INTRODUCTION
The Child Justice Act 75 of 2008 (hereafter referred to as “the Act”) establishes a separate criminal justice system for child offenders. Its main aim is to keep children out of the formal criminal justice system, mainly through diversion. Only when diversion is not a feasible option should child offenders be tried and sentenced in child justice courts. When it comes to sentencing, the core provision is section 68, which reads that, “A child justice court must, after convicting a child, impose a sentence in accordance with this Chapter.” It is the focus of this paper to assess what is meant by the words “impose a sentence in accordance with the provisions of the Act”.

I start by briefly explaining the new requirements for pre-sentence reports, but the bulk of the paper deals with the imposition of sentence itself.

PRE-SENTENCE REPORTS
In terms of section 71 of the Act, a child justice court must now get a pre-sentence report, prepared by a probation officer, before it can sentence a child offender. Although the Act leaves some room for exceptions, this room is very limited. In practical terms it is only when the offender is to be sentenced for the pettiest of offences (when diversion would normally be the preferred process), or when the offender has the money to pay an appropriate fine immediately. Why the report should always be requested from a probation officer is not clear, but the Act does appear to leave virtually no exceptions in this regard. This does not mean that other experts may not also provide pre-sentence reports. Other experts could include criminologists, psychiatrists and so on. However, their reports will have to be provided as additional reports. Other requirements of the Act in connection with pre-sentence reports largely serve to confirm the existing law.

THE SENTENCES A CHILD JUSTICE COURT MAY IMPOSE
Before the discussion that follows, it is important to keep in mind what the sentences are which are provided for by the Child Justice Act. The available sentences are:

- Community-based sentences.
- Restorative justice sentence.
- Fines.
- Correctional supervision.
- Compulsory residence in a child and youth care centre.
- Imprisonment.

Incidentally, I am of the view that only these sentences may be imposed by the court, and that any other sentences provided for in, for example, the Criminal Procedure Act, are no longer available to a child justice court.

* This contribution is a slightly reworked version of a paper read on 19 September 2013 at the Crimsa Biennial conference in Pretoria.
GUIDELINES ON IMPOSITION OF IMPRISONMENT

Basic rules regarding imprisonment
One of the crucial decisions which need to be made by any sentencing court is whether to impose a custodial sentence or not. It is no different in the case of child offenders. As a result, I will approach this discussion from the basis of imprisonment, although other reasons, which are made clear in the process of the paper, also dictate such an approach.

Section 77 directly addresses the imposition of imprisonment by a child justice court. First, it disallows the imposition of imprisonment on any person (child) who is under 14 years old at the time. Sentences for other child offenders may not exceed 25 years’ imprisonment. The assumption is that this limit applies per offence or charge, and not to the totality of offences charged, but I will return to this issue later. A final rule in section 77 is that the court “must antedate the term of imprisonment by the number of days that the child has spent in prison or child and youth care centre prior to the sentence being imposed”. This is different from the situation in the case of adult offenders, where courts are generally expected to take into account the pre-sentence detention of the offender, but there is no direct requirement that an equal period should be subtracted from the sentence.

Then follows a fairly complicated set of rules, linked to the seriousness of the crime, governing which child offenders may be sentenced to imprisonment. The rules consist of a combination of the crime, the presence or absence of previous convictions, and the existence or otherwise of “substantial and compelling reasons”. I will return to these provisions after a discussion of the seriousness of the crime.

To wrap up the discussion of section 77, it is necessary to tie down a few loose strands.

Minimum sentences legislation
Subsection (2) contains a provision to the effect that the minimum sentences legislation should be applied in the sentencing of child offenders, notwithstanding any other provisions, if the offender was 16 or 17 years old at the time of the offence. However, the relevant provisions of the minimum sentences legislation were declared unconstitutional in Centre for Child Law v Minister of Justice and Constitutional Development, with the result that there are no provisions affecting children of 16 and 17. Subsection (2) is due for removal, but until then a less than careful magistrate might still apply it by mistake.

25 Years’ imprisonment per charge
I noted earlier that it is assumed that the limit of 25 years’ imprisonment is per charge. To explain it is necessary to quote subsection (4):
“A child referred to in subsection (3) may be sentenced to a sentence of imprisonment for a period not exceeding 25 years.”

Who is this child referred to in subsection (3)? It is, “A child who is 14 years or older at the time of being sentenced for the offence, … [who] may only be sentenced to imprisonment, if the child is convicted of an offence….”

The reference to offence is in the singular each time. Similar provisions in the Criminal Procedure Act 51 of 1977 and Magistrates’ Courts Act 32 of 1944 have consistently been interpreted to refer to one offence: limits in the courts’ jurisdiction are per charge or offence. As a result, when an offender has been charged with, for example, 20 counts of fraud, a magistrate’s court’s jurisdiction is 3 years’ imprisonment on each of the 20 counts and theoretically, therefore, 60 years’ imprisonment. It should be noted that this total jurisdiction, which appears on the face of it to be massive, has very little bearing on the question what an appropriate sentence would be. With multiple offences there are other principles in play as well, of which the most important is that the court must take into account the cumulative effect of such sentence. In other words, the court should sort of think away the technicality of the various charges, and consider the totality of the criminal behaviour, and impose a sentence reflecting the seriousness of this totality. Similar considerations should apply in the case of child offenders.

Guidelines for the discretion to impose imprisonment
Apart from the rules discussed so far, principles aimed at guiding the court in its decision to impose imprisonment are scattered throughout the Act. Section 77 confirms that child offenders should be sentenced to imprisonment only “as a measure of last resort and for the shortest appropriate period of time”. This guideline is, of course, also contained in the Constitution, which means that one could refer to it as “the constitutional demand”. Most of the other guidelines are aimed at giving effect to this constitutional demand and it is, therefore, useful.
to consider those guidelines first, before returning to the constitutional demand.

**Further guidelines**

The basic principles of sentencing of child offenders are contained in section 69(1) of the Act. In addition to again stressing that imprisonment should be a last resort, this provision can be summarised as follows:

- The sentence must be individualised, and the well-known triad of factors, namely the offender, the crime and the interests of society has to be balanced with one another.
- Restorative justice should be an important consideration of sentencing of children, in that this is the approach which would “encourage the child to understand the implications of and be accountable for the harm caused”.22
- Child offenders should be reintegrated within their families and society, if necessary with the employment of supervision, treatment or whatever other measure might be appropriate.

There is no reference in section 69 to the other purposes of punishment, such as deterrence and rehabilitation. Although rehabilitation might be assumed under the term reintegration, there is nothing to equate with deterrence. A strong argument can be made out that this was not an oversight by the legislature, and that deterrence should also not be incorporated into this provision by way of the introductory part of section 69(1), which appears to permit the court to take into account “any other considerations relating to sentencing”. Child offenders should not be used to serve as examples to other would-be offenders, while an appropriate sentence based on the considerations noted earlier has the best chance of ensuring that the criminal behaviour will not be repeated. This argument is also in line with various provisions of the UN Convention on the Rights of the Child, provisions which the courts are expected to keep in mind when interpreting all the provisions of the Act.23 It is further supported by the decision of the Canadian Supreme Court that the equivalent provision in that country’s Act was deliberate and that deterrence is not a valid principle or purpose in the sentencing of children.24

In addition to the general guidelines in subsection (1), section 69(4) provides further guidelines specifically with respect to the imposition of imprisonment. It reads as follows:

“(4) When considering the imposition of a sentence involving imprisonment in terms of section 77, the child justice court must take the following factors into account:

(a) The seriousness of the offence, with due regard to—
(i) the amount of harm done or risked through the offence; and
(ii) the culpability of the child in causing or risking the harm;
(b) the protection of the community;
(c) the severity of the impact of the offence on the victim;
(d) the previous failure of the child to respond to non-residential alternatives, if applicable; and
(e) the desirability of keeping the child out of prison.”

Three of these factors would tend to aggravate the sentence in case of a serious crime, namely (1) the need of society to be protected again an offender who is violent or difficult to control, such as (2) when “non-residential alternatives” have proven to be ineffective, and (3) when the impact of the crime on the victim is severe (especially when this cannot be redressed through some form of restorative justice process).

The main guideline of this provision, which has potential to impact sentencing beyond the limits of child justice, relates to the seriousness of the crime.

**The seriousness of the crime**

Section 69(4) explicitly requires the court to take account of the seriousness of the offence, but then it continues that this seriousness has to be accounted for with “due regard to … the amount of harm done or risked through the offence; and … the culpability of the child in causing or risking the harm” (emphasis added). This is the first time I know of that any legislation in South Africa has referred to harm and culpability as indicators of the seriousness of a committed crime.

Internationally, most of the criminal justice systems worth comparing already use these two elements as determinants of the seriousness of the crime. These systems include the United States, Canada, English law, all the Australian and most European jurisdictions.25 These elements have also been proposed by the South African Law Commission in its Report of 2000 as the factors which determine the seriousness of a crime.26 In short, the DNA of these elements is well-established. But in practice, in our criminal justice system, they are unknown. This does not mean that courts do not regularly take note of the harm done by crimes in assessing the seriousness...
of the crime, or that courts do not consider the culpability of offenders when determining which sentence is appropriate. But the courts have not before been required to actually make an assessment of the harm involved with an offence, and generally the culpability of the offender has not been part of an assessment of the seriousness of the crime. It would have been possible to speak about these two components of the seriousness of the crime and the research done on them for the whole day. Instead, I am going to make the following observations only, and leave it there:

1. The seriousness of the crime has just about always been an important factor in determining an appropriate sentence. So far the courts have always made a rough discretionary assessment of this seriousness, without making a separate (interim) finding about the sentence which would fit the crime only. It is likely that many sentencers will simply continue this approach, and will not make a particularly accurate finding about the harm or the culpability. However, section 69(4) is mandatory, in that it states that the court “must” take account of these factors and in terms of the general principles of our law, when a court must take certain factors into account, it must specifically address them in its judgment.

2. Harm should generally be understood in accordance with its normal meaning, and so let me quote a dictionary on this meaning: “physical injury, especially that which is deliberately inflicted; material damage; actual or potential ill effect.”

3. Culpability has a technical meaning within South African criminal law, to the effect that people can only be held accountable if they have a “guilty mind” (mens rea) with respect to their criminal act. To quote one source in this respect: “The whole question of culpability may be reduced to one simple question, namely ‘could one in all fairness have expected X to avoid this wrongdoing?’” Culpability and blameworthiness are virtually the same, and the issue here is that when, for some reason, an offender is less than fully to blame for the harm associated with the crime, then the seriousness of the crime is reduced. To give full effect to this factor presupposes that the court should make some assessment of how much the offender is to blame, if this is less than fully, and this might even extend to a specific figure, such as that the offender is only 50% culpable (or blameworthy). Child offenders are less culpable than adult offenders for the same kinds of actions because of all the reasons why children are considered different: they are “less mature, more vulnerable to influence and pressure from others, … more open to rehabilitation.”

To summarise this discussion: we now have a requirement that the seriousness of the crime should be determined by two internationally recognised factors. This requirement appears, on the face of it, to be very limited. It only appears in section 69(4), in connection with the imposition of imprisonment, and only sets a requirement which a child justice court needs to apply. In other words, there is no demand from courts trying adult offenders, and the requirement does not apply when a court is only considering a sentence other than imprisonment. However, and this is my tentative argument, these two factors will eventually have to find much wider application. First, it makes no sense for a child justice court to determine the seriousness of the crime according to one standard for one kind of sentence, but according to another standard for another kind of sentence. In the same vein, it makes no sense for child justice courts to determine the seriousness of the crime for child offenders in accordance with one standard, different from the standard the other courts utilise for adult offenders.

The seriousness of the crime in terms of the schedules to the Act

As noted earlier, the Act contains lists of the crimes of which a child offender might be convicted in three schedules to the Act, with the least serious offences in Schedule 1 and the most serious in Schedule 3. In my view all the offences are contained in these schedules, but there is a reservation that there might be an obscure crime here and there that slipped through the cracks somehow, but the wording of the schedules certainly attempts to be all-encompassing.

A few examples of the crimes in the schedules give a sense of what is involved here. Schedule 3 includes crimes such as treason, murder, rape, aggravated robbery, and so on. Statutory offences include other serious sexual offences, drug offences, firearm offences and then also a number of generalised items, including serious offences committed by a gang or in an organised manner, and “Any other statutory offence
where the maximum penalty determined by that statute is imprisonment for a period exceeding five years.”

In Schedule 1, containing the least serious crimes, some of the most serious instances include theft involving property of an amount not exceeding R2 500; fraud not exceeding an amount of more than R1 500; unlawful possession of certain drugs; consensual "statutory rape"; common assault, etc. But there are also generalised items, such as “Any other statutory offence where the maximum penalty determined by that statute is imprisonment for a period of no longer than three months…” Very few statutory offences have such short maximum periods.

Schedule-2 offences cover the middle ground. The rules in the Act, linked to these offences, are the following: The simplest principle relates to the most serious offences, where the Act permits imprisonment without any further requirements. Imprisonment may be imposed for schedule-2 offences only when there are “substantial and compelling reasons” for the imposition of imprisonment. These “substantial and compelling reasons” are also required before imprisonment may be imposed for the least serious (schedule-1) offences, when in addition imprisonment is only permitted if the offender has “relevant previous convictions”.

It is notable that no judgment has yet been reported in which the words “substantial and compelling reasons” have been attended to. The phrase “substantial and compelling”, which describe the circumstances which have to exist before a court may depart from the minimum sentences prescribed for serious crimes in the Criminal Law Amendment Act 105 of 1997, are well-known. In that context our courts have preferred not to circumscribe these words to any greater extent, and have decided that they mean that there must be really good reasons for departing from the prescribe sentences, that the prescribed sentences should normally be imposed, but that a court should never permit an injustice to be done through a sentence it imposes. From this one might argue that “substantial and compelling reasons” in the Child Justice Act should at least mean that a court should impose imprisonment for the less serious range of crimes only when there are really good reasons to do so, but that the normal approach should be that imprisonment should not be imposed. On the other hand, there is also a strong argument to be made out that the wording in the minimum sentences legislation is so different from the Child Justice Act, and that the purpose of the phrases are actually diametrically opposed, so that the interpretation in the minimum sentences legislation is of no use to the interpretation of the Child Justice Act. But even if one concede these arguments, judgments on “substantial and compelling circumstances” have considered the ordinary meaning of these words, and are therefore still relevant. For example, S v Rieker38 noted that “substantial and compelling” cannot be equated to “unique” or “highly exceptional” or merely “convincing” or “relevant”, but that it should go to the core of the matter; “compelling” means that the circumstances are almost impossible to ignore. In S v Homareda39 the court held that substantial means “weighty, as opposed to trifling or insignificant”, and “compelling” involves being “urged irresistibly, constrained or obliged”. All these words confirm that the final decision will be in the hands (discretion, if you will) of the sentencer, and this point returns this discussion to the issue of imprisonment as last resort, the constitutional demand.

**When would imprisonment be a last resort?**

The fact is that this decision is inescapably a discretionary decision, which has to be left to the sentencer. At the same time, whether imprisonment is a last resort should not depend exclusively on the view of the individual presiding officer. As should be clear by now, the Act does regulate and guide this discretion. These guidelines could be summarised with a list of factors which the child justice court has to address in its sentencing judgment, and has to do explicitly:

- The harm caused or risked by the offence.
- The culpability or blameworthiness of the offender.
- The impact of the offence on the victim.
- Whether the child offender is so dangerous that society needs to be protected against him.
- In the case of a schedule-2 offence, whether there are substantial and compelling reasons for the imposition of imprisonment, together with an exposition of these reasons.
- In the case of a schedule-3 offence, the relevant previous convictions.
- The importance of imposing a sentence that will assist the child’s reintegration into society.
- The importance of imposing a sentence which will restore the harm, or other imbalances caused by the offence.
• Imprisonment may only be imposed when it is inescapable, and in coming to this conclusion, if the court is to err, it must err on the side of a non-custodial sentence.

Children who act as “adults”
From time to time one comes across the argument that a young offender cannot be treated as a child, as his actions were not commensurate with what one would expect of a child. Such an approach should have come to an end with the judgment in S v Machasa. Two of the appellants were 17 and 16 years old respectively when the deceased was murdered by a group of people in the course of public unrest. They were part of a bigger group. The trial judge held the brutality of their actions against them, finding that they acted with inherent wickedness. Appellate Judge Van Heerden found that it is not useful to import the concept of inherent wickedness in establishing the blameworthiness of these offenders, as their actions are explained by their immaturity, their lack of judgement and self-control, and that they are more easily influenced by other people.

This approach is also reflected in the judgment by the Constitutional Court in Centre for Child Law v Minister of Justice and Constitutional Development:

“The sharp distinction between children and adult offenders is not out of sentimental considerations, but for practical reasons relating to children’s greater physical and psychological vulnerability. [Children are] ... less mature, more vulnerable to influence and pressure from others ... more capable of rehabilitation ...”.

It is a feather in the cap of the South African legislature that it did not follow the many examples in the so-called free world, which allows children to be tried as adults when they commit more serious crimes.

CHILD OFFENDER
I have spoken of a “child offender” throughout this paper. It is important to understand that the Child Justice Act can only find application if the offender was a child, that is, under the age of 18 years old, when he or she committed the offence. We all know that South African wheels of justice can at times turn very slowly. How does this problem affect the sentencing of child offenders? There is a variety of different scenarios.

The simplest scenario would present itself when the offender is still under 18 years old at the time of sentencing. In this case the provisions of the Act and their consequences for child offenders find full application.

In a second scenario the offender can be under 18 years of age at the time when the proceedings are instituted, but no longer a child at the time of sentencing. Such an offender will still have to be dealt with in terms of the Child Justice Act. However, it could now be argued that not all the provisions can be applied in equal measure. For example, it is a child who should not be imprisoned except as a last resort. If the offender before the court is already 18 years or older, so the argument could go, this principle no longer applies in terms of the Constitution. While this is true, the Act defines “child”, and whenever it uses this word, it has to be interpreted in terms of this definition. And the Act’s definition will cover the offender in this scenario, even if the proceedings are drawn out to such an extent that the offender is much older at the time of sentencing. It will be for the court to deal with any practical problems which might arise because the offender might be now be an adult, with his own family, employment, and so on.

A third scenario would relate to someone who committed the crime while being under 18 years old, but the proceedings are only instituted at a later stage, when the offender is already an adult. Generally, these cases will be dealt with in the ordinary courts, and the Child Justice Act will find no application. However, when it comes to the severity of sentence, the court should mitigate the sentence because of the offender’s youth. I would argue that there is no reason why the court should not apply the same approach as I discussed earlier today, because that offender was still someone “less mature, more vulnerable to influence and pressure from others”.

CLOSING
When Parliament introduced the Child Justice Act, it was quite a momentous occasion. Through this step South Africa is now one of the leading countries in its compliance with its obligations in terms of the Convention on the Rights of a Child. To make sense of all the provisions of the Act, and to keep all the connections and links in mind at the right time, is no easy task. In a way I hope you are totally confused about many of the details of the legislation, because that is the way it should be unless one has the Act and related documents on your lap. However, the effort is worth it, because we are dealing with our future, the children of South Africa.
Endnotes:

1. As to the position prior to the Child Justice Act, see SS Terblanche A guide to sentencing in South Africa 2ed (2007) 320.
3. Section 72 of the Act.
5. Section 74 of the Act.
6. Section 75 of the Act.
7. Section 76 of the Act.
8. Section 77 of the Act.
10. Section 77(1)(a). It should be noted that this age applies at the time of sentencing, in contrast to the age of being a child (that is, under the age of 18), which is relevant at the time of the commission of the crime.
11. Section 77(4).
12. Section 77(5).
13. See, for an interesting view on this matter, S v Stephen 1994 (2) SACR 163 (W) and S v Brophy 2007 (2) SACR 56 (W). For the position in Canada, where it has been the practice for years now to reduce the period of imprisonment at a ratio of roughly 2:1 (2 days for every 1 day spent awaiting trial), see Julian V Roberts "Pre-trial custody, terms of imprisonment and the conditional sentence" (2005) 9 Canadian Criminal Law Review 191-213.
14. Section 77(3).
15. 2009 (2) SACR 477 (CC).
18. See, for example, S v Whitehead 1970 (4) SA 424 (A) at 439; S v Coates 1995 (1) SACR 33 (A) at 36; S v Mhlakaza 1997 (1) SACR 515 (SCA) at 523; S v Maseola 2010 (2) SACR 311 (SCA).
19. Section 77(1)(b).
20. Section 28(1)(a).
21. Section 69(1)(a).
22. Section 69(1)(a).
23. In terms of the Preamble to the Act, and s 3(i).
26. The peremptory nature was specifically noted in S v RS 2012 2 SACR 160 (WCC) at para 26.
32. Item 19.
33. Item 21.
34. Item 17.
35. Section 77(3)(a).
36. See S v Malgas 2001 (1) SACR 469 (SCA); S v Vilakazi 2009 (1) SACR 552 (SCA).
37. 2002 (1) SACR 566 (T) at 570.
38. 1999 (2) SACR 319 (W) at 322.
39. 1991 (2) SACR 308 (A) at 318.
40. A 318g-h.
41. 2009 (2) SACR 477 (CC) at paras 26-28.
42. I am aware of the controversies of terminology, and proposals that what should be used is “children in trouble with the law.” Child offender is used in the interest of legal clarity.
43. Section 1, in terms of which child “means any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 42(2).”
44. For a full discussion of this scenario, see SS Terblanche “The child justice act: a detailed consideration of section 68 as point of departure with respect to the sentencing of young offenders” (2012) 15 Potchefstroom Electronic Law Journal 436 at 453-456.