non-discrimination, tolerance, respect for diversity and inclusion of all groups;
- *Democracy*: The design and implementation of programmes in a manner that is informed by participation by all those involved;
- *Human rights*: Designing programmes and delivering services in a way that is congruent with human rights and the fundamental freedoms as articulated in the Constitution;
- *Sustainability*: Designing interventions so that the focus is on priority needs and interventions are financially viable, cost-efficient and effective;
- *Quality services*: Striving for excellence in social welfare provision;
- *Transparency and accountability*: Ensuring that welfare organisations and institutions are accountable and transparent at all levels;
- *Accessibility*: Welfare organisations and institutions should be accessible to all those in need and action should be taken to build access for all where there are barriers;
- *Appropriateness*: Social welfare programmes, methods and approaches are to be appropriate and responsive to the range of cultural, social and economic conditions in communities; and
- *Ubuntu*: Developing and adhering to the principle of 'caring for each-others' wellbeing' (Ministry for Welfare & Population Development, 1997:8-9).

The White Paper for Social Welfare (Ministry for Welfare & Population Development, 1997:54) commits government to "giving the highest priority to the promotion of family life, and the survival, protection and development of all South African children". These children are those that are denied their most basic human rights, which could result in their growth and development being impaired and hence finding themselves in conflict with the law (ibid: 59). The White Paper (ibid:62) talks about programmes that will be developed to meet the special needs and problems of youth. These programmes are to be integrated into other generic services where they are appropriate. Within the category of children with special needs are

juvenile offenders and their programmes were to be developed in partnership with other stakeholders (ibid:66).

The White Paper emphasises that social welfare services should be conceived and delivered in a way that treats a child's situation as an outcome of their family and community situation (ibid:61). In order to realise children's rights to social services, it is necessary to take into account the developmental needs, not only of vulnerable children themselves, but also of the relevant family and community. The call is for child welfare services to be delivered as part of a comprehensive package of services to vulnerable families (*ibid*:54). The aim of family and child welfare services is "to preserve and strengthen families so that they can provide a suitable environment for the physical, emotional and social development of all their members" (Ministry for Welfare and Population Development, 1997). Accordingly, residential facilities are to be used as a last resort for children in need of alternative care. Programmes should aim to re-integrate children into the family (or at least the community) if they have spent time in a residential facility. The White Paper offers some very broad guidelines for the delivery of social welfare services to each of the groups of children in conflict with the law. It also lists a number of general guidelines that are seen to apply to all categories of children living in difficult circumstances. The latter guidelines are:

- to protect children's rights;
- to address the fundamental cause of family disintegration;
- to foster self-reliance, capacity and empowerment;
- to concentrate interventions "first on prevention, by enhancing family functioning, then on protection, and lastly on provision of statutory services" (*ibid*:55);
- to deliver services in an integrated, comprehensive way, in keeping with the developmental approach;
- to make provision for the needs of families and children according to their different stages of family development; and
- to strive for the meaningful participation of all family members in activities aimed at promoting their wellbeing.

#### **2.4.3 The White Paper on Correction in South Africa and Child Justice and Partnerships**

According to the White Paper on Correction in South Africa (2004), South Africa has unique factors contributing to crime. The 1993 Government of National Unity inherited the entire public service, which was racially based, with disproportionate distribution of criminal justice

resources. The system could not cope with the demands created by the need to provide services to all South Africans. With the political transition there were many expectations which government could not deliver immediately. These high and unrealistic expectations associated with transition have contributed to the justification of crime. In South Africa, violence has been an acceptable means of solving social, political and even domestic conflicts. Youth have also been marginalised and this has led to many young people being at risk and coming into conflict with the law (Commissioner of Correctional Services, 2004:51).

*The Department's position on children in detention is that different age groups of children require different service delivery and should, as far as possible, be accommodated separately. The Department must align its policy with that of the other integrated justice system departments to ensure that appropriate policies are in place for the various age categories of children. Children should not be in correctional centres, and should as far as is possible be diverted from the criminal justice system. Where this is not an option, they should be accommodated in secure care facilities that are designed for children. (Commissioner of Correctional Services, 2004:78)*

*Children under the age of 14 have no place in correctional centres. Diversion, alternative sentences and alternative detention centres run by the Department of Social Development and the Department of Education should be utilised for the correction of such children. Where children are incarcerated, trained staff and facilities designed for children and the youth must be provided. Children must, at all times, be separated from adult inmates. The vulnerability of children and the youth to pressure, force and abuse by adult inmates must be prioritised in the training of all correctional officials. Any breach of this should be considered a serious offence in the Department's disciplinary code (Commissioner of Correctional Services, 2004:79).*

No correctional system can achieve its objectives if it does not have a healthy range of partnerships. The relationships between the Department of Correctional Services (DCS) and the community, community-based organisations, NGOs and faith-based organisations are inherent to the successful achievement of the rehabilitation and reintegration of offenders. Hence the DCS's services are underpinned with restorative justice. The partnership approach that is required in this regard must be managed through formal arrangements and the on-going monitoring and evaluation of such projects and work by such organisations in order to

ensure quality service delivery to offenders. At the same time, the Department should be involved in partnerships in the community, such as in social crime prevention, moral regeneration and poverty alleviation programmes (Commissioner of Correctional Services, 2004:85).

#### **2.4.4 Criminal Procedure Act 51 of 1977 (as amended)**

This was the general law applied in managing all matters related to criminal law, including that of child offenders prior to 1994. The law provided the legislative framework and procedure for the effective management of criminal matters. As South Africa transformed into a more democratic country during the mid-1990s, the Act was amended to be more accommodating to the needs of child offenders. Key aspects that reflected this transformation included the creation of juvenile courts at district magistrate court level that were separate from other criminal courts, the creation of after-hours courts to minimise the time spent by young offenders in police custody and the greater use of diversion options for first-time child offenders. The Act, however, had its limitations, in that it did not ensure consistency and fairness in the management of children as offenders in the CJS. In view of these limitations, a number of lobby groups, such as the Child Justice Alliance, initiated a call for a separate legislation that deals exclusively with the needs of children in conflict with the law (Department of Justice, 1977).

#### **2.4.5 Probation Services Amendment Act 35 of 2002**

The Act provides the legal framework for the management of offenders placed under the supervision of a probation officer. The amendment of the Act introduced a new occupational class of assistant probation officers. The Act states that the Minister of Social Development may appoint people as assistant probation officers to monitor and supervise people in conflict with the law. This is their key performance area. The role of assistant probation officers is further entrenched in Section 4A (2) of the Probation Services Amendment Act, which states that:

*(a) the monitoring of a child subject to home-based supervision*

*(b) the monitoring of the persons subject to supervision*

The Act also allows the assistant probation officer to fulfil the role of family finder in cases whereby family members have not been located prior to the child's first appearance in court. The appointment of assistant probation officers has the potential to enhance the work of probation services, by making it more efficient and effective because in many cases probation

officers are overloaded with work and this may reduce their effectiveness in their facilitation and monitoring of probation programmes for child offenders. The additional support from assistant probation officers may ensure fulfilment of key functions in instances whereby children have been placed in home-based supervision (Department of Social Development, 2002).

#### **2.4.6 Children's Act 38 of 2005**

The Children's Act 38 of 2005 provides specifically for the establishment of children's courts and for the appointment of commissioners of child welfare, so that they are certain to have protection and welfare. This Act provides a more comprehensive management of the welfare of children (0-18 years). The relevance of this Act in the management of children in conflict with the law is the provision in the Act that allows for the conversion of criminal matters involving children from criminal court to children's court.

According to Section 42 (8) of the Children's Act 38 of 2004:

*The children's court hearing must, as far as practicable, be held in a room which –*

*(a) is furnished and designed in a manner aimed at putting children at ease;*

*(b) is conducive to the informality of the proceeding and the active participation of all persons involved in the proceedings, without compromising the prestige of the court;*

*(c) is not ordinarily used for the adjudication of criminal trials; and*

*(d) is accessible to disabled persons and persons with special needs*

(Department of Social Development, 2008:37).

The social worker who has assessed the child plays a critical role in making sure that the matter is converted from criminal court to children's court (Department of Social Development, 2005).

#### **2.4.7 Correctional Services Act 111 of 1998**

This Act focuses mainly on the management of offenders within the country's disciplinary system. The Act allows for the detention of children in prison, but makes it clear that all children younger than 14 may not be held in prison. The Act also makes reference to ensuring opportunities for young imprisoned offenders to receive further education and training during the period that they are in prison. Imprisonment of child offenders is taken as a last resort.

Section 19 of the Act states that:

*1(a) Every prisoner who is a child and is subject to compulsory education must attend and have access to such education programmes.*

*(b) Where practicable, children who are prisoners not subject to compulsory education must be allowed access to educational programmes.*

*(2) The Commissioner must provide every prisoner who is a child with social work services, religious care, recreational programmes and psychological services.*

*(3) The Commissioner must, if practicable, ensure that prisoners who are children remain in contact with their families through additional visits and by other means*

(Department of Correctional Services, 1998:14).

The Act also allows for the placement of sentenced offenders under community correctional supervision whereby they would complete their sentences under the supervision of a correctional officer. Completing their sentences in the community can be very beneficial to child offenders, as they can maintain contact with their families and get an opportunity to complete their schooling in their community instead of correctional services (Department of Correctional Services, 1998).

## **2.5 The Child Justice Act 75 of 2008**

### **Conceptions of Child Justice**

South Africa's Child Justice Act 75 of 2008 aims to mirror the provisions in international instruments and guidelines and has been influenced by legislation in countries such as New Zealand, Australia, England and Canada. The Act deals with issues such as age and criminal capacity, pre-trial detention, pre-trial assessment, the preliminary enquiry, diversion, the child justice court, sentencing, legal representation and the expungement of records. The Act applies to three categories of children: children below the age of 10 years, children older than 10 years but younger than 18 years, and individuals older than 18 years, but younger than 21 years (Department of Social Development, 2010: 16). The criminal offences that are dealt with in the Act are divided into three schedules, depending on the severity of the offence. Schedule 1 consists of less serious offences such as public indecency, common assault, blasphemy, *crimen injuria*, theft (value must be lower than R2500) and trespassing. Schedule 2 offences include robbery, culpable homicide, public violence, arson, theft (value must be more than R2500) and abduction. More serious offences such as treason, murder, kidnapping and rape are placed under Schedule 3 (Department of Social Development 2010, 108-113).

The Act regulates and makes several provisions for dealing with children who are in conflict with the law. Diversion is one provision of the Act. Diversion is the rehabilitation of a child outside the formal justice system, encouraging the child to be accountable for the harm they have caused and to reduce the potential for re-offending. The objectives of diversion as stated in the Child Justice Act 75 of 2008, are to:

- (a) deal with the child outside the formal criminal justice system in appropriate cases;*
- (b) encourage the child to be accountable for the harm caused by him or her;*
- (c) meet the particular needs of the individual child;*
- (d) promote the reintegration of the child into his or her family and community;*
- (e) provide an opportunity to those affected by the harm to express their views on its impact to them;*
- (f) encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;*
- (g) promote reconciliation between the child and the person or community affected by the harm caused by the child;*
- (h) prevent stigmatising the child and prevent the adverse consequences flowing from being subject to the criminal justice system;*
- (i) reduce the potential for re-offending;*
- (j) prevent the child from having a criminal record; and*
- (k) promote the dignity and well-being of the child and the development of his or her sense of self-worth and ability to contribute to society.*

Department of Social Development 2010:59).

The above-mentioned objectives and aims in relation to diversion are to centralise diversion as an option for children in the Child Justice System, to expand and entrench the principles of restorative justice, to minimise the potential for reoffending through placing increased emphasis on the effective rehabilitation and reintegration of children, to balance the interest of children and those of society and victims and to create a system which, in broad terms, takes into account the long-term benefits of a less rigid criminal justice process that suits the needs of children in conflict with the law in appropriate cases (Department of Social Development, 2010:59)

### **Criteria for diversion**

Not all children will be considered for diversion. After consideration of all relevant information presented, and whether or not a child has previous record of diversion, they may be considered for diversion according to section 51 (1) if :

- (a) the child acknowledges responsibility for the offence;*
- (b) the child has not been unduly influenced to acknowledge responsibility;*
- (b) there is a prima facie case against the child;*
- (c) the child and, if available, his or her parent, an appropriate adult or a guardian, consent to diversion; and*
- (d) the prosecutor indicates that the matter may be diverted.*

(Department of Social Development 2010: 60)

### **Process for diversion**

Due to the fact that the Act created particular procedures for dealing with children who are alleged to have committed an offence that would see to their needs and rights, it is essential that the Act is applied to the right group of children. The Act therefore deals with issues concerning the age of a child in terms of the minimum age for criminal capacity or minimum age of prosecution of a child, the age until which criminal incapacity is presumed but may be rebutted, and determining the age of a child.

Section 28(1)(g) of the Constitution provides that detention should be used as a measure of last resort and for the shortest period of time. In order to facilitate and manage children who come into conflict with the law, the Act has created the preliminary enquiry, which is aimed at preventing children from getting lost in the system and to ensure that an individualised response is used in each case. The child's educational level, cognitive ability, age and environmental factors of the child are considered. It is usually at the assessment and preliminary inquiry phase that the decision to divert a child is made (Department of Social Development, 2010,16-21).

Significantly, the first objective of the Act is to protect the rights of children as stipulated in the Constitution. A balance is provided between protecting the accused child's rights as a child and an individual, on the one hand, and ensuring that the human rights and fundamental freedoms of the community are respected by children in trouble with the law, on the other (Department of Social Development 2010:14). The Act does not merely afford rights to



accused and convicted children, but aims to hold them accountable for their actions to the victims, the families of the child and victims and the community as a whole (ibid). Consequently, the concept of restorative justice is explicitly included as an objective. With regard to rehabilitation, emphasis is placed on the involvement of parents and families as well as the community, in order to encourage the reintegration of children into the community after they have been dealt with by the criminal justice system. This is so because increasingly, there is a recognition that interventions in offending children's lives need to be supported when the child leaves the justice system. Of equal importance is the reference to co-operation between government departments and other organisations and agencies in working with children in conflict with the law to implement the Act (Department of Social Development 2010).

Diversion begins with the referral of cases away from the formal criminal court procedures when there exists a suitable amount of evidence to prosecute. The selection of diversion options is dependent on the child's cultural, religious and linguistic background, the child's educational level, cognitive ability and the child's age and developmental needs (Department of Social Development 2010:65). Some of the diversion options are a compulsory school attendance order, a family time order, community service and compulsory attendance at a specified centre for a specified vocational, educational or therapeutic purpose (Department of Social Development 2010: 61-65). Thus the Act regulates the provision and accreditation of diversion programmes and service providers of diversion programmes (Department of Social Development 2010). The Act now provides a regulatory framework to ensure consistency of practice and legal certainty with regard to diversion. In terms of the Act, diversion is carried out in three different ways; firstly through prosecutorial diversion for minor offences committed, secondly by an order of the magistrate's court at a preliminary inquiry and thirdly by the child justice court in a trial, through an Order of the Court (Department of Social Development, 2010).

### **Conceptualisation of Restorative Justice in Diversion Programmes**

In keeping with the objectives of diversion, diversion options must be structured so that there is a balance between the circumstances of the child, the nature of the offence and the interest of society. The diversion options should not be harmful or exploitative to the child's physical or mental health, has to be appropriate for the age, as well as the developmental maturity of the child concerned, should not interfere with the child's schooling, must not be structured in

a way that puts other children at a disadvantage due to lack of resources, which may be financial or any other and, lastly, the diversion options have to be sensitive to the circumstances of not only the perpetrator, but also the victim (Department of Social Development, 2010: 66).

Furthermore, according to section 55 (2), the diversion programmes must, where reasonably possible:

- (a) impart useful skills;*
- (b) Include a restorative justice element which aims at healing relationships, including the relationship with the victim;*
- (c) include an element which seeks to ensure that the child understands the impact of his or her behaviour on other, including the victims of the offence, and may include compensation or restitution;*
- (d) be presented in a location reasonably accessible to the child;*
- (e) be structured in a way that they are suitable to be used in a variety of circumstances and for a variety of offences;*
- (f) be structured in a way that their effectiveness can be measured;*
- (g) be promoted and developed with a view to equal application and access throughout the country, bearing in mind the special needs and circumstances of children in rural areas and vulnerable groups; and*
- (h) involve parents, appropriate adults or guardians, if applicable.*

(Department of Social Development, 2010:66)

## **Partnerships**

In strengthening the child justice system, the role of the NGO sector and civil society is of utmost importance through effective partnerships with government and through on-going communication, co-operation and collaboration, because they have a role to play in offering a range of diversion programmes. While it is the responsibility of the Department of Social Development to develop, implement and manage diversion programmes, they also work co-operatively and provide funding for a wide range of NGOs offering diversion. 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 the Department of Social Development.

Section 56 (2)(e)(f)(g) of the Child Justice Act 75 of 2008 stipulates that:

*(e) The cabinet member responsible for social development must issue a prescribed certificate of accreditation to each diversion programme and diversion service provider that is accredited in terms of this section*

*(f) A certificate of accreditation referred to in paragraph (e,) is valid for a maximum period of four years from the date of accreditation*

*(g) A quality assurance process must be conducted in the prescribed manner in respect of each accredited diversion programme and diversion service provider.*

(Department of Social Development, 2010: 68)

## **2.6 Conclusion**

Chapter 2 focused on the legislative and policy framework for child justice, not only in South Africa, but also internationally. It provided a description of the policy framework and legislation that informs the Child Justice System in South Africa. The focus was on the Child Justice Act 75 of 2008, but there are other pieces of legislation supporting this Act, such as the Riyadh Guidelines, Beijing Rules, the South African Constitution, the White Paper on Social Welfare and the Children's Act 38 of 2005. They have all contributed to the Child Justice Act 75 of 2008.

## **Chapter 3**

### **Case Study: Khulisa**

#### **3.1 Introduction**

Khulisa Social Solutions is a service provider that works in partnership with the Department of Social Development in implementing diversion programmes provided for in the Child Justice Act 75 of 2008. Khulisa works in many areas around the country and Ugu district is one.

#### **3.2 Overview of Ugu District Municipality**

The Ugu District Municipality is one of the 10 district municipalities in KwaZulu-Natal, located at the most southern tip of the province, covering 112km of the Indian Ocean coastline. The district is bordered by the Eastern Cape province to the south, Indian Ocean to the east, Sisonke and Umgungundlovu to the west and eThekweni to the north. It consists of six local municipalities, namely Vulamehlo, Umdoni, Umzumbe, Hibiscus Coast, Ezinqoleni and Umuziwabantu. The Ugu District Municipality covers an area of 5866 km<sup>2</sup> (Ugu District Municipality, 2012:8).

The district has a fairly young population, with 47% being under the age of 19 years. Out of the estimated 300 000 young people of school-going age, only 218 242 are accounted for in the formal schooling system within the district. There are 518 schools in total in the Ugu area, of which 494 are public schools and 24 are independent (Ugu District Municipality 2012:8). The quality and accessibility of educational facilities and resources remain critical challenges within the district, particularly within the rural areas. Problems include a lack of physical resources such as laboratories and computer centres, the quality and quantity of educators, low levels of motivation of learners and educators, weak maths and science results; inadequate attention to life skills, teenage pregnancies and a limited focus on technical subjects such as agriculture. An overhaul of the formal schooling system within the district is urgently required (Ugu District Municipality 2012:8).

HIV/AIDS and TB are major contributors to poor health within Ugu. In 2010, 116 971 people were identified as HIV positive. This figure had increased dramatically from a recorded figure of 23 462 in 1995. The municipality with the largest population, the Hibiscus Coast Municipality, has the highest number (38 049) of HIV positive people. The large increase in

HIV incidence is a major issue of concern. Not only is there major pressure on existing health facilities and resources, but also an increase in child-headed households, higher dependency levels, increasing levels of vulnerability to external shocks, lower productivity levels, a reduction in the potential labour force and deepening poverty within the region (Ugu District Municipality, 2012:9). Levels of poverty within the Ugu district remain unacceptably high. Three of the local municipalities within the Ugu District rank in the top 10 of the province's most deprived areas (Ugu District Municipality, 2012:9).

In South Africa large numbers of children in conflict with the law are socio-economic victims denied their rights to education, health, shelter, care and protection. Many of them have had little or no education; some have left their homes and taken to the streets to escape from violence and abuse at the hands of their families. Pelsler (2008:1) notes that these negatively socialised excluded youth, who constitute a significant proportion of South Africa's population, have normalised violence and crime (illegitimate pathways) because they cannot access legitimate pathways. Irrespective of the absence of criminal intent in status offences, they can lead to confrontational contact with the Criminal Justice System (Pelsler, 2008:1).

### **3.3 Background of Khulisa Social Solutions**

Khulisa Social Solutions was founded in 1998 by Lesley Ann van Selm, with the aim of using holistic, systemic approaches to tackling crime in South Africa. Over the past 15 years Khulisa has built a strong track record and has worked in 130 communities spread across eight provinces. They currently have a presence in six provinces and 26 communities. Khulisa focuses on developing interventions that bring together a variety of role-players – including, government, NGOs and business, to maximise the impact of its initiatives. One of the major mechanisms to achieve this is the use of the Social Transformation Systems (STS) process, developed by Barbara Holtmann and the CSIR. This process brings together representatives from across the various sectors of a community to plot and identify critical blockages and challenges according to an analysis of a cycle of critical factors in ensuring a “safe community of opportunity”. In essence, the model looks at communities as a system, acknowledging that it is a complex and organic entity that has both vulnerabilities and strengths and that these will impact on one another. A core aspect of the model is that it seeks to build an understanding with stakeholders – government departments, NGOs, businesses and community members present – that they have a role in these elements; thus building

relationships between these groups to share expertise and resources is critical to their success. The tool also allows communities to build a concrete vision of what these elements will look like when they are “fixed” (Khulisa, 2013).

### **3.3.1 Aims and objectives of Khulisa**

Khulisa works in diverse environments all over the world, ranging from prisons and schools to large-scale projects engaged by using their systematic approach. This enables role-players to work effectively, efficiently and collaboratively (Khulisa, 2013). Khulisa services include the design and development of learning programs, remediation and learning processes. The goal of Khulisa Social Solutions (previously known as Khulisa Crime Prevention Initiative) is to inspire constructive behaviour in individuals and communities through programmes designed to promote sustainable community development. Khulisa Social Solutions has three core business units, namely behaviour change, skills development and Khulisa Social Enterprise, Business Development and Job Creation. These are designed to work collaboratively to contribute to a shared vision of a productive, happy, crime-free society.

Khulisa is an accredited diversion service provider. It has a formal, external monitoring process whereby the Department of Social Development (DSD) Accreditation Unit sets performance standards for service quality that measures the merit of an organisation, in relation to standards and keeps the organisation accountable to the public. The process is based on self-assessment and possible review of programmes and services. Nominated teams or professional surveyors assess the quality of an organisation’s service delivery and provide assistance aimed at improvement. Accreditation signifies formal recognition by the Department of Social Development’s Accreditation Unit, by means of a quality assurance procedure, that an organisation and diversion programme has met professional and minimum standard criteria laid down for the type of programme (Department of Social Development, 2010).

Khulisa is an NGO committed to reducing crime and empowering individuals through various programmes and initiatives. These programmes are based on restorative justice principles, which make Khulisa’s work consistent with developments in the official adoption of restorative justice in South Africa. Khulisa’s mission is to inspire constructive values and behaviours, using approaches and programmes that promote sustainable development in individuals, communities and enterprises (Steyn, 2005: 73). Three youth diversion

programmes are offered, namely the “Positively Cool”, the “New Directions” and the “Silence the Violence” programmes. While the programmes are similar in nature, they vary slightly according to duration, content and intensity. Here are examples of some of the diversion programmes offered by Khulisa. As a result of the child Justice Act 75 of 2008, children who have committed an offence for the first time and who have taken responsibility for their actions are given an opportunity to undergo a diversion programme. The child is assessed by a probation officer and the probation officer will recommend an appropriate diversion option to the courts. Children who complete the diversion programme do not have a criminal record and are thus given a second chance. Khulisa offers a number of options for diversion and is successfully implementing these programmes.

**(a) The “Positively Cool” diversion programme**

The Positively Cool diversion programme is a life skills programme that includes all the essential skills necessary for the management of a child’s life. The programme consists of 24 hour facilitated sessions that include a briefing, an assessment, a parent workshop, a family dialogue and a community project. The target audience is children between the ages of eight and 18 who have committed Schedule 1 or 2 offences, and who have been approved by the court and found to be suitable candidates for diversion. The programme is delivered over a period of eight weeks by suitably qualified facilitators in the area of the court district, at a venue that is easily accessible to the participating children. One or more of the following outcomes are expected on completion of the programme: development of self-awareness, development of self-management skills, improved self-esteem and self-image, replacing of negative behaviour with positive behaviour, understanding the impact of behaviour on self and other people, rebuilding of damaged relationships in the community and empowering of self in peer relationships (Khulisa, 2009).

**(b) The “New Directions” diversion programme**

The New Directions diversion programme is a community-based, non-custodial intervention for youth diverted from the court or referred by schools, the police, or parents. New Directions is primarily aimed at first-time offenders and children who have committed minor offences and attempts to determine and resolve the underlying problems associated with offending behaviour, as well as teaching necessary life skills to participants. The New Directions programme is for youth aged between 14 and 18, is based on the principles of *ubuntu* and follows a humanistic approach to the management and treatment of young

offenders. The programme consists of 23 sessions, delivered over a period of 16 weeks. The three main outcomes of the programme are personal and systematic change and development, behavioural change and the application of knowledge to real life (Khulisa Social Solutions, 2011).

**(c) The “Silence the Violence” diversion programme**

Silence the Violence (STV) is a violence and aggression behaviour diversion programme that takes participants on a journey of discovery in which they become aware of the extent of their own violence, where it comes from, as well as learning how to make effective non-violent choices. Not only does STV illustrate how violence, which is not always physical, is ingrained in our cultures and belief systems and how it emerges in daily interactions, it also allows participants to learn practical ways of minimising their violent behaviour. The STV programme is for youth aged between 14 and 18 years who have committed violent offences. It consists of 14 sessions delivered over a period of nine weeks. One or more of the following learning outcomes are expected on completion of the programme: the ability to recognise the different levels of violence, an understanding of violence and its origins, greater awareness of the effects of violence, improved listening skills, greater empathy for people, improved staff-inmate relationships, increased self-esteem, improved self-care and deeper commitment to one’s true self (Khulisa Social Solutions, 2011).

**(d) Family Group Conferencing (FGC)**

FGC was first pioneered and implemented in New Zealand in 1989. It sought to overcome problems created by the large numbers of young offenders, as well as to incorporate the value system of the indigenous Maori tribe (Tshem, 2009: 63). Since then, FGC has been further adapted and adopted in countries such as Australia, Asia, South Africa, North America and Europe (van Ness, Morris & Maxwell in Morris & Maxwell, 2003: 7). In South Africa, FGC is similar to mechanisms utilised by traditional African societies for the resolution of conflicts, whereby all members affected by the crime, including the victims, extended family and community members, are involved in the resolution and decision-making process.

FGC is one of several conflict resolution mechanisms based on the values of restorative justice that seeks to establish a greater degree of community control and is aimed at reparation rather than retribution (Neff, 2004: 138). Conferencing is defined as “a process in which any group of individuals connected and affected by some past action come together to



discuss any issues that have arisen”. It includes “community members most affected by the offence, personalises the consequences of the misbehaviour, and allows for the harm suffered to be expressed in very personalised terms with little guidance from the facilitator” (McCold, cited in Morris & Maxwell, 2003: 44). According to the Act (Section 61(1)(a)), FGC can be described as “an informal procedure which is intended to bring a child who is alleged to have committed an offence and the victim together, supported by their families and other appropriate persons”.

According to Branken (cited in Tshem, 2009: 62), it is “families and communities that know best how to deal with the offending behaviour”. Hence the involvement and presence of the offender’s family goes beyond being there to support the offender; “the family of the offender is instrumental in finding and determining the outcome and in facilitating the formulation of an appropriate plan” (Tshem, 2009: 67).

In general, FGC is aimed at youth between the ages of 14 and 18 who have committed less serious offences and have admitted guilt for the offence committed (Tshem, 2009: 65). FGC includes the primary victims and offenders and support persons of victims and offenders such as family members or friends of victims (van Ness *et al.* in Morris & Maxwell, 2003: 7). According to the Child Justice Act 75 of 2008, FGC may be attended by the following persons: the child and his or her parent, an appropriate adult or a guardian, any person requested by the child, the victim of the alleged offence, his or her parent, an appropriate adult or a guardian (where applicable), any other support person of the victim’s choice, a probation officer, the prosecutor, a police official and a member of the community in which the child resides (van Ness *et al.* in Morris & Maxwell, 2003: 7). Young offenders should play an active role in the FGC, so that they are able to understand the harm caused and take responsibility for that harm, as well as being given a sense of ownership regarding the outcome of the process (Tshem, 2009: 67).

The FGC has three basic phases: preparation (the offender, along with his or her family should be adequately prepared regarding the processes of FGC); facilitation (during this phase the offender is given an opportunity to acknowledge the offence and the victim is afforded an opportunity to speak, ask questions and receive clarity, after which a possible outcome and agreement is reached); and monitoring (this phase is critical for both success and confidence building) (Tshem, 2009: 66).

A primary function of FGC is to place greater control and responsibility in the hands of families themselves, which will result in higher appraisals of procedural fairness as well as increase the satisfaction among participants during the decision-making process (Neff, 2004: 140). FGC aims to make the offender realise the impact of their actions on the victim; provide an opportunity for the offender to go through the process with adequate support from his or her family; provide a platform for victims by acknowledging and giving them an opportunity to express their feelings about what has happened; acknowledge the offender's family as the primary guardians of the offender who should be given the chance to deal with the situation in their own family way; give an opportunity to repair the damage done to the victims; allow participants to reach a solution satisfactory to both the offender and the victim in a non-hostile situation; provide a supportive and healing environment to the victims, the offender and to his or her family; as well as aim to prevent recidivism (Tshem, 2009: 68).

It is clear that not only does FGC hold offenders accountable for their actions, but it is also responsive to victims; "it could provide victims with both a presence and a voice and with the opportunity for some healing, for some understanding of what happened and why, and for some closure" (McCold, cited in Morris & Maxwell, 2003: 46). FGC contributes to the empowerment and healing of the community as a whole as it involves community members called to the meeting to discuss the offence, its effects, and how to remedy the harm caused (Tshem, 2009: 68).

From the literature reviewed it is clear to see that a number of policies, laws, acts and treaties have been developed over the years to specifically deal with youth offending, both nationally and internationally. Due to these rapid reforms, a number of acts and policies have been put in place to treat youth offenders in a rehabilitative and restorative manner. Some of these restorative programmes include diversion and the use of FGC. However, there are various challenges when it comes to the implementation of these practices and programmes, such as a lack of resources and inconsistencies in the interpretation of the Act by different key role-players.

### **3.4 Conclusion**

This chapter was based on the case study, namely Khulisa, and the different diversion programmes that they offer in the area of the Ugu District Municipality. Khulisa is an accredited diversion service provider contracted by the Department of Social Development to provide diversion programmes to children in conflict with the law.

## **Chapter 4**

### **Theoretical Framework**

#### **4.1 Introduction**

Chapter 4 provides a theoretical framework for the analysis of the implementation of the Child Justice Act 75 of 2008: A case study of the diversion programme (vocational, educational or therapeutic) offered by Khulisa in the UGU District. The chapter firstly provides definitions of public policy and the different stages involved in the policy process. An exploration of the underlying approach to the Child Justice act 75 of 2008, in relation to diversion programmes offered by Khulisa is discussed. It explores the arguments for different role-players involved in policy processes and the underlying opportunities and challenges for the service providers, as well as ways of improving implementation. It examines the organisational structures and partnerships for implementation. It explores the nature of implementation used through these mechanisms and in these structures. Lastly the chapter presents the conclusion.

#### **4.2 Public Policy**

Public policy in its literal form means the carrying out or the fulfilment of the anticipated objectives of a policy. In other words, policy implementation encompasses those actions by public or private individuals (or groups) that are directed at the achievement of the objectives set forth in prior policy decisions (O'Toole, 2000: 266). While policy could be defined in several ways, implementation moves from originally set political goals to results on the ground (service delivery). Ultimately the literature has, in fact, come a long way in highlighting the inevitable complexity of the implementation process and the saliency of trying to understand this complexity (Smith, 1973: 202-203).

Anderson (1997: 9) defines policy as “a relatively stable, purposive course of action followed by an actor or set of actors in dealing with a problem or matter of concern”. He defines public policy as actions “developed by governmental bodies and officials” with the aim of meeting specific objectives (ibid: 9-10). This definition limits development of policy to government and government officials only, with seemingly no role played by others outside of government. In contrast to Anderson’s (1997: 10) definition of public policy, other theorists see policy as a complicated “process” (Jenkins 1978, Rose 1976, and Anderson 1978 cited in Osman 2002: 38), which involves players other than the 26 government (Osman 2002: 38).

Its complex nature involves “multiple issues and actors in which different stages tend to overlap and seldom follow a linear path” (Rivera et al. 2006: 5). While there is recognition that the policy process is far from being orderly (Rivera et al. 2006: 5; Evans et al. 1995: 2 cited in Moja 2003: 174-175; Hogwood and Gunn 1984: 4 cited in McCool 1995: 169), the complex nature of the policy process has led other theorists to identify various stages to policy for simplification purposes (Anderson 1975: 19 cited in Hill and Hupe 2002: 167-168; McCool 1995: 169).

Different theorists have more or fewer stages, but essentially the policy stages widely recognised in the policy process are agenda setting, policy formulation, decision-making, policy implementation and policy evaluation (Howlett and Ramesh 1995: 11). Howlett and Ramesh (1995:11) define agenda setting as the stage where “problems come to the attention of governments”. They describe the second stage, called policy formulation, as the stage where government formulates policy alternatives to address the identified problems. The third stage, called the decision-making stage, is where government decides on which “course of action or non-action” they will follow (ibid). The fourth stage of the policy process, called policy implementation, involves the actual implementation of policies (ibid). Lastly, policy evaluation involves the monitoring of policy outcomes. The next section briefly explores implementation.

#### **4.2.1 Implementation**

Cloete, Wissink and de Coning (2006: 195) view implementation as a political process concerned with who gets what, when, how, where and for whom. Therefore policy formation and policy implementation are the results of interactions among a plurality of separate actors with separate interests, goals and strategies (ibid). Pressman and Wildavsky cited in Brynard (2005:14) explained that implementation is not an easy concept to define. “As a noun, implementation is the state of having achieved the goals of the policy. As a verb, it is a process – everything that happens in trying to achieve that policy objective” (Brynard, 2005:14). Therefore implementation (verb) will happen, regardless of whether implementation (noun) has been achieved or not.

Grindle and Hildebrand, cited in Cloete *et al.* (2006:199), maintain that “the political, administrative, economic, technological, cultural and social environments within which action is taken must also be sympathetic or conducive to successful implementation”. This helps policy implementers to take appropriate decisions regarding implementation strategies

that will ensure achievement of the policy objectives, to the benefit of the target group. These decisions are made after proper consideration of the environmental factors that can help or distract policy implementation. “In understanding implementation as a complex political process, rather than a mechanical administrative one, the study of implementation becomes an attempt to unravel the complexity of following policy as it travels through the complex, dynamic maze of implementation; to understand how it changes its surroundings and how it is changed itself in the process; and most importantly, to see how it can be influenced to better accomplish the goals it is set out to achieve” (Brynard 2005:16). Brynard (2005:16) introduces 5C Protocols in order to understand implementation. These are content, context, commitment, capacity, clients and coalitions. According to Brynard (2005:16) “implementation capacity is likely to be a function of all the remaining four variables: policy content may, or may not, provide for resources for capacity building; the institutional context of the relevant agencies may hinder or help such capacity enhancement ; the commitment of implementers to the goal, causal theory and methods of the policy may make up for the lack of such capacity—or *vice versa*...again, supportive clients and coalitions may in fact enhance capacity”.

### *Content*

Lowi (1963, cited in Brynard 2005:17), characterises policy as either distributive, in that it creates public goods, regulatory, as it is specific to rules of conduct with sanctions for failure to comply, or redistributive, which seeks to change allocations of wealth or power of some groups at the expense of others. He also reasons that content of the policy is important, not only in the means it employs to achieve its end, but also in its determination of the means itself and how it chooses means to reach those ends. This criticality of policy content is exemplified by Pressman and Wildavsky (1973:xv), who view implementation as “a seamless web...a process of interaction between the setting of goals and actions geared to achieving them”. Mediating this choice of ends and means is the content of the policy.

### *Context*

“A context-free theory of implementation is unlikely to produce powerful explanations or accurate predictions” (Berman, 1980, cited in Brynard 2005:17). However, as O’Toole (1986), cited in Cloete et al. 2000:180) has noted, “the field of implementation has yet to address, as part of its research strategy, the challenge of contextuality, beyond fairly empty injunctions for policy-makers, implementers, and researchers to pay attention to social,

economic, political, and legal setting”. Hence the focus here is on the institutional context which, like in the other four variables, will necessarily be shaped by the larger context of social, economic, political and legal realities of the system.

The context in which the policy operates is important. Formulating a policy requires a good understanding of local needs, opportunities and constraints (population needs, capacities and commitment of local actors). The question of whether a policy is effective or not can be divided into two issues, namely the content of the policy itself, and the context or the environment in which the policy can be successfully carried out. It is therefore important to ask the questions: Why do some well-intended policies not achieve their goals? What are the challenges being faced in implementing these policies? Garn (1999) states that the success of policy implementation depends mainly on key factors, namely understanding of macro-social environment, understanding the socioeconomic environment and implementer attitudes. These are contextual factors that can dictate the nature of the policy outcomes created at the top of the implementation pyramid. Sometimes contextual factors can completely dominate the rules created by the central government. These factors affect policy implementation at the policy-makers’ level and they determine how the policy-makers or government will implement the policy.

Grindle and Hildebrand, as quoted by Cloete *et al.* (2006:199), maintain that ‘the political, administrative, economic, technological, cultural and social environments within which action is taken must also be sympathetic or conducive to successful implementation.’ We can conclude that policy environment and context is essential when studying policy implementation. This helps policy implementers to take appropriate decisions regarding implementation strategies that will ensure achievement of the policy objectives to the benefit of the target group. These decisions are made after proper consideration of the environmental factors that can help or distract policy implementation. Policy implementation is important to politicians, because of its ability to influence public opinion and the reputation of politicians.

In this study it is important to consider context in terms of location of khulisa offices with reference to the deep rural and scattered areas in which they have to operate versus accessibility.

#### *Commitment*

Governments may have the most logical policy imaginable, the policy may pass cost/benefit

analyses with honours, and it may have a bureaucratic structure that would do honour to Max Weber, but if those responsible for carrying it out are unwilling or unable to do so, little will happen (Warwick, 1982, cited in Brynard 2005).

- *Commitment is important not only at the 'street-level', but at all levels through which policy passes.*
- *The five critical variables, commitment will be influenced by, and will influence, all the four remaining variables: content; capacity; context; clients and coalitions. Those interested in effective implementation cannot afford to ignore any of these linkages and are best advised to identify the ones most appropriate to 'fix' particular implementation processes (Brynard, 2005).*

In this study, commitment of service providers in implementing the Child Justice Act is important for successfully attaining restorative justice.

### *Capacity*

In the context of this paper, the capacity of the public sector is conceptualised in general systems thinking terms, as the structural, functional and cultural ability to implement the policy objectives of the government, for example the ability to deliver those public services aimed at raising the quality of life of citizens, which the government has set out to deliver, effectively and as planned over time (in a durable way). Capacity refers to the availability of and access to concrete or tangible resources (human, financial, material, technological and logistical) (Brynard 2010:19). Capacity includes the intangible requirements of leadership, motivation, commitment, willingness, guts, endurance and other intangible attributes needed to transform rhetoric into action. The political, administrative, economic, technological, cultural and social environments within which action is taken must also be sympathetic or conducive to successful implementation (Grindle 1980).

In this study, capacity of the service providers is important, in terms of meeting and ensuring that all children undergo and complete the diversion programmes.

### *Clients and Coalitions*

As with the other variables, the first task is one of classification of determining the potentially influential clients and coalitions from the larger cast of characters in the implementation. The



constellation of actors who are directly or indirectly affected by any implementation process is likely to be far larger than the set of key constituencies whose interests are impacted enough for them to have the desire, or the ability, to influence the implementation process in return. The danger of so limiting the scope of enquiry as to leave out key actors is both real and serious. However, being bogged down with so many 'minor' actors that any exploratory investigation becomes unmanageable is equally dangerous. It is important, then emphasises, to the saliency of consciously seeking to identify key relevant stakeholders, as opposed to all identifiable actors (Brynard, 2005).

Implementation can be carried out by many stakeholders in partnership with governments, for example in clients and coalitions, as mentioned above. The voluntary sector can be a partner to government in its implementation of policies. In this study, the Department of Social Development has contracted Khulisa to conduct their diversion programmes to children in conflict with the law.

### **4.3 Partnership**

Modes of delivery, or 'systems' of policy delivery, have become a central concern for analysis in the modern public sector (Parsons 1995:491). This focus on the increasingly diverse intergovernmental and inter-organizational network of delivering public goods and services has been emphasized (ibid). According to Parsons (1995:492), "simple hierarchies and tiers have given way to delivery systems which use a mix of governmental relationships, new 'partnerships' between the public and private sectors, market mechanisms and 'marketized' public policy; and new roles are being defined for the voluntary sector and the community". Therefore, in order to gain compliance in public policy, this governmental and sectoral mix is important, as they provide "the institutional and organizational setting of policy delivery" (Parsons 1995:492), that is governmental forms and the interaction of the public, private, voluntary and community sectors.

There has been a debate regarding the limits of government. The concept of policy networks or Public Private Partnerships did not just emerge on its own, but was a result of on-going debate on governance and a reaction to other approaches that fell far too short of the high expectations, as the government had been setting its targets too high. "Less public sector, more private sector, deregulation and decentralization became the new catch words" (Kickert *et al.*, 2000:5).

These networks develop and exist because of the interdependency between actors. Inter-organisation theory emphasises the fact that actors are dependent on each other because they need each other's resources to achieve their goals. Interdependencies cause interactions between actors, which create and sustain relation patterns. The term interdependencies also implies that the partners involved all have something to gain (Kickert *et al.*, 2000:31)

The present study looks at the involvement of the voluntary sector in social and policy areas – the public and voluntary mix. This has been described as private agents of public policy (Streeck and Schmitter 1985, cited in Parsons 1995:499). It plays a major role in the delivery of goods and services (*ibid*). The use of the voluntary sector has been seen as contributing to a greater sense of community and personal responsibility (Parsons 1995:500). The service provider Khulisa is an example of an organisation from the voluntary sector that is partnering with government to deliver a service in implementing the Child Justice Act 75 of 2008

#### **4.4 Restorative Justice**

According to Crawford (in Hargovan, 2011:1) restorative justice is one of the most significant developments in criminal justice practice and criminological thinking to emerge over the past two decades. It is a flexible model varying from country to country and area to area, depending on local needs and customs (*ibid*). The term was first used in 1958 (*ibid*).

Albert Eglash identified three types of criminal justice systems. Retributive justice, which is based on punishment, distributive justice, which is based on therapeutic treatment of offenders and restorative justice, based on restitution. The punishment and treatment models tend to focus on the actions of the offender and therefore deny the victim participation whilst also not allowing the offender to participate (Hargovan, 2011:3). Restorative Justice (RJ) aims to empower victims by providing them with a forum whereby their voices are heard and respected. RJ actively involves victims, offenders and community members in the process. Currently, RJ approaches complement, rather than replace, the existing approaches in the criminal justice system. They represent a shift away from a purely punitive approach and include any number of initiatives that operate within a restorative justice mind-set, philosophy or framework. They operate in the interest of both adult and youth offenders, within and outside the criminal justice system. Criminal justice practitioners can make their work more restorative by integrating as many restorative elements as possible (Hargovan, 2011:4).

During the 1990s, the emergence of restorative justice, especially in relation to young offenders, influenced the way child justice reform took place throughout the world. Seen as “a post modernistic paradigm shift in criminal justice thinking” (Hargovan, 2007: 87), responses to child offending may be viewed from a restorative justice perspective.

Restorative justice is a mixture of theory and practice and includes programmes such as restitution, diversion, Victim Offender Meditation (VOM) and Family Group Conferencing. Instead of talking through a third party such as a lawyer, restorative processes and practices create opportunities for offenders to talk about their offending behaviour and the factors associated with it. This allows the offender to accept responsibility, express remorse, apologise and attempt to make amends for the offence committed and harm caused. The root causes and circumstances that lead to the offending behaviour in the first place are also addressed. It is believed that through the use of restorative justice practices, the offender will gain a better understanding of themselves, their offence and its consequences, and would be less likely to re-offend (Muncie, Hughes & McLaughlin, 2006: 243).

John Braithwaite’s seminal work *Crime, Shame and Reintegration*, set the theoretical foundations of restorative justice (Sloth-Nielson, cited in Davel, 2000: 420). According to him, painful and/or retributive approaches to crime do not minimise or reduce recidivism, and that for “informal justice to be restorative justice, it has to be about restoring victims, restoring offenders and restoring communities as a result of participation of a plurality of stakeholders” (cited in Marotta, 2009). This can be said to stem from “an acknowledgement that conscience is generally a more powerful weapon to control misbehaviour than punishment” (Dignan, 2005: 102).

At the heart of Braithwaite’s reintegrative shaming theory is the concept of shaming, both reintegrative shaming and disintegrative/stigmatising shaming. Whilst acknowledging the wrongful act, the theory recognises that child offenders should be valued and respected (Losoncz & Tyson, 2007). The child offender’s sense of guilt and shame is thus integral to his understanding and acceptance of the consequences. A sense of shame “comes from assimilating the perceived expressions of guilt offered by others”, whilst guilt is “only made possible by [the] cultural processes of shaming” (Braithwaite, cited in Marotta, 2009).

Reintegrative shaming can thus be considered to be effective both in the prevention of crime and in responding to crime (Harris, Walgrave & Braithwaite, 2004).

The Child Justice Act 75 of 2008 calls for the entrenchment of restorative justice in the child justice system. This paradigm considers crime as a harm to society and not only victims (Gallinetti *et al.*, 2004: 36). It is understood as strategies that involve the offender, the victim, their families and community members to collectively identify and address the damage caused by the offence (Roche 2002: 517). Key features of restorative programmes are active involvement, taking responsibility, co-operative decision-making, forgiveness, reparation and reintegration (Steyn 2005). However, it has been reasoned that not all programmes that function under the rubric of restorative justice completely satisfy these demands (Skelton & Batley 2006; Steyn 2005). Instead, practices function on a continuum between “fully restorative” and “restorative limited”, depending on the nature of stakeholder involvement and the activities in which the offender engages.

Restorative justice sees crime as a violation against people and relationships, as well as seeing people and communities as victims. O’Conner (2010) defines restorative justice as a “systematic response to wrongdoing that emphasises healing the wounds of victims, offenders and communities caused or revealed by the criminal behaviour”. Restorative justice theorists believe that those most affected by the crime should be involved in the conflict resolution process. While denouncing offending behaviour, restorative justice focuses on the strengths rather than the weaknesses of both the offender and victim, in order to promote reconciliation and reintegration into their respective communities (Umbreit, 1998). Not only does restorative justice bring all the concerned parties together (offenders, victims, respective support systems, community members, and key role players), but it also attempts to “engage them in a process of reconciliation and reparation” which gives both offenders and victims the opportunity to talk about their experiences and achieve mutually agreeable solutions (Mantle, Fox & Dhimi, 2005: 3).

Through restorative justice practices a range of goals can be met:

*...a meaningful experience of justice for victims of crime and healing of trauma which they tend to suffer, genuine accountability for offenders and their reintegration into law-abiding society, recovery of the social capital that tends to be lost when we hand our problems over to professionals to solve, and significant fiscal savings, which can*

*be diverted towards more constructive projects, including projects of crime and community regeneration (Johnstone & Van Ness in Johnstone & Van Ness, 2007: 5).*

The judicial system is at present moving away from a retributive Child Justice System where offenders are seen as individuals who violated the laws of the country, towards more restorative and rehabilitative processes (Nieman, 2002: 1), such as diversion programmes. According to Skelton and Batley (2006: 7), the majority of processes and programmes offered to children in the past were considered and described as restorative in nature. However, not all diversion programmes are restorative in nature and diversion does not necessarily translate into restorative justice. Various questions need to be asked, such as “does it address harms and causes, is it victim orientated, are offenders encouraged to take responsibility, are all stakeholder groups involved, is there opportunity for dialogue and participatory decision making” and, lastly, “is it respectful to all parties” (Hargovan, 2009).

To determine whether or not a programme or process is, in fact, restorative in nature, practitioners and scholars refer to, and often make use of, a “continuum” of restorative justice. By so doing, one is able to declare a programme to be either less or more restorative. Thus, if a diversion programme addresses the harms and causes of the offence and encourages the offenders to take responsibility, but ignores the victims of the crime, it can be said that the programme is “potentially” or “partially restorative” (Skelton & Batley, 2006: 7)

#### **4.5 Conclusion**

Chapter 4 examined the theoretical framework upon which the study is based. In describing the policy process, it discussed the implementation stage in the policy process. This stage takes into account the realities and complexities involved in policy implementation. The chapter also investigated policy implementation and theories involved in implementation. In so doing, it focused on the definitions of policy implementation using the 5C protocol; highlighting the importance of partnerships and involving affected parties in the implementation phase. The chapter then examined restorative justice and its diversion programmes. Diversion programmes take both social and individual factors into consideration when deciding on a treatment and can therefore be said to deal with the children in conflict with the law in a holistic and restorative manner.

## Chapter 5

### Findings and analysis

#### 5.1 Introduction

This chapter presents the findings and analysis of the study. The aim of the study was to examine the implementation of the Child Justice Act 75 of 2008, by using a case study of the diversion programme (vocational, educational or therapeutic) offered by Khulisa in the Ugu District. In presenting the findings and the analysis, the study sought to answer the following key questions:

- What are the conceptions of the service providers of the Child Justice Act 75 of 2008?
- What is the understanding of service providers of diversion programmes?
- How do service providers implement diversion programmes?
- What is the content and processes of Khulisa's diversion programme?
- What are the experiences of Khulisa in delivering their programme to children in conflict with the law?
- What are the experiences of Khulisa in their partnership with other departments and NGOs in implementing diversion programme?
- What are some of the successes and challenges of Khulisa in implementing the diversion programmes?

Broader issues to be investigated:

- The study seeks to explore the service providers' conceptions and understandings of the Child Justice Act 75 of 2008 and diversion programmes within the context of restorative justice
- This research will look at the experiences, content and process of implementation/delivery of diversion programmes by service providers for children in conflict with the law
- The study seeks to explore the nature of partnerships between service providers and the state in implementing diversion programmes of the Child Justice Act 75 of 2008

The study relied on findings from primary sources. Interviews were conducted at Khulisa, in their Ugu district offices. The respondents were the service office manager (R-1), two social

workers (R-2 & R-3) and three programme facilitators (R-4, R-5 & R-6). The theoretical framework, as well as the legislative framework chapters, will be used to interpret the responses to each of the respondents' answers. Reference will be made to the legislations and specifically the Child Justice Act 75 of 2008. Theories of public policy implementation, partnerships and restorative justice will be used.

## **5.2 The Acts Implementation in Diversion Programmes**

### **5.2.1 Conceptions of the Child Justice Act 75 of 2008 and Restorative Justice**

The Child Justice Act 75 of 2008 calls for the entrenchment of restorative justice in the Child Justice System. This paradigm considers crime as harm to society and not only victims (Gallinetti *et al.*, 2004: 36). It is understood as strategies that involve the offender, the victim, their families and community members to collectively identify and address the damage caused by the offence (Roche 2002: 517). Key features of restorative programmes are active involvement, taking responsibility, co-operative decision-making, forgiveness, reparation and reintegration (Steyn 2005). Respondents in the study conceptualise the Restorative Justice and the implementation of the Child Justice Act 75 of 2008 as:

*Restorative justice principles underpin everything that we do so even so far as rendering diversion services these are life skills groups that the children will participate in and if for an example there's a victim or family member that need to be brought into the intervention process all our focus is on restoring justice within parties concerned (R-2).*

Their conceptions of the Child Justice Act 75 of 2008 are in line with those of the Act. The respondents have the understanding that restorative justice has to underpin all that they do as stated by Roche (2002:517), and that family members have to be involved in the process as the offender does not live in a vacuum but in a family within a community. Hence justice has to be restored at all levels.

According to Steyn (2005), key features of restorative programmes are active involvement, taking responsibility, co-operative decision-making, forgiveness, reparation and reintegration. Therefore, if the child concerned does not take responsibility for the offence committed, it would be almost impossible to assist them, because the point of diverting the child from the

criminal justice system is to encourage responsibility, accountability and to promote reintegration. The service provider argued for the importance of responsibility for the offender taking responsibility for their offences as that further contributes to the specific type of diversion programme the child will be put into. Be it educational, vocational or therapeutic.

*Determining whether a particular case is suitable for our programme... besides the requirements in terms of the minimum norms and standards of diversion. Off course it has to be a first time offender. We do take in second and third time offenders depending on the seriousness of the offence. The court will only divert less serious crimes such as schedule 1 and 2 offences. Depending on the willingness of the individual to accept our intervention and taking responsibility for the crime committed (R-2).*

Selection of diversion programme have to be unique for each and every child. Factors such as the child's cultural, religious, linguistic background, cognitive ability, educational level and environmental circumstances have to be considered when selecting a specific programme for each child (Department of Social Development, 2010:65). The service providers expressed how restorative justice underpins everything that they do. The service providers concurred in that their services are aligned with those of the Act.

*We have specific programmes designed for specific problems and age groups as well. Like we have level 1 and level 2 diversion specifically targeted at youth. They all have different names like "positively cool" for youth then we have programme like "silence the violence" for people who have committed offences of violent nature. We would address issues of anger management and different levels of violence; so programme are structured around the need and these are accredited programme. They have to be accredited (R-5).*

*The whole aim is to help to make that mind shift change and to bring about behaviour change so that there's no re-offending so that if there's any likelihood that they can move away from offending behaviour and become more normative, acceptable type of behaviour in the community so it's also behaviour modification, life skills development and empowerment of the individual (R-3).*



*...a successful diversion intervention will ensure that the individual has made some kind of mind shift change. If the individual was involved in violent kind of behaviour he must understand violence, his violent nature, what triggers the violence and makes changes. The individual must be empowered and not resort to violent outbursts. In that way the individual is able to prevent re-offending. The individual should also be able to find alternative ways of dealing with problem if encountered in future. So a successful diversion intervention results in a highly functioning society of people who are able to conform to society's norms and standards (R-2).*

In South Africa, large numbers of children in conflict with the law are socio-economic victims denied their rights to education, health, shelter, care and protection. Many of them have had little or no education; some have left their homes and taken to the streets to escape from violence and abuse at the hands of their families. Pelsler (2008:1) explains that these negatively socialised excluded youth, who constitute a significant proportion of South Africa's population, have normalised violence and crime (illegitimate pathways) because they cannot access legitimate pathways. Irrespective of the absence of criminal intent in status offences, they can lead to confrontational contact with the Criminal Justice System (Pelsler, 2008:1).

The service providers could not over emphasise the environmental influences which are the underlying causes of children coming into conflict with the law.

*What causes these children to come into conflict with the law...It is mainly poverty, there's a lot of abuse at home. With the global recession unemployment and need by these communities so sometimes crime is committed out of need where we have youth, individuals or youngsters who are shop lifting or stealing because they don't have (a need to have something), substance abuse in the areas which are also contributing to the levels of crime (R-3).*

It is mostly poverty that causes children to come into conflict with the law. The view from respondents was, however similar in that it is not only children from poverty stricken backgrounds that come into conflict with the law, but children from all levels and backgrounds. Any child can come into conflict with the law.

*All children who come into conflict with the law and those who may be at risk also benefit. Children from all levels and from all categories. It doesn't mean only children from poor homes or impoverished backgrounds because we have a lot of children from so-called affluent homes also committing crime and therefore benefit from the programme (R-1).*

In keeping with the objectives of diversion, diversion options must be structured so that there is a balance between the circumstances of the child, the nature of the offence and the interest of society. The diversion options should not be harmful or exploitative to the child's physical or mental health, have to be appropriate for the age and developmental maturity of the child concerned, should not interfere with the child's schooling, must not be structured in a way that puts other children at a disadvantage due to lack of resources, which may be financial or any other, and lastly the diversion options have to be sensitive to the circumstances of the victim (Department of Social Development, 2010: 66).

The respondents expressed that they try by all means to work according to the minimum norms and standards of diversion, however sometimes this is not possible because of the lack of capacity and resources.

*Children and youth that are being referred for diversion and again in terms of the minimum norms and standards of the accused have to accept responsibility, they have to be willing to enter the programme for the contracted period. Like our programmes run for 6 – weeks so its compulsory that they attend the sessions because we are required to give feedback to courts and we would only be able to do that if there's compliance with the programme and off course if there's non-compliance we also have an obligation to refer the matter back to court to ensure that the process is followed through in terms of the Child Justice Act (R-1).*

*Mainly our programmes are run in group sessions. Like life skills group not individual. There is need in this area because it is somewhat semi and deep rural areas that we work in. We might get individuals from far flung areas and we can't possibly incorporate them into a group. Its kind of case work, but generally our programmes are run in group settings (R-3).*

With regard to rehabilitation, the respondents' placed emphasis on the involvement of parents and families, as well as the community, in order to encourage the reintegration of children into the community after they have been dealt with by the criminal justice system. This is because, increasingly, there is recognition that interventions in offending children's lives need to be supported when the child leaves the justice system.

*The parent or guardian has to be available so that they are incorporated into the intervention plan and give support to the young individual or child (you know) entering the programme (R-2).*

All respondents in the study displayed that they are well trained on the Child Justice Act 75 of 2008, as well as other supporting acts such as the Criminal Procedure Act; they articulated their commitment towards restorative justice. It can be argued that they have captured the mandate from government to entrench the principles of restorative justice when implementing the Child Justice Act 75 of 2008.

### **5.2.2 Implementation**

Khosa (2003:49), in a project entitled, "closing the gap between policy and implementation in South Africa" noted that "... the discrepancies between policy and implementation are largely caused by unrealistic policies, and a lack of managerial expertise". Also, a lack of resources, especially in the rural areas, as well as a lack of follow-up sessions and support services (inadequate monitoring) are also considered to be difficulties and disadvantages in the implementation of diversion programmes (Tshem, 2009: 48).

Khulisa, the 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 the Department of Social Development, 2010: 68. Respondents displayed how their challenges do not lie with the actual diversion programmes, but with the delivery of the programmes due to lack of resources, which are financial and transport.

*Generally it's the minimum norms and standards for diversion and all the legislation in terms of the Child justice Act and Criminal Procedure Act off course those and the Children's Act because we are working with children. Off course the focus is on the social work principles as well in terms of valuing the client, confidentiality, empathy, believing in the ability to change so it's all those principles Restorative justice principles underpins everything that we do... (R-3).*

*...It's not the programmes but the delivery of the programmes due to lack of finances or transport hence we rely on the Department of Social Development to assist (R-1).*

*Limitation is because of the far flung areas that we service and some children cannot afford to get to us. We don't want children to fall through the system however sometimes it's not viable for us to travel 3hours to get to the child (R-5).*

The political, administrative, economic, technological, cultural and social environments within which action is taken must be sympathetic or conducive to successful implementation (Grindle 1980). The Child Justice Act 75 of 2008 concurs with this statement in its minimum standards applicable to diversion, in that the diversion programmes should not interfere with the concerned child's schooling and it should not be structured in a manner that excludes certain children due to lack of resources, financial or otherwise.

There are numerous advantages to using diversion, such as offering the child an opportunity to take responsibility for his actions, giving the child an opportunity to pay some form of restitution, the prevention of a criminal record, and, very importantly, the prevention of stigmatisation (Gallinetti *et al.*, cited in Sloth-Nielson & Gallinetti, 2004: 32). Diversion programmes are innovative and less expensive than formal court procedures and reduce the court caseloads, the amount of time officers spend to process a case and the length of time during which the juvenile is involved in the juvenile justice system (Regoli & Hewitt cited in Van Der Westhuizen, 2004: 64). However, it has to be implemented as prescribed in the Child Justice act 75 of 2008.

It is important, as expressed by the service providers that family members contribute to the implementation of the Child Justice Act 75 of 2008 because without family support children will not succeed in completing their diversion programme.

*Some children are on substances and don't comply also where there's no family support because we rely on family especially for children to participate in our programmes. If the parent is unable to control their child and don't attend sessions. Also individuals who don't see their actions as being criminal and don't take responsibility. In such instances despite being referred to us by court we refer back to*

*court because we cannot work with such individuals. We have very few of such cases (R-6).*

According to the respondents, the environment both limits and directs the implementation. The environment, broadly viewed, includes geographic characteristics such as climate, natural resources, demographic variables, such as population size, age distribution and special location, political culture, social culture, or the class system and the economic system. Implementation problems occur when the desired result on the target beneficiaries is not achieved.

*Clearly with Khulisa just being, having three social work posts assigned for the Ugu District it was impossible to be able to have a social worker in each of the courts so we had a meeting with NPA which helped to guide where we would concentrate our services. We concentrate our services around the busiest courts and at least try so that the social worker can be available at those courts at least once a week and attend to intake matters, new referrals, diversion referrals and to be able to do the assessments(R-2).*

*Our work is very closely aligned to the Child Justice Act. It's the whole purpose of bringing about behaviour change to address crime. We have to align it to the Child Justice Act (R-2).*

### **5.2.3 Partnerships**

Partnerships are modes in which delivery or 'systems' of policy delivery have become a central concern of analysis and in the modern public sector (Parsons 1995:491). This focus on the increasingly diverse intergovernmental and inter-organizational network of delivering public goods and services has been emphasised (ibid).

*Khulisa is contracted by DSD to render diversion services... mainly the key stakeholders are DSD, DOJ, NPA and some like Legal aide if they are in the area and if there's any other stakeholder that could be identified; to train them on what programmes Khulisa offers and to discuss the whole referral process (R-3).*

As with the other variables, the first task is one of classification or determining the potentially influential clients and coalitions from the larger cast of characters in the implementation. The

constellation of actors who are directly or indirectly affected by any implementation process is likely to be far larger than the set of key constituencies whose interests are impacted enough for them to have the desire, or the ability, to influence the implementation process in return. The danger of so limiting the scope of enquiry as to leave out key actors is both real and serious. However, being bogged down with so many 'minor' actors that any exploratory investigation becomes unmanageable is equally dangerous. It is important, then, to emphasise the saliency of consciously seeking to identify key relevant stakeholders, as opposed to all identifiable actors (Brynard, 2005).

Khulisa prides themselves in their involvement with relevant stakeholders. All respondents illustrated the importance of partnerships.

*When Khulisa starts working in an area we do a transact walk. It's when you do a cross section of an area. We take a walk on foot and interview people as well as stakeholders in the area to find out how they perceive the problem so that we will be addressing real problem not the perceived problem as seen by us professionals. We target churches, schools and senior citizens focusing on the history, employment rate, etc. The walk is planned in order to establish routes then that informs Khulisa's intervention. Transact walk has been done in Ugu (R-1).*

According to Brynard (2010:19), the ability to deliver public services aimed at raising the quality of life of citizens, which the government has set out to deliver, effectively and as planned over time (in a durable way), obviously refers to the availability of, and access to, concrete or tangible resources (human, financial, material, technological and logistical). Respondents concurred, in that they have limitations in terms of finances as well as transportation of children. This lack of capacity hinders their performance.

*Our challenges mostly are not the programmes but the delivery of the programmes due to lack of finances or transport hence we rely on our partnership with department of Social Development to assist where they can (R-1).*

According to Grindle (1980), capacity includes the intangible requirements of leadership, motivation, commitment, willingness, guts, endurance and other intangible attributes needed to transform rhetoric into action.

In strengthening the child justice system, the role of the NGO sector and civil society is of utmost importance through effective partnerships with government and through on-going communication, co-operation and collaboration, because they have a role to play in offering a range of diversion programmes. The service providers reported to have a good partnership with their state partners.

*Well we have a good working relationship with the DSD currently especially because they have funded our programmes. We also offer training to the department with other stakeholders. There's good networking especially with DOJ and NPA and not too much with DCS because we don't do prison programs. Also department of health and education because we rely on the schools to refer for awareness programs (R-2).*

Of equal importance is the reference to co-operation between government departments and other organisations and agencies in working with children in conflict with the law to implement the Act (Department of Social Development 2010).

*Further from networking and partnerships we also implement STS model which engages all stakeholders and role players in a commitment towards addressing that identified problem. Towards seeing how the community will look like when the problem is fixed. In that way each stakeholder has a role to look at what to bring to the party, like what services to bring and how best to collaborate our efforts to ensure a better outcome (R-4).*

These networks develop and exist because of the interdependency between actors. Inter-organisation theory emphasises the fact that actors are dependent on each other because they need each other's resources in order to achieve their goals. Interdependencies cause interactions between actors which create and sustain relation patterns. The term interdependencies implies that the partners involved all have something to gain (Kickert et al., 2000:31).

The service providers' partnerships with the state has been efficient and effective.

*Together with all the role players and service providers that we are in partnership with; we want to be able to work closely with them in a more systematic way so that we can ensure a more successful outcome towards crime because despite our*

*organisations addressing the issue of crime, crime is still spiralling upwards. Level is still going up. So one wonders what we are doing wrong. So if we can collaborate our efforts and have one unified approach the likelihood is that we will have a better approach of addressing crime (R-1).*

### **5.3 Conclusion**

The findings of the study show that in implementing the Child Justice Act 75 of 2008, the service providers conceptions of the Act are in line with the minimum norms and standards of diversion programmes. They see their diversion programmes as being able to reach to all children who are willing to take responsibility for their offences committed as they are restorative in nature. In implementing the diversion programmes in terms of its content and process, the service providers try as much as possible to align it to the Act however they encounter challenges with resources in terms of their finances and transport. In relation to the children in delivery of the diversion programmes, it is important for the children to have support from their families so that they can successfully complete the diversion programme. In relation to the state as a partner in implementing the diversion programme, the service providers have a good working relation with all the government departments.



## **Chapter 6**

### **Discussion and conclusion**

Chapter 6 focuses on the conclusion of this study. It does this by summarising the main findings and makes recommendations on how to improve the implementation of the Child Justice Act 75 of 2008 diversion programmes offered by Khulisa. The study analysed the conceptions of the Child Justice Act 75 of 2008 and restorative justice, implementation challenges and partnerships.

The question is how one enhances policy implementation strategies to ensure successful service delivery. Policy development, implementation and service delivery therefore need to be consolidated so that a more coherent policy and strategy system with on-going review and performance management mechanisms are developed. According to Brynard (2005:2) “the complexity is not as much in the breath of the variables as in their depth. Unravelling that complexity is imperative to unravelling implementation effectiveness and therefore successful service delivery. The opportunity is to use the 5Cs strategically in their complex interlink ages to synergise implementation”.

Implementation problems occur when the desired result on the target beneficiaries is not achieved. Such problems can occur in both developed and developing countries. Whenever or wherever these critical factors are missing, there is bound to be implementation problems. These critical factors are communication, resources, dispositions or attitudes and bureaucratic structure which could lead to the implementation gap. Another cause of the implementation gap is the failure of the policy makers to take into consideration the social, political, economic and administrative variables when analysing for policy formulation. It is apparent that policies are rolled out regularly in developing nations, but most of the time, without achieving the desired results. As in developed countries, consideration should be given to the following: target beneficiaries should be involved from the formulation stage in order for them to have an input in what affects their lives, attention should be paid to both manpower and financial resources which will be needed to implement the policy, there must be effective communication between the target beneficiaries and implementers and provision should be made for adequate monitoring of projects.

“It is hard enough to design public policies and programmes that look good on paper. It is harder still to formulate them in words and slogans that resonate pleasingly in the ears of

political leaders and the constituencies to which they are responsive. And it is excruciatingly hard to implement them in a way that pleases anyone at all, including the supposed beneficiaries or clients” (Brynard, 2005:7). According to Kiiza (2007) there has never been a better time to be starting out on a public policy development career. New issues, improved leadership, improved governance and the demand for more performance oriented institutions that can compete in a globalised environment are all adding to the importance of public policy and the skills required for developing and managing it. As noted by Kiiza “there is an unmistakable mood of change around the globe about the importance of public policy in country stability, security and development. After decades, maybe even centuries, of debate about the respective roles of the private and public sectors, attention is now shifting towards more efficiency and effectiveness of public policy administration and implementation”.

The need for continued advocacy for restorative justice in South Africa cannot be over-emphasised. Restorative justice enhances re-integration of juvenile offenders back into society. Juveniles need to be afforded the opportunity to grow into responsible adults through programmes like diversion, which take into cognisance the juveniles’ accountability and developing them into responsible adults. Preliminary Inquiries, an innovation in the Child Justice Act 75 of 2008, serve as important forums for understanding young offenders’ situations in their totality and promoting their rights (both human rights and rights to juvenile justice). Service providers play important roles in ensuring justice for children in conflict with the law. Measures to bridge the gaps between legislation, policy and implementation need to be put in place. This may involve on-going capacity-building and support of all role-players in the Juvenile Justice sector. Government Departments should provide the necessary resources (human, infrastructural and financial) to ensure realisation of children’s rights in general, and the rights of children in conflict with the law, in particular. There is a strong role for multi-disciplinary teams, in achieving integrated solutions.

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## **Appendix 1**

### **Interview Guide for Service Providers**

## **INTERVIEW GUIDE FOR DIVERSION SERVICE PROVIDERS**

### **Establishment**

- When was the programme established? / What was the process?

### **Programme rationale**

- Why was the programme established? / What gave rise to its establishment?
- Who are the targeted beneficiaries? Why them?
- In your experience, what factors contribute to offending behaviour (only cases referred for diversion intervention)?
- What are the principles guiding the programme?

### **Methods**

- How would you define the intervention with child offenders?
- What are the criteria for diversion to your programme?
- How do you determine whether a particular case is suitable for your programme?
- How does your programme work? [Obtain programme/implementation documentation]
- How many children are taken in at a time?
- How would you describe the profile of a facilitator?
- What are the experiences of Khulisa in their partnership with other departments and NGO's in implementing diversion programme?

### **Output/outcomes**

- How many children thus far went through your programme? [stats per year]
- How would you define a successful diversion intervention?
- What is the value of your programme with child offenders? Please elaborate.
- What profile of child offender will best be served by your programme? [type/nature of offence, age, sex, developmental stage, peer groups, household dynamics, education, socio economic status] –
- What type offence will most likely be prevented by means of your programme?
- What is the typical profile of a child not reached through your programme? Please elaborate.
- What are the limitations of your programme?
- To what extent can your programme inform the diversion objectives of the Child Justice Act and restorative justice?