



OPEN SOCIETY FOUNDATION  
FOR SOUTH AFRICA

CONFERENCE REPORT

child**justice**  
**alliance**

August  
2006

# Child Justice in South Africa: Children's Rights Under Construction

Compiled by Jacqui Gallinetti, Daksha Kassan and Louise Ehlers



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# Foreword

The Child Justice Bill is regarded by many activists in the field of child justice, children's rights and child protection as a progressive step to offer child offenders the opportunity to take responsibility for their behaviour, the means to receive appropriate interventions in order to prevent re-offending and to be treated in a manner consistent with their age and vulnerability. The Bill is an illustration of the manner in which South Africa has embraced the concept of children's rights within the overall human rights discourse and is striving to create a culture of dignity, fairness and equality for all.

It is within this context of freedom and democracy that the Open Society Foundation for South Africa has supported the work of civil society organisations in their efforts to promote the principles that form the foundation of our constitutional dispensation. The partnership between OSF-SA and the Child Justice Alliance in hosting the conference that resulted in this publication has been ongoing for a number of years and illustrates their mutual desire to promote informed debate on rights-issues pertinent to constitutional development, in particular the promotion of the rights of children in the criminal justice system.

This publication encapsulates the range of discussion and debates that occurred during the conference. It also serves as a record of the proceedings that can be widely disseminated to provide further insight and awareness on child justice developments thus far and the challenges still facing children who come into conflict with the law.



**Zohra Dawood**

Executive Director  
The Open Society Foundation for South Africa  
December 2006

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# PART 1

# Introduction

Jacqui Gallinetti, Daksha Kassan  
and Louise Ehlers

## The importance of civil society and government collaboration

South African civil society has an illustrious past with a strong tradition of advocacy and lobbying in the context of the struggle against apartheid. These activities continued in the transition to a democratic form of government and are still emerging in various forms today.

One of the areas in which the advocacy efforts of civil society have made a tremendous impact and still has much scope for further action is the field of children's rights. The UN Convention on the Rights of the Child (CRC) is already over 15 years old and is the most widely ratified human rights document. In terms of article 4, State Parties to the CRC are bound to take all appropriate legislative, administrative and other measures for the implementation of the rights recognised therein. The obligation therefore rests with the State to ensure that national laws comply with and include the rights contained in the CRC. However, this does not mean that civil society, and non-governmental organisations in particular, do not have a meaningful and essential role to play in ensuring that national laws protect and enshrine the rights of children.

It is recognised that progress in establishing a children's rights culture is often due to governmental collaboration with NGOs and this has manifested itself in the drafting process of the CRC as well as in the monitoring of State's implementation of the CRC.<sup>1</sup> Bayes argues that the importance of NGOs in assisting and exerting pressure on government is due to the fact that NGOs have particular knowledge of a child's situation, can consult with children and are able to identify effective means of intervention and protection.<sup>2</sup>

There are a number of ways that NGOs can contribute to ongoing children's rights work in relation to government. These include assisting in service delivery, research, providing expertise in training, monitoring government action both nationally and internationally (the latter by reporting to the Committee on the Rights of the Child) and exposing human rights abuses.

In addition, in South Africa, our Constitution contains a number of provisions that facilitate the participation of civil society in interacting with government in order to achieve both accountability and transparency.

Following this tradition of civil society and governmental co-operation in striving to protect the rights of children, the Open Society Foundation for South Africa and the Child Justice Alliance recently convened a conference entitled "Child Justice in South Africa: Children's rights under construction". The purpose of the conference was to take stock of the situation relating to the criminal justice system for children in conflict with the law. Although South Africa has been on the brink of new law for child offenders for the last few years, such law reform has not as yet become a reality and children who commit crime are still treated in a manner that is similar to the way adults are treated in the criminal justice system.

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<sup>1</sup> H Bayes, "The Age of 'Agendas' for Children", *International Children's Rights Monitor*, 2000, Vol. 13, No. 2, 10.

<sup>2</sup> H Bayes, *op cit* 10.

## The rationale behind the conference

The recognition of this need for a separate child justice system dates back to the early 1990s, as it is argued that the child justice law reform process was initiated by non-governmental organisations that launched advocacy campaigns to focus attention on children who were being detained for allegedly committing common criminal offences as opposed to offences that were political in nature and linked to the struggle against apartheid.<sup>3</sup> These campaigns included the “Release a Child for Christmas Campaign”, the “No Child Should Be Caged” campaign, as well as the efforts of the Community Law Centre, which contracted university students to intervene informally in the criminal courts and provide assistance to arrested children, specifically in the form of trying to secure their release from custody awaiting trial.<sup>4</sup>

In 1996 a Project Committee of the South African Law Reform Commission (then the SALC) was established to investigate law reform relating to child offenders. This Project Committee was comprised of a number of experts in matters relating to children and included a number of presenters at this conference, including Dr. Ann Skelton as well as Professor Julia Sloth-Nielsen and Advocate Maggie Tserere. In July 2000 the Project Committee released its report together with the Child Justice Bill.

The Bill is aimed at protecting the rights of children accused of committing crimes, regulating the system whereby a child is dealt with and ensuring that the roles and responsibilities of all those involved in the process are clearly defined in order to provide effective implementation. The implication of the Bill being adopted as legislation will be to revolutionise the criminal justice system in South Africa in as far as it affects children in conflict with the law.

The Bill introduces a number of new procedures relating to children (e.g. the preliminary inquiry), as well as formally adopting processes that have been operating in practice over the last few years without formal legislative enactment in criminal procedure legislation (e.g. assessment and diversion). As a result the Bill introduces a child justice system aimed at ensuring that children who are capable of being diverted away from the system, and that children who are serious offenders and against whom the community needs to be protected are dealt with accordingly. This accords with the CRC, which emphasises the fact that the best interests of the child need to be balanced against the interests of the community to be safe and secure. While ensuring that a child’s sense of dignity and self-worth are recognised, the Bill also provides for mechanisms that ensure that a child respects the rights of others. In this respect the formal introduction of diversion and the underlying principles of restorative justice into our child justice system is very exciting. It encompasses the ultimate goal of achieving a system that allows child offenders to participate in a meaningful process of recognising their actions, making amends for them and preventing re-offending.

This Bill was lauded by many as a milestone in the creation of a protective legislative framework that complies with South Africa’s obligations contained in international and regional instruments as well as the Constitution.

However, after the Bill was introduced by the Department of Justice and Constitutional Development into the South African parliament in 2002 as Bill 49 of 2002 (essentially in its original form with only certain technical drafting changes having been effected to the South African Law Reform Commission’s Bill), little progress has been made in realising the enactment of this new proposed law. In 2003 the Portfolio Committee on Justice and Constitutional Development held public hearings and was briefed by government departments and civil society on Bill 49 of 2002. During the debates that took place before the Portfolio Committee in 2003, the Bill appeared to undergo certain changes. Although the ethos of the Bill remained the same in that the processes of assessment, diversion, the preliminary inquiry and alternative sentencing remained intact, the overall child rights nature of the

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3 J Sloth-Nielsen, “The Juvenile Justice Law Reform Process in South Africa: Can a Children’s Rights Approach Carry the Day?” QLR, 1999, Vol.18, No. 3, 470.

4 J Sloth-Nielsen, *op cit*, 470-471.

Bill that focused on the individual child offender was whittled away by the Portfolio Committee. The result was that at the end of 2003, the Bill was not yet finalised but was far more punitive in nature and did not allow for many of its provisions to apply to children charged with serious, scheduled offences.

However, after the debates in 2003, parliament recessed for the elections in 2004 and since that time, the Bill has not been debated again before the Portfolio Committee.

South Africa has been widely commended for its transition towards a human rights culture and its recognition of the inherent dignity and equality of all citizens and especially children. It is therefore lamentable that its parliament has failed to deliver on this critical legislative framework that would result in a separate procedural system of criminal law that acknowledges the vulnerabilities and needs of children.

Despite the delays in the enactment of the law, civil society and government activism in relation to child justice has not waned. In the absence of a legislative framework there are myriad services, policies and interventions that have been introduced into criminal justice practice largely through the initiatives of departmental and judicial officers. These include:

- the establishment of Reception, Assessment and Referral Centres by the Department of Social Development;
- the diversion of children out of the formal criminal justice system on recommendations of probation officers and the discretionary powers of prosecutors;
- the development, testing and implementation of diversion programmes for various categories of child offenders by civil society service providers and the Department of Social Development;
- the establishment of one-stop child justice centres in Port Elizabeth, Mangaung and Port Nolloth by the Department of Justice.

In addition to these innovations within the criminal justice system, there has been a range of new research undertaken by both government and civil society on child justice issues. This includes, among others, work on children involved in organised armed violence, research on children used by adults to commit crimes and a study on the use of life sentencing for children. Initial findings from all of these studies, as well as developments in South African jurisprudence reiterate the urgent need for a legislative framework in order to ensure that the rights of children in conflict with the law are protected.

## Child Justice in South Africa: Children's rights under construction

The conference convened by OSF-SA and the Child Justice Alliance therefore presented an ideal opportunity to reflect on the developments in child justice and to debate how best the findings of emerging research can be used to improve the delivery of services to children charged with criminal offences.

The objectives of the conference were to:

- showcase a range of new research findings in relation to child justice;
- review policy and legal precedents; and
- provide an opportunity to further the debate on child justice in South Africa.

The conference participants included NGOs working in the field of child justice, academics and representatives from the Departments of Justice, Education, Correctional Services, Treasury, SAPS, National Prosecuting Authority and the Legal Aid Board. The discourse and deliberations at the conference were enhanced by the atten-



dance of Professor Jaap Doek who delivered the key-note address. Professor Doek was able to provide a number of salient suggestions and recommendations both in terms of improvements to the Child Justice Bill in its current form as well as what steps South Africa would need to take to meet its international obligations in relation to the CRC.

The conference was formally opened at a function where Justice Yvonne Mokgoro stated that “in the context of criminal justice, no matter how heinous and no matter how vile their actions, children have a right to be treated as children”.

This publication documents the papers delivered at the conference as well as the deliberations and recommendations made by the participants. The case law and policies discussed as well as the findings from the research appear more fully in other forms. However, the papers that follow represent a concise overview of the state of child justice in South Africa.

## PART 2: CONFERENCE PAPERS

Professor Jaap Doek  
Chairperson of the United Nations  
Committee on the Rights of the Child

# Child justice trends and concerns with a reflection on South Africa

## Introduction

The Child Justice Bill lies at the centre of our deliberations and discussions at this workshop. Given the very high quality of this Bill, I appreciate the opportunity given to me to participate in this workshop and to provide some input from the Convention on the Rights of the Child (CRC) Committee's perspective. In my presentation, I will discuss some trends in the activities related to child justice together with the CRC Committee's concerns, followed by our comments on the Child Justice Bill.

By way of introduction I'd like to make the following observations:

- **First:** the traditional label for activities concerning children in conflict with the law is "juvenile justice". I will try to follow as much as possible the term "child justice" because that is the one used for the Bill mentioned above.
- **Second:** I think there is no need in this workshop of experts to give an exposé on the objectives of child justice as enshrined in article 40 of the CRC and other provisions of the CRC or on the content and meaning of, in particular, articles 40, 37 and 39.

So, I will limit myself to two specific comments:

First, the implementation of the CRC regarding children in conflict with the law should not be limited to articles 40, 37 and 39. The holistic approach, which is consistently promoted by the CRC Committee, means in this context, *inter alia*, that the so-called (by the Committee) general principles of the Convention (articles 2, 3, 6 and 12 of the CRC) have to be an integral part of the administration of child justice. In other words, make sure that discriminatory practices do not take place and if they do, take adequate (disciplinary and other) measures to correct the discrimination; make sure that in all actions taken with regard to the child in conflict with the law, her or his best interest is a primary consideration; make sure that actions taken do not negatively affect the child's right to life, survival and development and finally, make sure that the child is given the opportunity to express her or his views, not only during the trial, but also in all actions before and/or after the trial that affect him or her and that due weight is given to these views. This holistic approach also means that the implementation of the rights of the child such as the right to health care, to education and protection does not stop at the door of a detention centre or similar facilities for children in conflict with the law.

Secondly, the objectives of the Child Justice Bill (section 2) clearly reflect the objectives mentioned in article 40 (1) of the CRC, but I was puzzled by the fact that “assuming a constructive role in society” was not explicitly mentioned in section 2.

## Some trends from an international perspective

The developments in the field of child justice in the 192 States Parties to the CRC are so different that it is not easy to identify anything other than general trends; and some of these trends may not apply to every State. With this disclaimer the following can be said:

- **Changes of laws:** in many States Parties measures have been taken or are underway to bring existing laws, relevant to children in conflict with the law, in line with the provisions of the CRC, in particular article 40. In some States Parties, these law reform efforts mainly focus on procedural aspects with little attention paid to the sentencing issues in child justice. In other States Parties, a more comprehensive attempt has been made, or is underway (e.g. Brunei and South Africa) to introduce a complete new piece of legislation with different titles e.g. Children's Code, Juvenile Justice Act or Child Justice Act. Some of these laws comprehensively deal with both children in need of care and protection and children in conflict with the law. This sometimes results in some confusion because of the lack of a clear distinction between the two groups and children in need of care may be placed in facilities for children in conflict with the law and be subjected to a somewhat punitive regime.
- **Organisational measures:** in quite a number of States, measures are taken to establish juvenile courts - often a process that starts in the urban centres and is gradually extended to the rural and remote areas of the country. Lack of financial and human resources are often very serious obstacles in this regard and an alternative would be to appoint well-trained juvenile judges in the regular district courts with the mandate to deal with all the civil and criminal cases involving children. The same obstacles prevent or limit efforts to establish well-organised juvenile probation services with trained staff. The result of this is that there are well-intentioned proposals (often reflected in specific new legal provisions) for the development of alternative measures such as community service orders and different forms of restorative justice but these are not followed up by concrete actions.
- **Growing concern about juvenile crime:** the emphasis on a juvenile justice framework is not only inspired by the CRC, but quite regularly linked with concerns about growing juvenile delinquency. Major concerns expressed in this regard by many States Parties related to the increase of violent crimes and children embarking on criminal activities at a young age. This has sometimes resulted in discussions on lowering the minimum age for criminal responsibility, but to my knowledge only Japan has actually lowered the minimum age for criminal responsibility from 16 to 14 years of age. However, they have nonetheless developed measures for early intervention in the case of a child under the minimum age for criminal responsibility who commits an offence. These concerns made the call for a tough-on-crime policy very popular and rewarding during election time (e.g. prompting the use of zero tolerance; “three strikes and you are out”; minimum sentences). This tough-on-crime approach seems to make it more difficult to find sufficient political and other support (e.g. in the media) for the implementation of a system of child justice that is in full compliance with the CRC and the related international standards, and this is the case not only in South Africa. At the same time, legislative measures are sometimes put in place to make sentencing practice more punitive (see for example, South Africa's minimum sentencing legislation and its applicability to 16 and 17 year olds which was only recently (potentially) done away with by the Supreme Court of Appeal's decision in *Brandt v. State*).

In short, many States Parties do take legislative measures to bring their laws on juvenile justice in compliance with the CRC and this includes provisions for alternative measures. But the implementation of these measures often does not follow, for various reasons. The top priority in this field for the coming years is therefore implementation.

## The Child Justice Bill

Some of the concerns of the CRC Committee have already been mentioned but let me discuss these and some of our other concerns that link to the South African Child Justice Bill (hereinafter the Bill).

### MINIMUM AGE OF CRIMINAL RESPONSIBILITY

The Committee is concerned about the (very) low age of criminal responsibility in too many States Parties, which often belong to the Commonwealth and have inherited the low minimum age from British rule. The CRC requires that States Parties set a minimum age for criminal responsibility but without providing further information on what is acceptable in that regard. The Beijing Rules limit themselves to the rule that the minimum age for criminal responsibility should not be too low. From the many recommendations of the CRC Committee to the States Parties in this regard, it can be concluded that in all instances where the minimum age for criminal responsibility was below the age of 12 years, the Committee recommended an increase of that age without explicitly stating what it should be. However, it may nevertheless be concluded that the *de facto* acceptable lowest minimum age for criminal responsibility is 12 years and that the Committee favours a minimum age for criminal responsibility higher than 12 years. The minimum age for criminal responsibility of 10 years in the South African Bill does not meet this standard. One could argue that the minimum age is in fact 14 years because children of 10 to 14 years of age fall under the rule of *doli incapax*, meaning that there is a rebuttable presumption that the child lacked criminal responsibility. But the practice of the implementation of this rule gives reason for concern. Regarding section 5 of the Bill, it may not be easy to prove beyond reasonable doubt that the child had the capacity to appreciate the difference between right and wrong. In many countries, the prosecutor has the discretion to decide whether he or she will charge the child. It is of course speculative to say anything on what will be the practice under section 5 of the Bill, but it would not come as a surprise if the preliminary inquiry procedure does not actually conduct an in-depth assessment of the child's capacity if he or she is charged with a serious crime. Because judges usually defer to prosecutorial discretion, prosecutors are able to proceed to trial with more serious offences such as robbery and sexual offences. Because of this the CRC Committee is not in favour of the *doli incapax* rule and would prefer to set the minimum age at the level where the States Parties would like it to be in principle. In the case of South Africa, this would be 14 years as this is the age when children are considered to be *doli capax*.

Finally, the Committee has expressed concern that children below the minimum age for criminal responsibility who commit a crime are dealt with in an informal manner without (sufficient) detail guaranteeing their rights and freedoms. In the South African Law Reform Commission version of the Bill there were provisions setting out what actions could be taken when a child under 10 years committed a crime. Given the fact that the child must comply with these provisions at the risk of being referred to the children's court for an inquiry, this raises some questions. For example, won't it happen that a conference arranged by the probation officer to manage the issue of a child under the age of 10 years committing an offence - and which the child has to attend - becomes a kind of a (preliminary) inquiry and that the child is pressurised to confess to something he or she did not do? Is there a possibility for the parents of the child to file a complaint with an independent body if they do not agree with the probation officer's decision?

### THE POSITION OF 16 AND 17 YEAR OLDS IN THE CRIMINAL JUSTICE SYSTEM

One of the Committee's concerns is the fact that in quite a number of States, children aged 16 or 17 at the time of the crime are treated (and sentenced) as adults, either as a rule or by way of exception.

The Committee is of the opinion that all rules, regulations and services of the juvenile justice system should apply to all persons under the age of 18 years (and above the minimum age for criminal responsibility) at the time of the commission of the offence. So the "maximum" age for children to fall under a juvenile justice system should be 18 years. This implies that sentences such as the death penalty or life imprisonment without parole - or other long-term

imprisonment - applicable to adults in a country must not be applied to 16 or 17 year old children because the judge or general rule of law considers them to be adults for the administration of justice. This would constitute a very serious violation of the CRC. The same applies for fixed minimum sentences applicable to adults. In addition, the Committee has rejected fixed minimum sentences for children (see e.g. the Concluding Observations for Australia) because they go against the objectives of juvenile justice enshrined in the CRC (see, *inter alia*, articles 37(d), 40(1) and (4) of the CRC). Section 51 of the Criminal Procedure Act 51 of 1977 allows for minimum sentences to be imposed on 16 or 17 year old children subject to certain restrictions. The decision of the Supreme Court in *Brandt v State* has eliminated this possibility, although some commentators have doubts regarding the correctness of this interpretation of the case.

It would be best if section 51 is amended to clearly exclude persons under the age of 18 years from the imposition of fixed minimum sentences.

#### PRE-TRIAL DETENTION

The practice of pre-trial detention is one of the major (if not the major) concerns of the CRC Committee, not only because it often means a long period of deprivation of liberty, but also because most of the fundamental rights of the child (see in particular article 40 (2) of the CRC) are not respected during the child's detention. For example, no legal or other assistance is provided, no contact with parents is allowed and no information about the charge(s) is furnished.

In addition, it often happens that there are very poor living conditions, little or no protection from various forms of abuse by peers and members of the staff, no information on the duration of the detention and no opportunity to challenge the detention before a court (see also article 37 (d) of the CRC).

During the first part of this pre-trial detention (particularly when the child is held in police custody) he or she may be subjected to physically rough and intimidating interrogations by the police.

The South African Child Justice Bill contains quite a number of provisions regarding arrest and pre-trial detention and provides adequate answers to the concerns expressed. It is in full compliance with the letter and the spirit of the CRC. For example, the emphasis on the need to act with speed; provisions requiring the police to supply information to probation officers within 24 hours and to bring the child to the probation officer within 48 hours; the various possibilities of releasing the child (by the police or on bail) and the prohibition of detention in prison of children between 10 to 14 years in terms of pre-trial detention constitute progressive provisions.

In addition, a good provision relates to the length of the pre-trial detention being under regular review of a court or judge: every 60 days if the child is placed in a secure care facility or place of safety and every 30 days if the child is in prison. However, this implies that a child can be placed in a prison awaiting trial, which is not in accordance with the rule that children should not be placed in adult facilities.

#### DIVERSION AND OTHER ALTERNATIVES

Although there are encouraging steps in a number of countries to develop measures with a view to divert the cases from the traditional criminal procedures (in the terminology of the CRC article 40(3)(b): "measures for dealing with such children without resorting to judicial proceedings") there are still too many States Parties that have taken very little or no action in this regard.

In addition, and when judicial proceedings have been initiated, there are often no or very few effective alternatives for the traditional sanctions - in particular the deprivation of liberty.

The Bill has to be commended for the very strong emphasis on diversion and alternatives to deprivation of

liberty, although there does not seem to be a clear distinction between diversion as a measure to avoid judicial proceedings and measures available during the trial (also called diversion) that do not actually divert the case but present alternatives for traditional sanctions. However, the provisions for diversion are detailed and meet international standards. Nevertheless, I still wonder whether it is necessary and what would be the reason of having three levels of diversion?

I'd like to discuss the timing of diversion and alternative measures. In traditional criminal procedure there are three opportunities for action by three different role-players in the process: the police, the prosecutor and the court. Within a comprehensive diversion policy the police can, and in my opinion should, play a crucial role. When the child has first contact with the police the judicial proceedings have not yet been initiated. In other words, there is the possibility that the police may issue an informal warning. There is not enough attention paid to the role of the police in the diversion process.

These activities need time and may result in delays (e.g. due to a high number of cases and/or lack of human resources) and one could raise the question whether these actions are indeed necessary in all cases. It poses the dilemma of creating an ideal system in which every child in conflict with the law gets maximum attention (although it may also result in a practice in which the commission of an offence is used to undertake and justify rather far-reaching interventions in the life of the child and her/his family, also known as net-widening) and a system that is trying to deal with juvenile delinquency in an efficient (and effective) way, favouring a minimal approach of not increasing the number of interventions in the life of the child and his or her parents – running the risk that sometimes the more problematic background of the child is not sufficiently addressed.

The role-player who could initiate diversion is the prosecutor. In the Bill the prosecutor plays a crucial role during and after the preliminary inquiry, including administering the discretionary power to refer the case for diversion. The prosecutor should have the power to divert a case, even if it was decided to take the case to court. This diversion may take different forms and must meet the requisite conditions.

Finally, the court or juvenile judge is the last role-player, not so much for diversion, as the child is already in court, formally charged and standing trial, as for the imposition of alternative measures. The Bill provides for the possibility of alternative measures in a satisfactory way.

## SENTENCING/DEPRIVATION OF LIBERTY

Chapter 8 of the Bill contains an impressive variety of alternative sanctions, illustrating the basic philosophy that deprivation of liberty has to be a real last resort. I will limit myself to a few observations: children should not be imprisoned if this means that they are placed in facilities for adults. The Bill is not clear whether this would be the case. Imprisonment often means that the child is not separated from adults although technically that may be possible (e.g. in separate wings). But this raises the question why imprisonment is necessary unless it means a longer deprivation of liberty than possible for placement in a residential facility, which is not a prison. The Bill does not explicitly set a maximum period for a sentence of imprisonment, which it should do.

Finally, it is very rare that specific rules of law are given in order to fully respect the rights of children placed in residential facilities or similar places where they serve a sentence of deprivation of liberty. However, these rules are very necessary not only because the children are dependent on the authority of these facilities and have lost contact with the outside world. Rules that, for example, confirm the right of the child to be heard and involved in the drafting and implementation of his or her treatment plan, the right to education and health care, leisure and sports and cultural activities and rules that specify the possible measures to maintain order and discipline and that provide for the possibility to file complaints in case of violations are crucial.

I did not find a specific reference in the Bill for the establishment of such rules.

## Criminal records

The expunging of criminal records is an important aspect of a policy to prevent the child from being criminalised for the rest of his life. The rules in the Bill give a full and discretionary power to the judge (except in some specific cases) to decide on expungement. I personally would prefer a regulation in which fixed terms are set for expungement and that relate, for example, to the seriousness of the offence and the age of the child at the time of the commission of the offence. Discretionary power, even for a judge, runs a serious risk of being used in a discriminatory way.

## Conclusion

There is more to be said in terms of concerns and the content of Bill. But the overall picture, despite some critical concerns, is a very positive one. There are many good things in the Bill and what the Committee particularly appreciates is the fact that the Bill comes with a budget and an implementation plan which, along with many other aspects, makes it a unique Bill.

# "A short history of time"

Professor Julia Sloth-Nielsen  
Faculty of Law<sup>1</sup>, University  
of the Western Cape

## Charting the contribution of social development service delivery to enhance child justice 1996 - 2006

### Part 1: Introduction<sup>2</sup>

Whilst much of what is provided here is to some extent objectively verifiable, but only partially available through documentary evidence, mention must be made at the outset that the overall evaluation provided below is a personal one, based on a decade of my own involvement in child justice work at national and provincial level. I am acutely aware that an alternative analysis could have been put forward, particularly by those less impressed with the positive steps that I perceive and that I will attempt to chart in the main body of this paper. I nevertheless believe that my own views insofar as the constructive developmental context is concerned, and the conclusions that I reach, are indeed valid and able to stand scrutiny.

The starting point of this paper has been conveniently selected as 1996. That year was characterised by three signal events in the history of child justice in South Africa. First, 1996 heralded the adoption of the Correctional Services Amendment Act 14 of 1996, now infamous as having re-paved the way for the incarceration of children aged below 18 years in prisons whilst awaiting trial.<sup>3</sup> This was a step taken to address the (by then) well-known difficulties caused at a practical level by the previous amending legislation,<sup>4</sup> which sought to prohibit altogether the detention of children in prison after an initial 48 hour period prior to appearance in court.

Second, 1996 saw the release of the first interim policy recommendations of the Inter - Ministerial Committee on Youth at Risk (IMC),<sup>5</sup> established by Cabinet to deal with the crisis that had surrounded the sector upon the

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1 Formerly ad hoc consultant on the Inter-Ministerial Committee (IMC) on Young People at Risk-related research projects, and member of the South African Law Reform Commission Project Committee on Juvenile Justice (1996 - 2000).

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3 See, for further discussion, part 2 of this paper.

4 Providing alternatives to children in prison was one of the earliest policy objectives of the government of national unity which came to power following South Africa's first democratic elections in April 1994. The White Paper on Reconstruction and Development reflected this idea and called for the amendment of section 29 of the Correctional Services Act to remove children awaiting trial from prisons and police cells, as well as for the provisions of separate facilities and specifically designed treatment programmes for juveniles sentenced to imprisonment. The legislature quickly acted to effect the required amendment leading to the Correctional Services Amendment Act 17 of 1994. For further details, see A Skelton "The influence of the theory and practice of restorative justice in South Africa with special reference to child justice", 2005, University of Pretoria LLD thesis (Unpublished) 396-403.

5 IMC Interim Policy Recommendations (1996). Before releasing the Interim Policy Recommendations, the IMC had, in July 1996, released "In whose best interest? Report on places of Safety, Schools of Industry and Reform Schools" effectively breaking the silence surrounding children in residential institutions in South Africa. The research investigated all youth institutions including 32 places of safety, 12 schools of industry and 9 reform schools. The study indicated that 85% of all youth in state institutions were inappropriately placed in these facilities, and 60% were children in need of care rather than correction. There was gross overcrowding in some of the facilities (and under-utilisation in others) and the ratio of staff to children ranged from 1:6 - 1:63. Serious concerns were also raised about staff competency and training insofar as only 54% of personnel from residential institutions appeared to have a basic qualification in child care (IMC 1996: 15). The IMC recommended the immediate rationalisation and movement of youth from the system and the formulation of an inter-sectoral plan of action for the total transformation of the child and youth care system (IMC 1996: 62).



release of children awaiting trial in 1995 when the first round of amendments to section 29 of the Correctional Services Act were effected.<sup>6</sup> Although headed theoretically by a joint Cabinet Committee, the lead ministry was in fact the then Department of Welfare and Population Development, and the IMC rank and file comprised of an assortment of both government and NGO role-players acting in various capacities – managers, researchers, drivers of pilot projects etc.<sup>7</sup> Some were involved on an *ad hoc* basis, whilst others worked on IMC projects on a more full time basis. Although many of those involved with the IMC processes during its existence continue to be involved in child justice development and implementation, a far greater number of role-players and practitioners currently responsible for service delivery, policy formulation and training are not familiar with the work of the IMC and I therefore plan to describe some of this in detail in ensuing sections of this paper. It must be noted that the IMC was informally disbanded as a policy development organ after its principal, the then Minister of Welfare and Population Development, was moved to a new Cabinet post in early 1999. A substantial objective of this paper therefore, is to assess the eventual impact of the IMC's work during its short three year existence. This is, I submit, necessary in view due to the fact that a final IMC report was not completed and adopted by government, and thus little in the way of concrete points of reference is to be had.<sup>8</sup>

The third important reason why 1996 provides a useful starting point is that that was the year that the Minister of Justice (as he then was) appointed a project committee of the South African Law Reform Commission (then the SALC) to commence an investigation into the desirability and proposed content of separate child justice legislation for South Africa.<sup>9</sup> That the legislative drafting process – lasting from 1997- 2000 – and the policy development initiative of the IMC were complementary is born out by even the most cursory perusal of the Discussion Paper and Report on Juvenile Justice that constituted the major interim and final products of the law drafting process prior to the tabling of the Child Justice Bill 49 of 2002 in Parliament.

The approach followed in the ensuing sections is issue-based – the themes of assessment, pre- trial incarceration in prison, developments in residential care, probation and probation-related services, and (to a limited extent) diversion are addressed.

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6 Some 1 600 youth were released from prison and police custody on 8 May 1995. Presently, section 29 of the Correctional Services Act Amendment Act (1996) applies (having not been repealed by the new Correctional Services Act 111 of 1998). The first amendment to section 29 of the Correctional Services Act had put a blanket ban on pre-trial detention in prison of any person under 18 years. Apart from a few limited concessions, this first amendment was intended to prohibit pre-trial detention in prison for all children under the age of 18 years, irrespective of the offence with which the child had been charged or prior criminal history. More humane welfare institutions such as places of safety were therefore envisaged for children awaiting trial rather than prison custody. Subsequent chaos ensued due to the sudden promulgation of this amendment coupled with lack of planning and provisioning. A huge number of children were released into society because of a lack of adequate places of safety and other alternatives and because of the unpreparedness of staff at welfare institutions. A few children who had committed serious and violent crimes took advantage of this chaotic situation and there ensued a cycle of arrests (second and further arrests) and release without the completion of the resulting criminal proceedings. The government was forced to backtrack in light of these developments against a public backlash. This was backed by a media campaign against the amendment. See J Sloth-Nielsen "The juvenile justice law reform process in South Africa: Can a children's rights approach carry the day?" 1999 18 (3) *Quinnipiac Law Review* 473-476. See also G Odongo and J Gallinetti "The treatment of children in South African prisons- A report on the applicable domestic and international minimum standards" CSPRI Research Paper No. 11 November 2005 6-7. See also T L Mosikatsana "Children's rights and family autonomy in the South African context: A comment on children's rights under the final Constitution" 1998 3 *Michigan Journal of Race and Law* 360-362. See also generally J Sloth-Nielsen "No child should be caged: Closing the doors on the detention of children" 1995 8 *SACJ* 47.

7 The official committee consisted of several national non-governmental organisations and the Ministries of Welfare, Justice, Education, Health, Correctional Services, Safety and Security, and RDP- and was chaired nationally and provincially by the Ministry of Welfare. See *Draft Discussion Document for the Transformation of the South African Child and Youth Care System February 1996*. The non-governmental organisations represented were the National Association of Child Care Workers, Lawyers for Human Rights, the Community Law Centre (UWC), NICRO, the Institute of Criminology (UCT), the National Children's Rights Committee, the National Youth Development Project and the National Council for Child and Family Welfare. See A Skelton note 4 above 403-404.

8 This information provided in this paper is based on draft reports, pilot project reports, personal knowledge, workshops report and so forth, much of which is not available electronically, which renders it rather inaccessible to contemporary scholars.

9 See, for instance, J Sloth-Nielsen, "Child Justice and Law Reform", in CJ Davel (ed) *Introduction to Child Law in South Africa, 2000 Lansdowne, Juta Law*, 389-393.

## Part 2

### Assessment

The concept of assessment cannot be directly ascribed to the IMC. It is by now well established that the concept of a social work intervention to provide a limited social background report to functionaries in the judicial system deciding on release or custody, and to a more limited extent, the possibility of diversion, was pioneered provincially in the Western Cape mainly via the provincial Department of Social Development.<sup>10</sup> This occurred shortly before the formation of the IMC, in 1994.<sup>11</sup> As initial positive reviews of assessment interventions were compiled, the initiative was expanded in the province. More importantly, though, given the occasional view that the Western Cape was isolated from national developments, and moreover better resourced insofar as social service delivery was concerned, assessment was taken up via the IMC policy formation process at a national level as a desirable best practice.<sup>12</sup> One of the eight IMC projects analysed the implementation of assessment services in the Durban Magistrate's Court.<sup>13</sup> An early IMC workshop held in Cape Town in late 1996 concluded that the efficacy of assessment should be recognised and promoted.<sup>14</sup>

Moreover, the IMC added a further theoretical dimension to the practicalities of assessment, namely that this intervention would be based on the concept of *developmental assessment*, focusing on the child's strengths and abilities rather than the pathology attached to the offence or family environment from which the child had come. This, in my view, was an important adjunct - not only did it lend some depth to the practice, but it linked more broadly to general shifts in social welfare theory emerging at the time, and subsequently concretised in the 1997 White Paper on Social Welfare. Furthermore, it enabled practitioners to embrace assessment as something new, something more meaningful than the pedestrian collation of (more or less the same) information after conviction for the purposes of preparing pre-sentence reports. Also, because developmental assessment as a conceptual and theoretical paradigm shift was viewed as being premised on the quality of a personal interaction, rather than one which focused on physical or geographical attributes (such as the venue or building where the service was to be undertaken) the basis was laid to expand access to assessment even in the absence of significant formal budgetary allocations that are most usually required to pave the way for the introduction of a new service (e.g. pension payout points, prisons and primary health care facilities).

With this as a foundation, provinces set about appointing staff - probation officers and others - to undertake the pre-trial investigations required for the assessment phase to have benefit for children in trouble with the law. Although the benefits chiefly related to more informed decisions about pre-trial incarceration or release, diversion decisions were also furthered through the early intervention of social workers performing this task. From an extremely low base in double digits in 1996, mention was made in 2005 of more than 600 probation posts countrywide having been created since 1996. A large measure of this was driven by the need for assessment services,

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10 J Sloth-Nielsen *Annual Juvenile Justice Review 1995* SACJ 333: See also J Sloth-Nielsen "The role of international law in juvenile justice reform in South Africa" 2001 LLD thesis (Unpublished) UWC 218-221.

11 The desirability of pre-trial assessment was first advocated at an international conference on juvenile justice reform held in 1993. For further details see *Report on the International Seminar on "Children in Trouble with the Law" 1995* 52, 54 and 83, copy on file with the author

12 J Sloth-Nielsen note 10 above.

13 J Sloth Nielsen "Report on the Durban assessment reception and referral centre", commissioned by the IMC, 1997. See too "Report on the Pilot Projects", IMC 1998 for a summary of the results of this project. In Kwa-Zulu/ Natal, arrest reception and referral centres had been set up in a number of other districts, such as Pietermaritzburg, Newcastle, Ntuzuma (Kwa Mashu), and Empangeni. Plans were under way to establish further centres at Pinetown, Stanger, Umlazi, Dundee, Vryheid and Ladysmith by the 2004 financial year. For further details see J Sloth-Nielsen "Preparing for implementation in KwaZulu-Natal" 2004 Article 40, Vol. 6, No. 4.

14 IMC report on a workshop on arrest, reception and referral, November 1996, copy on file with author.

rather than for other conventional probation services such as the compilation of pre-sentence reports or the supervision of probationers. Moreover, arrest reception and referral centres staffed by probation officers, assistant probation officers and (most recently) volunteer assistant probation officers have been established in a number of jurisdictions: in May 2005 there were already 54 reception arrest and referral centres throughout the country, and this number may well have grown since.<sup>15</sup> Although it cannot be said that coverage is universal in South Africa, there can be no doubt that substantial achievements have been made to mainstream assessment services at local level, and that the IMC process contributed in no small way to this development.

Underscoring the penetration of the assessment concept in South African child justice development has been the enactment of legislative reform via the Probation Services Amendment Act of 35 of 2002, put into effect in 2003.<sup>16</sup> Among other things, the Act defines assessment as a (new) legal concept.<sup>17</sup> Further, an amendment to section 4 (1) of the principal Act ensures that the duty of performing assessments and the related issue of reception of accused persons and their referral form part of the core mandate of the probation service.<sup>18</sup>

Most importantly, the amending legislation makes provision for a new section 4B which provides for the assessment of any arrested child by a probation officer as soon as is reasonably possible, but before his or her first appearance in court, with the proviso that if a child has not been assessed before first appearance, such assessment must take place within a period specified by court, which may not exceed seven days following his or her first court appearance. Thus assessment, and the requirement that arrested children must be assessed as soon as reasonably possible, now has a legislative basis even in the absence of the enactment of the relevant provisions of the Child Justice Bill, discussed below.

In further support of the development of assessment services, mention must be made of the numerous training initiatives that have been undertaken through both national and provincial processes over the past seven or so years to support the professionalisation of probation service delivery in this area. The training conducted in the North West Province in 2002 - 2003 is one example,<sup>19</sup> and current training being undertaken in the Western Cape Province provides a further example. Unit standards for probation via the South African Qualification Authority (SAQA) process are almost complete, and the unit standards for a learnership for assistant probation officers have been finalised and the first round of volunteer learnerships are about to commence.<sup>20</sup>

As I have stressed previously, it may be a surprise to many to hear that assessment as a dedicated phase in youth justice is worthy of the extensive remarks I have made above. Assessment is, after all, regarded by many as axiomatic in contemporary child justice practice in present day South Africa. Yet, equally, it must be considered

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15 *J Prosezky, Report on developments in Social Development, copy on file with the author. See in general, G Brown "Probation services in Gauteng" 2005 Article 40, Vol. 7, No. 3. See also "Launch of Volunteer Assistant Probation Programme" 2005 Article 40, Vol. 7, No. 3 and see T van der Berg "Centre offers quick assessment of juvenile offenders" 2005 Article 40, Vol. 7, No. 1 for a discussion of the Johannesburg Assessment Centre.*

16 *Probation Services Amendment Act 35 of 2002. But note should be taken that even before the enactment of this legislation, judicial pronouncements have been made on assessment. For instance, see S v J and Others 2000 (2) SACR 310. In this judgment, it was provided that "[f]rom the recommendations of the IMC and the South African Law Reform Commission Project Committee on Juvenile Justice, it appears that the purpose of an assessment report in respect of a juvenile offender is, inter alia, to establish the prospects of the child in question being diverted away from and dealt with outside the criminal justice system, and to assist the prosecutor and other relevant officials in determining whether or not to continue with the prosecution of the child."*

17 *Assessment is defined as "a process of developmental assessment or evaluation of a person, the family circumstances of the person, the nature and circumstances surrounding the alleged commission of an offence, its impact upon the victim, the attitude of the alleged offender in relation to the offence and any other relevant factor." (Section 1 of the Probation Services Amendment Act, amending section 1 of the principal Act 116 of 1991.)*

18 *This is a notable acceptance of responsibility, when seen against the backdrop of NGO proposals pre-1994 which envisaged that the bulk of service delivery to children in trouble with the law would be undertaken by 'youth justice workers', who would purportedly have combined legal and social work skills.*

19 *See Mooki "Assessment of North-West training" 2002 Article 40, Vol. 4, No. 2 for some results of this training.*

20 *The learnership has been developed by the University of the Western Cape Social Work Department, and various role-players from the University of Fort Hare.*

that (to the best of the author's knowledge) this is a uniquely home grown legal step, initiated a short 10 years ago, and already concretised in legislative form. There would appear to be no international equivalent to this concept in comparable child justice legislation.

Hence, the development in law, theory and practice of assessment and assessment-related services would appear to me to be a prime achievement in the 10 years since the IMC draft interim report on the child and youth care system, and one that shows all the signs of further growth.

## Pre-trial incarceration

This was the very issue that ostensibly brought about the formation of the IMC, established in mid-1995 explicitly to address the crisis around the release of children awaiting trial in May 1995. The legislation re-amending section 29 of the Correctional Services Act promulgated in May 1996, and once again allowing the pre-trial detention of children in prison in specified circumstances, was intended to be in effect for two years only, to give government - i.e. the IMC - the breathing space needed to organise or sort out alternatives to incarceration in prison for youth who could otherwise not be released. The amendments were supposed to fall away in May 1998, resuscitating the previous position which entailed a complete ban on pre-trial incarceration in prison.<sup>21</sup>

However, there can be no gainsaying that the bulk of IMC work in the initial phases of its existence by and large ignored the issue of pre-trial detention and need for alternatives to prison.<sup>22</sup> Instead, the focus of the IMC, indicated also by the documentation that emerged,<sup>23</sup> was on reshaping the model for social work intervention in both child welfare and youth justice settings. The (by now well known) framework propounded by the IMC was the inverted triangle with the widest level focused on early intervention and prevention services, then statutory intervention, followed by a continuum of care, forming the narrowest, and hence least used, option.<sup>24</sup> This model was bolstered by both constitutional principles relating to deprivation of liberty as a last resort, as well as slogans which have happily become embedded in everyday practice, such as the use of the least restrictive forms of deprivation of liberty in both child protection and child justice practice. Apart from this signal policy, the other principle output of the IMC during the initial phase of its operation was the infamous report on places of safety, schools of industry and reform schools,<sup>25</sup> undertaken explicitly in response to a (unwelcome) suggestion by the then Minister of Correctional Services that awaiting trial children could rather be accommodated in those care

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21 Presently, section 29 of the Correctional Services Act Amendment Act (1996) applies (having not been repealed by the new Correctional Services Act 111 of 1998). Subsections 1(b) and (c) that deal specifically with detention should have fallen away, yet as a result of a "special savings clause" have remained unaffected. The State has admitted a bureaucratic blunder stating that the legislation (as a private members bill) had not been subjected to its usual level of scrutiny. See also note 6 above for further discussion.

22 For a contrary position see A Skelton note 4 above at 404, although the author differs in that an announcement that secure care was the alternative route did not materialise in much practical development. My observations are supported by personal recollections that the author, who in November 1997 (i.e. six months before the pending expiry of the amendment to section 29 of the Correctional Services Act), debated vigorously the need for attention to be devoted to alternatives to prison with IMC staff. This occurred more or less simultaneously with the introduction of "Project Go", which, in my view, constituted the main IMC response at the time to the pending demise of the provisions permitting pre-trial incarceration in prison. The basic plan was to move children out of welfare facilities, i.e. places of safety, to create the bed space to accommodate children in prison. Definitive documentation on "Project Go" is hard to come by, although the author has a few briefs on file. In my view, there was an unrealistic expectation within (at least some) ranks of the IMC that sufficient alternative placements would be freed up to accommodate those children then detained in prison.

23 See, for example, Interim Discussion Document, February 1996.

24 The policy is divided into four levels namely: (I) Prevention, (II) Early Intervention, (III) Statutory Processes and (IV) Continuum of Care. Level I of the policy promotes prevention through the early identification of "high risk" factors that may precipitate child abuse, neglect or a crime. Level II is concerned primarily with the diversion of youth from the formal justice or welfare systems through early intervention. Level III deals with statutory processes in juvenile and children's courts (as defined by child justice and child care legislation). It seeks to ensure the most appropriate placement of children and advocates developmental and therapeutic strategies which are "in the best interests" of the child. The continuum of care refers to the range of alternative care interventions which cater in a holistic and ongoing manner to the individual's need for protection/containment and developmental opportunities. The continuum of care ranges from adoption and foster care on the one extreme to youth correctional facilities and secure care on the other.

25 In whose best interest? Report on places of Safety, Schools of Industry and Reform Schools, 1996, IMC.

institutions than in the prisons falling under his jurisdiction. The report, detailing a litany of human rights infringements and areas of abuse, neglect and inappropriate services to children in care, effectively put paid to that avenue of thought. However, an alternative proposal for pre-trial accommodation for awaiting trial children was not actively promoted at that stage.

It was not until the looming deadline for the expiry of the 1996 amendments to section 29 of the Correctional Services Act was nigh, i.e. in 1998, that the IMC started to actively consider that suitably secure accommodation for high-risk awaiting trial children or those charged with serious offences was not only necessary, but that this would be the only acceptable alternative to detention in prisons for justice officials. Places of safety would simply not fit the bill for certain children charged with serious or violent offences. Hence the development of the concept of secure care facilities.

By March of 1998, a short while before the May 1998 deadline for the expiry of the amending legislation permitting pre-trial detention of children, the pressure on the IMC to deliver on the core mandate upon which it was originally established had been to some extent alleviated, as a drafting error ensured that the applicable sections did not, in fact, fall away.<sup>26</sup> Nevertheless, the realisation had by then dawned that the need for alternatives was an inescapable imperative. That the Justice and Constitutional Development Portfolio Committee busied itself throughout 1998 with a complex and detailed Bill to regulate pre-trial juvenile incarceration emphasised this all too graphically.<sup>27</sup> Consequently, the secure care programme really only began to take off after that, and some valuable years were lost in the process. When the IMC disbanded in early 1999, the concept had been received into child justice practice, but (to the best of my recollection) no functioning secure care facilities existed, save for former places of safety which had been upgraded with additional security. "Secure care", as envisaged in IMC policy, would refer to an environment and level or form of child and youth care work, rather than focusing on a particular (architectural) form of facility. Thus they were not in any way to be regarded as "kiddie prisons" and moreover, were not in the view of the IMC, intended exclusively for awaiting trial children, but rather for any child who was the subject of statutory intervention who required a secure environment of care. After the demise of the IMC, the secure care programme was further developed at provincial level.

Currently, the idea that secure care facilities are more appropriate for the detention of children awaiting trial seems to have taken root.<sup>28</sup> Some time during latter 2004-2005 the numbers of children detained in secure care began to outstrip the numbers held in prisons awaiting trial, and by May 2005 it was recorded that there were 2 047 children awaiting trial (CAT) in secure care facilities. Added to the increased availability of secure care placements has been a marked drop in the numbers of children awaiting trial in prisons, so that the trend that secure care has replaced prison as the primary placement avenue has continued. However, although the number of children awaiting trial in prison has gone down in recent years to half the levels of even two years ago,<sup>29</sup> there is still scope for improvement.<sup>30</sup> Recent reports indicate that on the 28th of February 2006 only 71% of the 2199 secure care beds available were in use,<sup>31</sup> which means that "another 643

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26 See note 6 and note 23 above.

27 The Bill reached the House of Assembly, but did not ultimately get passed into law. The contents and processes of the development of this Bill are described fully in J Sloth-Nielsen "The role of International law in the development of South Africa's juvenile justice system" 2001 LLD thesis (Unpublished), University of the Western Cape 346-360.

28 The Child Care Act was amended to provide for a definitional clause regarding secure care facilities. Just recently, the principle of detention as a last resort was also embedded in the White Paper on Corrections 2005 in which it is stated that "[c]hildren under the age of 14 years 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". See Department of Correctional Services, March 2005, White Paper on Correctional Services, para 11.2.3.

29 As at 31 December 2005, there were 2 354 children under the age of 18 in prison. Among these 1 217 of them are awaiting trial while 1 137 were serving sentences. This means that there are 706 less children in prisons in South Africa than there were on 31 March 2005. See Office of the Inspecting Judge Annual Report 2005/2006, 16.

30 Some of the reasons for the reduction of the number of children in prison awaiting trial may also be attributed to the Interim National Protocol for the Management of Children Awaiting Trial and other more targeted initiatives aimed at reducing the number of children awaiting trial like the Children Awaiting Trial Project in the Western Cape. See C Camilla and A Dissel "Children awaiting trial in prison" 2006 Article 40, Vol. 8, No. 1.

31 As above.

children could have been accommodated in secure care facilities rather than in prison<sup>32</sup>. The reasons for under-utilisation of secure care facilities include the fact that some courts are not inclined to refer children to secure care facilities in certain regions, lack of resources for transporting children to secure care facilities and structural issues.<sup>33</sup> It is also a source of concern that we do not know how many children are detained (illegally) in police cells after their first appearance in court. Nevertheless, despite these implementation problems, there still is cause to reflect on the enormous strides that have been made since the secure care programme got off the ground, and measurable benefits can now be recorded.

## Residential care and child justice

Unsurprisingly a significant thrust of IMC policy work concerned the residential care sector. Not only was this presaged by the formal report on conditions in places of safety, reform schools and schools of industry presented to Cabinet in November 1996, but key staff of the IMC were drawn from the residential care sector in the first place, and had, prior to the establishment of the IMC, expressed concerns about a crisis in child and youth care facilities.<sup>34</sup> This, to an extent, also explains the lack of initial focus on developing alternatives to prison, given the ills already identified in the residential care system.

Two main IMC-driven outputs that I would like to single out for mention are the development of children's rights compliant norms and standards for the administration of care institutions, concretised in extensive amendments to the regulations to the Child Care Act 74 of 1983, and shepherded through the legislative process shortly before the cabinet reshuffle that saw the chairperson of the IMC move to another Cabinet post. Corporal punishment and other unacceptable forms of chastisement were prohibited,<sup>35</sup> management structures broadened and made mandatory and children in care were required to be provided with a proper developmental plan aimed at ensuring their growth and well being,<sup>36</sup> amongst the host of issues addressed in the extensive amendments and new regulations. As a blueprint for mainstreaming children's rights, the amended regulations cannot be faulted and must be regarded as a signal indicator of success of the IMC process.

The second innovation pioneered by the IMC was the notion of developmental quality assurance (DQA) in the residential care sector. DQA was intended to be the enabling tool for the re-orientation, reskilling of staff and upgrading of children's care institutions. Described as "a recognised means of assessment aimed at the production and implementation of an organisational development plan",<sup>37</sup> the whole idea has recently been given a judicial imprimature of approval in relation to a challenge to conditions in a school of industry brought by the Centre for Child Law.<sup>38</sup>

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32 As above.

33 See *Department of Correctional Services Secure Care Status Report 2006*.

34 *Personal communication, 1997*.

35 *Regulation 32(3)(d), and see further regulations 30A(1)(d), 30A(2)(m) and 31A(1)(m)*.

36 See, for example, *regulations 31A(1)(b), 31A(1)(d), 31A(1)(e), 31A(1)(e) and 31A(1)(s) of the Act. For tighter procedures prior to a ministerial extension of children's court orders see regulations 15(1)-(9)*.

37 *The Centre for Child Law and Others vs MEC for Education and Others Case No. 19559/06 (Unreported, judgment given 30 June 2006) para 6*.

38 *The Centre for Child Law and Others vs. MEC for Education and Others Case No. 19559/06 (Unreported, judgment given 30 June 2006). In this case, which concerned the JW Luckhoff High School and the physical condition of the hostels within which the children were housed, the lack of access control, and the absence of proper psychological support and therapeutic services at the school were put in question. The applicants requested that the children, which number about 150, be provided with sleeping bags, have the conditions in the building improved for them and the developmental assessment assurance process be undertaken. The respondent, the MEC for Education argued that the problem was created because of budget constraints. It further contended that providing sleeping bags for the children, as requested by applicants, would be violating the equality principle of the Constitution, lest others similarly denied their rights should seek the same remedy at very significant cost to the state. After considering the relevant provisions of the Constitution and Child Care Act, the court gave orders compelling the authorities to provide each child with a sleeping bag, and to put in place proper access control and psychological support structures. It also ordered the MEC for Education, the first respondent, to be directed to make immediate arrangements for the school to be subjected to a developmental quality assurance process. The court also found that psychological and social support is a critical ingredient of State care, absent parental support, and found that the absence of such a service is unacceptable. The judge ordered that, given the dilatory and lackadaisical approach taken so far, it would be a good idea that the court retained a supervisory role to ensure progress in particular pertaining to undertaking the developmental quality assurance process.*

However, both as regards State-run alternative welfare facilities and as regards the institutions managed by provincial education departments (schools of industry and reform schools), the results of this ten year overview cannot be said to have been sufficient, despite the apparent adequacy of the IMC policy proposals put in place, as noted above.

In the Western Cape, a process of rationalisation of the former reform schools and schools of industry was a direct consequence of the 1996 IMC report, and the amalgamation and rationalisation resulted in five new institutions called child and youth care centres, being established in the period 1998 - 2002. Coetzee noted that:

"As a result of the implementation of the recommendations of the IMC on young people at risk by the relevant departments, the enrolment figures at schools of industry and reform schools have dropped markedly, as alternative placements or programmes have been found for learners who until then would have been sent to these schools ... There were two reasons for changing the schools of industry and reform schools. Firstly, they were part of an outmoded and ineffective system, and secondly, they were grossly uneconomical to run. Transforming them, while at the same time rationalising them, had become an urgent necessity. The new approach, which involves the Departments of Justice, Social Services and Education, among others, envisages the child and youth care system as an integrated one that emphasises prevention and early intervention and minimises residential care."<sup>39</sup>

However, in practice it seems that huge difficulties continue to prevail. These include the adequacy of educational and vocational programmes for children sent there, maintenance of safety and security and inability to affect the domination of gangs, drug control, poor staff- learner relations and staff perceptions of extreme vulnerability and lack of effective reintegration techniques.<sup>40</sup> Moreover, the centres are disproportionately expensive to run, and are standing emptier and emptier, perhaps testimony to the lack of faith that the justice system has in both their containment and rehabilitative capacity.

Whilst the provincial Department of Education freely acknowledges these shortcomings, and has sought expert assistance in an effort to address them, if truth be told, the ideal alternative rehabilitative institution is still a long way off, and the "what must be in place" provided by the IMC has not answered the question of "how this can be done".

As regards education-managed facilities in other provinces, the position after ten years is rather dire. Most provinces have failed to grasp the nettle entirely as an ever increasing number of judgments bears witness to.<sup>41</sup> Nor is it clear that the State is in fact able to deliver on the required brief, i.e. skills-oriented, modern, safe, constitutionally compliant and caring institutional confinement for children deprived of their liberty outside the prison setting. This has been recognised in one province, KwaZulu-Natal, where a contract is in the process of being awarded to the private sector to erect, maintain and provide the services in four facilities to awaiting trial and sentenced children in trouble with the law.<sup>42</sup> The proof of private sector superiority in this sphere lies, however, in the future and must be largely speculative at this time.

Similar observations can be made regarding progress in the transformation of welfare facilities since 1996. A 2004 review of facilities in the Western Cape (commissioned by the provincial Department of Social Development)

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39 C Coetzee "Changes in the Education System that Cater for Learners in Distress in the Western Cape Education Department", 2003, Article 40, Vol. 5, No. 2.

40 Some of these were aired frankly at a workshop on Restorative Justice and Child and Youth Care Centres held at Ottery Child and Youth Care Centre on 22 June 2006.

41 See for instance S v Zuba and 23 similar cases (cases no CA40/2003 and 207/2003, Eastern Cape Division, judgment handed down on 2/10/2003). For a review of the judgments, see J Sloth-Nielsen "Interdicts and Child Justice - a big-stick approach", 2003, Article 40, Vol. 5, No. 4. See also J Sloth-Nielsen "Structural interdicts again - the Zuba saga continues", 2004, Article 40, Vol. 6, No. 1. See also S v M (case no. 435/04 and 237/04, judgment delivered 11/11/2005). For a review of these cases see J Sloth-Nielsen "Developing a child justice system through judicial practice", 2005, Article 40, Vol. 7, No. 4.

42 The author is in possession of the tender documents, having attended the compulsory briefing session in May 2006.

found numerous ills besetting the management and functioning of the places of safety that were reviewed, and unfavourable comparisons were drawn with the outsourced secure care facility that was used by the researchers as a benchmark.<sup>43</sup> The review could be considered as providing at least initial evidence that outsourcing of facilities is the way forward.

According to press and other reports,<sup>44</sup> a substantial process of transformation of facilities is set to take place in Gauteng. Worryingly, concerns have been raised about this province's intentions to follow IMC norms and standards, in particular those related to the size of institutions and the kinds of security measures that are regarded as being child rights compliant.<sup>45</sup>

In conclusion, the IMC can be said to have charted an initial way forward for the transformation of the residential care system, but the progress since 1999 has been halting and partial. Considerable scope for further research and staff skills upliftment remains to improve the delivery of children's rights in this sector.

## Probation

Probation services are not only important once the child enters the criminal justice system, but they are also critical for prevention and for programme delivery.<sup>46</sup> The fact that the IMC considered probation a key priority issue<sup>47</sup> led not only to the Probation Services Amendment Act 35 of 2002, but to huge expansion in this sector. Skelton records that:

"[t]he Department has taken various measures to strengthen probation services, including the establishment of a separate personnel administration standard, training of probation officers, discussions with universities, notably UCT, to enhance graduate and post-graduate learning in the field, and the establishment of a professional board for probation work."<sup>48</sup>

Accordingly, the Probation Services Amendment Act 35 of 2002 concretised the role of probation officers as investigators, supervisors, crime "preventors", planners and implementors of programmes, and with the Child Justice Bill in mind, convenors and mediators in restorative justice initiatives.<sup>49</sup> Therefore, a previously Cinderella field populated by a mere handful of active probation officers is now a vibrant and well established field. Moreover this has put an end to the debates in vogue at the time of the IMC related to generic versus specialised social work professionals, and the amendments to the Probation Services Act strengthened the hand of probation

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43 For instance, the review found that "[t]he average salary per member of facility staff in all the Department's facilities was between 11% and 55% higher than the average salary of staff at New Horizons, the outsourced facility. Furthermore, at New Horizons, 54% of current expenditure was being expended on staff costs, the remaining 46% was used to fund food, clothing, educational materials, maintenance, etc. In other words, 46% was being spent on care of the children. By contrast, at one departmental facility, 80% of the current expenditure went towards staff costs, and a mere 20% on other items." Therefore, it was rightly argued that "[b]ased on the performance of departmental facilities as measured against the benchmark provided by the outsourced facility, it may be concluded that the outsourced facility provides a service that is more aligned with child rights and more economical than departmental facilities." See "Provincial Administration of the Western Cape (PAWC) commissions a review of facilities" 2004 Article 40, Vol. 6, No 4. The full text of the facility review, has, however, not been released. The author of this paper was the lead consultant involved in the research and preparation of the review, and therefore writes with personal knowledge of the contents.

44 See press statement, MEC for Social Development Gauteng on the occasion of the release of the provincial budget, March 2006 available at <<http://www.gpg.gov.za/docs/index-pr.html>> accessed on 20 July 2006.

45 As noted above, the IMC did not have "kiddie prisons" in mind, with elaborate visible perimeter and internal hard security. Optimum occupancy per unit was regarded to be 60. Mention has been made of 3000 bed facilities in Gauteng.

46 D Kassan "Probation Officers as roleplayers" in J Gallinetti and J Sloth-Nielsen (eds) Child Justice: A guide to good practice in Africa, 2004, Community Law Centre, 130.

47 A Skelton, note 4 above, 406.

48 As above.

49 Kassan, note 46 above, 131.



officers in claiming their position as identified experts. The idea that probation would move from reactive services delivery (the old style pre-sentence reports) to a far proactive role, was concretised both in legislation and in practice as probation officers began to be directly involved in programme delivery. Again in summary, the professionalisation of probation services and confirmation of their centrality on child justice processes was a significant consequence of the IMC process.

## Diversion

In South Africa, diversion services have been offered since the beginning of the 1990s.<sup>50</sup> However, the first attempt to incorporate diversion in an official document was through the inclusion of recommendations on diversion in the Interim Policy Recommendations of the IMC.<sup>51</sup> Thus the Interim Policy Recommendations was the first government document to formally acknowledge the limited availability of diversion programmes and the unequal access to these programmes.<sup>52</sup> In order to remedy this situation, the IMC recommended that an effective referral process be developed; that diversion should be offered at a range of levels; and that a new diversion option, family group conferencing, should be piloted.<sup>53</sup>

An issue paper,<sup>54</sup> a discussion paper,<sup>55</sup> and a report<sup>56</sup> of a project committee of the South African Law Reform Commission to draft proposals for a child system followed closely on the recommendations of the IMC in proposing for legislative inclusion of diversion.<sup>57</sup>

Currently, diversion is an ever expanding and diversifying field, even in the absence of a legislative base. The fact that tens of thousands of children access diversion every year is a substantial achievement in a very short period of time. The provincial Departments of Social Development have supported, mainstreamed and diversified diversion services to the extent that implementation of article 40(3)(b) is a signal characteristic of child justice service in South Africa.

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50 See C Wood "Diversion in South Africa: A review of policy and practice 1990-2003", 2003, *Institute of Security Studies, Occasional Paper*. The process began in early 1990s as a result of the establishment of the Youth Empowerment Scheme Programme ("Yes" programme) by the National Institute for Crime Prevention and Reintegration of Offenders (NICRO). See for instance, J Gallinetti "Diversion" in J Sloth Nielsen and J Gallinetti (eds) *Child justice in Africa: A good guide to good practice*, 2005, *Community Law Centre*. See also J Sloth-Nielsen, "Child Justice and Law Reform", in CJ Davel (ed) *Introduction to Child Law in South Africa*, 2000, *Juta Law*, 418-428.

51 *IMC Interim Policy Recommendations 1996 40-47*. However, it should be noted that under international law, the UN Convention on the Rights of the Child under article 40(3)(b) enshrines, for the first time, the desirability of the development of diversion for child justice systems. Diversion is also the subject of rule 11 of the Beijing Rules for the Administration of Juvenile Justice of 1985. Previous academic publications or working papers on diversion in the South African context existed before the IMC (for instance, *The Drafting Consultancy 1994*). For further discussion, also see J Sloth-Nielsen LLD thesis, note 10 above, 257-261.

52 As above.

53 J Sloth-Nielsen "The Juvenile Justice Law Reform Process in South Africa: Can a Children's Rights Approach carry the Day?", 1999, *Quinnipiac Law Review* 18, 469-489. See also C Wood note 50 above.

54 SA Law Commission Issue Paper No 9 on Juvenile Justice (May 1997).

55 SA Law Commission Discussion Paper No 79 on Juvenile Justice (December 1998).

56 SA Law Commission Discussion Report (2000).

57 J Sloth-Nielsen, *Child Justice and Law Reform*, in CJ Davel (ed) *Introduction to Child Law in South Africa*, 2000, *Juta Law*, 423-428.

## Part 3: Conclusions

The contribution of the social development sector to child justice development as described in the preceding sections is in my view a substantial and measurable one, notwithstanding the fact that the development of children's rights-compliant alternative facilities remain an area of challenge. The array of transformative and reconstructive advances discussed above extend from policy and programmatic progress, through legislative reform, to increased human resources capacity and skills development. Physical infrastructural expansion can also be highlighted as regards secure care facility provisioning, particularly since the turn of the millennium.

The consequence is that child justice practice today has been deeply enriched through a more multi-modal and diverse (as opposed to linear) range of service delivery interventions. Whilst the contribution of other stakeholders to child justice development (especially the various elements of the justice sector)<sup>58</sup> are in no way to be minimised or ignored, it is my contention that the contribution of the IMC has not only been sustained, but that it has been surpassed, and that the social development sector can look back on this with pride.

As I have endeavoured to show in this paper, the decade since 1996 has seen "assessment", "diversion", "secure care", and "probation" become firmly ensconced in theory, practice, policy, law and fiscal planning. I submit that Child Justice Act or not, there is now no turning back!

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<sup>58</sup> *In particular, various national and provincial NPA units, individual prosecutors, the magistracy, Justice College, and the office for vulnerable groups in the National Department of Justice.*



# A reflection on child justice legislation, policy and practice

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## Introduction

The Department of Justice and Constitutional Development's mandate in dealing with children in conflict with the law relates to those children that are below the age of 18 years. Section 28(3) of the Constitution of South Africa Act 108 of 1996 defines a child as any person below the age of 18 years.

## Legislative framework

### INTERNATIONAL LAW

Articles 37 and 40 of the Convention on the Rights of the Child (CRC) deal specifically with children in conflict with the law.

In terms of article 37, States Parties are obliged to protect children in detention from torture, capital punishment and deprivation of liberty. Article 40 provides that children alleged as, accused of, or recognised as having infringed the penal law, should be treated in a manner consistent with the child's dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others, taking into account the child's age and the desirability of promoting the child's reintegration and the child's assumption of a constructive role in society. Similarly, article 17 of the African Charter on the Rights and Welfare of the Child (ACRWC) contains almost identical wording relating to children in conflict with the law..

Article 40(3) of the CRC provides that States Parties shall seek to promote the establishment of laws, procedures, activities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law.

Of note is the fact that article 3 of the CRC and article 4 of the ACRWC state that the best interest of the child shall be the major consideration in all actions that concern the rights of the child.

### CONSTITUTIONAL LAW

The South African Constitution, in section 28, specifically deals with the rights of children.

- Section 28(1)(b) provides that every child has the right to family care or parental care or to appropriate alternative care when removed from the family environment.

- Section 28(1)(d) states that every child has the right to be protected from maltreatment, neglect, abuse or degradation.
- Section 28(1)(g) provides that every child has a right not to be detained except as a measure of last resort and may be detained only for the shortest appropriate period of time. The child also has the right to be kept separately from detained persons over the age of 18 years and treated in a manner and kept in conditions that take account of the child's age.
- Section 28(2) provides that a child's best interests are of paramount importance in every matter concerning the child.
- Section 28(3) defines "child" to mean a person under the age of 18 years.

## THE CURRENT LAW

The Criminal Procedure Act 51 of 1977 also contains specific provisions relating to children under the age of 18 years. Section 290(1) of the Criminal Procedure Act (CPA) states that any court in which a person under the age of 18 years is convicted of any offence may, instead of imposing punishment upon him for that offence, order that he be sent to a reform school as defined in section 1 of the Child Care Act 74 of 1983. Section 290(3) makes this sentence applicable to any young person who has turned 18 years of age but has not yet reached 21 years.

Section 290(4) provides that a court that orders that any person be sent to a reform school, may direct that such person be kept in a place of safety as defined in section 1 of the Child Care Act 74 of 1983, until such time as the order can be put into effect. It can be argued that the intention of the Criminal Procedure Act was to ensure that children would not be detained in prison or a correctional facility whilst awaiting designation to a reform school, but rather in a facility run by the Department of Social Development.

In terms of section 276A, where it is found that the accused is "not fit" to be sentenced to reform school, the court that handed down the sentence may reconsider the punishment and impose any other punishment. This allows for an opportunity by magistrates to correct a sentence that has already been imposed.

Section 276(h)(i) of the CPA provides for correctional supervision to be imposed as a sentence. In terms of section 254, the proceedings in the criminal court may be stopped and converted into a children's court inquiry and the court may refer the child offender to the children's court operating in terms of the Child Care Act 74 of 1983.

## Proposed legislation

### THE CHILD JUSTICE BILL 49 OF 2002

The Child Justice Bill (the Bill) provides a legislative framework that promotes a co-ordinated mechanism for the Justice, Crime Prevention and Security Cluster (JCPS) to handle matters relating to children awaiting trial and ensures the implementation of a child-friendly criminal justice system for children in conflict with the law.

The Bill promotes *ubuntu* in the child justice system through fostering a sense of dignity and worth, reinforcing respect for human rights of others, supporting reconciliation through restorative justice, involving families and communities in the outcomes for children, and promoting co-operation between departments and other organisations.

Importantly the Bill provides for the holding of a preliminary inquiry before a magistrate, where decisions are made about diversion, release or placement of the child based on a probation officer's assessment report.

The Bill provides for diversion of less serious offenders away from the criminal justice system whilst allowing for the fast-tracking of children charged with serious offences through the courts.

The Bill introduces measures to speed up trials involving children in conflict with the law. Children awaiting trial in prison have to be brought before court every 30 days instead of every 14 days (as it is currently stated in law) as this allows more time for the police to investigate the offence. There is a six month limit within which cases need to be finalised, except for certain scheduled offences of a serious nature such as murder or rape.

The Bill encourages community-based alternative and restorative sentencing options.

The Bill proposes the slight expansion of grounds for automatic review in that any sentence involving correctional supervision with a residential component is subject to automatic review.

The Bill also empowers the Minister of Justice to establish one stop child justice centres that provide integrated services such as probation, police and diversion services under one roof and monitoring to occur at all levels.

## DIVERSION

The current legal framework used for diversion, in terms of the CPA, as amended, is contained in section 6, which allows the prosecuting authority the power to withdraw a charge or stop the prosecution. A Director of Public Prosecutions or any person conducting a prosecution at the instance of the State may withdraw a charge before an accused pleads, or stop the prosecution after an accused pleads but before conviction. If the child then goes through a diversion programme and the court is informed that the child has successfully completed the programme, the charge is withdrawn and the prosecution does not take place. This means that the child will not have a criminal record. If the child does not successfully complete the programme, then the matter is referred back to court for the trial and prosecution to continue.

Diversion of children in conflict with the law from the mainstream criminal justice system has been possible through the co-operation of the prosecution, the judiciary, the probation officers, the police and NGOs.

Approximately 30 000 children were diverted from the criminal justice system during 2005 via agreements with the National Prosecuting Authority and NGOs. Unfortunately, the majority of cases that get diverted involve less serious offences.

There is, therefore, a need to consider the diversion of serious cases where such diversion is warranted. New Zealand, for example, provides one of the best models for restorative justice. Restorative justice is not limited to less serious cases but also includes serious offences and cases where the child has re-offended.

A concern is that the community does not understand the concept and purpose of restorative justice and diversion. As a result, there is a need to raise public awareness in order to avoid the public taking the law into their own hands. Such awareness should not only be limited to the judiciary and the prosecution.

## Policy

The Department of Justice and Constitutional Development is leading an inter-sectoral committee namely, the Inter-Sectoral Committee on Child Justice (ISCCJ) comprising various government departments and NGOs to provide an integrated platform for the management of children in conflict with the law, including children awaiting trial.

In the absence of a comprehensive legislative framework to deal with children in conflict with the law, numerous gaps exist in the system. To address these gaps, the ISCCJ developed a protocol to ensure the appropriate management of children accused of crimes, particularly children awaiting trial in custody. This protocol is known as the Interim National Protocol on the Management of Children Awaiting Trial.

The objectives of the interim protocol are to ensure the following:

- effective inter-sectoral management of children who are charged with offences and who may need to be placed in a residential facility to await trial;
- appropriate placement of each child based on an individual assessment;
- correct use of available residential options;
- flow of information between residential facilities and the courts;
- managers of facilities are assisted to keep the numbers in facilities manageable;
- communities are made safer through appropriate placement of children;
- effective management of facilities and minimisation of abscondment;
- children in custody are effectively monitored; and
- appropriate procedures are established to facilitate the implementation of the proposed new legislation, once it has been passed by parliament.

The need is for the child to be placed in the “least restrictive and most empowering” residential option that is available and that is appropriate to their circumstances. The decision as to where a child should be placed should not be based on the offence alone. Rather, the assessment should take into account the child’s needs and his or her circumstances and history.

The seriousness of the offence is one of the factors to be considered but the central question is whether or not the child needs containment and if so, how restrictive the containment needs to be. Some children charged with serious offences may be considered to be of little risk to the community whilst other children who repeatedly commit less serious offences may need containment. Thus the departure point for making a decision regarding placement is considering the needs of the offender and not the type of offence committed.

#### *SOUTH AFRICAN POLICE SERVICE*

There are various provisions in the CPA setting out the duties that a police official needs to fulfill when a child is arrested. Section 50(4) of the CPA provides that when a child is arrested, every effort must be made by the police to notify the parents or guardians as soon as possible that the child has been arrested. The parents must be notified as to the time, place and date on which the child will appear in court (section 74(2)). The release of the child into the care of a parent or guardian must be considered. A written notice to appear in court must be issued. In terms of section 50(5), a probation officer must be notified that a child has been arrested and the child must be taken directly to a probation officer for assessment if there is a probation officer on duty. In addition confirmation of the child’s age must be obtained when notifying the parents of the arrest.

#### *DEPARTMENT OF SOCIAL DEVELOPMENT*

Various duties are placed on probation officers employed by the Department of Social Development. In addition the provincial departments must make the following available to all police stations in the area of service:

- the times that probation services are available;

- the venues where children are to be brought for assessment;
- relevant names and contact details of probation officers; and
- information on the assistance the department can offer with finding the family of the arrested child.

Every arrested child must be assessed by a probation officer no later than 48 hours after the arrest of the child. A sufficient number of trained staff should be available in the area of service to undertake assessments. Probation services should liaise between the residential care facilities and the court, ensuring that the courts are informed about the various facilities and the availability of vacancies in each facility on an ongoing basis. The assessment report, once completed, must contain recommendations regarding diversion, release into the care of a parent or guardian, possible placement options and information relating to the age of the child. The probation officer should, where possible, be available to give reasons to support his or her recommendation if necessary.

#### *DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT*

In dealing with children in conflict with the law, the Department of Justice will provide assistance to the Department of Social Development by:

- ensuring that probation officers have easy access to all children appearing in the courts, including those appearing in ordinary (not juvenile) district courts;
- designating one court within a district to deal with all juvenile matters, as far as is reasonably possible;
- channelling regional court cases involving juveniles through one regional court where reasonably possible;
- allowing adequate time for assessments to take place on the morning of the first appearance, if such assessments have not already been completed; and
- notifying probation services if a child due to appear in court has not been assessed and make such child available for assessment.

According to current law, the cases of children awaiting trial in prison must be remanded for a period of not longer than 14 days. The idea is aimed at giving children an opportunity to raise problems or concerns with magistrates regarding their placement and to serve as a monitoring system for children in detention. The practical application of these regular remands tend to place an additional burden on the courts and can create delays. The 14-day remand rule places pressure on working parents or guardians as they need to take leave from work to be present at court. Court personnel should therefore be sensitive to that fact and consider the possibility of releasing parents from this responsibility provided they are present on the date of the trial. For these reasons, the Child Justice Bill seeks to address this problem by extending this 14-day remand period to 30 days in the case of children awaiting trial in prison and 60 days for children awaiting trial in secure care facilities or places of safety.

## Monitoring

At a national level the ISCCJ monitors the situation of children in conflict with the law by receiving statistics and lists of names of children awaiting trial in prison from the Department of Correctional Services and prioritises these cases.

The inter-sectoral monitoring of the situation of children in trouble with the law also leads to inter-sectoral interventions that are instituted to get as many children as possible assessed, diverted into programmes, placed in alternative care or referred to the children's courts if the children are thought to be in need of care and protection. These children then have the opportunity to be placed into foster care, children's homes, reform schools, or be returned to their parents' or caregivers' care.



In December 2005, the statistics from the Department of Correctional Services reflected that 42 children sentenced to reform schools were awaiting designation in correctional facilities. This is due to the gap that exists in procedures designating such children to reform schools. The ISCCJ's intervention in this regard resulted in 40 children being transferred to reform schools. Since reform schools exist in only two provinces, they are not easily accessible. The ISCCJ has since requested the National Department of Education to submit its plan for more reform schools to be built or designated in all provinces.

The gap relating to the procedures regarding designation of sentenced children to reform schools has led to the ISCCJ deciding to develop an Interim Protocol for the Designation of Sentenced Learners to Reform Schools. This is currently in the process of being finalised.

Once the name lists and statistics are received from the Department of Correctional Services, these are distributed to the National Prosecuting Authority (NPA), the judiciary and the Legal Aid Board to ensure the fast-tracking of these cases. As a result of these interventions, more children are diverted, placed in alternative facilities and also afforded legal representation. The name list also includes the type of crime the child has committed. The Department of Justice makes a distinction between serious crimes and less serious crimes and refers the latter to the NPA to fast-track.

An inter-sectoral plan of action was developed to fast-track the release of children from prison, police cells and places of safety or secure care facilities and to ensure integrated efficient and effective management of children in conflict with the law, through developing specified projects. For example, the situation of children in conflict with the law should be monitored at a provincial and local level. The provincial child justice fora seek to monitor the situation of children in conflict with the law at a provincial level whilst the local case review teams, which are under the leadership of the Director of Public Prosecutions seek to monitor the situation at local court level. Case review teams have been established under the leadership of the Director of Public Prosecutions at local court level in some of the provinces.

In this regard, the ISCCJ appointed a task team to assist all the other provinces to establish provincial child justice fora where they do not exist and to strengthen the existing ones. Efforts are also being made to establish case review teams in all local courts.

## One Stop Child Justice Centres

Another project has been the establishment of one stop child justice centres in Port Elizabeth and Mangaung where various role-players operate under one roof, providing integrated services specifically designed for children in conflict with the law. This model ensures that children accused of crime are treated in a way that promotes their sense of dignity and worth and encourages in them a respect for the rights of others. This system was specifically designed for children in line with article 40 of the CRC and article 17 of the ACRWC. At these centres, preliminary screenings by probation officers are undertaken, access to diversion is promoted and detention of children is used as a last resort.

These centres are far more child-friendly than the ordinary courts and have increased the use of diversion and improved pre-trial services. Inter-sectoral management of the centres presents a challenge and the ISCCJ has developed guidelines for one stop child justice centres to assist with the facilitation and management of the various sectors operating in one environment.

The Mangaung One Stop Child Justice Centre is currently piloting the preliminary inquiry as envisaged in the Child Justice Bill. The preliminary inquiry is intended to be facilitated by a magistrate and takes the place of what is currently known as the "first appearance". The aim is to look at the case in greater detail to determine if the matter can be diverted or not, to determine where the child should be placed or if the child can be released.

The preliminary inquiry is an informal inquisitorial procedure that is to occur within 48 hours after the arrest of the child. The inquiry involves the magistrate, the social worker, the prosecution, the child offender and his or her parents or guardian. It may also involve the magistrate summoning a teacher, a school worker, a community member or even the victim to give evidence at the inquiry.

Information required for the inquiry relates to the child's past behaviour, age, school attendance, family history and any previous convictions or previous social work intervention. This information is used to determine whether the child should be diverted or whether the matter should proceed to trial.

A wide range of diversion options are considered ranging from compulsory attendance at a programme to family group conferences and services to the community.

In the case of a conviction, a wide range of sentencing options are considered, including community-based sentences, restorative justice sentences and suspended sentences. These are subject to conditions such as prescribed times of school attendance and recreational activities.

## Challenges

Despite the existence of the policies discussed above and various projects being initiated, the following have emerged as challenges and issues for consideration:

- There is a lack of adherence to the Interim National Protocol for the Management of Children Awaiting Trial among relevant departments;
- diversion programmes are not available throughout the country, especially in the rural areas;
- diversion for more serious cases should be considered where warranted;
- little research exists on the success of diversion and recidivism rates;
- there is a lack of an integrated database for the effective management of children in conflict with the law;
- there is a lack of understanding by the community of restorative justice and diversion and there is therefore a need to raise public awareness in this regard;
- there is a need to train the judiciary in the district, regional and High Courts, as well as the prosecution services in restorative justice and diversion;
- children who have committed very serious offences are security risks in secure care facilities and often these young offenders get referred to correctional facilities where specially trained staff and proper facilities for children are lacking.

## Conclusion

In conclusion, the envisaged Child Justice Bill will provide a comprehensive legislative framework in line with our Constitution and international instruments. Whilst awaiting the Bill's enactment, it is imperative for the various sectors of government, NGOs, business and the public to collaborate and join hands to support restorative justice initiatives and encourage the use of diversion for more serious offences. It is also important to showcase the success of diversion and the inter-sectoral management of children in conflict with the law by using one stop child justice centres and the existing monitoring structures as examples during the parliamentary process on the Child Justice Bill. There is a need to advocate for the Bill and the extension of diversion to serious offenders by illustrating the successes of diversion. The enactment of the Child Justice Bill will ensure the delivery of services to children in conflict with the law by all stakeholders.



# The development of diversion within the National Prosecuting Authority

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## Background information

Irrespective of the absence of legislation on diversion, prosecutors on an *ad hoc* basis have supported early initiatives on diversion programmes delivered by the National Institute for Crime and Re-integration of Offenders (NICRO). Originally the offices of the Attorney-General in their respective divisions issued circulars to prosecutors on how to implement diversion. However, when a single national prosecuting authority was established in terms of the National Prosecuting Authority Act 32 of 1988 (NPA Act), new developments took place.

## Policy development

In the development of a diversion policy for South Africa, the National Prosecuting Authority (NPA) was guided by international instruments such as the United Nation Convention on the Rights of the Child (CRC) (in particular article 40(3)(a)) and the United Nations Standard Minimum Rules on the Administration of Juvenile Justice. The NPA Act states that the National Director of Public Prosecutions must encourage the provincial Directors of Public Prosecutions to respect and comply with the United Nations Guidelines on the Role of Prosecutors, which were adopted in 1990. Articles 18 and 19 specifically deal with alternatives to prosecution. Article 18 states that:

*In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatisation of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.*

Article 19 states that:

*In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special consideration shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.*

Following the adoption of these guidelines, the NPA issued the 1999 National Policy Manual containing sets of guidelines and procedures to assist prosecutors on how to do their work. Part Seven of the manual is on diversion.

It was tabled and approved by Parliament in November 1999. The manual defines diversion, how it should be implemented, the selection criteria and processes to be followed. It encourages prosecutors to be proactive in the establishment of diversion programmes, although this is the primary responsibility of the Department of Social Development. The policy further allows prosecutors to argue for diversion options to be imposed as a sentence during the sentencing stages of the trial and stipulates that a prosecutor must keep a register of all offenders screened for diversion. It is important to note that the policy directives do not only apply to juvenile offenders but to adult offenders as well.

The NPA, in October 2001, also published a Handy Hints Manual for prosecutors and diversion is discussed therein. The manual is a user-friendly guide to be used by prosecutors in and out of court on a daily basis.

In addition, the NPA and Justice College developed a Child Law Manual for Prosecutors wherein various experts in the field of child law made valuable contributions. A chapter in the manual is dedicated to diversion. This chapter focuses on the history of diversion, covers case law, practical implementation, and formal and informal diversion programmes that currently exist. Prosecutors receive ongoing training via the Justice College, NPA and other experts. The manual is in the process of being reviewed and updated to incorporate the latest developments.

## Research and work done by the NPA

In 2000 the NPA, through their Sexual Offences and Community Affairs Unit (SOCA), conducted a national audit on diversion programmes. The findings of the audit indicated that there were few diversions occurring in the rural areas as compared to the urban areas where there are greater resources. In the rural areas it appeared that prosecutors and other role-players such as probation officers and police officers needed training on diversion.

The findings of the audit led to the Restorative Justice Centre conducting a pilot project on rural diversion with the participation of traditional leaders in Mpumalanga. They developed a Resource Manual on Rural Diversion Process and Implementation, which can be utilised by service providers in developing diversion programmes in rural areas.

The first decentralised multi-disciplinary training was conducted in 2002. It was facilitated by the NPA in conjunction with NICRO and the Department of Social Development. To date the NPA has trained 403 prosecutors and other role-players in the implementation of diversion.

As a follow-up to the training, the NPA embarked on assisting prosecutors in specific courts to introduce diversion practices with the assistance of NICRO and the Department of Social Development. The project took place towards the end of 2002 and actual visits were made to specific courts identified in Limpopo, North West, Western Cape and Northern Cape. This initiative was undertaken to ensure that children had equal access to diversion programmes in the rural and urban areas.

The NPA has also started gathering data manually as from July 1999 to determine the number of diversions. However, statistic forms which were utilised by prosecutors, did not record whether the matter had been diverted. The forms only stated that the case had been withdrawn and a mammoth task faced prosecutors who were required to extract that information separately *ex post facto*. This resulted in the statistic forms being amended and an additional column added to record diversions. As from July 1999 until December 2005, the NPA had diverted 115 582 matters. However, a major shortcoming is that the figures do not indicate the types of offences and the ages of the children who had been diverted.

A further activity arose when the Portfolio Committee on Justice tasked the NPA to facilitate the development of minimum standards on diversion as proposed in the Child Justice Bill. The Department of Social Development commissioned NICRO to develop these standards and a final report containing 95 minimum standards for diversion of children in conflict with the law has been completed.

In addition, an audit of diversion programmes currently utilised by prosecutors was conducted to assist the Department of Social Development in the process of mapping the available programmes in the country. This was done to determine the areas where programmes do not exist.

Another development has been the launch of the Hatfield Court Pilot Project in 2004, which is a public-private partnership between the Department of Justice, the University of Pretoria, the NPA, the Tshwane Metropolitan Council, the South African Police Service and the Department of Correctional Services. The aim of this specialised court is to address petty offences in the Hatfield area. Diversion programmes have been instituted to channel petty offences, especially cases involving young offenders, away from the criminal justice system under certain conditions. Over a seven month period, the court handled 1 945 cases, had 832 convictions and 44 acquittals and had diverted 359 individuals of which 80 were child offenders.

A research project focusing on the effectiveness of the Hatfield Court Project was launched as a preliminary investigation into the views of the youths who had been in conflict with the law and who had been diverted by the Hatfield Court. The feedback received from the "diverted" offenders who participated in the research study was positive and most of the research participants expressed that they experienced a positive personal change after the programme.

Finally, a successful project is operating in the Vaal Rand Cluster upon the initiative of Advocate JJ Venter, a Chief Prosecutor. He started implementing the Community Diversion Project in his cluster, which incorporates Benoni, Brakpan, Springs, Nigel, Heidelberg, Meyerton, Vereeniging, Vanderbijlpark, Sebokeng and Oberholzer. For the period between February 2006 and May 2006 alone, a total of 6 241 diversions had taken place. This was also made possible due to the involvement of the NPA, as well as other sponsors.

## Findings and learnings

The NPA Transformation Project has identified the use of alternative methods of prosecution in addition to the traditional methods that are currently in practice. The creation and strengthening of structured and formal relationships with our stakeholders is critical in ensuring the effective and efficient management of children in conflict with the law. There is a need for ongoing skills development for prosecutors and other relevant role-players. The NPA has identified the need for more probation officers to ensure that proper assessments are done for each and every child that is arrested.

## CHALLENGES AND CONSTRAINTS

Various challenges and constraints have been encountered. These include:

- There is insufficient financial and human resources to successfully embark on the NPA's mandate.
- The data initially recorded by the NPA did not indicate the ages of the people that were diverted, thereby making it difficult to distinguish adults from children. Fortunately, this matter is currently being addressed.
- Government has not embarked on a national study on the impact of diversion to see whether it does reduce the rate of re-offending. As an organisation we need to explore diversion of serious offences with specific reference to other types of rapes committed by children against children.
- There are limited diversion programmes available in the rural areas, and the affected departments must see to it that resources are channelled to these areas.
- In ensuring that all children are properly assessed, the Department of Social Development must develop a standardised assessment tool to improve assessments and the quality of assessment reports furnished to court.

- Not all young sex offenders who should be diverted are in fact diverted, due to the lack of programmes for young sex offenders.
- Diversion of children living on the streets has been an ongoing challenge due to the lack of a physical address and diversion programmes with residential elements to cater for them.

## Proposed projects

In order to determine the effectiveness of diversion in rehabilitating the lives of young offenders, the NPA deems it necessary that these services be reviewed. The Institute for Security Studies has proposed a research study on child justice. The research will be done in co-operation with the NPA and the Departments of Justice and Social Development.

As stated above, the NPA is currently involved in the process of revising the Child Law Manual for Prosecutors to bring it in line with new developments.

### LAW REFORM

The passing of the Child Justice Bill is long awaited and we hope that, once enacted, it will increase the diversion of children away from the punitive justice system to rehabilitative programmes that will ensure that children are re-integrated into their families and communities.

The Bill proposed equal access of children to diversion and this would lay the basis to ensure availability of programmes in the rural areas.

NPA policy directives on diversion will be amended to align them with the requirements of the new legislation. There will be a national register of diversion, which the Bill proposes should be located in the Department of Social Development. This will ensure that we get reliable data on diversions. The legislation will enhance the implementation of the minimum standards and ensure that children are referred to accredited quality programmes and service providers. The Bill will allow for greater collaboration among relevant role-players and joint decision-making in crucial matters affecting children in conflict with the law.

# Case review teams: Children awaiting trial in detention in the Western Cape

Advocate Bronwyn Pithey  
National Prosecuting Authority  
(Sexual Offences and Community  
Affairs Unit)

The Case Review Team (CRT) project in the Western Cape developed broadly out of the need nationally to reduce the number of children awaiting trial, particularly those in the custody of the State, i.e. those children in correctional centres, police cells and places of safety. The CRT was the initiative of the National Prosecuting Authority (NPA), and was implemented in the Western Cape as a pilot in 2005. The main stakeholders involved in the project are the NPA, the judiciary, the South African Police Services (SAPS), Department of Correctional Services (DCS), Department of Social Development (DSD), Department of Justice and Constitutional Development (DOJ) and NGOs.

The CRT project forms part of a larger structure in the Western Cape: the Western Cape Child Justice Forum (WCCJF). It is mainly due to this structure that the CRT project owes its cautiously optimistic achievements. The WCCJF is a provincial monitoring committee in the Western Cape. In 2000, the Western Cape Provincial Administration was taken to court by outspoken opposition members of parliament, claiming a constitutional violation of children's rights. The issue involved 600 awaiting trial youth detained in the province, some kept longer than six months in overcrowded and appalling circumstances. In March 2000, a meeting of provincial stakeholders responsible for the implementation of the system, most notably the SAPS, the DOJ, the NPA, DCS, DSD, Department of Education and key NGOs, was convened to address this issue. This was the genesis of the Western Cape Child Justice Forum. A detailed planning process was followed to highlight the key problem areas and identify specific tasks and time-frames in which action needed to be taken. This provincial committee oversaw the entire process and, over a five month period, the number of detained children was reduced to less than one hundred.

The WCCJF now meets once a month and has proved to be invaluable in identifying any specific problems or stumbling blocks in the system which are contributing to the high numbers of children in custody. The forum has expanded to include the Office of the Inspecting Judge of Prisons, academic institutions, and a number of NGOs working both with children in correctional institutions and in the community. This forum reports directly to the Director of Public Prosecutions Stakeholder Meeting held monthly, where the heads of all provincial departments are present, and where final decision-making is exercised. There is thus strict accountability of the forum regarding the status and treatment of children in custody.

The CRT's account to the WCCJF by means of monthly reports submitted by prosecutors to the DPP's office, detailing the status of every child that appears in court and that is ordered into custody by the magistrate (see Annexure A). CRT's are based at local court level, and meet monthly or more often if required. The CRT is comprised of the most senior prosecutor managing the district court, a senior police officer, a probation officer, the office manager from DOJ, the Legal Aid Board, and NGOs. The magistracy is represented in some limited instances, but they remain committed to the process, and have made themselves available for reconsideration of cases should new information concerning individual children become relevant.



The role of the CRT is multi-fold. It must scrutinise DCS name lists supplied weekly to all role-players and address the cases of the children that appear on their court role. It must reconsider the assessment report (see Annexure B) that was prepared by the probation officer before the first appearance of the child in court, and assess the court's ruling regarding the placement of the child into custody in relation to the recommendations from the probation officer. Should it become clear that the court may not be in possession of information about the child (that was either not presented in court at the time of the appearance of the child, or new information received from one of the role players) the CRT may request a re-assessment of the child by the probation officer. Should it be appropriate, the child may be requisitioned to court to expedite his or her possible release from custody pending trial. Generally the CRT must screen dockets, review the age of the alleged child offender, evaluate the length of time the case has been pending and interrogate the reasons for long delays with the intention of expediting the case as soon as possible, and consider the seriousness of the offence. If an amount of bail has been fixed and it is not paid by the child or his or her parent or guardians as they are indigent, other means of securing the accused's presence for trial must be explored. All alternative methods of securing court attendance must be fully investigated, with the principle of detention as a last resort guiding all decision-making. Options such as the possibility of diversion, plea bargaining and other alternatives, must be vigorously researched on a case-by-case basis.

A number of challenges have faced the CRT's and the WCCJF. These are not peculiar specifically to this project, but have historically challenged those who have addressed the issue of children awaiting trial in custody. Regional court cases, due to their complexity and seriousness, continue to take long periods of time to be finalised. This obviously impacts adversely on the child accused involved in these cases. An added complication is that often the child is co-accused with adults. A second challenge has been the assessment process of children by probation officers on arrest. The quality and lack of availability of these assessment reports did not allow for the courts to make informed decisions for the placement of the child in accordance with his or her best interests, often resulting in the child being inappropriately placed awaiting trial. As a result, a new form and process has been devised and implemented with the intention of ensuring accountability from all relevant role-players in the process. A third challenge has been the availability of places of safety. This remains a challenge as resourcing for this much-needed alternative to correctional facilities is limited.

The experience of the project has indicated that emphasis must be placed on 'pre-first appearance interventions'. All possible alternative methods of securing attendance at court must be considered. Once the child is arrested, proper procedures are required to ensure that his or her rights are upheld, that parents or guardians are involved as soon as possible, that family finders are used to the optimum, that assessment procedures are completed before the child first appears in court, that the child is approached by the Legal Aid Board for legal representation (preferably before first appearance) and that the child is given an opportunity to apply for bail, where appropriate, as soon as possible.

The achievements and best practice of the CRT's and WCCJF, are mainly due to inter-departmental accountability, and the various tiers of accountability as detailed above. The revision of the assessment process is yielding good results, with few, if any, children not being fully assessed before their first appearance in court. The Legal Aid Board has embarked on a very effective intervention by ensuring that all arrested children are approached for legal representation before first appearance. This is improving the quality of information placed before the court pending decisions on the placement of the child awaiting trial. The project has undoubtedly reduced the number of children awaiting trial in custody in correctional facilities. The challenge is now to address those children awaiting trial in places of safety. A final achievement of the project is that it has been identified as a best practice by the NPA and Inter-Sectoral Committee on Child Justice (ISCCJ), and is in the process of being implemented nationally.

ANNEXURE A: NPA FORM

Children awaiting trial in detention

<b>ACCUSED</b>	
<b>BIRTH DATE</b>	
<b>CASE NO</b>	
<b>HOLDING FACILITY</b>	
<b>CHARGE(S)</b>	
<b>REASON(S) FOR DETENTION</b>	
<b>REASON FOR DETENTION IN PRISON/POLICE STATION (if applicable)</b>	
<b>DATE OF FIRST APPEARANCE</b>	
<b>REMAND TO</b>	
<b>REASON(S) FOR REMAND</b>	
<b>DATE FINALISED</b>	
<b>RESULT</b>	

ANNEXURE B:

Part 1: Child Justice Assessment Form: Western Cape

TO BE COMPLETED BY THE PROBATION OFFICER  
PLACE IN DOCKET ONCE COMPLETED

**A. PERSONAL INFORMATION**

Surname: .....

Name: .....

Alias: .....

Date of Birth: ..... Age: .....

Proof of birth provided: .....

Gender:  Male  Female

Residential Address: .....

.....

SAPS Station: .....

Court: .....

CAS: .....

PO ref: .....

District Office: .....

Parent/Guardian: .....

Address of Parent/Guardian: .....

Parent/Guardian present during assessment:  Yes  No

If not, attempts made: .....

Contact Details (telephone no.): .....

Disabilities: .....

Medical information (including any injuries): .....

.....

Schooling: Name of school: .....

Address of school: .....

Tel no. of school: .....

Grade: .....

Name of teacher: .....

Part 2: Conference Papers

Employer: Name of employer: .....  
Address of employer: .....  
Tel no. of employer: .....  
Type of employment: .....

**OTHER INFORMATION**

General behaviour: .....  
.....  
.....

Previous interventions with child: .....  
.....

Recommendation of parent/guardian: .....  
.....

**B. OFFENCE**

Alleged offence/s: .....  
Date & time of arrest: .....

Risk factors: Gang involvement:	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Substance use:	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Adult involvement:	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Socio-economic factors:	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Peer Pressure:	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Other cases pending:	<input type="checkbox"/> Yes	<input type="checkbox"/> No

If cases pending, please state details: .....  
.....

Relationship with victim (family, girl/boyfriend, stranger): .....

Previous institutional care:	<input type="checkbox"/> Yes	<input type="checkbox"/> No
------------------------------	------------------------------	-----------------------------

If yes, please state name and when .....  
.....

**C. RECOMMENDATION OF THE ASSESSMENT OFFICER: (ONLY ONE OPTION)**

1 Parent/Guardian's care: Address (if not same as mentioned) .....  
.....  
.....

2 Diversion: (e.g. Nicro or Dept)

3 Home-Based Supervision {Sec. 62(f)}

4 Conversion:

5 Placement in Place of Safety Contact details of person at the Place of Safety  
& time confirmed: .....  
.....

6 Correctional Centre: (state reasons) .....  
.....  
.....

**D. LEGAL REPRESENTATION**

1. Does the child have legal representation? Yes No

2. If yes, name of Legal Representative: .....

3. Contact number/s of Legal Representative: .....

.....  
.....  
.....

Assessment officer/Probation officer  
(Print name)

Date and time of assessment

.....

.....

Contact number

District Office

# PART 2(a): Child Justice Assessment Form: Western Cape

TO BE COMPLETED BY THE PUBLIC PROSECUTOR  
ATTACH TO J7 ONCE COMPLETED

Surname: .....

Name: .....

Alias: .....

Date of Birth: ..... Age: .....

Proof of birth provided: .....

Gender:  Male  Female

Residential Address: .....

.....

Parent/Guardian: .....

Contact Details: .....

Alleged offence/s: .....

Date & time of arrest: .....

Probation Officer's recommendation: .....

.....

Prosecutor's comments: .....

.....

Court ruling: .....

.....

Reasons if detained in Correctional Centre: .....

.....

.....

Assessment officer/Probation officer  
(Print name)

Date and time of assessment

SAPS Station: .....
Court: .....
CAS: .....
PO ref: .....
District Office: .....

# PART 2(b): Child Justice Assessment Form: Western Cape

TO BE COMPLETED BY THE PUBLIC PROSECUTOR  
ATTACH TO CHARGE SHEET ONCE COMPLETED

Surname: .....

Name: .....

Alias: .....

Date of Birth: ..... Age: .....

Proof of birth provided: .....

Gender:  Male  Female

Residential Address: .....

.....

Parent/Guardian: .....

Contact Details: .....

Alleged offence/s: .....

Date & time of arrest: .....

Probation Officer's recommendation: .....

.....

Prosecutor's comments: .....

.....

Court ruling: .....

.....

Reasons if detained in Correctional Centre: .....

.....

.....

Assessment officer/Probation officer  
(Print name)

Date and time of assessment

SAPS Station: .....
Court: .....
CAS: .....
PO ref: .....
District Office: .....

# PART 3: Child Justice Assessment Form: Western Cape

TO BE COMPLETED BY THE PROBATION OFFICER  
ATTACH TO J7 ONCE COMPLETED

NAME OF FACILITY: .....

CHILD'S NAME: .....

DOB: .....

1. MASTERING: .....

.....  
.....

2. GENEROSITY: .....

.....  
.....

3. INDEPENDENCY: .....

.....  
.....

4. BELONGING: .....

.....  
.....

FAMILY REUNIFICATION (WHERE AND WHEN POSSIBLE); SUPPORT TO/FOR FAMILY IF NEEDED: .....

.....  
.....  
.....

.....  
Probation officer  
(Print name)

.....  
Date and time of assessment





# The development of minimum standards for diversion programmes

Lukas Muntingh  
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## Introduction<sup>1</sup>

Sections 48 and 49 of the Child Justice Bill 49 of 2002 mandates the Minister of Social Development to develop an accreditation system based on the minimum standards for diversion programmes. The minimum standards are intended to give expression to the rights that are afforded to children through international and domestic law. Minimum standards define a level of performance below which we cannot drop, as this will hold a direct and severe risk for the recipient of the intervention or other stakeholders and, furthermore, compromise the intended outcome of the intervention. Minimum standards therefore aim to set a level of performance that is non-negotiable, and defined as such to protect the interests and rights of stakeholders.

The Bill provides two sets of standards in section 49, the first being compulsory requirements for diversion programmes and the second, a more flexible standard that should be adhered to when reasonably possible to do so. In respect of the first set, the requirements are that diversion programmes:

- must be structured in such a way so as to strike a balance between the circumstances of the child, the nature of the offence and the interests of society;
- must be aimed at minimising the potential for recidivism;
- must promote the dignity and well-being of a child, and the development of his or her sense of self-worth and ability to contribute to society;
- may not be exploitative, harmful or hazardous to a child's physical or mental health;
- must be appropriate to the age and maturity of a child;
- may not interfere with a child's schooling; and
- may not be structured in a manner that excludes certain children due to a lack of resources, financial or otherwise.

The second set of requirements states that where reasonably possible diversion programmes should:

- impart useful skills;
- include a restorative justice element which aims at healing relationships, including the relationship with the victim;

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<sup>1</sup> This paper is based on the full report (Final report to the Department of Social Development on the development of minimum standards for diversion programmes for children in conflict with the law 2004) by the same authors.

- include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, including the victims of the offence, and may include compensation or restitution;
- be presented in a location reasonably accessible to the child;
- be structured in such a way that they are suitable to be used in a variety of circumstances and for a variety of offences; and
- be promoted and developed with the 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.

In 2003 the Department of Social Development contracted National Institute for Crime and the Re-integration of Offenders (NICRO) to develop minimum standards for diversion programmes as contemplated in the Child Justice Bill. Such programmes have been in existence since 1992 but operating in an unregulated environment. This paper reflects on the minimum standards for diversion programmes that were developed as a result of that project.

## The need for minimum standards

Minimum standards are there to manage identified risk areas. In diversion programmes there are a multitude of risks that require management. Setting minimum standards is an attempt to firstly be proactive in managing the risk by "laying down the rules" and secondly to set a standard that is objective, transparent and verifiable. We can, for heuristic purposes, ask the question "what will happen if there are no minimum standards or rules?"

At an early stage in this project, eight risk areas were identified by a panel of experts. Each of these was unpacked with respect to different stakeholders, to produce a matrix of potential risk areas if programmes continue to operate in an environment without minimum standards. The eight primary risk areas are:

- infringing upon the rights of children;
- mal-administration and mismanagement of resources;
- poor programme quality;
- inappropriate programme content;
- inappropriate matching of children to programmes;
- lack of capacity within service provision agencies;
- lack of skill in service providers; and
- unequal access to diversion services.

The stakeholders in respect of diversion programmes were identified as being:

- children (programme participants) and their families;
- service provider organisations (NGOs);
- donors;
- the Department of Social Development; and
- the Department of Justice.

It is not necessary to describe here in detail the matrix analysis of the different risk areas and its meaning for each of the stakeholders. The important issue is that in the absence of minimum standards, risks are created for all stakeholders on several levels.

Minimum standards in diversion programmes are aimed at proactively managing risk areas by setting clear guidelines for performance standards in an effort to reduce risks in advance. Developing minimum standards for diversion programmes is one step in the direction of protecting children's rights in the criminal justice system.

Following from this is the need for a monitoring and accountability mechanism. There is little sense in having standards and a monitoring mechanism if these do not come together in an accountability system.<sup>2</sup> The standards that are described in this paper will only be as effective in protecting children as our ability to ensure the accountability of diversion programme providers.

## The approach and methodology followed in developing the standards

The minimum standards for diversion programmes have, at their core, the purpose of protecting children's rights by proactively managing risk areas through standard setting. The challenge has been to develop minimum standards that make a real difference to the protection of children's rights and to the quality of service delivery while being as inclusive as possible. It is essential that these standards do not give unfair preference to the urban-based service providers, and that they can be achieved by service providers in the poorer and rural communities. It should furthermore be added that the aim was not to standardise the content (and design) of the programmes, as tempting as this may be, but rather to set standards that would assist in the continuous development of programme content on a needs-basis, and adhering to methodological and design rigour.

In order to commence with the project a number of **assumptions** were made:

- The rapid expansion of diversion programme types and reach of diversion programmes will continue for a number of years.
- A wider range of organisations (NGOs and CBOs) will become involved in diversion programmes as service providers, especially if there is a financial incentive.
- There are a number of organisations that have developed considerable expertise in operating diversion programmes and that have a proven track record in this regard.
- Organisations without any or with limited exposure and experience in working with children in conflict with the law will become or will want to become involved in diversion programme delivery.
- It is desirable to set standards in a manner that is developmental and empowering, regulating pro-actively instead of reactively.
- The Child Justice Bill provides (in sections 48 and 49) some broad minimum standards for diversion programmes but these standards need to be expanded upon in order to operationalise them.

The first phase in the development of the minimum standards was the facilitation of a consultation process with experts in the field of child justice with a view to finalising a project plan and ensuring that the needs of the various government departments and NGOs were taken into consideration in putting together the implementation strategy. The outcomes of this workshop included the following:

- the identification of risk areas should there be no minimum standards;
- the finalisation of the project assumptions, goals and objectives; and
- the finalisation of the overall implementation plan.

This also enabled the demarcation of two broad categories of standards to be developed, namely:

- standards relating to the organisational and service provider abilities and capacities, and
- standards relating to programme outcomes, i.e. what programmes need to achieve.

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<sup>2</sup> A Saporiti "Evaluating the Process of Monitoring Children's Rights" E Verhellen (ed) Monitoring Children's Rights, 1996 Marthinus Nijhoff Publishers, The Hague.

The overall goal of the project was therefore formulated as:

*To develop standards for diversion programmes suitable to the South African context that are achievable, developmental and empowering whilst simultaneously not compromising on the rights of children and the quality of services rendered to children.*

The identified risk areas and this goal enabled the development of the following objectives for the project:

- to develop standards that regulate the **infra-structural, administrative** and **managerial** requirements of diversion programme providers;
- to develop standards to regulate the **knowledge and skills** requirements for programme providers and facilitators in terms of the three levels of diversion programmes as set out in the Child Justice Bill;
- to develop standards to regulate the **operational management** of diversion programmes;
- to develop standards to regulate the **monitoring and evaluation** of diversion programmes;
- to develop standards that regulate the **minimum requirements** for diversion programme service providers; and
- to develop standards that will guide the **outcomes** for diversion programmes.

The second phase of the project involved a comprehensive research process aimed at documenting national and international best practice and drafting the preliminary standards. Through this process a draft set of standards was produced in both research areas for consultation purposes.

The assumption in relation to the organisational standards was that unless an organisation was functioning well with clear governance, management and operational systems in place, it would be unable to render effective programmes and protect children from the risks articulated above. Standards developed in this regard, therefore, included areas such as governance structures, management systems, financial accountability, human resource management, service level agreements and the training of programme facilitators.

The Human Sciences Research Council (HSRC) was contracted to develop draft minimum standards relating to programme outcomes. It is important to note that the idea behind creating minimum standards for programme *outcomes*, rather than for programme *content*, is to allow service providers flexibility as to how to achieve outcomes, while still ensuring that the rights of children and the interests of stakeholders are protected. During their research, the HSRC also produced a literature review on "what works" in diversion programmes, a very useful by-product which will be an invaluable resource for diversion service providers.

The third phase in the development of the standards involved a national consultation process with stakeholders in the child justice field. Once draft standards were developed, a thorough consultation process was undertaken. This was structured by essentially two questions:

- Is it *desirable* to have this standard? In other words, is this a good standard? Will it contribute to protecting children? Will it protect other stakeholders? Will it result in a better service? Will it contribute to better outcomes?
- Is this standard *feasible* to implement? In other words, do we have the resources? Do we have the skills? Is this realistic? Will it work in our context? Will it work in a rural area and an urban setting?

Workshops were held during October 2004 and participants included prosecutors, magistrates, probation officers, academic institutions, welfare organisations, the South African Police Services, Department of Correctional Services, Department of Social Development, and organisations currently rendering diversion programmes or planning to do so. The aim was to ensure participation of individuals who had not already been consulted in the drafting process but who were associated with diversion on a regular basis. There were between 15 and 30 participants in each workshop with a total of 132 participants.

At each workshop, participants were introduced to the project and provided with the necessary background through a presentation by the facilitators. The participants were then presented with the draft minimum standards and given the following tasks:

- to comment on whether they felt each standard was desirable, and if not, why;
- to comment on whether the standard was feasible, and if not, why;
- to comment on what steps would need to be taken to make the standard feasible; and
- to add new standards if they felt that there was an omission in the draft standards.

Groups recorded their comments in writing and the results from all six workshops were collated into a single consolidated report. With a few exceptions, the majority of groups found the proposed standards both desirable and feasible, thus broadly validating the standards developed by the researchers. The findings in the consolidated report were rigorously interrogated by the project team and incorporated into a final set of minimum standards for diversion.

The final phase in the development of the standards involved a process of testing the proposed standards against the current functioning in seven diversion service provision agencies. The organisations that participated in the testing process ranged from established urban-based service providers, wilderness programme experts, a small community-based diversion provider and a state run one-stop child justice centre. The objectives of this process were:

- to collect reliable information on the state of selected diversion programmes and service providers in South Africa;
- to make a critical assessment of diversion programmes using the minimum standards as a yardstick;
- to identify the gaps between reality and the standard;
- to identify where reality conforms to the standard; and
- to articulate what would be required to meet the standard.

The organisations that participated in this process agreed to do so on condition of anonymity and the undertaking given that this process was not intended to show up their shortcomings, but rather to gauge the extent to which existing diversion service providers are meeting the proposed minimum standards and to identify the gaps, resource and skills requirements in order to meet the standards.

In addition to the outcomes of the testing process, the researchers developed a tool for the ongoing assessment of diversion service provision against the standards.

In summary, the development of the standards followed a process of triangulation throughout between:

- the project team;
- the researchers; and
- external stakeholders, case studies and practitioners.

This ensured a continuous process of dialogue and verification to confirm more than once that the standards were indeed desirable and feasible.

## Overview of content of standards

In developing these standards three issues were kept in mind in an effort to be efficient, namely:

- Where possible, the minimum standards were to refer to existing legislation and standards and the minimum standards are not as detailed in areas where there are existing standards or legislation;
- The standards are written in such a way that the required structures and systems can overlap with existing structures and systems; and
- They are also formulated in such a way that organisations have some degree of flexibility as to how it can meet the standards, and the standards are therefore aimed at the result as opposed to the exact steps in getting the results.

A total of 95 standards were formulated; 60 in the category of organisational standards and 35 in the programme outcome category.

### ORGANISATIONAL INFRASTRUCTURE AND SYSTEMS STANDARDS

The following categories of standards relate to organisational requirements for diversion service providers. These standards are intended to regulate governance, management systems including financial, service level agreements, human resources, as well as the training of programme facilitators for diversion service providers.

### PROGRAMME OUTCOME STANDARDS

The organisational standards presented above attempt to create an environment that is conducive for proper management. The programme outcome standards are an attempt to articulate what the actual services must achieve. It is not an attempt to “standardise” services (or programme content) but rather to articulate the non-negotiable results of diversion programmes. The outcome standards place emphasis on instilling a sense of methodological rigour in the design, development, implementation, monitoring and evaluation of services.

The outcomes standards were to a large extent informed by the analysis conducted as part of this study and will be reflected on here in more detail. The analysis extracted valuable lessons from extant literature in a variety of settings. The same authors also describe the risk factors and developmental pathways relevant to the emergence of anti-social and/or delinquent behaviour. A number of key-findings also emerge from the analysis on “what works” and these are presented below as the characteristics of the most effective interventions.<sup>3</sup>

- Programmes that are theoretically grounded and, which rely on existing evidence, have been found (on average) to be five times more effective in reducing re-offending than those without a theoretical basis (Izzo & Ross, 1990).
- Other effective youth justice programme types are: provision of employment (38% reduction in target/antisocial behaviours); multi-modal and behavioural therapies (35% reduction in target behaviours); and skills-oriented approaches that target the skill deficits that caused or contributed to offending behaviour (20% reduction in target behaviours).

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<sup>3</sup> See A Dawes and A Van der Merwe The development of minimum standards for diversion programmes in the child justice system: final report for Nicro, 2004, *Department of Social Development (Unpublished)*.

- Structured, cognitive-behavioural, multi-modal interventions, particularly those that include inter-personal and social skills training, have consistently been found to be more effective in reducing antisocial and offending behaviour than educational, vocational and undirected therapeutic approaches (producing a reduction in recidivism of up to 40%) (Lipsey & Wilson, 1999; Wilson & Lipsey, 2000; Kurtz, 2002).

There are also common characteristics of the least effective programmes:

- Programme content focussing on deterrence (25% **increase** in target behaviours), vocational counselling (18% **increase** in target behaviours), family counselling (2% reduction in target behaviours), group counselling (7% reduction in target behaviours), and individual counselling (9% reduction in target behaviours) have shown negligible, negative and/or inconsistent effects on antisocial and offending behaviours (Lipsey, 1995).
- U.S. reviews show that when subjected to rigorous analysis, wilderness/adventure therapy programmes and vocational interventions for non-institutionalised young offenders (when implemented as single-component interventions) have repeatedly been found to have weak or negative outcomes (Lipsey & Wilson, 1999; Wilson & Lipsey, 2000).

Based on the above information it was possible to develop some guidelines and design principles for *effective* diversion programmes, namely:

- **Risk principle:** Match offender risk levels with the *intensity* of the intervention; offenders representing a higher risk of recidivism and/or committing serious/violent offences need more intensive services; lower-risk individuals should receive less intervention (Andrews et al., 1990; MacGuire & Priestley, 1995; Rutter et al., 1998).
- **Need principle:** Focus on factors that *cause, support or contribute to offending behaviour* and not on factors that are distantly or unrelated to this behaviour (MacGuire & Priestley, 1995; Lösel, 1993).
- **Responsivity principle:** Staff should use a warm, flexible and enthusiastic interpersonal style and a *firm but fair approach* (Andrews et al., 1990). Staff and offender *learning styles should be matched*. Active participatory methods rather than either didactic or unstructured experiential methods should be used (Gendreau & Andrews, 1990; Andrews et al., 1990; MacGuire & Priestley, 1995; Rutter et al., 1998).
- **Key elements of effective programmes include:** anti-criminal modelling; re-inforcement of desired outcome behaviours; concrete problem solving; pro-social skills training; verbal guidance and clear explanations (Andrews et al., 1990).
- **Community based principle:** Programmes that have close links with the child's community are most effective. Proximity to participants' homes promotes real-life learning and generalisation of positive skills (Lösel, 1993; Mulvey, Arthur & Reppucci, 1993; MacGuire & Priestley, 1995; Rutter et al., 1998).
- **Multi-modal intervention principle:** The most effective programmes are *multi-modal and social skills oriented*. Highly structured, cognitive - behavioural treatments directed at development of concrete skills have been shown to be at least twice as effective as other interventions, and to have more lasting effects (Gendreau & Andrews, 1990; Izzo & Ross, 1990; Lösel, 1993; Lipsey, 1995; Mulvey, Arthur & Reppucci, 1993; Lipsey, 1992a; Lipsey, 1995; MacGuire & Priestley, 1995; Tate, Reppucci & Mulvey, 1995; Rutter et al., 1998).



- **Intervention integrity principle:** Indicators of integrity are: the intervention should be research-based throughout; have sufficient resources to achieve objectives; objectives should be linked to intervention components and desired outcomes and the intervention should be systematically monitored and evaluated (MacGuire & Priestley, 1995).

In the same manner, characteristics that *should be avoided* in programme design and implementation have been identified:

- Interventions in which participants are mis-matched according to the risk, need and responsivity principles noted above;
- Non-directive, relationship-dependent and/or unstructured psychodynamic therapeutic approaches;
- Milieu and group approaches that emphasise in-group communication (the risk is that anti-social bonding occurs), without a clear plan for participants to gain control over target offending and/or anti-social behaviours;
- Poorly targeted academic and vocational approaches (these could include "life skills" approaches that do not have clear and proximal links to the causes of the target behaviour);
- Single-component wilderness/adventure therapy interventions e.g. outward-bound type programmes that are not multi-modal, and that do not have problem-focused components as noted above;
- Punitive approaches such as "boot camps" (Andrews et al., 1990; MacGuire & Priestley, 1995; Lipsey & Wilson, 1999);
- Residential interventions - residential settings diminish the positive effects of otherwise appropriate interventions and enhance the weak or negative effects of inappropriate interventions (Andrews et al., 1990).

Apart from the general principles and guidelines to adhere to and the characteristics to avoid, there are also programme specific guidelines that have been identified by Dawes and Van der Merwe. In the research process it was debated at length on whether it was necessary to develop programme specific standards, for example standards for life skills programmes or for specific offence categories. In the end it was agreed that only two exceptions will be made namely, restorative justice processes and programmes for young sex offenders.

A total of 35 programme standards were developed based on the initial report compiled by Dawes and Van der Merwe as well as the provincial consultation workshops. The standards are listed below in summarised version. The standards emphasise, in particular, the importance of thorough assessments to inform decision-making and the value of a comprehensive programme design and development process.

## The Programme Standards

### POST ARREST ASSESSMENT BEFORE REFERRAL

- Every arrested child is assessed within 48 hours of arrest by a probation officer before the prosecutor makes the decision to (or not) to divert;
- Probation officers use a standard national assessment procedure;
- Probation officers have been trained in conducting the assessment procedure;
- The purposes of the probation officer's assessment, and the procedures immediately following the assessment are explained to the child in a manner appropriate to the child's age;
- The assessment is appropriate to the child's age and conducted in a language the child understands;
- The probation officer's assessment includes a specified list of information items (which is not listed here due to space constraints);
- The child's rights to privacy, confidentiality, appeal of decisions and participation during the probation officer's assessment are protected;

- The prosecutor's (and/or preliminary inquiry magistrate's) decision to (or not to) divert is informed by the probation officer's assessment;
- The prosecutor (and/or preliminary inquiry magistrate) has sufficient knowledge about the nature of available diversion programmes to make an informed referral;
- The prosecutor's referral of the child to a particular diversion programme is based on the needs and circumstances of the child.

#### PROGRAMME DESIGN AND DELIVERY

- Every child referred to a particular diversion programme is assessed before participation in the programme, and the assessment includes a specified list of information items (which is not listed here due to space constraints);
- Diversion programmes include post-intervention assessments that measure changes in factors assessed in the pre-intervention assessment;
- The diversion programme is reasonably geographically accessible to the child;
- The programme is appropriate to the child's age, physical, and cognitive ability;
- The development of diversion programmes is based on research evidence of what works in reducing criminal behaviour in children and adolescents;
- Diversion programmes have clearly articulated programme objectives and outcomes;
- Diversion programme design and activities can be shown to address the factors directly associated with offending, and are therefore likely to reduce the problem of re-offending;
- Diversion programmes have a system for monitoring the quality of programme delivery;
- Diversion programmes have a system for monitoring the child's progress, including his/her compliance with the conditions of his/her diversion order, and a record of reasons for non-compliance, if applicable;
- The intensity of diversion programmes (frequency and duration of programme activities) vary according to the level of risk recorded in the pre-intervention assessment of participants (i.e. the most intensive services are delivered to higher risk cases; and less intensive services are delivered to lower risk cases);
- A senior staff member regularly supervises diversion programme staff members;
- The manner in which the programme is delivered encourages the active participation of the young offender;
- Diversion programmes are subject to regular outcome evaluations;
- Diversion programme staff track participating children within one year of programme completion to establish the overall well-being of the child with an emphasis on further offending behaviour.

#### STANDARDS FOR RESTORATIVE JUSTICE PROCESSES

- The details of the participants, the procedures involved in the restorative justice initiative, and the possible consequences of the restorative justice initiative, are discussed with all parties involved in the process before their participation;
- Participation in restorative justice initiatives is truly voluntary for both the offender and the victim;
- A key objective of restorative justice initiatives is increasing children's investment in, and agreement with the decisions made;
- Participants to the restorative justice process and parties with a direct interest (victim, offender, families, prosecutor, facilitator etc) must receive as soon as possible a written copy of the agreement that was reached (if applicable), setting out the respective duties and obligations of the relevant parties;
- A key objective of restorative justice initiatives is enhancing the perceived fairness of the process.

## SEX OFFENDER PROGRAMME STANDARDS

- The pre-intervention assessment includes information on a specified list of information items relating to amongst others violence or coercion involved in the crime, relationship to the victim, impulse control, and sexual history;
- The diversion programme includes sex education;
- The diversion programme addresses the child's ability to regulate his/her behaviour, specifically, impulse control;
- The diversion programme should consist of sessions amounting to no less than 24 hours in total, excluding the time taken for conducting the pre-intervention assessment;
- The diversion programme addresses the development of victim empathy;
- The child's parent/caregiver is directly involved in the diversion programme.

## The impact of minimum standards - do minimum standards have negative consequences?

If minimum standards are interpreted, applied and monitored in the correct manner, there is no doubt that they will provide children participating in diversion programmes with additional protection against rights violations. The principle of setting and applying minimum standards to protect human rights is well established in international law by instruments such as the United Nations Standard Minimum Rules for the Treatment of Prisoners and the United Nations Standard Minimum Rules for the Non-Custodial Measures. However, it is also necessary to enquire if minimum standards, as described in this paper, have potentially adverse consequences. Is it possible that in our efforts to regulate diversion programmes that we have created a framework that will only allow for structured, well-resourced and academically informed programmes to meet the standards? Is the future of diversion programmes elitist, bureaucratic and devoid of grassroots creativity?

## RESOURCES

To answer these questions it is necessary to return to the definition of minimum standards used in the introduction: *minimum standards define a level of performance below which we cannot drop, as this will hold a direct and severe risk for the recipient of the intervention or other stakeholders and, furthermore, compromise the intended outcome of the intervention.* In order to arrive at standards that conform to this definition, a process of extensive consultation was engaged in to ensure that the standards are both feasible and desirable. It should furthermore be pointed out that minimum standards are there to raise performance and not merely describe the lowest common denominator. There should therefore be an acceptance by stakeholders that when minimum standards are developed, they will have resource implications because minimum standards are aimed at achieving a minimum and equitable distribution of resources and protection. Resources in this case specifically refer to skills and capacity at implementation level.

## ELITISM

The minimum standards also apply without variation and exception. There are not different standards for urban or rural programmes, or between programmes run by established well-resourced organisations and small community based organisations. Admittedly not all diversion programme service providers will comply with all the minimum standards at present and it would be unrealistic to expect this. However, to ignore the critical areas of non-compliance would undeniably place children at risk. In the process towards compliance, it is thus necessary to identify and address the priority areas of non-compliance with the involved standards and resolve these first. Priority should be determined by the potential risk created through the extent of non-compliance. In other words, in instances where there is a low level of non-compliance but it creates a high risk and these should be the highest

priority areas to address. Logically these would be the areas that are the easiest to correct with the maximum benefit. Assessing compliance should be a process oriented towards both risk management and priority setting. Compliance with these standards should not and cannot be seen as elitist for these minimum requirements ensure the protection of children and have been tested for both desirability and feasibility.

## CREATIVITY

Diversion programme practitioners may ask the question of whether these standards will stifle creativity and limit the extent to which innovative responses can be developed to meet the needs of children in diversion programmes. The question is important, as most of what has been achieved in respect of diversion over the last decade has been the result of individual and organisational creativity. As noted above, minimum standards for diversion programmes do not, in the first instance, imply the standardisation of content but rather setting a standard for how programmes are developed and implemented. This promotes rigour in programme design to ensure that programmes are developed and implemented in adherence to the integrity principle. Secondly, to juxtapose freedom in programme design against the protective measures of the minimum standards would amount to blaming the rights of children for the supposed lack of creative programme designs. From a rights perspective this cannot be accepted. Creative and innovative programmes must (still) be in compliance with the minimum standards which are intended to protect children.

Excluding the specific standards for restorative justice processes and sex offender programmes, there are only three standards that have very specific application with regard to programme design, namely:

- The development of diversion programmes is based on research evidence of what works in reducing criminal behaviour in children and adolescents;
- Diversion programmes have clearly articulated programme objectives and outcomes; and
- Diversion programme design and activities can be shown to address the factors directly associated with offending, and are therefore likely to reduce the problem of re-offending.

It is evident that these standards do not place a limit on creative content, save that it must be based on knowledge; hardly an unreasonable demand. Programme designers and developers have a duty to be well-informed and responsibly creative.

## BUREAUCRACY

The standards relating to organisational capacity may create the impression that the intention was to create bureaucracy. Standards 1 to 60 are no more onerous than general principles of good governance and organisational development. They are also no more onerous than what is expected of organisations in respect of their own constitutions, labour legislation, non-profit organisation legislation, tax legislation, donor reports, insurance policies, professional body requirements and other regulatory frameworks. Nonetheless, in the process of standards development it was acknowledged that some small organisations or individuals may never be able to meet these standards but that they can, and already do, play an important role in providing services, especially in rural areas. To address this issue, the minimum standards make a distinction between *hosting organisations* and *implementing organisations*.

The *hosting organisation* is the organisation that is responsible for ensuring that the diversion programme is correctly planned, implemented, monitored and evaluated, and that children's rights are protected. This organisation is also responsible for ensuring that the appropriate records and contracts are developed and maintained, and that the appropriate processes are followed. This organisation may choose to either implement the diversion programme itself or to outsource the implementation of the programme to an individual or another

organisation. The legal entity of this organisation is described in standard 1 of the organisational standards.<sup>4</sup> This organisation is eligible for accreditation as a diversion service provider and may also implement the programme (as the implementing organisation).

The *implementing organisation* is the organisation that is responsible for planning, implementing, monitoring and evaluating the diversion programme. The legal entity of this organisation is described in standard 2 of the organisational standards.<sup>5</sup> This organisation is required to work under the strict supervision of the hosting organisation and is not eligible for accreditation as a diversion service provider.

This mechanism allows for smaller organisations or individuals to operate as implementing organisations in partnership with a more established hosting organisation. It is also more likely that established organisations will be able to meet the organisational standards more readily.

Critics may point exactly to this as bureaucracy development with larger organisations managing smaller ones. Firstly, it should not be assumed that this relationship will remain static and in due course an implementing organisation may well meet the requirements to become a hosting organisation. Secondly, in the development of systems, bureaucracy should not be confused with accountability. Record-keeping, reporting, organisational development and other administrative tasks are part of being transparent and accountable. These standards would in fact mean very little if there is no accountability mechanism, an issue that is described in more detail in the following section.

## The Child Justice Bill and the diversion minimum standards

The main challenge for the diversion field is that, whilst there may be minimum standards in place, it is a different task to make them effective in protecting children's rights. In an effort to address this concern, the Bill, in section 48(2)(a)(ii), states that the Minister of Social Development must develop and implement a policy and framework for the accreditation of diversion programmes based on minimum standards. It also provides for the removal of accreditation, presumably as a result of non-compliance with the minimum standards. The Bill does not provide further guidance on how this process would work and mandates the Minister of Social Development to develop a policy and framework in this regard. The rest of this paper will deal with the issue of an accreditation system and structure in an attempt to provide some pointers.

Accreditation is the 'procedure by which an authoritative body gives formal recognition that a body or person is competent to carry out specific tasks'.<sup>6</sup> The first requirement is therefore the establishment of an "authoritative body" with a specified mandate, procedure for appointments, powers and functions, and the usual requirements for a structure of this nature.<sup>7</sup> These requirements were left out of the Bill but there are good reasons for these to be legislated rather than left to policy and regulations. Given the centrality of diversion in the Child Justice Bill, it is of critical importance that the structure regulating the bulk of service provision has a clear and legislated mandate in order to provide it with the necessary stature and power to complete its task successfully.

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4 The hosting organisation of a diversion programme may be a non-profit organisation (a trust, voluntary non-profit association or a section 21 company), school, company, and a government department.

5 The implementing organisation may be a non-profit organisation (a trust, voluntary non-profit association or a section 21 company), school, company, government department, individual, close corporation, and a partnership.

6 Standards Council of Canada The Benefits of Accreditation for Developing Countries accessible at [http://www.scc.ca/en/publications/policy\\_papers/benefits\\_accr\\_dev\\_e.pdf](http://www.scc.ca/en/publications/policy_papers/benefits_accr_dev_e.pdf)

7 It should be noted that advisory structures with a less onerous duty, such as the National Council on Correctional Services, are provided for in the Correctional Services Act 111 of 1998 in sections 83 and 84.

The second reason for this accreditation structure to be legislated for is to establish its independence. This specifically relates to independence from the organisations or programmes being assessed, as well as independence from the assessment process.<sup>8</sup> In order to ensure that the sector has confidence in the accreditation process, the accreditation body must be seen as independent and free from manipulation. Establishing it by law, with a specified structure, composition, functions and powers will contribute to this objective. The distinction should therefore be drawn between the processes of assessment and accreditation as two separate functions.

Thirdly, it is necessary to ensure that this structure is not only independent but also impartial. This structure and its membership must be free and unattached from both the organisations and the programmes it must regulate. There is no doubt that the perceived (or real) lack of independence and impartiality of the accreditation body will severely undermine the quality of diversion programmes.

Fourth, an accreditation structure of this nature needs to be properly resourced in order to perform its task successfully. Whilst a legislated mandate does not guarantee resources, it does improve the chances thereof. Standard setting is an important vehicle for government to ensure delivery by holding service providers accountable and resources allocated to this function are thus not spent in vain.

There remains a number of unanswered questions with regard to the mandate of the accreditation structure. The first is whether this structure should be purely a reactive one, assessing applications for accreditation in an independent and impartial manner, or whether there is scope to act in a more proactive manner with regard to diversion programmes. Training, research, and the development of materials are some of the activities that can be undertaken as proactive measures. Secondly, and following from the notion of proactive interventions, it may be necessary to mandate this structure with the power to visit (announced and unannounced) programmes and organisations to assess the implementation of programmes. A structure of this nature has a duty to be informed of what the “real” situation is and visits are one way of establishing this. Thirdly, structurally it is not clear where such an accreditation function will be located. Since welfare is a provincial function, it needs to be determined whether the accreditation function will be devolved to provinces or housed at a national level or a combination of the two, and if the latter, how responsibilities will be distributed.

Diversion programmes are now an established part of the child justice landscape and the task that lies ahead is to ensure that through the rigorous application of the minimum standards, children in the programmes do in fact enjoy the protection that the standards intend to provide.

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8 Standards Council of Canada, see note 6.



# A decade of case law in child justice

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## Introduction

Law reform has been a major focus in the field of child justice in South Africa, with much effort having been poured into the creation of a new system as described by the Child Justice Bill (the Bill). However, delays in the passing of the Bill, whilst enormously disappointing, have not prevented the law on child justice from developing.

Another way in which the law develops is through case law. Non-lawyers are sometimes mystified by this, but the fact is that law is constantly being changed and reformed as judges pronounce on specific provisions in legislations. This is also how common law (the law that is not written down in statutes) develops over time.

When a judge examines the law and makes a pronouncement on it in a written judgment there is always the potential that a new precedent will be set. Sometimes the legal issue is an uncomplicated one and the judgment does not add to the law in any significant way. However, if the judge decides that the case is important and does add to the law, he or she will mark that judgment "reportable", and it is then published in the law reports. It becomes a precedent which is binding on other courts in that province and is persuasive in other provinces. If a case ends up before either the Supreme Court of Appeal or the Constitutional Court, it creates a precedent which is binding on the whole country.

The majority of child justice matters are dealt with in the magistrate's court. This is good in that these courts have a limited sentencing power, but on the other hand, magistrate's court judgments do not end up being reported in the law reports so they do not create precedents.

Cases about child justice that end up being reported in the law reports are therefore either cases that are very serious and thus are being tried in the High Court, or they are cases that have gone on appeal or review from the magistrate's court. South Africa has an excellent provision in the Criminal Procedure Act<sup>1</sup> which says that prison sentences must go on review if they are for longer than three months (or in some cases, six months) in duration.<sup>2</sup> These automatic review cases sometimes uncover serious irregularities in the way the magistrate's court has dealt with the matter. It is these review cases that make up the bulk of the case law I will be discussing. Perhaps for this reason, sentencing is the issue which accounts for the largest number of cases.

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<sup>1</sup> Section 302 of the Criminal Procedure Act 51 of 1977 - sentences subject to review in the ordinary course.

<sup>2</sup> The rule is that where the magistrate has held the substantive rank of a magistrate for less than seven years, any sentence longer than three months imprisonment will automatically be reviewed by a High Court judge, and where the magistrate has held the substantive rank of magistrate for longer than seven years then any sentence longer than six months imprisonment will go on automatic review.



The Bill of Rights in the South African Constitution, Act 108 of 1996, set a new benchmark against which to measure the law relating to children in the criminal justice system. Section 35 of the Constitution deals with the rights of all arrested, detained and accused persons. Children, like adults, are entitled to have these rights protected. In addition section 28(1)(g) of the Constitution states that a child has the right not to be detained except as a measure of last resort, in which case, the child may only be detained for the shortest period of 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. Furthermore, the Constitution provides that in matters concerning a child his or her best interests shall be the paramount consideration.

The Constitution also opened the door to international instruments being considered by South African courts. In terms of section 39(1) of the Constitution a court must consider international law and may consider foreign law. Further, the provisions of section 233 of the Constitution provide that when interpreting any piece of legislation, courts must give preference to any reasonable interpretation of the legislation that is consistent with international law. The Constitutional Court has affirmed that both binding and non-binding international instruments may be referred to when interpreting the provisions of the Bill of Rights.<sup>3</sup>

## Sentencing

### DEVELOPMENT OF A CHILD SENTENCING JURISPRUDENCE

I will begin an examination of the case law, therefore, with a case that came before the Constitutional Court, namely *S v Williams*.<sup>4</sup> Williams and several other youngsters were sentenced to whipping, and had their sentences sent on review by a magistrate as he suspected that such sentences did not conform with the new constitutional order. The applicants sought to have the judicially imposed whipping declared unconstitutional. It was common cause that the provisions allowing for corporal punishment of adults were inconsistent with the Constitution.<sup>5</sup>

The State argued that juvenile whipping was no more reprehensible than other forms of punishment since an element of humiliation is to be found in most forms of punishment. Moreover, as there was a lack of sentencing alternatives for children,<sup>6</sup> whipping should remain as a sentence for them. The State argued that a child's character, still in the process of being formed, was susceptible to correction and advice and that corporal punishment might still have a reformatory aspect. Langa J disagreed, finding that "it is precisely because a juvenile is of a more impressionable and sensitive nature that he should be protected from experiences which may cause him to be coarsened or hardened".<sup>7</sup>

Langa J found that the dignity of both adults and children would be impaired by a judicially-ordered whipping, and that even the dignity of the person carrying out the whipping would be infringed. Finding that whipping amounts to cruel and unusual punishment, the court held that the sentence of corporal punishment was unconstitutional. So ended centuries of judicially-ordered beatings in South Africa.

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3 Grootboom v Oostenberg Municipality and Others 2000 (3) BCLR 277 (C), S v Makwanyane and Another 1995 (6) BCLR 656 (CC).

4 1995 BCLR 861 (CC).

5 *Op cit* para 10.

6 The Court observed that there was much room for creative methods to deal with the problem of juvenile justice. Evidence was placed before the court of various alternative sentencing options and these were recognised by the Court, as was the value of non-custodial correctional supervision. Langa J concluded (para 76) as follows: "Doubtless these processes, still in their infancy, can be developed through involvement by State and non-governmental agencies and institutions which are involved in juvenile justice projects." *Op cit* para 75.

7 Para 47.

In the course of the judgment, Langa J made important remarks with regard to law reform. He observed that “[t]here is growing interest in moves to develop a new juvenile justice system. This impacts directly on the availability of sentencing options for juveniles”.<sup>8</sup> Later in the judgment, whilst finding that the range of penalties on the statute books did in fact allow for a flexible and effective approach to sentencing children, he also expressed the view that “[t]o the extent that facilities and physical resources may not always be adequate, it seems to me that the new dynamic should be regarded as a timely challenge to the State to ensure the provision and execution of an effective juvenile justice system”.<sup>9</sup> This significant statement was an endorsement by the Constitutional Court, only a year into the new democracy of a process for legal and systemic reform with regard to children in the criminal justice system. Sadly, more than a decade later, we are still waiting for the legal reform to come to fruition.

Sentencing, as I have said, is the area in which the courts have been the most active. *S v Z en Vier Ander Sake*<sup>10</sup> was the first case in the post-constitution period to attempt to set out general guidelines for sentencing of child offenders. It was a case in which five matters came before the High Court on review in the ordinary course, in which suspended sentences had been imposed upon young offenders. Erasmus J took a very energetic approach, in which he personally visited the juvenile section of the prison and requested a report from the Director of Public Prosecutions (Eastern Cape).

The guidelines he laid down may briefly be described as follows:

1. Diversion should be considered prior to trial in appropriate cases;
2. age must be properly determined prior to sentencing;
3. the court must act dynamically to obtain full particulars about the accused’s personality and personal circumstances;
4. the court must exercise its wide sentencing discretion sympathetically and imaginatively;
5. the court must adopt, as its point of departure, the principle that, where possible, a sentence of imprisonment should be avoided, and should bear in mind especially (a) that the younger the accused is the less appropriate imprisonment will be, (b) that imprisonment is rarely appropriate in the case of a first offender, and (c) that short-term imprisonment is rarely appropriate;
6. the court must not impose suspended imprisonment where imprisonment is inappropriate for a particular accused.<sup>11</sup>

The approach set out in *S v Z en Vier Ander Sake* was followed the following year in *S v Kwalase*.<sup>12</sup> This judgment is also notable for the lengths to which the Court went in setting out a clear legal and philosophical framework for the sentencing of offenders below the age of 18 years at the time of the commission of their offences. This was a case in which a 15-year-old had been sentenced to three years’ imprisonment, half of which was suspended. On review, the Court stressed the fact that when sentencing child offenders the Court must now take into consideration the constitution and the international law. Van Heerden J (as she then was) spelt out the importance of the section 28(1)(g), the right of a child not be detained except as a measure of last resort and for the shortest appropriate period of time. She went on to talk about South Africa’s ratification of the United Nations Convention

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8 Para 69.

9 Para 74.

10 1999 (1) SACR 427 (E).

11 This last point of view does not seem to have carried much weight with the Supreme Court of Appeal, as will be seen later. A similar approach appears to have underpinned the reasoning in *S v S 2001 (2) SACR 321 (T)* in which a suspended prison term for a 15 year old girl, who had falsely accused a 17 year old boy of rape because she was afraid of her father, was set aside and replaced with a postponed sentence. However, the reported judgment does not refer specifically to *S v Z en Vier Ander Sake*.

12 2000 (2) SACR 135 (C).

on the Rights of the Child, and the importance of the Beijing Rules. The South African Constitution, she explained, must be interpreted having due regard to these international instruments. The judicial approach towards the sentencing of juvenile offenders had to be re-appraised and developed in order to promote an individualised response.

The three judgments that I have mentioned thus far really began what we can call a constitutional jurisprudence on the sentencing of children.

## MINIMUM SENTENCES

At the same time, however, sentencing of child offenders was sent in a contrary direction as judgments started to emerge based on the courts interpretation of the minimum sentencing legislation.<sup>13</sup> When the Act was promulgated, it excluded all children below the age of 16 years from its operation. Sixteen and 17 year olds were included in the ambit of the Act,<sup>14</sup> but the procedure for them was different from the procedure for adults.<sup>15</sup>

The courts have debated the interpretation of the provisions relating to 16- and 17- year-olds,<sup>16</sup> and the matter was finally resolved by the Supreme Court of Appeal in *Brandt v S*<sup>17</sup> which held that minimum sentences do not apply to 16 and 17 year olds. The case involved a 17 year old boy who had been convicted of murder. The Court *a quo* had applied the minimum sentence of life imprisonment on the boy. His appeal against this sentence was upheld on the basis that, in the opinion of the Court, minimum sentences do not automatically apply to persons below the age of 18 years.

A constitutional argument was invoked, namely that as the Constitution provides that children should not be detained except as a last resort, and that a minimum sentence implies a first resort of imprisonment. The Court held that the traditional aims of punishment for child offenders have to be re-appraised in the light of international instruments. Any sentencing court must have discretion when sentencing a child in order to give effect to the requirements of international law for individualisation and the need for proportionality to be applied to the young offender, as well as the crime and circumstances surrounding it.

The court found that minimum sentences do not accord with the principle of "detention as a measure of last resort". The court added, however, that when dealing with 16 and 17 year olds, the fact that the legislature has ordained minimum sentences for specific offences should be taken as a weighting factor when the Court exercises its discretion in the sentencing process.<sup>18</sup>

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13 Sections 51 to 53 of the Criminal Law Amendment Act 105 of 1997, which came into operation on 1 May 1998. The amendment was initially intended to be a short-term measure.

14 In *J Kriegler Criminal Procedure: Legislation Annual Survey 2003* 786 points out that there is no clear rationale for treating 16 and 17 year olds differently from 14 and 15 year olds. He makes this comment in relation to the rules relating to automatic appeal as introduced by the Criminal Procedure Amendment Act 42 of 2003. It is submitted that the point he makes is equally applicable to the law on minimum sentences.

15 Section 51(3)(b) provides as follows: "If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings."

16 *S v N* 2000 (1) SACR 209 (W); *S v S* 2001 (1) SACR 79 (W); *S v Blaauw* [2001] 3 All SA 588 (C); *S v Malgas* [2001] 3 All SA 220 (SCA); *S v Nkosi* 2002 (1) SACR 135 (W); *Direkteur van Openbare Vervolgings, Transvaal v Makwetsja* 2003 2 All SA 249 (T).

17 2005 2 All SA 1 (SCA); Also reported as *B v S* 2006 (1) SACR 311 (SCA).

18 At para 24 (d): Despite the initial intention of the legislature that section 51 would be a temporary measure it was extended again by parliament in April 2005, notwithstanding the efforts of an extensive lobbying campaign by the Inspecting Judge of Prisons, Judge Hannes Fagan, and non-governmental organisations.

In 2005 the Supreme Court of Appeal again considered the issue of sentencing of child offenders in the case of the *Director of Public Prosecutions, KwaZulu-Natal v P*.<sup>19</sup> This case arose from an appeal by the State of a non-custodial sentence that had been handed down by the High Court in a case of murder committed by a girl who was only 12 years old at the time of the commission of the offence. The Supreme Court of Appeal intervened, and replaced the postponed sentence with a suspended prison term of seven years suspended for five years. The judgment is disappointing. Although it restates the sentencing principles that were set out in *Brandt*, it sends a confused message instead of the ringingly clear enunciation of imprisonment as a measure of last resort as was reflected in the judgment of the Court *a quo*. In addition, it appears to have weakened the principle laid down in *S v Z and Another* that suspended prison terms should not be used in cases where imprisonment is adjudged not to be appropriate.

The longer term impact of *Director of Public Prosecutions, Kwa-Zulu Natal v P* is yet to be seen. It is encouraging to note that in the recent case of *Mocumi v S*,<sup>20</sup> as well as in an unreported case which I will refer to as *M*<sup>21</sup> in the Pietermaritzburg High Court earlier this year, the decision in *Director of Public Prosecutions, KwaZulu-Natal v P* was referred to in cases where prison terms for child offenders were found to be shockingly inappropriate.

In a plea and sentence agreement entered into by the State and a 16 year old girl relating to being an accessory after the fact of murder on 25 July 2006, reference was also made to *Director of Public Prosecutions, KwaZulu-Natal v P*. In this case, a suspended prison term was again utilised, but this time for a shorter period of three years imprisonment, suspended for five years.

#### PRE-SENTENCE REPORTS

The courts have continued to stress the importance of a probation officer's pre-sentence report. This was not a new legal approach,<sup>22</sup> but the courts have said some interesting things about this topic since the advent of the Constitution.

*S v Z en Vier Ander Sake* sent a clear message that due to the importance of understanding the personality and personal circumstances of the child offender, a pre-sentence report is very important. *S v Kwalase* repeated this point, stressing an individualised approach.

In the case of *S v J and Others*,<sup>23</sup> a 16 year old first offender had been sentenced on the basis of an "assessment record", instead of a proper probation officer's pre-sentence report. The court found that the form was unnecessarily complex and on the other hand that it was wholly inadequate for the purposes of sentencing.

This approach was confirmed by the Supreme Court of Appeal in *S v Petersen en 'n Ander*.<sup>24</sup> In that case the Director of Social Welfare Services had submitted a letter to court saying that probation officers do not undertake home visits in gang infested areas of Port Elizabeth. The Court firmly stated that the magistrate had misdirected himself when he accepted this excuse, and that he should not have sentenced a young offender without the benefit of a probation officer's report.<sup>25</sup>

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19 2006 (1) SACR 243 (SCA).

20 [2006] JOL 17525 (NC).

21 Unreported case, case number RC 979/2004, Natal Provincial Division.

22 The importance of a pre-sentence report was referred to in *S v H and Another* 1978 (4) SA 385 (EC), *S v Ramadzanga* 1988 (2) SA 837 (V) and *S v Quandu* 1989 (1) SA 517 (A).

23 2000 (2) SACR 310 (C).

24 2001 (1) SACR 16 (SCA).

25 See further C Rickard "Juveniles may be sentenced only after a full background report", Article 40, 2000, Vol. 2 No. 4, 4.

*S v N and Another*<sup>26</sup> dealt with the fact that it is preferable for a probation officer to be called to give evidence rather than just hand in a written report. In this case the court had ignored the probation officer's recommendation that correctional supervision would be appropriate, and had instead imposed three years imprisonment. This was overturned, and the matter remanded back for a pre-sentence report.

The Court in *S v M and Another*,<sup>27</sup> citing *S v Petersen en 'n Ander*, found that the magistrate had erred in sentencing the accused in the absence of a pre-sentence report. The matter was referred back for a probation officer's report and sentence, with a direction that the time already served by the child offenders should be taken into consideration when setting the sentence afresh.

In the unreported case of *M*,<sup>28</sup> a correctional officer had presented a report that a child of 13 years old was not suitable for correctional supervision and should be sentenced to imprisonment. The Court found that this report had been an insufficient basis on which to sentence the child as it concentrated on suitability for correctional supervision, and did not assess the broader ambit of sentencing options provided by sections 290 and 297 of the Criminal Procedure Act 51 of 1977. The prison sentence was thus set aside and the child was remitted back to the regional court for a probation officer's report and a new sentence.

## REFORM SCHOOL CASES

Staying with the theme of sentencing, the issue of sentence to reform schools has come up for review in a number of interesting ways during the past decade.

In the case of *S v M en 'n Ander*,<sup>29</sup> the Court declared that a sentence to a reform school does contain elements of punishment and can be experienced as a severe sentence, and consideration should accordingly be given to the gravity of the offence. It is inappropriate, the Court went on, to simply regard reform a school as an institution to which a youth may pursue his schooling career in a disciplined manner, and should only be used in cases where the child has shown marked criminal proclivities, such as by repeatedly committing crimes or committing a crime of a serious nature. In that case, 15 and 16 year olds had impulsively stolen a bag of electrical switches and reform school was found to be an inappropriate sentence.

Most of the cases relating to reform schools during the past decade have related to the problem of a lack of facilities. In *S v M*<sup>30</sup> a sentence to be sent to a reform school was set aside and the matter sent back for reconsideration due to the fact that there were no reform schools for girls.

In *S v Z and 23 similar cases* 2004 (4) BCLR 410 (E), the Court dealt with a review of 24 cases which were referred to the Court by a concerned magistrate in terms of section 304(2)(a). In all of these cases, child offenders had been sentenced to a reform school in terms of section 290 of the Criminal Procedure Act, but had been in prison for long periods of time waiting to be transferred to the reform school. The Court directed the department to report on a range of matters, as well as the immediate release of 24 child offenders whose two year orders had either lapsed or would soon lapse. Other arrangements were made for those who had not spent a very long duration in prison.

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<sup>26</sup> 2005 (1) SACR 201 (CKH).

<sup>27</sup> 2005 (1) SACR 481 (E).

<sup>28</sup> See further A Skelton, "Examining the age of criminal capacity" Article 40 2006 Vol. 8 No. 1, 1.

<sup>29</sup> 1998 (1) SACR 384 (C).

<sup>30</sup> 2001 (2) SACR 316 (T).

The matter was postponed for six months and this subsequent appearance gave rise to a further written judgment, reported as *S v Z and 23 similar cases 2004 (1) SACR 400 (E)*. Reports had been filed by the provincial Departments of Education and of Social Development. The Department of Education presented a plan for structural alterations to JJ Serfontein School of Industries to create a reform school that could receive sentenced children.

As a result of the final order of the Court, the Centre for Child Law has been receiving regular reports regarding the progress on the plans presented to the court. I have seen these reports and can state that although the structural alterations had been completed by September 2005, no staff has, as yet, been appointed and the building is thus standing empty.

The same scenario that led to the *Zuba* judgments has subsequently played itself out twice again in other provinces. A Northern Cape High Court judgment<sup>31</sup> arising from an urgent special review on 11 November 2005 dealt with two children, a boy who at the age of 16 years had been convicted of housebreaking with intent to steal and theft and sentenced to a reform school, and a girl who was 17 years of age when she was convicted of theft and sentenced to a reform school. By the date of the review the boy had been in prison for 15 and a half months, and the girl for 19 and a half months.

Lacock J, on page 3 of the judgment, stated as follows:

“This state of affairs, to say the least, is shockingly inhumane, worthy of the strongest possible expression of the Court’s antipathy. It requires no stretch of the imagination to realise what dangers – both physical and psychological – these youngsters have been exposed to in an adult prison.”

He found that although the sentences were appropriate they could not be carried out, and he set them aside and replaced them with prison terms matching the periods already served and the children were consequently released forthwith.

In the Pietermaritzburg High Court a judgment was handed down arising from an urgent special review dealing with two teenage boys who had been awaiting designation to a reform school in Westville prison for 18 months.<sup>32</sup> Levinsohn J ordered the immediate release of the boys, pointing out that the sentence was a competent one. He therefore did not set the sentence aside but released the two boys on the grounds that it was in the interests of justice to do so. Lamenting the shortage of reform schools, the judge urged magistrates who sentenced young people to reform schools to diarise the matter for one month, and to send the matters on special review if the children are not moved timeously.

## Detention of child offenders

Prison conditions, as well as the practice of holding children below the age of 14 in prison, have also come under fire in a number of High Court applications.

The first of these took place in June 2000 when the South African Prisoners Organisation for Human Rights and the Human Rights Committee brought an urgent application to the High Court and obtained an order that a 12 year old boy and two 13 year old boys be immediately removed from Westville Prison where they were awaiting trial. In the same year, Ms Patricia de Lille (member of parliament) brought an application on behalf of a group of

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<sup>31</sup> See Article 40, 2005, Vol. 7, No. 4.

<sup>32</sup> See A Skelton “Lack of Reform Schools: a most unsatisfactory and undesirable state of affairs”, Article 40, 2006, Vol. 8 No. 2.

prisoners below the age of 18 years who were being held in the awaiting trial section at Polsmoor Prison in unhygienic and overcrowded conditions. Some of the children were given medical treatment, and many were transferred to places of safety or released into the custody of their parents.<sup>33</sup> Earlier this year, the South African Prisoners Organisation for Human Rights again brought a successful urgent application before the Durban High Court, which ordered the removal of several children from Westville Prison who were below the age of 14 years.

With regard to pre-trial detention in police cells, two urgent applications were brought before the Transvaal Provincial Division in 2003. The cases both emanated from a small police station in the village of Amsterdam in Mpumalanga. The first dealt with a 14 year old boy charged with petty theft, who I shall refer to as V. He was unlawfully held for 30 days in a police cell and was repeatedly raped by adult cell mates. An attorney who happened to be in court when he re-appeared and complained, brought an urgent application to the High Court for his release, which was accordingly granted. The story was reported in the newspapers, and yet, only a few months later, a second boy, who I shall refer to as B, was held in the police cells for two weeks. Another urgent application resulted and was granted. When police failed to physically remove him, a contempt of court application was granted and a warrant of arrest was issued (and stayed) for the Commissioner of Police, following which the boy was promptly released.

These excellent examples of public interest litigation did not result in written judgments, probably because they were brought on an urgent basis. They were also brought mainly on constitutional grounds, with little awareness on the part of the litigants of the provisions of section 29 of the Correctional Services Act 8 of 1959, which deals with pre-trial detention of children. Surprisingly, this controversial section has not come under scrutiny in any reported judgments.

## Diversion

Although diversion has not been specifically provided for in statutes, it operates through the common law principle that the prosecutor is *dominus litis*, and has the power to prosecute or decline to prosecute and this is further bolstered through section 6 of the Criminal Procedure Act 51 of 1977. Despite the lack of a specific legal framework however, diversion has received mention on a number of occasions by the courts. The first case in which diversion was referred to was in *S v D* 1997 (2) SACR 673. In this case four children were arrested for possession of dagga and pleaded guilty within a couple of hours of their arrest. The matter was taken on review on the basis that an almost identical matter at the same court had been diverted a few weeks prior to this one. Although the court records indicated that diversion was regularly being used in the province for this type of offence, the court stuck to the view that the prosecutor was *dominus litis*, and that he therefore had the right to proceed with the criminal charges.

Diversion was enthusiastically endorsed in *S v Z en Vier Ander Sake*, although this case dealt mainly with sentencing. The judge indicated that in his view diversion should at least be considered, and should be promoted in appropriate cases.

Another case regarding diversion is the unreported High Court decision in the case of *M v The Senior Public Prosecutor, Randburg and Another*.<sup>34</sup> This case was a review of a decision to prosecute a girl on a shoplifting charge when her co-accused was diverted. The application examined the exercise of prosecutorial discretion. There was no evidence before the Court that the prosecutor had applied his or her mind to the possibility of diversion ("not to prosecute"), and in the absence of such evidence, the Court found that discretion had not been

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<sup>33</sup> Z Madotyeni "Enforcing Children's Rights through Litigation" Article 40, 2000, Vol. 2, No. 3, 9.

<sup>34</sup> Case number 3284/2000, Witwatersrand Local Division.

properly exercised. The judgment left the door open for the fact that two co-accused in one case could be dealt with differently, but that this would have to be supported with reasons.

What is a little disappointing about the decisions on diversion thus far is the fact that none of the judgments referred to the United Nations Convention on the Rights of the Child or the Beijing Rules requirements that alternative measures should be sought, without resorting to trial. If a jurisprudence relating to diversion is to be developed in the future it should be based within that international legal framework.

## Assistance of parent or guardian

The importance of a child being assisted by a parent or guardian has also come before the courts a few times during the past decade.

In the case of *S v N*,<sup>35</sup> Dukada J examined section 73 and 74 of the Criminal Procedure Act which deals with the right of an offender below the age of 18 years to be assisted by a parent or guardian. He determined that section 74 is peremptory (“shall”, not “may”) and that it is there to protect the interests of an immature accused person. The Court held that non-compliance in itself would not be a fatal irregularity warranting the setting aside of proceedings unless there is proof of substantial prejudice.<sup>36</sup> In this case, the child was a 15 year old girl charged with dealing in dagga. She was not legally represented, and no attempt had been made by the Court or the police to ensure that her parent or guardian was present. She had pleaded guilty to the charge and was sentenced to a fine or imprisonment, and, unable to pay the fine, she ended up in prison. The Court found that she had not been afforded a fair trial and her conviction and sentence were set aside.

*S v M and Another*,<sup>37</sup> in the same division some years later, followed the reasoning set out in *S v N*. In her judgment, Maya J said it “boggled” her mind that a magistrate with 15 years of experience could allow a 16 year old boy who was not assisted by a parent or guardian (and who was not legally represented) to plead guilty on the serious charge of theft of a firearm. She accordingly found that his conviction was improper and it was set aside.

*S v M and Another*<sup>38</sup> dealt with two boys who had been convicted of housebreaking. They were aged 15 and 17 years respectively and neither had parents or guardians at court to assist them. The court examined section 74, which requires that a child be assisted by a parent or guardian. The section is peremptory but non-compliance is not a fatal irregularity provided that there is no substantial prejudice to the accused or a miscarriage of justice. In this case not only were the boys not assisted by their parent or guardian, but the Court also failed to call for a probation officer’s report before sentencing. The Court should not have finalised the matter without making more effort to get parents or guardians to attend Court, and should not have sentenced the boys without a probation officer’s report. The matter was referred back for a pre-sentence report and sentence.

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35 1997 (1) SACR 84 (Tk).

36 This was based on the reasoning in the earlier cases of *S v Ramadzanga 1988 (2) SA 816 (V)* and *S v M 1993(2) SACR 487 (A)*.

37 2003 (2) SACR 212 (Tk).

38 2005 (1) SACR 481.



## Issues relating to age

### EVIDENCE OF AGE

Evidence of age was the subject of *S v Mbelo*.<sup>39</sup> It was a minimum sentence case in which the age of both the offender (17 years) and the female victim of rape (14 years) were at issue. The Court found that admissions about age made by a legal representative were admissible, particularly as the magistrate had questioned the accused and his father about the correctness of the admissions. In the recent case of *S v Dial 2006 (1) SACR 395 (E)*, Plaskett J warned against magistrates estimating the age of young people claiming to be below the age of 18 years. He pointed out that the determination of being 18 years of age or below that age was crucial, as a person below the age of 18 years is a child and falls within the purview of section 28 of the Constitution. He recommended that, in the absence of unequivocal documentary evidence, magistrates should obtain a report from a district surgeon regarding the probable age of the young person.

### CRIMINAL CAPACITY

The question of admissions made a legal representative also came up in the recent case of *M*. In this case a 13 year old, who was legally represented, pleaded guilty to murder. The issue of criminal capacity was not canvassed in Court. The magistrate did not ask any questions, but found him guilty on his section 112(2) plea and sentenced him to eight years imprisonment. On appeal, the sentence was set aside. However, on the merits it was argued by myself that the *doli incapax* presumption should have been rebutted, that it cannot merely be conceded, and that the child cannot give instructions to his attorney on whether or not he has criminal capacity. The Court was not convinced and the conviction of the child was upheld. The Centre for Child Law has applied for leave to appeal.

## Child Justice Bill mentioned in numerous cases

Despite the fact that the Child Justice Bill has not yet been passed, it is worthy of note that the Bill has been referred to in numerous cases during the past decade. As already mentioned, the Constitutional case of *S v Williams* spoke of "a growing interest in moves to develop a new juvenile justice system" - though the Bill had not at that stage been drafted.

In *S v Kwalase 2000 (2) SACR*, the court specifically referred to the South African Law Reform Commission's Project Committee on Juvenile Justice: "In line with the constitutional and international law relating to youthful offenders, the Discussion Paper recommended that custodial sentences should be the last resort in children's matters and, where such sentences are passed, they should be for a minimum period and should be conducive to the return of children to society."<sup>40</sup>

In *S v Nkosi 2002 (1) SACR 135 (WLD)*, Cachalia J repeated the remarks cited in *S v Kwalase* about the South African Law Reform Commission's Discussion Paper 79 and the first draft of the Child Justice Bill, and added the following: "Significantly life imprisonment for any child under the age of 18 would not be permitted. However, a custodial sentence would be appropriate where a presiding officer is satisfied that such a sentence is justified by 'the seriousness of the offence, the protection of the community and the severity of the impact of the offence upon the victim'."

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<sup>39</sup> 2003 (1) SACR 84 (NC).

<sup>40</sup> At 140.

In *S v J and Others 2002 (2) SACR 312 (C)*, Van Heerden J found the “developmental assessment process” to be unnecessarily complex. She went on to say: “[t]o my mind, this highlights the importance of legislation clarifying the approach to the assessment of young people in conflict with the law, as also the proper training of probation officers in this regard. Recommendations for such legislation have been made in by the South African Law Reform Commission’s Project Committee on Juvenile Justice (Project 106 – see chapter 8 of the Discussion Paper 79 and chapter 4 of the Draft Child Justice Bill annexed thereto). These recommendations of the Project Committee have been widely supported, and it seems likely that they will be repeated in the final report and the final draft of the Child Justice Bill, which will probably be released later this year”.

The Supreme Court of Appeal has twice mentioned the Child Justice Bill. Firstly, in the case of *Brandt*, the court remarked as follows: “The Child Justice Bill, which was introduced into parliament on 3 August 2002 and debated during 2003, *inter alia* prohibits the sentence of life imprisonment for children who commit offences whilst under the age of 18.”

In *DPP KZN v P* the Supreme Court of Appeal again referred to the Bill,<sup>41</sup> as follows: “In July 2000 the South African Law Reform Commission’s Project Committee on Juvenile Justice (Project 106) released a Discussion Paper embodying a draft Child Justice Bill. On the sentencing of child offenders there is unqualified support for the principle that ‘detention should be a matter of last resort’. It also recommended that ‘the sentence of imprisonment for children below a certain age (14 years) be excluded.’ Following the Beijing Rules, in particular rule 17(1)(c) thereof, the committee recommended that imprisonment should only be imposed upon children who have been convicted of serious and violent offences. These recommendations have not as yet been adopted by parliament and can have peripheral value at this stage.”

It is apparent therefore, that the jurisprudence relating to children in the criminal justice system has already felt the influence of the Child Justice Bill, and the fact that a Bill not yet passed has generated some jurisprudence is indeed remarkable.

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<sup>41</sup> Para 17.



# Child offenders and life imprisonment

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## Introduction

One of the main focus areas of the Centre for Child Law is the promotion of the principle that imprisonment of child offenders must always be a measure of last resort and for the shortest appropriate period of time. This principle is entrenched in the Constitution of the Republic of South Africa (the Constitution), the United Nations Convention on the Rights of the Child (the CRC) as well as in several non-binding international instruments.<sup>1</sup>

Section 28(1)(g) of the Constitution of the Republic of South Africa states that children have the right “not to be detained except as a measure of last resort ...” and “the child may be detained only for the shortest appropriate period of time.” Courts must consider international law which is binding when interpreting the Bill of Rights and in *S v Makwanyane and Another*<sup>2</sup> the Constitutional Court held that non-binding international law may be considered. The Constitution also places an obligation on courts to promote the spirit, purport and object of the Bill of Rights when developing the common law.<sup>3</sup> Furthermore, South Africa has a long history of case law in which the principle is firmly established that youth is always a mitigating factor and that children cannot be measured against the same standards as adults. Therefore children should not receive the same sentences as adults.

The Centre for Child Law commenced an investigation to determine how many children, who were under the age of 18 years when they committed the crime for which they were convicted, are serving a sentence of life imprisonment. Persons who may have been below the age of 18 years at the time of the commission of the offence were interviewed, and records of those court proceedings examined. It was found that 32 such prisoners are currently serving life sentences.<sup>4</sup> Of the 32 prisoners, 17 are in KwaZulu-Natal, three in the Free State, three in the Eastern Cape, four in Mpumalanga, one in the North West Province and four in Gauteng. Some of them were as young as 14 and 15 years when they committed the crime.

By its very nature life imprisonment is not detention for the shortest period of time. The question becomes whether it is ever appropriate to impose a sentence of imprisonment for life on children. Another question which will be examined in this paper is whether the imposition of minimum sentences is in accordance with the principle that detention should be a measure of last resort.

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1 *International conventions become part of the law of South Africa in terms of section 231 of the Constitution. There are usually several international instruments antecedent to the Conventions, so-called soft law, which are non-binding but give guidelines and principles on the implementation of the Convention.*

2 1995 (3) SA 391 (CC) para 35.

3 Section 39 of the Constitution.

4 Findings according to information sent by the Office of the Inspecting Judge of Prisons in 2005.

## International law

The most important children's treaty is the United Nations Convention on the Rights of the Child of 1989. Article 37 of the CRC states that:

- (a) *No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment, nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;*
- (b) *... the arrest, detention or imprisonment of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time.*

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (known as the Beijing Rules) stress that the principle of proportionality and the well-being of the juvenile should be the guiding factors during sentencing. Imprisonment should only be imposed when there is "no other appropriate response" and "shall be limited to the possible minimum".<sup>5</sup>

The principle of imprisonment as a measure of last resort is re-iterated in Guideline 46 of the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines). Furthermore, the best interests of the young person should always be of paramount importance.

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty makes it clear from the outset in Rule 2 of its fundamental perspectives, that deprivation of liberty must be limited to exceptional cases and early release must be a possibility.

The African Charter on the Rights and Welfare of the Child (hereinafter the ACRWC) does not expressly include the principle of imprisonment as a measure of last resort nor does it have a section prohibiting life imprisonment for children. It does, however, state that the 'essential aim' of juvenile justice shall be the reformation, reintegration into family and social rehabilitation of the child.<sup>6</sup> This implies that life imprisonment is not appropriate since it is not consistent with the main objective of release and reintegration of the child into the community.

Imprisonment as a measure of last resort is the primary principle as the ideal is that the sentencing judge should investigate what would be an appropriate sentence for a child offender according to the unique needs and circumstances of the individual child and the sentence must promote the rehabilitation and reintegration of the child into his or her community.

## Practice in other countries

Although South African courts are not bound to follow decisions in foreign jurisdictions, the courts may derive assistance from comparative law and may consider foreign law when interpreting the Bill of Rights.<sup>7</sup>

### CANADA

In 2002 Canada enacted the Youth Criminal Justice Act, which states that children may only be sent to prison if there are no other appropriate alternatives, and that imprisonment may only be imposed for violent offences, in exceptional cases where there are aggravating circumstances, or where there is a pattern of convictions against the child. Judges must consider alternatives such as a combination of imprisonment and correctional supervision before imposing direct imprisonment.

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<sup>5</sup> Rule 171(b). Notably the commentary to Rule 171(b) explains that retributive sanctions may have some merit in cases of severe offences committed by children but "should always be outweighed by the interest of safeguarding the well-being and future of the young person".

<sup>6</sup> Article 17(3) of the ACRWC.

<sup>7</sup> Section 39(1)(c) of the Constitution. See also *S v Makwanyane and Another 1995 (3) SA 391 (CC) para 37*.

If direct imprisonment is the only appropriate sentence, the maximum period of imprisonment is seven to ten years, depending on whether it was first or second-degree murder. The period to be served continuously before becoming eligible for parole is six and four years respectively.<sup>8</sup> The Act therefore removes the possibility of a life sentence for children.

## ENGLAND AND WALES

In England and Wales, it used to be the case that children who were convicted of serious violent offences for which adults would be sentenced to life imprisonment, were sentenced to be detained “during Her Majesty’s pleasure”. Such a child would be eligible for release when it was recommended by the parole board in consultation with the trial judge and the Lord Chief Justice, but the final power to release the child was vested in the Secretary of State.

In practice, the trial judge would recommend a minimum period to be served, which was confirmed or varied by the Lord Chief Justice before being relayed to the Secretary of State. However, there was no statutory provision mandating or requiring the trial judge to set a minimum period of imprisonment and it was at the discretion of the Secretary of State whether the child should be released, even if the parole board recommended release. The minimum period set by the judge or Secretary of State was not part of the judicial proceedings and was not open to appeal or review.

This practice resulted in a situation where children imprisoned “during Her Majesty’s pleasure” were being treated the same as persons serving a mandatory life sentence.<sup>9</sup>

The European Court of Human Rights found that this practice violated the European Convention on Human Rights.<sup>10</sup> In particular, it was found that it was cruel and inhuman punishment to detain children without any certainty about when they might be released. The situation was exacerbated by the possibility that the Secretary of State might exercise his discretion which allows him to veto a recommendation for early release from the parole board.

The legislation was amended and the trial judge must now set the minimum period of time that must be served. The minimum period set by the judge is part of the sentencing proceedings and may now be appealed. The child must be considered for parole and early release after serving the period set by the judge. If the parole board recommends release, the Secretary of State must release the child.<sup>11</sup>

## GERMANY

German legislation relating to the imprisonment of children is specifically based on the Beijing Rules<sup>12</sup> and states that the administration of child justice is based on the principles of ‘minimum intervention’ and prison as a sanction of last resort. For very serious crimes such as murder and rape, children between the ages of 14 and 17 years may be sentenced to a maximum of ten years. Furthermore, sentences must always run concurrently and may never run cumulatively.<sup>13</sup>

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8 Section 42 of the Youth Sentences of the Youth and Criminal Justice Act of 2002.

9 DA Thomas, “Sentencing: Detention during Her Majesty’s pleasure - Offender convicted of murder committed when under 18”, *Criminal Law Review*, 2001, 839.

10 *Hussain v The United Kingdom (1996) EHR 1*. A subsequent amendment to the Crime (Sentence) Act 1996 stated that the Secretary of State must set the minimum period to be served. If the parole board recommends release after this period had been served the Secretary had no discretion in the matter and was obliged to release the child. This section was also found to be against the European Convention on Human Rights in *T v The United Kingdom (2000) 30 EHR 121*. The Secretary of State is part of the executive branch of government and the exercise of a judicial function was found to violate the principle of separation of powers.

11 Parliament enacted section 61 of the Criminal Justice and Court Services Act 2000, which inserted section 82A into the Powers of Criminal Courts (Sentencing) Act 2000. Section 53 of the Children and Young Persons Act 1933 was consolidated as section 90 of the Powers of Criminal Courts (Sentencing) Act 2000.

12 F Dunkel “Juvenile Justice in Germany: Between Welfare and Justice” 2004 (Unpublished paper) available at [www.safarix.com](http://www.safarix.com).

13 German Juvenile Justice Act of 1990.

## AUSTRALIA

In Australia each State has its own criminal and sentencing legislation but in general, Australia is one of very few countries that still retains the possibility of life imprisonment for children in its current legislation.<sup>14</sup> Legislation in New South Wales states that mandatory life sentences do not apply to persons below the age of 18;<sup>15</sup> however, trial judges still have the power to impose a discretionary life sentence.

The Young Offenders Act of 1997, in the same State, created a very complex system for sentencing of young offenders for very serious and violent crimes. The Act allows a judge to craft a sentence of imprisonment for a period to end within six months of the child turning 21 years of age. In a recent shocking and particularly vicious case of racially motivated murder and assault, a 17 year old offender was sentenced in this way to three and a half years' imprisonment.<sup>16</sup> This seems to indicate that the Young Offenders Act serves as a guideline for sentencing as opposed to requiring the imposition of a discretionary life sentence.

## AFRICA

In Uganda a child may not receive a sentence of detention for a period exceeding three years when convicted of a crime that for adults is punishable by death. This is according to the Children's Statute of 1996, which also incorporates the principle of imprisonment as a measure of last resort.<sup>17</sup>

One of the basic children's rights enshrined in the Children's Act 8 of 2001 of Kenya states that no child may be subjected to life imprisonment.<sup>18</sup> When reading the chapter on child justice it becomes clear that Kenya does not allow imprisonment of children at all. At worst, children are sentenced to reform or borstal schools.<sup>19</sup>

In Lesotho, no person below the age of 18 years may be imprisoned unless there are substantial and compelling reasons and imprisonment may never be longer than 15 years. Furthermore, the Children's Protection Act of 1980 also states that imprisonment is a measure of last resort and for the shortest appropriate period of time.

According to the Namibian Constitution no person under the age of 16 years may be imprisoned.<sup>20</sup> However, they have indicated in a report to the United Nations Committee on the Rights of the Child that they do allow life imprisonment for children.<sup>21</sup>

## Overview of the South African experience

Historically both the courts and legislature have always made a distinction between adults and children when it came to the sentencing of very violent and serious crimes.<sup>22</sup> According to the Criminal Procedure and Evidence Act of 1917, a judge could use his discretion to impose any other sentence than the death penalty when sentencing a person below the age of 16 convicted of murder.<sup>23</sup>

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14 Human Rights Watch, "The death penalty and life imprisonment without the possibility of release for child offenders who were less than 18 years of age at the time of their offence, and juvenile justice models of rehabilitation", Commission on Human Rights, 62nd Session.

15 Section 61 of the Crimes (Sentencing Procedure) Act of 1999.

16 R v MD [2005] NSWCCA p342.

17 Sections 94(1)(g) and 94(4) of the Children's Statute of 1996.

18 Section 18 of the Children's Act 8 of 2001.

19 Sections 190 and 191.

20 Section 15(5) of the Constitution of Namibia.

21 Initial Report of the State Parties due in 1992: Namibia 22/01/93 CRC/C/3/Add.12.

22 See S v B 2006 (1) SACR 311 (SCA) para 14. "The recognition that children accused of committing offences should be treated differently to adults is now over a century old."

23 Section 338 of the Criminal Procedure and Evidence Act 31 of 1917.

In 1955 the phrasing of the same section was amended to give the judge the discretion to impose any other sentence than the death penalty when it was found that there were extenuating circumstances.<sup>24</sup> In 1959 the minimum age of 16 was raised to 18 by the Criminal Law Amendment Act.<sup>25</sup> This continued to be the position in South Africa until 1990 when the Criminal Law Amendment Act<sup>26</sup> abolished the death penalty for persons below the age of 18. Following the decision of the Constitutional Court in *S v Makwanyane and Another* the death penalty was abolished by parliament for all persons.<sup>27</sup>

As far back as 1908, in *R v Jantjies*,<sup>28</sup> the Court found that a fitting sentence for a 12 year old boy who had murdered his friend, was a sentence of two years in reform school. In *S v Whitehead*<sup>29</sup> the Court found that a sentence of 22 years amounts to life imprisonment and that a more appropriate sentence for a 17-year-old would be 15 years. The Court opined that any term of imprisonment of almost 25 years should only be imposed in the most exceptional circumstances, and was very unusual in our law.

In *S v Maimela*<sup>30</sup> the trial court convicted a 16-year-old boy of murder, and found that there were no extenuating circumstances that would justify imposing any other sentence than the death penalty. On appeal the court found that, even though age may not always be a mitigating factor where the offender is under the age of 18, it must always be taken into account when the court is exercising its discretion with regard to the death penalty. The court has to examine to what extent the youthfulness of an offender under the age of 18 makes the death penalty inappropriate.

In *S v Lehnberg*,<sup>31</sup> the judge found that being young means being immature, lacking life experience, being reckless, and is in a mental state where one is very easily influenced. Furthermore, you cannot measure children against the same standard used for adults. Although *Lehnberg* also pronounced on when it would be appropriate to impose the death penalty, it has become the *locus classicus* on youth as a mitigating factor and has been followed consistently in subsequent judgments.<sup>32</sup>

Even when there were severe aggravating circumstances present, the Court exercised leniency due to youthfulness. In *S v Willemse*,<sup>33</sup> an 84-year-old woman was repeatedly raped, beaten, stabbed and eventually thrown into a well on her farm. One of the offenders was 14 years at the time and the Court of Appeal found that the sentence of ten and a half years imprisonment was shockingly inappropriate and that he should instead be sent to a reform school.

Although it does not follow automatically that life imprisonment is inappropriate just because the courts found that the death penalty is inappropriate for youth offenders, what is clear, is that youthfulness has always been a mitigating factor leading to a different sentencing practice for children.

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24 Criminal Law Amendment Act 56 of 1955.

25 Act 16 of 1959.

26 Act 107 of 1990.

27 Criminal Law Amendment Act 105 of 1997.

28 1908 22 EDC 382.

29 1970 4 SA 424 (A).

30 1976 2 SA 587 (A).

31 1975 4 SA 553 (A).

32 Followed in *S v Tshisa en 'n ander* 2003 1 SACR 171 (O) and *S v Willemse* 1988 3 SA 836 (A).

33 1988 3 SA 836 (A).



## Impact of the minimum sentences legislation

Minimum sentences were introduced in 1997 through section 51 of the Criminal Law Amendment Act 105 of 1997. The Act created a sentence of mandatory life imprisonment, to be imposed when a person is convicted of a crime listed in Part I of Schedule 2 of the Act, unless there were substantial and compelling circumstances to justify deviating from the minimum sentence.<sup>34</sup> Minimum sentences do not apply to persons below the age of 16, but if a presiding officer wants to impose a minimum sentence on a 16 or 17 year old he may do so, provided that the reasons for doing so are recorded.<sup>35</sup>

This section led to widespread confusion about whether minimum sentences automatically apply to children who were 16 or 17 years when they committed the crime, in the same way that they apply to adults. The question was resolved in 2004 in the case of *S v B*<sup>36</sup> in the Supreme Court of Appeal, where it was held that minimum sentences and specifically life imprisonment do not automatically apply to children of 16 or 17 years. Youthfulness *per se* would ordinarily be a substantial and compelling circumstance when considering a minimum sentence for a child offender.<sup>37</sup> The Court affirmed the importance of the principle of imprisonment as a measure of last resort and emphasised that the traditional aims of punishment must be re-evaluated in light of the Constitution and international law relating to child offenders, including the principles of rehabilitation, proportionality and the best interests of the child.

According to the trial transcripts, most of the children serving life were sentenced in the period after the introduction of minimum sentences. Prior to the abolition of the death penalty, there was a clear legal distinction between adults and children, but when the death penalty fell away and minimum sentences were introduced, it seems as if children and adults were placed in an equal position before the law. This may explain why children were receiving as harsh a sentence as life imprisonment.

Following the decision in *S v B* it is conceivable that the incidence of children being sentenced to life imprisonment may decrease now that the Supreme Court of Appeal has clarified the law. What is discouraging though, is that during the research records were found of children who were 14 or 15 years when they committed a crime, and were sentenced in terms of the court's common law jurisdiction to a sentence of life imprisonment.

The basic rule is that imprisonment should be a measure of last resort for child offenders. Minimum sentences are not a measure of last resort, they are a measure of first resort. They do not allow a sentencing judge to exercise his discretion. The legislation does not allow an individualised approach to sentencing as required by international law and it does not make provision for the rehabilitation or early release and reintegration of children into society in suitable cases.

## Impact of the Correctional Services Act 111 of 1998

A further problem in this case is that there is no mechanism in any South African legislation providing for the early release of children serving a sentence of life imprisonment. Article 37 of the CRC prohibits life imprisonment without the possibility of parole. Strictly speaking, life imprisonment without the possibility of release does not

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<sup>34</sup> Schedule 2 of Part I lists the crimes for which a person convicted of such a crime must receive a sentence of life imprisonment. Crimes include murder which was planned or premeditated, rape of a girl under 16 or when the accused raped the victim repeatedly or when the victim was raped by more than one accused in the furtherance of a common purpose.

<sup>35</sup> Section 51(3)(b) of the Criminal Law Amendment Act 105 of 1997.

<sup>36</sup> *S v B* 2006 1 SACR 311 (SCA).

<sup>37</sup> *Op cit* para 8.

exist in South Africa. In terms of section 73 of the Correctional Services Act<sup>38</sup> “a prisoner sentenced to life imprisonment remains in prison for the rest of his or her life”. However, section 73 provides that a person serving life must be considered for parole after serving a period of 25 years in prison, irrespective of how many life sentences were imposed or whether the person received a sentence of imprisonment in addition to life.

The Correctional Services Act makes no distinction between adults and persons who were below the age of 18 years when they committed the offence. Although life imprisonment is not without the possibility of release, it is clearly not for the shortest appropriate period of time and it makes no provision for early release. The Act also neglects to take the principles of rehabilitation, reintegration, individualised sentencing and best interests of the child into account.

## Conclusion

The latest published Child Justice Bill, which was introduced into parliament in 2002, prohibits life imprisonment for any person under 18 years and focuses on diversion, non-custodial sentences and restorative justice.<sup>39</sup> However, it is not certain whether this clause will make it into the final version of the Bill. Another possible solution to limit the imposition of life imprisonment on child offenders is to amend the minimum sentences legislation to completely exclude all persons below 18 years, or at least create a mechanism whereby persons who were below the age of 18 when they committed the crime may become eligible for early release, i.e. before serving 25 years in prison.

It must be emphasised that the argument against life imprisonment of children does not mean life or nothing, nor does it mean that children may never be sentenced to prison. The sentence must still recognise the gravity of the offence but it must be appropriate taking into account the principles of youth sentencing enunciated in *S v B*. Life imprisonment should only be imposed when a person poses a threat to society and cannot be rehabilitated. Sentencing a child to life imprisonment means that we no longer recognise that their youthfulness contributed to reckless and immature behaviour and that such behaviour can be corrected through rehabilitation. We have effectively given up on that child, but we still expect him or her to become a productive and responsible member of society after serving 25 years in prison.

The reasons why we have to make exceptions for young offenders was summarised as follows by a Canadian criminal court judge:

“Their degree of responsibility and blameworthiness is less because of their immaturity, their susceptibility to negative influence, and their natural tendency to impulsive ill-considered behaviour. Further, youthful offenders possess greater potential for rehabilitation because their character is not well formed and there is a greater chance that deficiencies can be corrected. These factors lead to the accepted conclusion that youth sentencing should be less severe than for adults and that the emphasis should be placed on rehabilitation.”<sup>40</sup>

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<sup>38</sup> Act 111 of 1998.

<sup>39</sup> Clause 95(1) provides that: “No sentence of life imprisonment may be imposed on a child who, at the time of commission of the offence, was under the age of 18 years.”

<sup>40</sup> *R v L (D)* 2005 ONCJ 386 at para 20.



# First baseline study monitoring the current practice of the criminal justice system in relation to children: some preliminary findings

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## Introduction<sup>2</sup>

The Child Justice Alliance,<sup>3</sup> a network of non-governmental organisations, individuals and academics, which was formed in 2001 to create awareness around the Child Justice Bill<sup>4</sup> and to garner support for it during the parliamentary process recently completed a research study monitoring the implementation of the criminal justice system pertaining to children.<sup>5</sup>

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2 The information contained in this paper is extracted from the First Consolidated Research Report on the Criminal Justice System Pertaining to Children in three magisterial districts conducted by the Child Justice Alliance. The Consolidated Report (2006) is compiled by Jacqui Gallinetti and Daksha Kassan of the Community Law Centre (the First Consolidated Report). This report is still in the process of being finalised and at the time of writing this paper was still in draft form. It consolidates the data obtained from all three research sites contained in the respective site reports. The Wynberg Research Report was compiled by Julie Berg and Angela Bonora of the Institute for Criminology, UCT. The Pietermaritzburg research report was compiled by Sue Padayachee of Lawyers for Human Rights, Pietermaritzburg and the Pretoria research report was compiled by Carmen Domingo-Swartz of the CSIR Crime Prevention Centre.

3 The Child Justice Alliance consists of over 400 members and friends, who are either civil society organisations or concerned individuals. The Alliance is run by a driver group consisting of the Restorative Justice Centre, the Children's Rights Project of the Community Law Centre (UWC), the Defence, Peace, Safety and Security (DPSS) Crime Prevention Research Group (formerly the Crime Prevention Centre) at the Council for Scientific and Industrial Research - CSIR, the Chapter 2 Network at Idasa, Lawyers for Human Rights, NICRO National Office, the Youth Justice Project at the Institute of Criminology at UCT, the Centre for Child Law at UP, the Institute of Security Studies, the Campus Law Clinic at UKZN, the Civil Society Prison Reform Initiative of the Community Law Centre (UWC), Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) and the Department of Social Development at UCT.

4 Bill 49 of 2002.

5 After the public hearings on the Child Justice Bill were completed in 2003, the Child Justice Alliance took on a new focus where the work of the Alliance now concentrated primarily on research projects and awareness raising activities around the content of the law (once enacted), implementation of the Child Justice Act and monitoring such implementation.

The scope of this research project was aimed at monitoring the current practice of the criminal justice system in relation to children in three magisterial districts, in order to obtain baseline information regarding the management of child offenders in the criminal justice system in relation to:

- the general principles and objects of the Child Justice Bill, in so far as there is adherence thereto in the absence of an Act;
- methods of securing the attendance of the child at the first court appearance;
- placement of the child awaiting trial;
- assessments of children by probation officers and the types of recommendations made in their reports;
- access to diversion;
- the number and reasons for postponements and withdrawals;
- time periods between the first appearance and plea, judgment and sentencing; and
- the types of sentences imposed on children convicted of an offence.

The study essentially focused on quantitative research. The decision to monitor in this manner was based on the fact that information of a qualitative nature would only be available once the Child Justice Bill has been enacted and in operation for at least six months.

This research study is intended to form the basis of ongoing monitoring research that will examine the implementation of the Child Justice Bill (once enacted). It is envisaged that there will be a second phase of this baseline data gathering process along the same lines that this research was undertaken (intended to commence in September 2006 until February 2007) in order to provide a broader and more comprehensive view of the present criminal justice system and how it treats children. Once the Child Justice Bill is enacted and promulgated, further research will be undertaken to monitor the implementation of the child justice legislation. The findings from the baseline studies will thus provide comparative data against which the implementation of the child justice legislation can be measured.

This paper highlights some of the findings from the research study obtained from the charge sheets, particularly relating to the age profile of the children that appeared during the research, the types of crimes they most commonly commit, the placements of children following first appearance or awaiting trial, the assessments of children, the delays that occur between key procedural stages, the types of sentences that are more commonly imposed upon children, diversion of children and the postponements of matters. The paper will further seek to offer some commentary on how the provisions of the Child Justice Bill will address the management of children in conflict with the law once enacted.<sup>6</sup>

## Sites

The research was conducted at three magisterial courts in three different provinces selected by the Child Justice Alliance driver group, namely the Pretoria Magistrate's Court in Gauteng, the Pietermaritzburg Magistrate's Court in KwaZulu-Natal and Wynberg Magistrate's Court in the Western Cape. Three different organisations, all of which were members of the Child Justice Alliance driver group, were appointed to undertake the research at each of the sites. CSIR was appointed to undertake the research at Pretoria Magistrate's Court, Lawyers for Human Rights for Pietermaritzburg and the Institute for Criminology (UCT) for Wynberg.<sup>7</sup>

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<sup>6</sup> All references are made to the provisions of the Child Justice Bill (B49 of 2002) as tabled in parliament during 2002. It is noted that the Portfolio Committee on Justice and Constitutional Development has made some amendments to the Bill - however these are not official and therefore for purposes of this paper the sections that appear in Bill B49 of 2002, as introduced, are referred to.

<sup>7</sup> The driver group of the Alliance decided that it would be appropriate and expedient to appoint organisations that served on the driver group structure to undertake the research. This decision was based on the fact that the relevant organisations had a good working knowledge of child justice, had an intimate understanding of the purpose and objects of the research and could source and manage field researchers to undertake the research. In addition, because of the limited resources available to undertake the research, it had to be carried out in close vicinity of the research organisation, with minimal travel involved.

The selection of these sites was preceded by much discussion involving questions, *inter alia*, concerning the numbers of children arrested at a site; sites where role-players have a greater knowledge of the Child Justice Bill as opposed to sites where there was no such awareness of the Bill; sites where there existed a juvenile court; sites near a university so that students could be employed to undertake the field research; the rural versus urban debate and also the availability of resources and non-governmental organisations near the site.

## Methodology and challenges

The methodology to gather the baseline data generally involved field research at the selected sites requiring field researchers to go through official court documents and probation records and transcribe the information onto the research templates that were developed.

The methodology thus involved various steps aimed at establishing a sound and credible basis for the research. The methodology also had to take into account the fact that this research constitutes the first of a number of research projects that will commence once the Bill is passed. This study will form the basis against which the implementation of the new child justice legislation will be measured and so the methodology was designed in such a way that future research can be conducted in the same manner to allow for credible comparison with the present undertaking.

### DEVELOPMENT OF RESEARCH INDICATORS AND RESEARCH TOOLS

During July 2004, the Alliance contracted the Gender Health and Justice Research Unit at UCT to develop monitoring indicators for the research. The Criminal Procedure Act and Child Justice Bill were the primary documents against which the indicators were drafted. Once the indicators were finalised, the Gender Health and Justice Research Unit proceeded to compile the actual research tools for application at the research sites during the field research. Three research tools were developed in order to collect information from various records such as charge sheets, police dockets and probation records as well as an observation tool to record information relating to actual court proceedings. The tools developed were:

- charge sheet template
- police docket template
- probation records template
- observation template

### REQUEST FOR PERMISSION TO UNDERTAKE RESEARCH

Since the nature of the study was primarily to undertake field research at the selected magistrates' courts using official documents and involving various departmental officials, it was necessary to obtain the necessary permission before proceeding with the research.

Letters seeking such permission, which set out the scope and purpose of the research as well as the research methodology were sent to the following:

- Department of Justice (DoJ) - to conduct research at courts and have access to charge sheets;
- National Prosecuting Authority (NPA) - to conduct research at courts and have access to charge sheets;
- Provincial Departments of Social Development (Western Cape, Gauteng and KwaZulu-Natal) - to have access to probation records;
- Legal services (national office) at the South African Police Service (SAPS)- to have access to police dockets.

Permission was obtained from all of the above departments with the exception of SAPS.<sup>8</sup> Following on the permission that was granted, each research organisation that was tasked with the research proceeded to obtain permission from the relevant officials at each magistrate's court.

#### TRAINING OF FIELD RESEARCHERS

During April 2005 a training workshop was held with the three appointed research organisations and their field researchers.<sup>9</sup>

The purpose of the training was to explain the aim of the research, prepare the field researchers for the application of the research tools and equip them, as far as possible, with knowledge of how the present child justice system works in order to obtain consistency in the research undertaken in the three sites throughout the research study.

#### PILOTING OF RESEARCH TOOLS

Once the research tools had been developed and the field researchers trained, the tools were piloted over two days during May 2005. The purpose was to determine the suitability, effectiveness and applicability of the research tools. The pilot constituted a simulated version of the actual field work component of the research process. Once the pilot was completed, written feedback was provided to the project co-ordinators at the Community Law Centre and adjustments were made to the research tools, which were then finalised.

#### FIELD RESEARCH

The field research commenced at the beginning of June 2005 and was completed at the end of September 2005.

The field research was conducted by two field researchers on any two days a week, every week over a four month period. The research involved the application of the research tools including data collection on court documents and probation records, as well as interviews with probation officers relating to the number of cases that are dealt with by them on a particular day that the relevant field researcher attended court. The researchers had to collect information on and apply the tools to all the cases that were dealt with at the relevant court on the days that they were stationed there each week.<sup>10</sup> This meant that they were required to record the data from the charge sheets for every case appearing on the court roll for each day that they attended court. In addition they were required to observe the proceedings for each of these cases and record their observations on the observation template.

#### DATA CAPTURING

The Alliance made arrangements for the design and development of a database on which all the information gathered by the field researchers could be captured. It was intended to be a resource that would allow for consistent data capturing and which would generate similar reports for all three sites to allow for the continuous formulation and interpretation of the research information. However, it was very unfortunate that there were

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8 In a letter dated 7 April 2005, SAPS refused to allow access to police dockets in cases "not yet finalised". It was therefore decided not to pursue the research in relation to police dockets.

9 The training session included an introduction to child justice and the criminal justice system, an overview of the monitoring research project, a discussion on research ethics, a discussion on court process, charge sheets, probation reports and the relevant role-players in the criminal justice system, application of the research tools and reporting requirements.

10 Towards the end of the research Lawyers for Human Rights reported that their field researchers had not been capturing the data as specified at the outset of the study. The LHR research supervisor then obtained all the dockets and assessment sheets that were on the roll for the days that the field researchers were supposed to have collected the data and then reconstructed the necessary data.

unforeseen long delays occasioned by misunderstandings between the co-ordinators and the data-base developers. Therefore the database was not accessible during the actual field work and only came into operation after the completion of the field research. While it was originally envisaged that data would be captured on a weekly basis, the research organisations had to transcribe all information from hard-copy to electronic form after September 2005. Further delays were occasioned on account of the fact that there had been no trial data capturing process and so system bugs then had to be addressed.<sup>11</sup> This resulted in much of the data being manually counted by the researchers - thereby rendering the efficiency of the database virtually obsolete.

However, despite the problems experienced, the use of the database did prompt data capturers to conduct cross-checks of all the electronic data with the monitoring tool data as well as discuss amongst themselves the nuances of the data capturing process thereby forcing a systematic check on the validity and reliability of the research results. The database also provided a form of grounded reference point to which the researchers could find and review data and despite the many problems encountered with the database, it provided a point of contact for the researchers who were dispersed in the three sites.

#### COLLATION OF RESEARCH DATA AT EACH SITE

Once all the information was captured electronically, the research organisations were tasked with generating the reports from the database in order to draft a research report on their specific site that would analyse the data collected. The organisations were required to draft the report in accordance with a standard reporting format that addressed the following issues:

- Description of research site and profile of the area;
- Methodology at the specific site;
- Findings from the charge sheets;
- Findings from the probation records;
- Personal observations by the field researchers on the various courts and court process;
- Obstacles and challenges to the research;
- Recommendations for the specific courts - both medium term and immediate.

However, as indicated above, there were significant difficulties with the database that indicated that the findings that were generated were incorrect. After this became apparent during the initial drafting stages of the final consolidated report, the three research organisations were requested to manually capture the data from the research templates into their report. This was done and a number of verification audits of data were conducted on each report.

What follows are some of the findings from the research undertaken in the three magisterial districts.<sup>12</sup>

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<sup>11</sup> *The types of problems encountered were of a technical nature to some extent, as well as due to problems with the database limiting the types of information that could be entered - thereby requiring a significant review of what, how and why the database was excluding and/or misinterpreting information. For instance, many of the database interpretations of the data captured were inadequate in that the data lacked a stratified account of the information - for example only providing the numbers of males and females in the sample stratified according to age group but not according to other categories such as crime committed, nor presenting the researcher with the case number so as to refer to the particular case. In some sense the database also resulted in ambiguity of interpretation on the part of the researchers - thereby allowing, for instance, different data capturers to enter the data in different ways, potentially skewing the results of the study. However this was solved by the numerous manual recounts and all the researchers ultimately agreeing on how to interpret the data, for example ensuring there was a correct understanding of what was meant by "not applicable", "not available" and "unknown".*

<sup>12</sup> *See the First Consolidated Report, op cit, for a comprehensive reflection and discussion of all the findings. This report is soon to be finalised and printed.*



## Findings from charge sheets

During the research period, a total of 1273 charge sheets were collected (Pretoria = 506, Wynberg = 359 and Pietermaritzburg = 408). Of these, a total of 1165 charge sheets were captured onto the database (Pretoria = 506, Wynberg = 251 and Pietermaritzburg = 408).<sup>13</sup>

### PROFILE OF CHILDREN

The total number of children that appeared during the research period and whose details appear on the database amounts to 1 324. In Pretoria there were 506 children, of whom 451 were male and 55 were female. In Pietermaritzburg there were 503 children of which 467 were male and 36 were female and in Wynberg there were 315 children of which 281 were male and 34 were females.

#### Total number of children

While it appears that Pietermaritzburg (n= 503) and Pretoria (n=506) courts dealt with very similar amounts of children over the research period, Wynberg (n=315) dealt with considerably less children. One of the reasons is that the Wynberg results were skewed on account of not all the data for each case being captured in the database. However despite this the total number of children appearing only totalled 365, still significantly less than the other two courts over the same period.

Not surprisingly, most of the children appearing in each court were male (Wynberg n= 281, Pretoria n= 451 and Pietermaritzburg n=467).<sup>14</sup>

### CASES WHERE THE CHILD'S AGE WAS IN DISPUTE

The Discussion Paper of Project 106 of the South African Law Reform Commission noted that it is not uncommon for South African children to be unaware of their ages and dates of birth and in some cases even the parents are unable to give particulars in this regard.<sup>15</sup> The Discussion Paper also points out that where legislation provides different consequences for different ages, the issue of age determination is placed firmly on the agenda. Therefore, various proposals were made that culminated in specific provisions in the Child Justice Bill to assist with age determination at the assessment stage. The information obtained in this study as to the numbers of cases where age is in dispute is intended to form the basis against which the success of the provisions of the Child Justice Bill can be measured once enacted.

In Pietermaritzburg, a disproportionately high amount of cases involved a dispute related to the child's age (in 248 cases the age of the child was in dispute). This is open to a number of interpretations namely, that Wynberg (in five cases the age of the child was in dispute) and Pretoria (in 38 cases the age of the child was in dispute) are either doing their assessments well or the court is not engaging in age determinations or that Pietermaritzburg's assessments are not being completed properly or the court is overly concerned with the child's age.

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<sup>13</sup> Although Wynberg collected 359 charge sheets, only 251 charge sheets were captured on account of the fact that the balance of the charge sheets contained very minimal information that was impossible to decipher; for example, many charge sheets did not even reflect the age of the accused and therefore it was uncertain whether the accused was even a child (as it was found that adults also appeared in the juvenile court on occasion).

<sup>14</sup> This accords with findings from previous research on children in conflict with the law that show that child offenders are mostly male. See for example L Muntingh (ed) Children in conflict with the law: A compendium of child justice statistics 1995-2001 2003 (study commissioned by the Community Law Centre, University of the Western Cape) (hereinafter referred to as the Muntingh study).

<sup>15</sup> Discussion Paper 79, Project 106, 1998, para 6.52.

## REASONS FOR MATTER BEING PLACED ON THE COURT ROLL

There have been many reports of delays in court that result in children's matters not being dealt with expediently and that they are held in detention awaiting trial for long periods of time. The field researchers were therefore requested to record the reason for the cases appearing in court on the days that they attended court in order to determine the nature of court proceedings that most frequently occurs on any particular day.

	WYNBERG	PIETERMARITZBURG	PRETORIA	TOTAL
First appearance	26	42	79	147
Bail application	15	3	0	18
Age determination	3	1	1	5
Postponement	58	203	3	264
Withdrawal of charge	19	50	4	73
Plea	107	74	16	197
Trial	21	57	31	109
Judgment	0	4	0	4
Sentence	20	48	10	78
Unknown	46	21	362	429

While it is not clear what type of postponement the matters were enrolled for it is clear that the most frequent reason for children appearing in court is a postponement.

The Child Justice Bill lengthens the remand time for children in custody from 14 days to 30 days for children in prison and 30 days to 60 days for children in welfare facilities.<sup>16</sup> The lengthening of the time periods will hopefully ensure a speedier finalisation of trials (as this will ensure more time for police investigation and subpoenaing witnesses for example) as well as a less congested court roll. It will be interesting to see the effect of the enactment of the Child Justice Bill on these figures. What will also be interesting is whether the amount of children appearing for plea or trial will decrease once the preliminary inquiry and the regulation of diversion is introduced.

## CRIME CATEGORIES, GENDER AND AGE DISTRIBUTION

Information was also collected to illustrate the prevalence of types of offences committed by children and then disaggregated.<sup>17</sup> The figures confirm the statistics that show that children mostly commit economic offences (for example as illustrated in the Muntingh study), the three most common offences being theft, shoplifting and house-breaking and theft more commonly being committed by males over the ages of 14. Other more frequently committed offences include malicious injury to property, possession of drugs, common assault, assault with intent to do grievous bodily harm and robbery.<sup>18</sup>

<sup>16</sup> Section 36(5).

<sup>17</sup> The information is set out according to offence categories that exist in our common law or statutory law. However, there were instances where the charge sheets reflected offences that did not constitute a valid criminal offence - e.g. in Wynberg one accused was charged with sodomy despite this being declared unconstitutional in 1999. This instance was recorded in the indecent assault category above. Likewise, a charge of theft of sheep was included in the category of stock theft.

<sup>18</sup> Other offences included theft of a motor vehicle (17), theft out of a motor vehicle (33), theft of a cell-phone (8), receiving stolen property (14), possession of stolen property (23), possession of housebreaking implements (2), possession of motor vehicle breaking implements (7), housebreaking with intent to commit offence unknown to prosecutor (9), fraud (5), animal abuse (1), illegal possession of crayfish (3), driving motor vehicle without owner's permission (1), driving motor vehicle without license (2), negligent driving (5), driving under the influence (2), pointing of a firearm (18), possession of unlicensed firearm (12), possession of illegal ammunition (5), possession of a dangerous weapon (8), dealing in drugs (1), murder (3), attempted murder (2), culpable homicide (2), armed robbery (5), attempted robbery (2), indecent assault (14), rape (13), assault of a police official resisting arrest (1), crimen iniuria (1), any conspiracy, incitement, attempt to commit an offence (18), unknown charge (13), contravening a peace order (2), failure to attend court (4), perjury (4), stock theft (2) and trespassing (2).

## DETENTION OF CHILDREN

Detention of children is a high priority issue in child justice. Section 28(1)(g) of the South African Constitution provides that detention of children should be a last resort and for the shortest appropriate period of time. Similarly, the Child Justice Bill echoes these principles.

There have been numerous developments over the last 10 years to attempt to manage this issue, for example, section 29 of the Correctional Services Act. In 1995, section 29 of the Correctional Services Act was amended to allow for the release from detention of all children in prison awaiting trial except in certain limited circumstances. Due to the fact that welfare facilities could not cope with the sudden influx of children, the implementation of this provision was not successful and section 29 was amended again. This amendment, which came into effect in May 1996, provided for the detention of children awaiting trial who were older than 14 years of age and who were charged with certain offences. Although it was only intended to be in force for a maximum period of two years, due to a drafting error the provision still remains on the statute books. Since September 1996, when there were only approximately 600 children awaiting trial in prison on any one day, this amount steadily increased to the point when, in March 2000, a total of 2 800 children were being detained countrywide. Recent statistics show that the average number of children awaiting trial in South African prisons in 2004 was 1921, down from 2 329 in 2003.<sup>19</sup>

The following information is intended to illustrate the trends of placing children both pre-first appearance and awaiting trial. On account of the fact that there is little guidance given to presiding officers at present and their discretion is very wide, the Child Justice Bill attempts to curtail that discretion by providing specific guidelines to regulate such placement.<sup>20</sup> Therefore, the data collected in this research as well as in future studies, will seek to measure whether the provisions of the Child Justice Bill impact on the detention of children.

### PLACEMENTS OF THE CHILD

	WYNBERG	PIETERMARITZBURG	PRETORIA <sup>21</sup>	TOTAL
Care of parent/guardian	91	333	313	737
Place of safety	36	4	116	156
Police cells	9	162	38	209
Prison	7	4	6	17
Secure care facility	1	0	5	6
Unknown	171	0	30	201

What is interesting from the above breakdown is that it appears that children in Pietermaritzburg are held in police cells after arrest on a far larger scale than the other two courts. Likewise, children in Pretoria are sent to places of safety far more often than the other two districts. Finally, Wynberg court's charge sheets do not adequately reflect where children were placed.

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<sup>19</sup> Muntingh L, "Children in prisons: some good news, some bad news and some questions", Article 40, 2005, Vol. 7, No. 2, 8.

<sup>20</sup> For example, children charged with Schedule 1 offences MUST be released from detention in police custody into care of parent or appropriate adult (with exceptions); children may be released before a court appearance in consultation with the prosecution or DPP in relation to those children charged with Schedule 1 offences and have not yet been released, or children charged with Schedule 2 offences. The Bill also echoes the last resort principle and detention for the shortest possible time principle.

<sup>21</sup> Out of the 506 cases, there is a discrepancy of two (2), in terms of the placement of the child - the database for some reason produces the finding that total children placed are 508. One possibility is that for two children two placements for each were recorded instead of just one for each.

While it is encouraging to note that placement with a parent or guardian is the most frequent occurrence, the numbers of children held in prison exceed the number placed in secure care facilities.

## ASSESSMENT

The Child Justice Bill provides for a framework whereby assessment of the child becomes a standard procedure in the child justice system.<sup>22</sup> The Child Justice Bill is the mechanism whereby prosecutors, magistrates and police officers are obliged to facilitate and take assessments into account. In terms of the proposed legislation, an assessment must occur prior to the child's appearance at the preliminary inquiry and as the preliminary inquiry must occur within 48 hours of arrest, the assessment must occur within that 48 hour period. The result of the assessment is a set of recommendations submitted to the preliminary inquiry magistrate pertaining to the management of the child. This procedure will be invaluable in determining which children can be dealt with outside of the criminal justice system and then ensuring that they realise that opportunity. At present the Probation Services Act 116 of 1991, as amended, provides that assessment is one of the core responsibilities of probation officers. However, assessments in the present system are not uniformly applied or regulated and delays often occur. Therefore the present study will hopefully lay a foundation against which to assess improvements in the overall child justice system in relation to assessment once the Child Justice Bill is enacted.

In terms of the proposed child justice legislation, children should be assessed within 48 hours of arrest. As children have to appear in court within 48 hours of arrest, they should be assessed prior to the first court appearance. This can be largely facilitated by the fact that the child is initially in police custody and if assessed and then released, for example into his or her parent's care, this practice would assist in averting further delays at court when the child would have to be assessed before appearing for the first time.

The study showed, however, that children are released by the police before being assessed. The intention is that the mechanisms provided in the Child Justice Bill would stop this practice and require police and probation officers to ensure the child is assessed as early as possible.

In Pretoria, out of the 506 children, 111 of them were released before being assessed. In Wynberg, two out of the 315 children were released and in Pietermaritzburg, 210 out of 503 children were released prior to assessment. This seems to indicate there is a problem with assessments at the Pietermaritzburg court as it appears that 41, 7% of the children, are not being assessed before they are released, possibly occasioning delays at court.

## TIME PERIODS BETWEEN KEY PROCEDURAL STAGES

There are ongoing concerns expressed about lengthy delays experienced in the criminal justice system. Therefore, the research investigated time delays between all the key procedural stages in a matter in order to lay the basis for determining whether the new child justice laws will have the effect of preventing such delays given the introduction of the preliminary inquiry<sup>23</sup> and the provision requiring the child justice courts to conclude trials of accused children as speedily as possible and ensure that postponements are limited in number and duration.<sup>24</sup> In addition, section 58(3) provides that where a child remains in detention and the trial of the child is not concluded within a period of 6 months from the date upon which the child has pleaded, the child must be released from detention (unless charged with murder, rape or robbery with aggravating circumstances or involving the taking of a motor vehicle).

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<sup>22</sup> Chapter 4.

<sup>23</sup> *The Child Justice Bill creates a wholly new procedure to facilitate the management of children in conflict with the law, namely, the preliminary inquiry, which makes use of current resources and personnel. This inquiry has a number of objectives, which include establishing whether a child can be diverted and if so identifying a suitable diversion option and determining the release or detention of a child. As our present child justice system has no similar procedure, this study was unable to collect information against which to measure the future implementation of the preliminary inquiry. Instead the research sought to assess the current functioning and practice of the three juvenile courts.*

<sup>24</sup> Section 58(1).

In the First Consolidated Report,<sup>25</sup> specific details of each matter have been recorded to give an exact idea of what kind of matters are being delayed, the age and gender of the children involved and the exact number of days that had elapsed between the date of first appearance and plea, first appearance and judgment and also first appearance and sentence.

With regard to the time period or delays between first appearance and plea, what is evident is that some matters are taking a very long time to be resolved in the district courts. What is of even more concern is the fact that the offences are not serious ones – so the longest delay in Pretoria is over one year (413 days) for theft while the longest delay for Pietermaritzburg is over three years (1 192 days) for an offence of housebreaking and theft. Furthermore, Pietermaritzburg court has five cases where the delay between first appearance and plea is over one year.<sup>26</sup>

Unfortunately, the research did not determine what the reasons for the actual delays were and this can be seen as a shortcoming as it may well have been that the child absconded and this caused the delay rather than a fault on the part of the criminal justice system. Nevertheless what the research has done is to note the number of postponements that occurred during the research period and noted what the main reasons for these postponements were.<sup>27</sup>

As in the case of the delay between first appearance and plea, there are lengthy delays between first appearance and judgment and again the lack of reasons for the delays are not determinable from this study. However Pietermaritzburg seems to be the court where the most delays and the lengthiest occur and it stands out against the other two courts particularly regarding delays in court process. In Pretoria the longest delay is 213 days for theft involving a male over 14 years and in Wynberg it is 268 days for theft involving a female over 14. However in Pietermaritzburg there were three cases where the delay between first appearance and judgment is over one year, these being 954 days and 458 days for theft and 442 days for theft out of a motor vehicle involving two females and one male over 14 years respectively.

Again delays in the different stages of the court process seem to be quite common with Pietermaritzburg again being the court of most concern.

In Wynberg the longest delay between first appearance and sentence was 294 days for housebreaking and theft and assault, in Pretoria it was 538 days (over 1 year) for housebreaking and theft and in Pietermaritzburg there were three cases involving delays of over 1 year, these being 442 days for theft out of a motor vehicle, 486 days and 954 days for theft.

The research study noted that in all three sites information concerning either the date of plea or the date of judgment was omitted on the charge sheets and thus the researchers were unable to determine the length of time that had elapsed between the date of first appearance and date of plea and judgment. This indicates that presiding officers are not recording crucial information on the charge sheets and reflects a lack of proper performance on behalf of the presiding officer.

## SENTENCE

During the research period, a total of 87 children were sentenced (in Pietermaritzburg 58, in Pretoria 4 and in Wynberg 25) in terms of the wide range of sentencing options to be used in matters pertaining to children. The following table illustrates the types of sentences handed down by each court.

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<sup>25</sup> See tables that appear at 27-46 and 63-68 of the draft report, copy on file with the author.

<sup>26</sup> The others being 390 days for housebreaking and theft; 458 days for theft; 742 days for housebreaking and theft and 954 days for theft – all were children over 14 years.

<sup>27</sup> These more commonly included further investigations, probation officer's report, completion of a diversion programme, postponed for plea, trial, judgment or sentencing and accused not being in court.

	WYNBERG	PIETERMARITZBURG	PRETORIA	TOTAL
Imprisonment	0	6	0	6
Correctional supervision	0	0	1	1
Suspended sentence	21	17	1	39
Postponed sentence	0	33	0	33
Imprisonment with option of a fine	2	1	0	3
Warned and discharge	1	1	1	3
Reform school	1	0	1	2

Of the six children the Pietermaritzburg court sentenced to direct imprisonment, two were sentenced for housebreaking and theft and the others for theft, theft out of a motor vehicle, robbery and common assault, all involving males over the age of 14. These offences are not serious offences and in particular common assault is considered a minor offence. Although the children's previous convictions were unknown to the researchers, nor were the circumstances of the crime known, the sentences of direct imprisonment still seem harsh in the circumstances. It should also be noted that Section 69(2) of the Child Justice Bill provides that no sentence of imprisonment may be imposed upon a child in respect of offences such as common assault and theft where the value of the property is less than R500.<sup>28</sup>

A total of 39 suspended sentences were handed down between the three research sites. Suspended sentences are also considered a harsh sentence for children as the failure to comply with the sentence means the imposition of direct imprisonment. This issue was raised by the court in *S v Zen 4 ander sake* 1999 (1) SACR 427 (E). The Court outlined progressive sentencing guidelines that included the principle that a court must not impose suspended imprisonment where direct imprisonment is inappropriate for the particular accused.

While only one sentence of correctional supervision was imposed, many of the sentences were suspended on condition that the child be placed under correctional supervision. This is also a drastic measure for children as correctional supervision is perhaps the next most restrictive sentence to imprisonment and to couple it to a suspended sentence may be a disproportionate sentence considering the circumstances.

Of the 33 postponed sentences most of these were postponed for five years and involved the placement of the child under the supervision of a probation officer for a period ranging from 6-18 months. Many of the sentences seem to be formulaic and similar in nature, giving the impression of "one size fits all". It should however be noted that the Child Justice Bill limits postponed sentences for a period not exceeding three years.<sup>29</sup>

However, in drafting the original version of the Child Justice Bill, the South African Law Reform Commission decided to re-appraise the sentencing of child offenders as it recognised the impact of the concept of restorative justice on the criminal justice system, the effect of our Constitution on the traditional aims of punishment and the shift in the international approach to sentencing from rehabilitation to reintegration into society.

It should be noted that the Child Justice Bill provides for a range of sentencing options including community-based sentences, restorative justice sentences, correctional supervision, sentences with a residential requirement, referral to residential facility, referral to prison (only for children over the age of 14),<sup>30</sup> postponed sentences, suspended sentences and fines. The Bill also prohibits the imposition of life imprisonment for children. It further

28 Other offences listed are trespass, malicious injury to property where the damage is less than R500, possession of dependence producing drugs where value is under R500.

29 Section 70(1).

30 However, it appears from the parliamentary debate on Justice and Constitutional Development that the Portfolio Committee is considering inserting a provision that allows for the imprisonment of a child under the age of 14 years if he or she has committed a schedule 3 offence, for example murder, and allows for the life imprisonment of children but limited to 25 years.

sets out that the purposes of sentencing are to encourage the child to understand the implications of and be accountable for the harm caused, promote an individualised response which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the offence, promote the reintegration of the child into the family and community and ensure the provision of any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration.<sup>31</sup>

It is hoped that the Child Justice Bill will open up the scope of sentencing options for children and that judicial officers become more creative in imposing sentences for children that are appropriate taking the child's age, needs and circumstances into account.

#### *PRE-SENTENCE REPORT*

Despite the fact that there is no mandatory provision requiring pre-sentence reports before a court imposes a sentence upon a child, there have been many High Court decisions emphasising the need for sentencing officers to have the accused's personal circumstances properly placed before them in order to hand down an appropriate sentence.<sup>32</sup>

In Wynberg, there were pre-sentence reports for 15 of the 25 children who were actually sentenced, while it was unknown whether there was a pre-sentence report available in 10 out of the 25 sentenced children's matters. Of the 10 where it was unknown whether there was a pre-sentence report available and the child was nevertheless sentenced, 6 involved the children receiving a suspended sentence of a fine or imprisonment (3 of which also included a declaration that the child was unfit to possess a firearm), 2 involved a postponed sentence, 1 child was warned and discharged and the final child was sentenced to R2000 or 4 months in prison. This indicates that magistrates have sentenced children to serious sentences of a fine or a suspended sentence possibly without the benefit of a pre-sentence report, despite the numerous precedents handed down by our courts requiring such reports before sentencing children.

In Pietermaritzburg, of the 58 children that were sentenced, probation officer's pre-sentence reports were available for 57 of these children and in one case there was no pre-sentence report - it is unclear in which case this happened. In Pretoria, a pre-sentence report was available for all four children that were sentenced.

It should be noted that the Child Justice Bill provides that a court imposing a sentence must request a pre-sentence report prior to the imposition of sentence and may only dispense with this requirement if the child is convicted of a Schedule 1 offence, such as theft, or where requiring such report would cause undue delay in the conclusion of the case to the prejudice of the child.<sup>33</sup> It is thus hoped that once the Child Justice Bill is enacted, most sentences imposed upon children, if not all, will be informed by a pre-sentence report and will be appropriate in the circumstances taking into account the necessary factors.

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<sup>31</sup> Section 63.

<sup>32</sup> *In S v Van Rooyen (unreported) the Cape High Court, referring to the Convention on the Rights of the Child as underlining the policy that as far as possible children should be dealt with by the criminal justice system in a way that takes into account their special needs, held that it was difficult to see how the court a quo could properly have determined an individualised punishment without the benefit of a pre-sentence report. In S v N and another, S v J and others (unreported) and S v D 1999 (1) SACR 122 (NC) the Courts, sitting as appeal and review courts, set aside the sentences imposed by the courts a quo as in none of the cases pre-sentence reports were provided despite the fact that in all of the cases sentences of imprisonment were imposed. Also see S v P 2001 (2) SACR 70, S v Peterson 2001 (1) SACR 16 (SCA).*

<sup>33</sup> Section 62(4).

## DIVERSION

Diversion involves the referral of cases, where there exists a suitable amount of evidence to prosecute, away from the formal criminal court procedures.<sup>34</sup> Diversion can be closely linked to the concept of restorative justice, which involves a balancing of rights and responsibilities. The purpose of restorative justice is to identify responsibilities, meet needs and promote healing.<sup>35</sup> In this way a child that is accused of committing a crime takes responsibility for his or her conduct and makes good for his or her wrongful action. Through this process diversion can involve a restorative justice. The benefits of diversion are many and include the child gaining insight into the consequences of his or her actions, taking responsibility for them, making good the harm caused (by, for example, compensating the victim or performing some sort of community service or service to the victim), allowing for victim participation where appropriate and ensuring the child does not obtain a criminal record thereby granting him or her the opportunity to forge a path in life without the stigma of a criminal conviction.

Having noted these benefits it is also useful to bear in mind certain potential dangers of diversion. These have to do with the accused person's right to a fair trial and due process.

It is imperative to ensure that children are not diverted to programme or other informal diversion options in lieu of the possibility of prosecution. In other words, if the state does not possess sufficient evidence against the child to prosecute the matter, it cannot resort to diverting the child as a "second prize". The state cannot absolve itself of the onus of proving the guilt of an accused beyond a reasonable doubt by making use of diversion to achieve a result that it could otherwise not obtain. This would constitute a serious invasion of the accused's right to be presumed innocent until proven guilty.

Likewise, an accused person's right to remain silent can potentially be compromised by the possibility of diversion. Diversion involves the acceptance of responsibility for the child's actions. The danger exists that a child could be unduly influenced into accepting responsibility for an offence at the expense of his or her right to remain silent. This right is inviolable and it is only a voluntary acceptance of responsibility that would give credence to diversion procedures and a proper child justice system.

It is therefore important to ensure that diversion is properly regulated. The Child Justice Bill proposes various forms of diversion. The options range from receiving a formal caution or compulsory school attendance order to the attendance of a specified programme or referral to a programme with a residential element. As diversion is intended to meet the individual needs of a child and as diversion services are not as readily available in rural areas as they are in urban areas, the Bill allows the preliminary inquiry magistrate to develop an individual diversion option which meets the purposes of and standards applicable to diversion in the Bill. This last-mentioned provision allows for flexibility and the utilisation of existing community resources where formal diversion programmes are lacking.

The present research was designed to try assess the extent of diversion in the present system, although there is no regulatory framework available yet. This will show whether prosecutorial discretion is being made use of in order to further the rights of children. When the Bill is finally enacted, the present information will be useful as baseline data against which to measure the implementation of formal diversion.

In Pretoria, 204 children were diverted. Of these 175 were male and 29 female. In Wynberg two boys were diverted. Despite the low level of diversions, these figures represent what is known about children appearing before court during the time of the study and who were diverted following this appearance - it is likely that many children had been diverted prior to appearing in court and so do not appear in the study.

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34 L Muntingh. (ed) *Perspectives on Diversion, 1995*, NICRO National Office, Cape Town.

35 A Skelton. "Juvenile Justice Reform: Children's Rights and Responsibilities versus Crime Control", in Davel, C.J. (ed) *Children's Rights in Transitional Society, 1999*, 93.



In Pietermaritzburg, a total of 36 children were diverted. Of these four were female and 32 were male. Similarly to Wynberg, this figure is quite low for reasons that it represents what is known about children appearing before court during the time of the study and who were diverted following this appearance - it is likely that many children had been diverted prior to appearing in court and so do not appear in the study.

The following table represents the age and gender of the children who were diverted.

The above information again illustrates inconsistent practice in the different courts. It is illustrative that there is a need for a legislative framework within which procedural certainty can be established.

In Pretoria, the number of children who were not diverted totalled 293. There were various reasons for the failure to divert these children namely:

- No acknowledgement of responsibility or guilt (n=113);
- Previous convictions (n=46);
- No parent or guardian (n=39);
- Seriousness of offence (n=8);
- No fixed address (n=3);
- Other reasons unspecified (n=83);
- Unknown (n=1).

In Pietermaritzburg, the number of children who were not diverted totalled 458. The reasons for the failure to divert are as follows:

- Seriousness of the offence (n=250);
- No acknowledgement of responsibility or guilt (n=149);
- No parent or guardian at court (n=25);
- Previous convictions (n=11);
- Other reasons (n=22);
- Reasons not available (n=1).

In nine cases there was no indication of whether the child was diverted or not.

The emphasis on the seriousness of the offence being a disqualifier for diversion illustrates the fact that the individual needs of the child may be being outweighed by prosecutorial discretion to prosecute. It is hoped that the preliminary inquiry may lead to a more detailed and comprehensive consideration of diversion that would avoid this result. However if the Portfolio Committee on Justice and Constitutional Development persists in disallowing diversion for serious offences, this situation might continue.

In Wynberg, the number of children who were not diverted totalled 160. Of these, the reasons for not diverting 158 children are unknown. There were two boys over the age of 14 who were charged with assault GBH and who were not diverted because of a lack suitable diversion programmes.

The gender and ages of the children who were not diverted is as follows:

#### *POSTPONEMENTS*

One of the main concerns about the present juvenile justice system is the fact that there are lengthy delays before matters are finalised. This is evidenced by the information above relating to the delays that occurred between the date of first appearance and plea, judgment and sentence.

In Wynberg, 230 matters were postponed during the period of the research. In Pretoria 412 matters were postponed and in Pietermaritzburg 396<sup>36</sup> matters were postponed.

The present research therefore examined the nature of postponements in each site. There were numerous reasons for a matter being postponed ranging from further investigations to waiting for a probation officer's report. The most common instances included further investigations, accused not in court, completion of a diversion programme or the matter being postponed for plea, judgment or sentence.

Insofar as many of the reasons listed relate to the staffing of the court (absence of a prosecutor, magistrate and interpreter), reports by probation officers, the unavailability of the docket or the police, there is cause for concern that the role-players in the criminal justice system can contribute to delays. However, it must be noted that many delays are also occasioned by the absence of guardians, parents, legal representatives and even the accused. The other postponements seem to be the natural consequences of the criminal justice system, for example, postponements for further evidence, part-heard trials and referral to diversion programmes.

However, it must be noted that the Child Justice Bill seeks to ensure the speedy conclusion of trials involving children and ensure that postponements are limited in number and duration.<sup>37</sup> Once enacted, it would be interesting to see the impact on the number of postponements that take place.

## Conclusion

This is a very small study looking at limited procedures in the present criminal justice system. What emerged from the study generally confirmed perceptions and other information available on the child justice system at present, for example that male children are the most common perpetrators of crime and that economic offences are generally the crimes with which children are charged. It must also be noted that this study was confined to the district magistrate's courts and thus is not reflective of the types of matters that appear in the regional courts where children come into conflict with the law.

What is helpful about the study is that it highlights the inconsistency of practice amongst certain courts - in particular in relation to diversion and how each court manages children charged with sex offences in that in both Pretoria and Pietermaritzburg, these cases are not heard in the juvenile court.<sup>38</sup>

Likewise, it also provides information that tends to shed light on how courts are operating. For example, Pietermaritzburg court was the only court to impose direct imprisonment for children that appeared in the research sample and was the court that consistently had the longest delays between first appearance and plea, judgment and sentence.

However, it is hoped that many of the procedural uncertainties will be addressed by the Child Justice Bill once enacted. The other problems that have been highlighted relate mainly to work performance, staff shortages (such as interpreters and probation officers) and lack of training. These issues would need to be attended to by the relevant departments as they cannot be solved by legislation. Quality control, court management and training are issues that need to be addressed for any child justice system, present or future, to function properly.

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<sup>36</sup> Even though 396 matters were postponed in Pietermaritzburg the reasons provided add up to 450 - this could possibly be attributed to the fact that multiple reasons existed for the postponement of a matter (for example, postponed for a legal aid attorney and also for guardian to be present at court).

<sup>37</sup> Section 58(1).

<sup>38</sup> In Pietermaritzburg, these cases are referred to a particular court, namely court A, and upon finalisation of the investigation is the matter referred to the regional court for trial.



# The use of children in illicit activities: child justice and child labour meet

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## Introduction

The child justice movement in South Africa emerged in the early 1990s and was focused on a number of issues, with the detention of children and the need for law reform being the two most prominent. In 2006, the numbers of children awaiting trial in prison have dramatically decreased and a draft Child Justice Bill awaits finalisation. However, these seemingly positive results are overshadowed by the fact that it appears that the numbers of children awaiting trial have decreased because of pardons from prison rather than an actual change in the way detention orders are issued. The Child Justice Bill, despite being a revolutionary piece of legislation and lauded by civil society and government alike, has been trapped in parliament since 2003 without any indication of when it might re-emerge.

However, the child justice movement has created a platform within the field of criminal justice for a range of child justice related issues to emerge and develop. One of the results of the intensive work in child justice over the last two decades has been the recognition that there are certain groups of child offenders, within the greater category of children who come into conflict with the law, that need special management and interventions.

For South Africa, this realisation first manifested itself in relation to young sex offenders. Over the last ten years specific programmes have been developed in order to create meaningful and content driven interventions aimed at reducing re-offending and these have been used in the context of both diversion and alternative sentences.<sup>1</sup> These interventions were welcomed by child justice NGOs, criminal justice role-players and eventually the victim's lobby as being viable alternatives that actually seek to prevent re-offending and further violence against women and children. What has followed is the recognition of the needs of children who are repeat offenders, children used in armed violence and children used by adults and other older children to commit crime (CUBAC).

## International background to children used by adults to commit crime (CUBAC)

The first reference to children used by adults to commit crime (CUBAC) is made in the United Nations General Assembly (GA) Resolution 43/121 of 8 December 1988 on the use of children in the illicit traffic in narcotic drugs and rehabilitation of drug addicted minors. This followed two previous General Assembly Resolutions on the international campaign against drug abuse and the illicit traffic in drugs.<sup>2</sup> Resolution 43/121 recognised that drug deal-

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<sup>1</sup> For example the programmes developed by Childline KZN in KwaZulu-Natal, the Teddy Bear Clinic in Gauteng and SAYStOP in the Western Cape and Eastern Cape.

<sup>2</sup> GA/RES/41/127 of 4 December 1986 and GA/RES/42/113 of 7 December 1987.

ing organisations make use of children in the illicit production and trafficking of drugs and condemned such actions, urging States to join together to establish national and international programmes to protect children from involvement in illicit production and trafficking, as well as calling on States to protect them from consuming drugs. It also called on States to promote the adoption of laws to provide for suitably severe punishment of drug trafficking crimes that involve children.

Resolution 43/121 was followed by the much broader General Assembly Resolution 45/115 of 14 December 1990 on the instrumental use of children in criminal activities. Resolution 45/115 recognised that, within the traditional forms of child exploitation, the use of children in criminal activities has become an increasingly grave phenomenon, which represents a violation of social norms and a deprivation of the rights of children to proper development, education and upbringing, and which prejudices their future.<sup>3</sup>

The resolution's preamble goes on to recognise that there are categories of children, such as those that are run-away, vagrant, wayward or "street" children, who are targets for exploitation that includes seduction into drug trafficking and abuse, prostitution, pornography, theft, burglary, begging and homicide for reward. The General Assembly accordingly requested States to take measures to formulate programmes to deal with the problem and to take effective action by including, but not limited to, measures to ensure appropriate sanctions are applied against adults who instigate these crimes.

The United Nations Convention on the Rights of the Child (CRC) also makes reference to the use of children, however it is also limited to children's involvement in the illicit drug trade. Article 33 of the CRC states that:

"State Parties shall take all appropriate measures including legislative, administrative, social and educative measures to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties and to prevent the use of children in the illicit production and trafficking of such substances."

The Commission on Narcotic Drugs that falls under the auspices of the United Nations Economic and Social Council has addressed the issue of youth and drugs in three specific reports to the Council.<sup>4</sup> In only one of the reports there is reference to children used in the illicit production and trafficking of drugs - and even in this instance there are only two oblique statements relating to this issue.<sup>5</sup>

Specifically referring to GA Resolution 45/115, the International Association of Prosecutors and the International Centre for Criminal Law Reform and Criminal Justice Policy released *Model Guidelines for the Effective Prosecution of Crimes Against Children*.<sup>6</sup> Under the section dealing with pre-trial decisions, the guidelines specifically deal with CUBAC in paragraph 11:

"Children who engage in criminal activities through coercion by others who profit by their acts should be considered victims of exploitation rather than perpetrators of crime. Prosecutors should treat these children as victims and should actively pursue charges against the adults involved."

The explanatory note emphasises the need to make justice personnel sensitive to situations of social risk that cause children to be used by adults and older children to commit crime. In addition, appropriate sanctions should

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<sup>3</sup> Para 7 of the Preamble.

<sup>4</sup> E/CN.7/1999/8 of 11 January 1999 (*Youth and drugs: a global overview*); E/CN.7/2001/4 of 6 December 2000 (*World situation with regard to drug abuse, with particular reference to children and youth*) and E/CN.7/2002/3 of 21 December 2001 (*Prevention of the recreational and leisure use of drugs among young people*).

<sup>5</sup> E/CN.7/2001/4 of 6 December 2000 at 5 and 23.

<sup>6</sup> Copy on file with Community Law Centre.

be applied against adults who are the instigators of crimes, rather than against the children involved who are victims of criminality by virtue of them being exposed to crime.

The recent *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* also deal with CUBAC.<sup>7</sup> This document contains good practice guidelines based on relevant international and regional norms, standards and principles and provides a practical framework to assist in the review of national law and policy, design and implementation of law and policy, guide professionals working with child victims and witnesses.

In all of the above instances, CUBAC is dealt with within the confines of the criminal law and criminal justice system. The international documents recognise the phenomenon of CUBAC and call for its management within the criminal justice system. Importantly, the vulnerability of child offenders to adult manipulation is recognised and the prosecution of adults is emphasised.

The development of the CUBAC phenomenon is however not merely limited to the criminal justice field. It has also emerged as a child labour issue. Child labour, strictly defined, is work that affects the child's enjoyment of his or her fundamental rights: civil, political or economic, social and cultural - particularly the broad right to survival and development of the child. The relevant ILO Conventions, the CRC and a number of domestic laws call for the elimination of child labour (with priority being given to its worst forms). According to the ILO's International Programme on the Elimination of Child Labour (IPEC), "not all work performed by children is child labour: [child labour] depends on multiple factors, including, but not restricted to, the age of the child, the duration for which the activity is performed, the nature of the activity, the conditions of work, or a combination of these and other factors".<sup>8</sup>

The conceptual dilemma relating to child labour, at least as regards age, is partly resolved by the provision in the ILO Minimum Age Convention (No. 138) requiring the setting of the minimum permissible age at which children can work and that this age must not be set below that of 15 years (for developed countries) and 14 years (for developing countries).

Further, certain types of work are deemed outrightly hazardous as clearly spelt out through a number of instruments, particularly the latest ILO Convention (No.182) on the Elimination of the Worst Forms of Child Labour, which, in article 3 sets out the worst forms of child labour (WFCL), which includes CUBAC, namely:

- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

The above illustrates that the issue of CUBAC has been addressed by a number of international organisations in different contexts. What is evident, however, is the recognition that children who commit crime through being used by adults or older children should be regarded as victims, and in particular victims of a worst form of child labour.

But the children have still committed an offence. This raises an interesting conceptual question, namely, whether to treat these children as perpetrators of crime or victims. There is no easy answer to this. Obviously if the child has been threatened or violence has been used to coerce the child, this would negate the child's intention and the unlawfulness of the offence committed and the child can then be seen as a victim in the traditional sense of the word. The issue becomes fuzzy when the child willingly participates in the commission of the offence.

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<sup>7</sup> *The unofficial version of these guidelines was released by The United Nations Commission on Crime Prevention and Criminal Justice at its 14th session 23-27, May 2005. A copy of this document is on file with the Community Law Centre.*

<sup>8</sup> *"IPEC Report on action against child labour 2003-2004: progress and future priorities" IPEC 2003 12.*

A recent study looked at children's responses to and perceptions of the issue of CUBAC. It was not a criminological study but purely qualitative aimed at capturing children's views on the phenomenon.<sup>9</sup> A total of 541 children were consulted through the facilitations of 41 focus group discussions in a school and places of safety and secure care facilities in the Western Cape and Gauteng. What emerged was that 39 of the groups stated that children often committed crime willingly, and that this was often due to the nature of the reward expected. A strong theme that emerged from the discussions was the reasons for which children needed money. In many of the groups, participants stated that this sometimes related to necessities, but mostly to the acquiring of clothes and other possessions that, in their view, enabled them to gain esteem and worth in the eyes of others, especially peers and girls. This most often translated into the need to acquire clothing and shoes with known brand names and labels, many of which were listed by the children throughout the study. The use of drugs as a reward or benefit for committing crime was a significant theme in the study as a whole. Although alcohol was mentioned by the groups, illicit drugs such as mandrax, heroin, tik and dagga were specifically named by children during group discussions, and their role in involving children in crime, and keeping them in criminal lifestyles was clearly noted by group participants. Group participants were divided on the issue of how much choice drug addicts have in relation to committing crime, given the constant need to feed their addictions. The need to impress, to gain acknowledgement, esteem and respect from peers, gangsters, girls and others was also noted by the groups. Ideas of how esteem and respect are gained are often obtained from what children see in their own homes and neighbourhoods and these were noted in 15 of the focus groups.

It is therefore argued that the child needs to be seen through two lenses - that of being a perpetrator of the crime and also as a victim of a worst form of child labour. The child needs to be held accountable for his or her actions, but treated in a manner that recognises his or her status as a victim. Interventions should thus seek to assist the child, secure the safety of the child and reduce the risk of re-offending. This could be through referring the child to the welfare court system, through diverting the child from the criminal justice system to an appropriate programmatic intervention or through viewing the CUBAC status of a child as a mitigating factor during sentence or handing down a sentence that addresses the child's situation and his or her having been used for criminal activities.

## CUBAC in South Africa

Criminal law provisions relevant to this phenomenon are largely uncodified and commonly rest on common law definitions of offences developed since Roman Dutch law was received at the Cape of Good Hope. The first premise is that both an adult and a child involved in the same offence would ordinarily be liable as co-perpetrators of that offence, and would theoretically be equally liable to prosecution and conviction, provided the child is over the minimum age of criminal responsibility, currently being 7 years. Adult influence would, however, serve as a factor to be considered in mitigation of the sentence of the child and could also serve to aggravate the sentence received by the adult offender. Unless the defence of duress could be successfully raised by the child concerned so as to *vitiare dolus*, voluntary participation in the act would usually be sufficient to ensure a conviction.<sup>10</sup>

The above propositions evidently mirror the position adopted by the Portfolio Committee on Justice and Constitutional Development, who during their deliberations on the Child Justice Bill in 2003 rejected the proposal in the version of the Bill proposed by the South African Law Reform Commission to create an independent (statutory) offence for which an adult, who used a child during the commission of the offence, could be prosecuted (in addition to any prosecution as perpetrator or accomplice to the original offence, such as housebreaking). Instead, later versions of the Bill (which are not yet publicly available) reportedly contain a clause requiring that the use of a child by an adult during the commission of an offence, be considered as an aggravating factor at the sentencing stage of the adult.

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<sup>9</sup> C Frank and L Muntingh "Children Used by Adults to Commit Crime (CUBAC): Children's Perceptions", *International Labour Organisation*, 2005

<sup>10</sup> See in general De Wet and Swanepoel *Strafreg 4th ed Butterworths and Co 1984*.

As far as an adult “instigator” is concerned, a conviction on the grounds of the doctrine of common purpose, or as an accessory after the fact, is also possible where the actions of the accused adult do not indicate actual participation in the commission of the offence itself, but where such adult “commissioned” the act in question, or has rendered assistance subsequently. A practical example might be where adults wait outside whilst a house is wrongfully broken into, and then assist with the get-away and disposal of the proceeds of the offence.

Even though at common law, the person who conspires with or incites another to commit a crime would in any event be vested with criminal liability himself or herself on the basis that he or she meets the definitional requirement to be convicted either as a co-perpetrator or as an accomplice, prevailing legal uncertainty around the liability of the inciter or conspirator who did not actually participate in the commission of the wrongful act led to statutory intervention as early as 1914.<sup>11</sup> The applicable statute has been redrafted several times, and conspiracy to commit a crime is now punishable in terms of section 18(2) of the Riotous Assemblies Act 17 of 1956.<sup>12</sup> In essence, a prosecution for conspiracy can only succeed if “there is a definite agreement between two persons to commit a crime.”<sup>13</sup> However, the conspirators do not have to know the identity of all the other conspirators, which means that a boss of a gang, whose underlings recruit children for the purposes of committing crime would be liable as a conspirator even though he was unaware of the identity of the children who were actually recruited.<sup>14</sup> Incitement to commit a crime is thus punishable under the Riotous Assemblies Act.<sup>15</sup> The inciter would be convicted either as co-perpetrator or as accomplice to the crime. Originally it was held that an element of persuasion of the perpetrator by the inciter must be present, but this view was overturned in the Appellate Division in 1996, and it is immaterial whether the person at whom the incitement is aimed is susceptible to persuasion.<sup>16</sup> The emphasis is on the conduct of the inciter, not the incitee – therefore, the means used to influence the incitee are not relevant. The inciter must consciously seek to influence another to commit a crime, thus if the incitee lacks culpability (e.g. because he or she is below the minimum age of criminal culpability), the inciter cannot be convicted.

Therefore, South African law, while having provisions that can assist in the investigation and prosecution of adults who use children to commit crime, has not really applied its mind to the particular phenomenon of CUBAC – save for one clause in the Child Justice Bill that has now been changed to state a principle that has always existed, namely, that the use of children by an adult is an aggravating factor in the sentencing of the adult.

From a labour perspective, the South African Constitution (Act 108 of 1996), in section 28 (1)(e) and (f), provides that children under 18 years have a right to be protected from work that is exploitative, hazardous or otherwise inappropriate for their age. The draft South African Child Labour Programme of Action (CLPA) was provisionally approved by representatives from various government departments on 4 September 2003, subject to certain amendments and the costing of the recommended action steps to be implemented by the key government departments. CLPA has identified a wide range of activities that fall under the mandate of various government departments and agencies, some of which are already contained in existing policy and others that are new and will require expenditure and budgets.<sup>17</sup> In doing so, Annexure A of CLPA sets out the actual action steps that have to be undertaken by designated stakeholders including the Departments of Justice (DoJ), Social Development (DoSD), Education (DoE), Labour (DoL), Correctional Services (DoCS) and South African Police Services (SAPS) as well as employers and NGOs. These steps include policy development, public awareness campaigns, collection of data and statistics and training, amongst many others.

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11 *De Wet and Swanepoel op cit at 205.*

12 *C Snyman Criminal Law 4th ed Butterworths publishers Durban at 292.*

13 *Ibid.*

14 *Ibid at 294.*

15 *Section 18(2) which makes it an offence to ‘incite, instigate, command or procure any other person to commit an offence’.*

16 *S v Nkosiyana 1996 (4) SA 655 (A).*

17 *CLPA, 3-4.*



The key elements of CLPA are:<sup>18</sup>

- the rollout of programmes on poverty alleviation, employment, labour, and social matters in areas that involve work that is harmful to children;
- the promotion of new legislative measures aimed at prohibiting the worst forms of child labour;
- the strengthening of national capacity to enforce legislative measures;
- increasing public awareness and social mobilisation against the worst forms of child labour.

One of the worst forms of child labour in South Africa that is identified by CLPA is the instrumental use of children to commit illicit activities by adults or older children (CUBAC).

In relation to children used by adults (or older children), CLPA identified specific action steps concerning children who are used by adults in offending which are set out in recommendations 56-59, namely:

- Regarding the involvement of children in the production and trafficking of drugs and other illegal activities, an important element of investigation and prosecution should be finding and prosecuting adults (or sometimes other children) using the children or benefiting from the children's illegal activities, if any. *Lead institution:* Department of Justice. *Secondary institutions:* National Prosecuting Authority (prosecution of those using children) and SAPS (identification of those using children who are in conflict with the law, and investigating cases against them).
- Where children commit crimes, the diversion of such child offenders away from prison should be the preferred option for children. Where appropriate, prosecution of a child should be converted to a children's court inquiry, after conviction. *Lead institution:* Department of Justice. *Secondary institutions:* Department of Social Development, National Prosecuting Authority (prosecution of those using children, and diversion programmes), SAPS (identification of those using children who are in conflict with the law, and investigation of cases against them).
- Formal education or vocational training should be offered to all children whose sentences involve deprivation of liberty, including those held while awaiting trial. *Lead institution:* Department of Education. *Secondary institution:* Department of Correctional Services.
- Authorities holding children in custody should be allowed to continue requiring of them to work. Work is preferable to children being bored and feeling useless. However, policy should be formulated on when children deprived of their liberty may be required to work, and when such work should be remunerated. This policy should be in line with national and international protective laws on children. *Lead institutions:* Department of Correctional Services, Department of Education (reform schools). *Secondary institution:* Department of Social Development.

It is noteworthy that while CUBAC is seen as a worst form of child labour and for the first time comprehensively dealt with by the CLPA, the action steps and obligations fall on the departments responsible for the criminal justice system.

## The management of the CUBAC phenomenon in South Africa

The programme, Towards the Elimination of the Worst Forms of Child Labour (TECL) is a technical assistance project to the Department of Labour (DoL) and is essentially an executing agency for the Child Labour Programme

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<sup>18</sup> CLPA, 4.

of Action (CLPA). TECL contracted consultants to investigate and design three pilot projects, aimed at addressing activities of children that are likely to adversely affect their development. These pilot projects address the issues that have been identified as worst forms of child labour in South Africa and these include CUBAC.

The pilot projects focusing on CUBAC followed three phases of research - a situation analysis, a baseline study and a child consultation research study. These informed the design of the pilots, which are aimed at ensuring that the activities can be mainstreamed into current policy and practice as well as being sustainable. The activities of the pilots (being run in Mitchell's Plain in the Western Cape and Mamelodi in Gauteng) include the following:

- **Programmatic interventions** - The design of prevention and diversion programme content that is specific to CUBAC to be offered during the pilots to complement ordinary criminal justice practice and mainstream CUBAC into programmatic interventions for children.
- **Assessments and probation officers** - During the baseline study, study participants agreed that in order to identify CUBAC, CUBAC needs to be considered in the assessment procedure. Some participants to the study felt that the assessment form should be changed to include questions that would lead to the identification of CUBAC, whilst others felt that an instruction or directive to probation officers needed to be drafted to ensure that they were mindful of CUBAC during the assessment phase. This directive would also include triggers or indicators of risk to assist probation officers in the identification of CUBAC.
- **Instructions to police and prosecutors** - During the baseline study it became apparent that there was a need for instructions for police and prosecutors relating to the investigation and prosecution of CUBAC cases. These instructions would be official departmental instructions that are mandated by the national and regional offices of SAPS and the NPA.

These are some of the main activities of the pilot projects. The activities have been designed with the provisions of the Child Justice Bill in mind, in that they provide for the assessment of children and the diversion of children away from the criminal justice system. Fortunately, even though the Bill has not been enacted, South Africa's child justice policy and practice makes provision for assessment and diversion and so it was possible to provide for CUBAC within the current framework.

## Can the Child Justice Bill impact on the management of CUBAC?

The answer to this question is essentially a "no-brainer". Of course it can. At present, children who come into conflict with the law are dealt with in terms of the Criminal Procedure Act 51 of 1977. This piece of legislation sets out the procedure to be followed in all cases of accused persons in South African courts and this obviously includes children accused of crimes. The Criminal Procedure Act, however, is not well equipped to manage issues specific to children accused of committing a crime and its provisions are not conducive to the children's rights culture that the CRC and our Constitution aim to create. Therefore, the Child Justice Bill has re-worked the present criminal justice system, as it pertains to children, and has introduced new provisions to address the problems encountered in the field of child justice.

The Bill is aimed at protecting the rights of children accused of committing crimes as well as regulating the system whereby a child is dealt with and ensuring that the roles and responsibilities of all those involved in the process are clearly defined in order to provide effective implementation. The Bill recognises the fact that children do commit serious offences and that they must be held accountable for their actions and take responsibility for the human rights and fundamental freedoms of others. This is achieved through the provision that allows for children to be imprisoned, however only after certain prerequisites have been met.

More importantly, there are a number of provisions in the Child Justice Bill that significantly change the present state of our child justice law and these relate to, *inter alia*, the proposed preliminary inquiry, assessment, diversion and sentencing.

The Child Justice Bill creates a wholly new procedure to facilitate the management of children in conflict with the law, namely, the preliminary inquiry, which makes use of current resources and personnel. This inquiry has a number of objectives which include establishing whether a child can be diverted and if so, identifying a suitable diversion option; determining the release or detention of a child and establishing whether the child should be referred to the children's court to be dealt with in terms of the Child Care Act 74 of 1983 (or in future the Children's Act 38 of 2005).

The Bill also requires that any child who is to appear at a preliminary inquiry must be assessed prior to that appearance, although an assessment can be dispensed with in certain circumstances. An assessment is conducted by a probation officer and it is intended to serve a number of purposes, namely, estimating the age of a child, establishing the prospects for diversion, establishing whether a child is a child in need of care, making recommendations relating to the release or detention of a child and determining steps to be taken in relation to children below ten years of age.

At present there is no legal requirement in criminal justice legislation for the assessment of children who are arrested, although assessments by probation officers do occur in terms of the Probations Services Act 116 of 1991, which falls under the obligations of the Department of Social Development. However, assessments in the present system are not uniformly applied or regulated and delays often occur.

In terms of the proposed legislation, an assessment must occur prior to the child's appearance at the preliminary inquiry and as the preliminary inquiry must occur within 48 hours of arrest, the assessment must occur within that 48 hour period. The result of the assessment is a set of recommendations submitted to the preliminary inquiry magistrate pertaining to the management of the child. This procedure will be invaluable in determining which children can be dealt with outside of the criminal justice system and then ensuring that they realise that opportunity.

As is the case with assessment, diversion does not feature in our criminal justice legislation at present. Despite this, diversion practices have been implemented in some of our courts since the early 1990s. Diversion involves the referral of children away from the criminal courts, where appropriate, in order to serve a number of purposes which include encouraging the child to accept responsibility for his or her actions, allowing the victim to express his or her views on the harm caused, promoting reconciliation between the offender and the victim(s) and community, avoiding stigmatisation of the child and preventing him or her from having a criminal record.

The Child Justice Bill proposes various forms of diversion. These options range from receiving a formal caution or compulsory school attendance order to attendance of a specified programme or referral to a programme with a residential element. As diversion will be used as a means of referring children away from the formal criminal justice system it is of great importance that diversion is properly regulated. Consequently, the Bill sets out certain criteria and minimum standards applicable to diversion programmes to ensure due process protections, the avoidance of harmful or exploitative practices and the inclusion of restorative justice elements, as well as ensuring the development of the child's understanding of the impact of his or her behaviour on others.

The Child Justice Bill is also constructed in such a way as to encourage the use of alternative sentences and allow for the imprisonment of children only as a last resort and for the shortest period of time.

The Bill has sought to address the problems encountered in the field of child justice, as it exists within the framework of current legislation. The effect of the Bill being adopted as legislation will be to revolutionise the criminal

justice system in South Africa in so far as it affects children in conflict with the law. While ensuring that a child's sense of dignity and self-worth are recognised, the Bill also provides for mechanisms that ensure that a child respects the rights of others. In this respect, the formal introduction of diversion and the underlying principles of restorative justice into our child justice system is very exciting. It encompasses the ultimate goal of achieving a system that allows child offenders to participate in a meaningful process of recognising their actions, making amends for them and reducing re-offending.

## Concluding remarks

CUBAC as a category of children within the child justice field is well on its way to being recognised at a national level. In the areas of the pilot sites, activities are underway to ensure that the problem is addressed at provincial and local level. These activities, although initiated through a labour initiative, have been integrated into criminal justice policies and practices. However, it must be borne in mind that child justice in South Africa is still a developing field and that CUBAC is a relatively new issue that role-players must engage with. The enactment and implementation of the Child Justice Bill will ensure a legal framework that encompasses procedural mechanisms to address the situation of all child offenders and that recognises the needs of children in trouble with the law, as well as those who present with special needs such as sex offenders and CUBAC.



# Children in detention pending trial and sentence

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## Introduction

The concern about children in prisons has resulted in a number of initiatives that have reduced the number of incarcerated children. However, concerns about their conditions and treatment in custody remain. This paper looks at the trends regarding children in custody in prisons and in secure care centres over the last decade, and comments on legislative and policy initiatives affecting them over this period. It also highlights the custody conditions and makes recommendations for the future.

## The law enabling detention of children in conflict with the law

The Constitution enshrines the international principle that children should not be detained except as a measure of last resort, and for the shortest amount of time (Section 28(g)). Following concerns about child imprisonment, section 29 of the Correctional Services Act<sup>2</sup> (Act 8 of 1959) was amended in 1994<sup>3</sup> to effectively prohibit pre-trial detention in a police cell or prison of anyone under the age of 18 years beyond 48 hours. However, following difficulties in the implementation of the section,<sup>4</sup> this was amended in 1996 to allow for the extended detention in prison of children who are 14 years or older and who are charged with a scheduled serious offence or in circumstances of such as serious nature as to warrant such detention. The Act provides that such children should be brought before the court every 14 days to enable the court to reconsider the decision to detain the child in prison.<sup>5</sup> The Act therefore anticipates that most children will either be allowed to await trial in the community, or in a secure centre, or reformatory or police cell, rather than a prison.

The amended section 29 contains a savings clause to the effect that it would cease to have any effect a year from its commencement, but that parliament would extend its operation for one further year. This was meant to give the Inter-Ministerial Committee on Young People at Risk (IMC) time to prepare more appropriate facilities and arrangements for children who came into conflict with the law. This they largely failed to do, concentrating instead on prevention and diversion. It was only later towards the expiry date of the section that the Committee sought to deal with this problem.<sup>6</sup> The Child Care Act, which provides for the protection and welfare of children in residential

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1 This paper draws heavily on a previous paper: Camilla Nevill and Amanda Dissel (2006) "Reversing the Trends", Article 40 2006, Vol. 8 No 1.

2 Section 29 of the Correctional Services Act 8 of 1959 was retained, despite the bulk of the Act having been repealed and replaced by the Correctional Services Act 111 of 1998.

3 Amended in terms of the Correctional Services Amendment Act 17 of 1994.

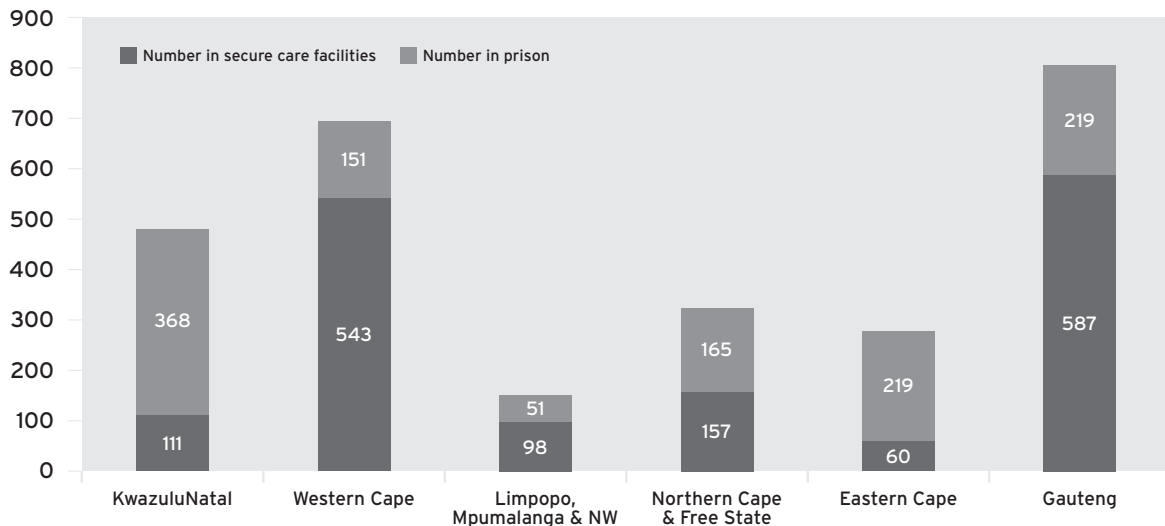
4 See for instance Godfrey Odongo and Jacqui Gallinetti, "The Treatment of Children in South African Prisons - A Report on the Applicable Domestic and International Minimum Standards" 2005, CSPRI Research Paper, no 11, Cape Town.

5 Section 5(a) of Correctional Services Act 14 of 1996.

6 Julia Sloth-Nielsen "A short history of time": Charting the contribution of social development service delivery to enhance child justice 1996- 2006, see para 1 and 2 of this publication.

care, was amended to provide for the establishment of secure care facilities, for the reception and accommodation of children awaiting trial.<sup>7</sup> Such children are accommodated under the auspices of the Department of Social Development (DSD). Children awaiting trial or sentence can now be housed in secure care facilities or a reform school, or in a prison or police cell.

Figure 1: Number of children awaiting trial in prison (as at 07/03/06 n=1173) and in secure care facilities (as at 28/02/06 n=1556) by region



As of 7 March 2006, 2329 children were held in secure care centres and in awaiting trial sections of prisons (Figure 1). Sixty seven percent of these children were held in secure care centres under the auspices of the Department of Social Development (DSD), and 33% in prisons under the authority of the Department of Correctional Services (DCS), the majority of children being held in Gauteng and the Western Cape. While it is encouraging that more children were held in more appropriate secure care centres, this was not the case in KwaZulu-Natal, Northern Cape/Free State and Eastern Cape. Unfortunately, since statistics on children awaiting trial in police cells were not available to the researchers, it was not possible to obtain a global perspective of the numbers of children in custody at the time of writing.

## International instruments establishing the principles governing children in custody

Before examining the extent and circumstances of children in custody, it is worthwhile to remind ourselves of the international and local standards. A number of international instruments and guidelines establish the principles that should govern children who have been deprived of their liberty. These provide that children should be detained as a measure of last resort and for the shortest possible time. Where a child is detained they should be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.<sup>8</sup> The UN Rules for the Protection of Juveniles Deprived of their Liberty provides that detention of children pending trial should be limited to exceptional circumstances and where used, the investigation of cases against such children should be expedited so as to ensure the shortest possible duration of detention.<sup>9</sup> Children should be kept separate from adults, and detention should have regard to the

<sup>7</sup> Section 28A of Act 74 of 1983 [as amended by the Child Care Amendment Bill, B 14B- 99].

<sup>8</sup> Art 37(c) of the United Nations Convention on the Rights of the Child.

<sup>9</sup> Rule 17 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, General Assembly Resolution 45/113 of 14 December 1990.

particular needs, status and requirements of juveniles according to their age, personality, sex and type of offence, as well as mental and physical health. Detention should also provide the type of care best suited to the individual needs of the juvenile for the protection of his or her physical, mental and moral integrity and well-being.<sup>10</sup> Further standards are provided regarding their treatment, exercise, education, vocational development and access to families. Section 54 of the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines)<sup>11</sup> provides that no child or young person should be subjected to harsh or degrading correction or punishment at home, in schools or other institutions. In addition, the Standard Minimum Rules for the Treatment of Prisoners applies to children in custody as well.<sup>12</sup>

International principles also refer to the provision of compulsory education for those of school going age as well as access to education and vocational training for other children is also provided for. Juveniles should be entitled to a suitable amount of time of daily exercise. They should have the right to remain in contact with their family through correspondence and visits, save in exceptional circumstances.<sup>13</sup> The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) recommends that detention in open facilities for juveniles should be established (those with no or minimal security measures). Where children are held in closed facilities, it is specified that the numbers of children so accommodated should consist of small enough numbers to allow for individualised treatment. The Rules also give specific reference to the standards of accommodation, recognising the need for stimulation of children, the right to keep personal effects, wearing of own clothing and serving of appropriate meals at regular meal times. Importantly, it requires that juveniles (under the age of 18 years) receive unobtrusive supervision at night time. The Rules set out detailed standards to their recreation, educational and vocational training, contact with their community, and a range of other provisions.

The South African Constitution guarantees the basic rights of individuals as well as the rights of all arrested, accused and detained persons. In relation to children it confirms the principle that children should only be held as a measure of last resort, or the shortest appropriate time, and then to be treated in a manner, and kept in conditions, that take account of the child's age.<sup>14</sup>

## Children awaiting trial in secure care centres

Secure care facilities, which fall under the Department of Social Development, offer a less restrictive residential alternative (in comparison to prison) where children cannot be released into the care of their parents or guardian. The Child Care Act 74 of 1983 (Section 28A) provided for the establishment of institutions for the reception of children and for their treatment and accommodation in places of safety, reform schools and secure care centres. Although the Act specifically identified secure care centres as places for children awaiting trial and sentence, they may also be held in the other institutions. Since these children have been deprived of their liberty, the international standards discussed above apply. The legislation also provides that these institutions may be run by private entities. However, this legislation has been repealed by the Children's Act of 2005 (not yet promulgated), but new measures dealing with children in secure care facilities have not yet been put in place.<sup>15</sup>

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<sup>10</sup> *The United Nations Rules for the Protection of Juveniles Deprived of their Liberty, General Assembly Resolution 45/113 of 14 December 1990.*

<sup>11</sup> *U.N. Doc. A/45/49(1990).*

<sup>12</sup> *Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its Resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.*

<sup>13</sup> *United Nations Convention on the Rights of the Child, 1989, article 37(c).*

<sup>14</sup> *Section 28(1)(g) of the Constitution of South Africa, Act 108 of 1996.*

<sup>15</sup> *An amendment to the Act dealing with these provisions is currently being debated by the provincial legislatures.*

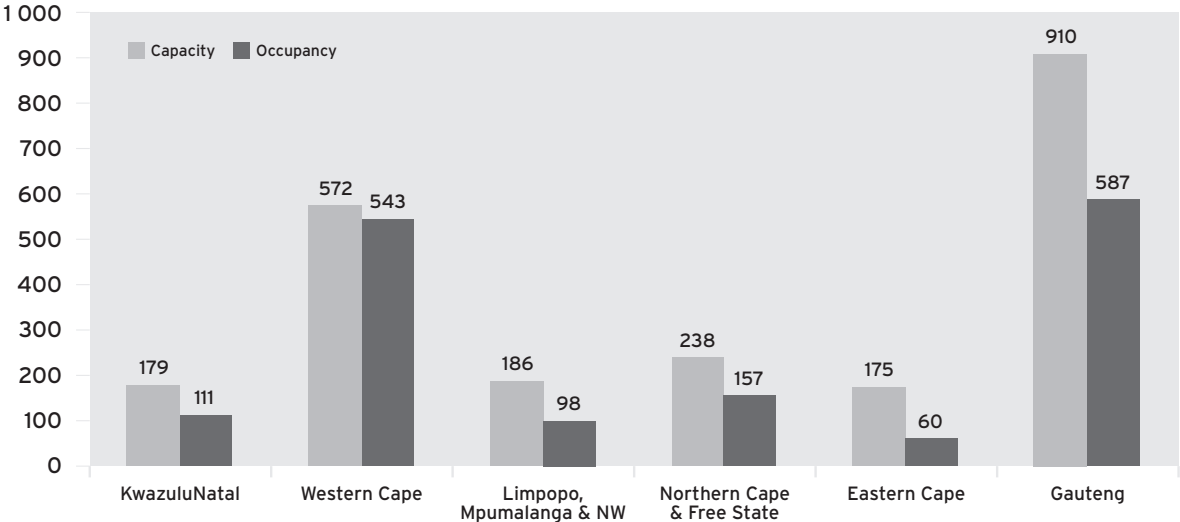


The Regulations to the Child Care Act outline some limited provisions regarding children's treatment in these centres, but more detailed standards are set out in the Minimum Standards for the South African Child and Youth Care System (May 1998) developed by the Department of Social Development. These standards provide that children should live in a safe, healthy, well-maintained environment which provides appropriate access to the community and which meets their needs in terms of privacy, safety and well-being. The minimum standards cover nutrition and health, discipline, contact with families, emotional development opportunities, health care, etc.

Although the majority of awaiting trial children are now held in secure care centres rather than in prisons, the statistics indicate that the former facilities are not fully utilised. According to the DSD only 71% of the 2 199 secure care beds available were in use on the 28th of February 2006.<sup>16</sup> This indicates that potentially another 643 children could have been accommodated in secure care facilities rather than in prison.

The capacity and occupancy of secure care beds varies from region to region (Figure 2). Only the Western Cape is close to using its full capacity of 572 secure care beds (95% occupancy). Interestingly the Eastern Cape, despite having a shorter average awaiting trial period, has a small number of secure care beds and is only using 34% of these. This is due to staffing problems resulting in the non-utilisation of one facility. Another facility is being built, but is only expected to be occupied by the end of 2006.<sup>17</sup> The DSD intends to construct four new facilities in the Eastern Cape in order to increase its capacity by 230 places. However, if this comes into effect there will be greater capacity than needed (only 235 children were in custody in prisons and secure care centres at the time of this study), and that these will soon be filled up as more magistrates may be willing to send children to these facilities awaiting trial than to release them through non-custodial measures.<sup>18</sup> Alternatively, these facilities may be used to hold children from other areas, conflicting with the principle of holding children as near to their homes as possible.

Figure 2: Capacity and occupancy of secure care beds by region on the 28th of February 2006



16 Department of Social Services Secure Care Status Report, 2006.  
 17 Dolly Ngqangweni, "Update on the Eastern Cape Probation Unit", Article 40 2006, Vol. 8, No 1.  
 18 Ibid.

The DSD reported that courts do not tend to refer children to secure care facilities in certain regions. The DSD identified problems related to magistrates who believe that children should await trial in correctional centres, and prosecutors who are reluctant to accept recommendations from probation officers to send children to secure care centres.<sup>19</sup> This situation is more likely to occur in a situation where a child is charged with either aggressive or sexual offences (57% of the children awaiting trial on the 7th of March 2006). Other reasons identified by the DSD for empty beds in secure care facilities include lack of resources for transporting children to secure care facilities, and structural issues.

In 1996 the Inter-Ministerial Committee on Young People at Risk (IMC) produced a damning report on the state of residential child care facilities, which gave rise to such initiatives as the development of minimum standards for the Child and Youth Care System in 1998. However, there have been no recent reports on conditions in these facilities so it is difficult to evaluate the impact of this policy.

## Children awaiting trial in prison

Although awaiting trial child prisoners are decreasing, there are still large numbers of them being held in prisons, and it is therefore important to look at the policy governing such children, as well as the population trends.

The new Correctional Services Act 111 of 1998 outlines the basic rights pertaining to all prisoners in order to ensure that all prisoners are detained in safe custody whilst ensuring their human dignity. The provisions pertaining to accommodation, nutrition, hygiene, exercise and health are set out in the Act. It contains only limited reference to specific needs of children save to say that every child who is subject to compulsory education must attend and have access to educational programmes, and other children should have access to these programmes. It also provides that children should be provided with social work, religious care, recreational programmes and psychological services. In addition, the Commissioner of the Correctional Services must ensure that children remain in contact with their families through additional visits and other means.<sup>20</sup> These provisions apply to both sentenced and unsentenced children.

Awaiting trial prisoners were specifically excluded by the latest White Paper on Correctional Services,<sup>21</sup> as the DCS is of the view that the responsibility for these prisoners should be shifted to another State department (such as the Department of Justice and Constitutional Development, or the Department of Safety and Security). However, the White Paper notes that children, and specifically those under the age of 14 years, should not be in correctional centres and as far as possible should be diverted from the criminal justice system, or held in alternative centres under the auspices of the Department of Social Development or the Department of Education.<sup>22</sup> It also states that children must at all times be separated from adults, and specifically trained staff and specially designed facilities should be available to children. It also recommends the adoption of the UN Rules for the Protection of Juveniles Deprived of their Liberty as the minimum standards with which the correctional centres should comply.

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<sup>19</sup> Department of Social Services Secure Care Status Report, 2006.

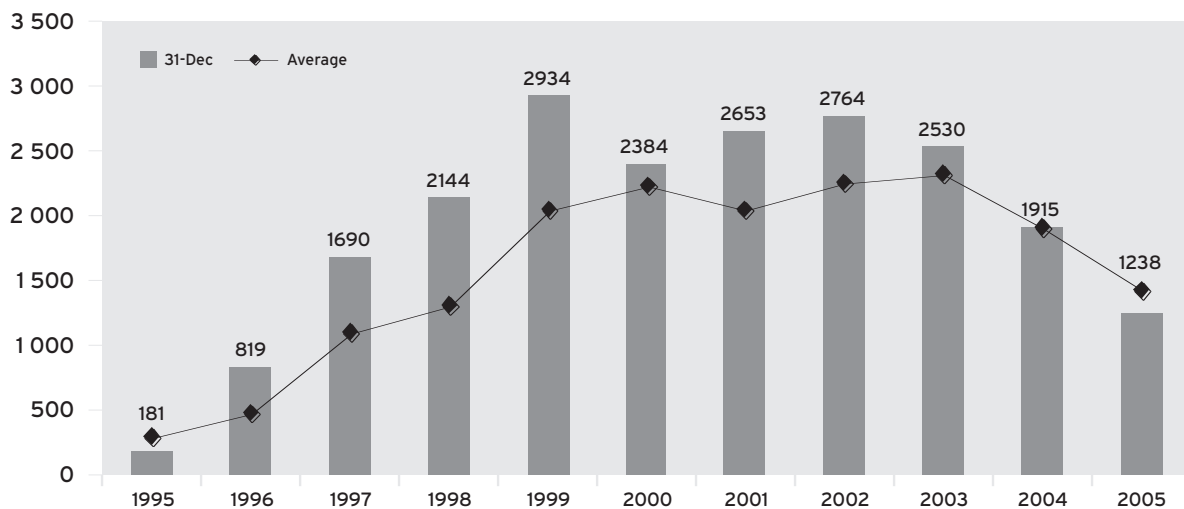
<sup>20</sup> Section 19.

<sup>21</sup> Department of Correctional Services, 2005.

<sup>22</sup> Paragraph 11.2.

## Trends for children awaiting trial in prison

Figure 3: Children awaiting trial in prison: 1995 to 2005



The number of children awaiting trial in prisons has been decreasing steadily after reaching its peak between 1999 and 2002. The proportion of the total unsentenced prison population that constitute children has decreased from a high of 4.2% in 2003<sup>23</sup> to less than 3% in 2005. This reduction can largely be attributed to the Interim National Protocol for the Management of Children Awaiting Trial that was agreed to by parliament in 2002 and follows the principles outlined in the Child Justice Bill.

However, despite this recent success there is still a long way to go before South Africa comes into line with its own Constitution and international instruments that require that children should only be detained as a measure last of resort and for the shortest period of time.<sup>24</sup> DCS statistics on 31 March 2006 showed that there are still more unsentenced than sentenced children in prison with 52% of the total child prison population being children awaiting trial (Figure 4).<sup>25</sup> Comparatively, only 31% of the total adult<sup>26</sup> prison population is awaiting trial. These figures show that despite recent efforts children's cases are still not being processed at an acceptable rate and are hampered by ongoing delays.

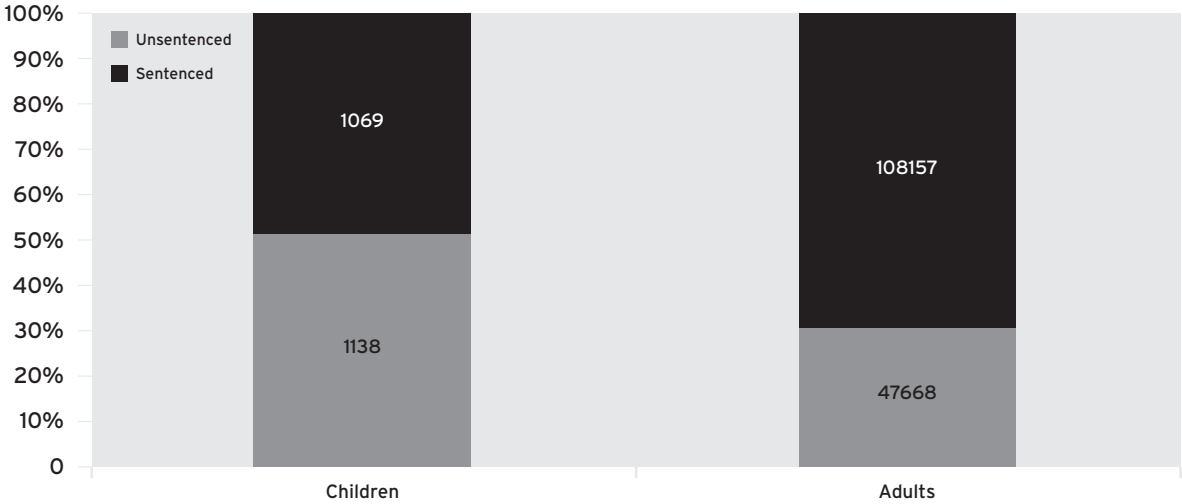
<sup>23</sup> *Muntingh (December, 2003) reported that children constituted 7.8% of the total awaiting-trial prisoner population in South Africa.*

<sup>24</sup> *See for instance Section 28(1)(g) of the Constitution of the Republic of South Africa, 1996, and Article 37(c) of the Convention of the Rights of the Child.*

<sup>25</sup> *Department of Correctional Services statistics, courtesy of the Judicial Inspectorate of Prisons.*

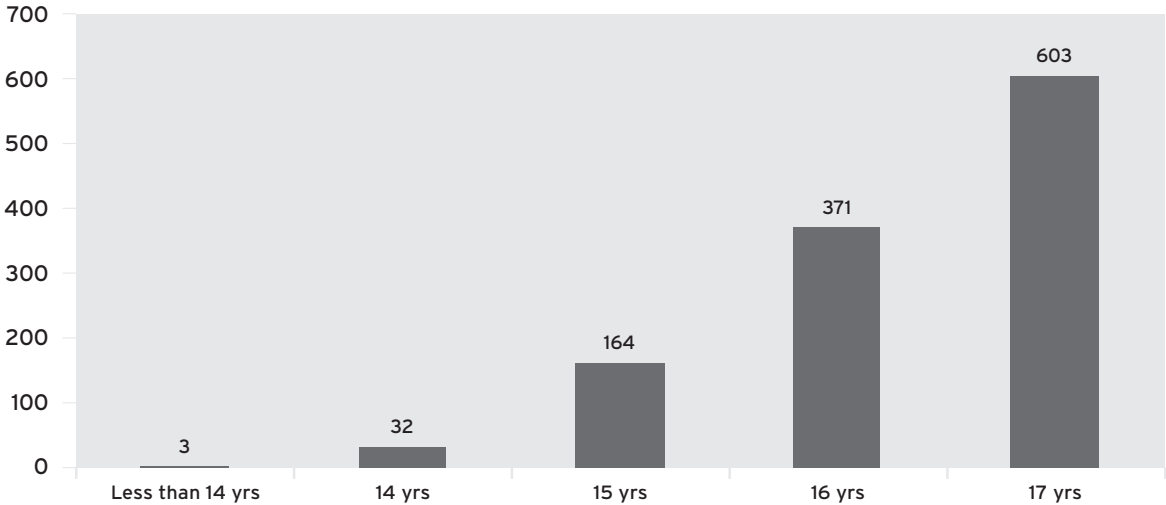
<sup>26</sup> *Adult refers here to those aged 18 years and over.*

Figure 4: Proportion of unsentenced to sentenced prisoners on the 31st of March 2006



Despite the Correctional Services Act prohibiting the detention of children under the age of 14 years, there are still small numbers of very young children being held awaiting trial. According to a recent name list of children in prisons on 7 March 2006, obtained from the Judicial Inspectorate of the Prisons, there were three children under the age of 14 years, and 35 children under the age of 15 years being held awaiting trial (Figure 5).<sup>27</sup> It is also unsatisfactory that so many 14-year-olds are being held in prisons rather than child-friendly secure care facilities.

Figure 5: Age profile of children awaiting trial on the 7th of March 2006

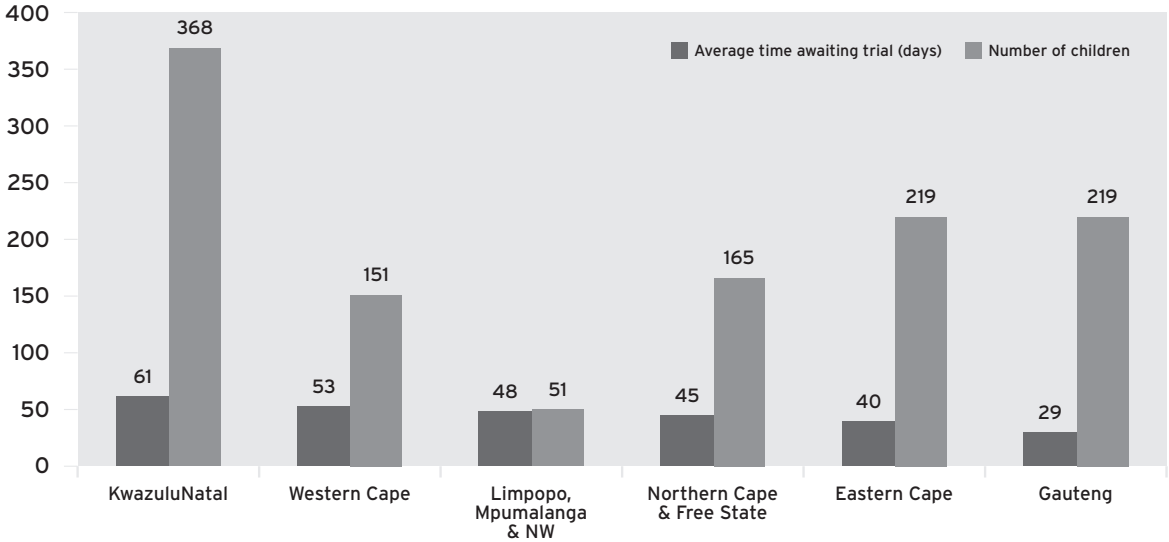


<sup>27</sup> The source of the name list is information captured on a daily basis at the 238 prisons. The information changes every day as prisoners are released and new ones admitted. Therefore, data extracted from this name list and used in this article should be perceived as giving an indication of the current situation rather than being definitive.

Even more worrying is the length of time children are being held awaiting trial in prison. On the 7th of March 2006 the average length of time that the 1 173 unsentenced children held on that date had been awaiting trial was 48.8 days - almost seven weeks. However, some children are being held for much longer periods of time. On the same date, 21 unsentenced children had been held for over one year and one child had been held awaiting trial in prison for 1 922 days - over five years.<sup>28</sup>

However, the average length of time children have been awaiting trial differs regionally (Figure 6). KwaZulu-Natal, as well as having the largest number of children awaiting trial on 7 March 2006 of any region, also recorded the longest average length of time (60.5 days) that children have been awaiting trial. The Eastern Cape recorded a much lower average awaiting trial time (39.7 days), despite having the second largest number of children awaiting trial in prison. This could be attributed to local interventions such as the one stop child justice centre based in Port Elizabeth. Gauteng region records the shortest average length of time that children have been awaiting trial (29.3 days).<sup>29</sup>

Figure 6: Number of children and the average length of time (days) they have been awaiting trial in prison in different regions on the 7th of March 2006 (N=870)

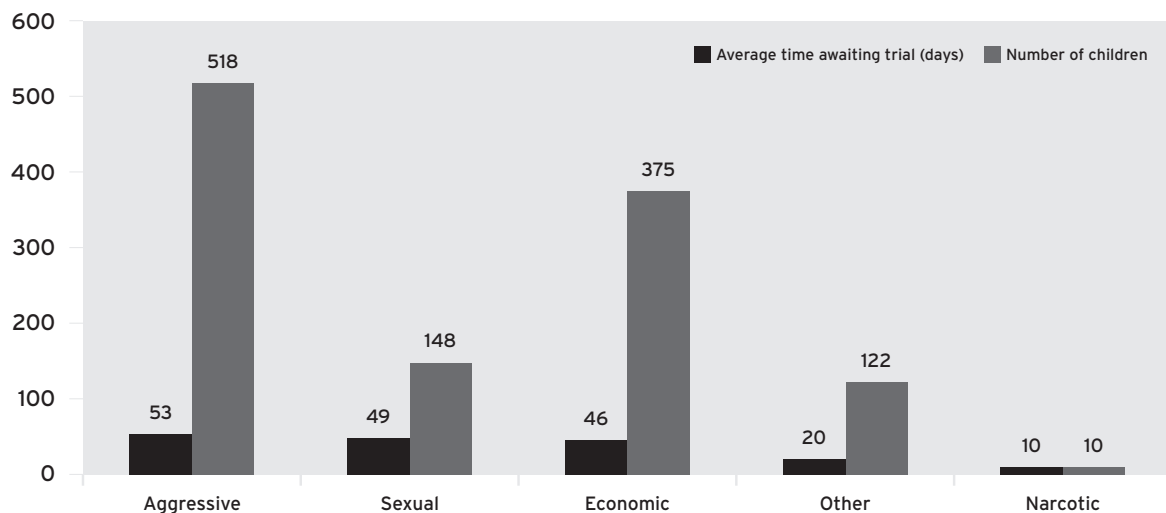


The crime or crimes that children are charged with also has an impact upon the length of time they should expect to be awaiting trial. Just under half (44%) of children held awaiting trial in prisons on the 7th of March 2006 were charged with aggressive crimes. As would be expected, children accused of aggressive or sexual crimes had spent the longest period of time awaiting trial, with average times of 52.7 and 48.8 days respectively (Figure 7). This could be due to the cases being more complex as well as the severity of the alleged crime increasing the likelihood that a magistrate will keep a child imprisoned on the basis of section 29 of the Correctional Services Act. This may also reflect the longer time needed to complete trials, as well as backlogs experienced at regional and high court level, where more of the serious crimes are likely to be heard.

28 This assumes that the date of the child's arrest given on the prison name list is correct.

29 Length of time awaiting trial was calculated by subtracting the arrest date from the date of the name list (7th March 2006). Any children, who had no date of arrest given on the name list, or a date in the future, were excluded from the calculations of average time spent awaiting trial. However, in Gauteng only 39% of the children on the name list had an arrest date given or one that was not in the future. Therefore the average given for Gauteng is less accurate than that for the other five regions. This data is based on an analysis of 870 of the total of 1 173 children in custody at the time of writing.

Figure 7: Number of children and the average length of time (days) they had been awaiting trial in prison by crime type on 7th of March 2006 (N=1173)



## Conditions in prison

While it is encouraging to note that the numbers of children in prison has reduced, the overall conditions in prisons have not been substantially altered. The mass release of prisoners in 2005 left awaiting trial numbers unaffected.<sup>30</sup> There has been much criticism over the state of our overcrowded prisons in the last few years, and reports indicate that the conditions for awaiting trial prisoners are especially severe.<sup>31</sup>

The Johannesburg Attorney's Association, which visited Johannesburg prison on 19 December 2005, commented on the conditions for awaiting trial juveniles held in Medium A prison. The report noted that there were seven correctional officers allocated to the 813 juveniles (up to the age of 21 years) accommodated in the section – a ratio of 1 warder to 116 inmates.<sup>32</sup> There were 21 children being held in this section in March 2006. The report also indicates the presence of adults in the prison who had lied about their age in order to secure better conditions for themselves. This gives lie to the principle of separation according to age categories. The accommodation at the time was crowded, with approximately 70 juveniles being held in communal cells, sleeping four people to a “double bed”. Each cell contains only one toilet, two basins, and two showers. Although medical attention was readily accessible, infections such as scabies were rife because of the conditions under which the prisoners were detained. It was also noted that blankets on the beds were covered in fleas. There were no reports of abuse, though prisoners spoke of inmates being sold for sex to other prisoners with the assistance (and apparent profit) of correctional officials. Drugs and other favours were also exchanged for sex. Juveniles complained that they were disciplined by being made to do physical exercise, such as push ups. Although the Correctional Services Act provides for access to developmental opportunities for all children, no rehabilitation services were available to the prisoners, and it was felt that the conditions were more conducive to the hardening of attitudes, rather than rehabilitation. Education was available to prisoners, though the DCS seemed unable to assist them to study for Matric due to the limited subject choices available to student prisoners. In contravention of the law allowing

<sup>30</sup> 31 856 sentenced prisoners were released from prison between July and September 2005 following a special remission of sentence that was granted by the Minister of Correctional Services. Department of Correctional Services Budget Vote, 20 March 2006.

<sup>31</sup> See for instance the annual reports of the Judicial Inspectorate of Prisons, accessible on <http://judicialinsp.pwv.gov.za>.

<sup>32</sup> The total prison population of Johannesburg Correctional Centre stands at 11 472 prisoners, which is 222% of the approved lock-up numbers in December 2005. It is one of the most overcrowded prisons in the country.

prisoners at least one hour of daily exercise in the open air,<sup>33</sup> juveniles in this section were only allowed out of their cells once a week, and there were no recreation facilities available to them. Visits with families were restricted to weekly visits of 10 minutes each.<sup>34</sup>

Since the report does not specify whether that children experience conditions any different to those described above, we can assume that they live under the same regime, although most likely the children were accommodated in a separate cell within the juvenile section, as is the common practice and the law.

The shocking nature of this report is heightened when one compares the conditions for juveniles awaiting trial (technically innocent in the eyes of the law) with those for sentenced juveniles in the same prison (Medium C). The Attorneys' Association reported that in December there were 587 sentenced juveniles held in a section with 121 warders (1 warder to 4.85 prisoners), even though the section was 194% occupied. Most prisoners were held in single cells, accommodating two or three prisoners, but there was one communal cell accommodating 12 prisoners. Overall, the conditions were reported to be neat and clean, with medical services provided once a week. Hardly any infectious diseases were reported among the juveniles, and those on special diets received them. There was no visible sign of physical or sexual abuse, and inmates appeared to be respectful of warders. There were few complaints from prisoners. Rehabilitation services were provided for, with one full time educationalist employed in the section, and other staff to provide other services. Prisoners had access to plenty of outside exercise after breakfast and lunch and prisoners could play soccer and outdoors sports. There was also a pool table and table-tennis table provided. However, correctional officials expressed their concern that the benefits of this environment were undone when juveniles reached the age of majority and were transferred to adult sections of the prison. The provision of food had been outsourced to a private entity, and their kitchen had been voted the best kitchen in the country.<sup>35</sup>

While this represents only one prison among many in the country, it is an indication of the completely different mindsets and practice governing the regime of awaiting trial prisoners and those who are sentenced. Despite the explicit protections afforded to children in our existing law and policy, and the established principle that un-sentenced prisoners should be subject to a less harsh regime, these are routinely neglected. While it is recognised that even the conditions for sentenced prisoners are less than ideal, they are in stark contrast to those of the awaiting trial children who have not yet been found guilty of any crime.

## Recommendations

The political commitment to reducing the numbers of children in custody, provided by President Mbeki,<sup>36</sup> and the identification of national priorities of the ministries of Social Development, Justice and Correctional Services, ensured that the coordinated efforts of stakeholders has proven effective in reducing the numbers of children in prison. However, there is still some way to go. It is important to continue to monitor the number of children in custody in various institutions over time, so that measures can be taken to reduce numbers, but also so that the reasons for any changes can be properly attributed and understood. A proper system for tracking the national statistics on children in police custody also needs to be put in place.

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<sup>33</sup> Section 11 of Act 111 of 1998.

<sup>34</sup> Kevin Hacker Prison Report 2005. Johannesburg Attorney's Association. 12 - 13.

<sup>35</sup> *Ibid.*

<sup>36</sup> President Thabo Mbeki. State of the Nation Address of the President of South Africa, Thabo Mbeki: Joint Sitting of Parliament, 3 February 2006, <http://www.info.gov.za/speeches/2006/06020310531001.htm>. accessed on 7 October 2006

The seemingly forgotten Child Justice Bill aims to complete the framework of new legislation dealing with the rights and treatment of children. In dealing with children in conflict with the law, it promotes the release of children arrested pending trial, but recognises that in some instances sustained detention may be necessary for children 14 years or older, either in a police cell, place of safety, secure care centre, or prison. While this is so, it is important to ensure that detention in prisons is only left as a last resort, where no other accommodation is available. Children should instead be held in suitably child-friendly environments as are provided for by the child justice and child welfare systems, under the control or oversight of the Department of Social Development.

This requires that a suitable number and spread of facilities are available nationwide, so as to accommodate children as near to their homes and the presiding court as possible. To facilitate this, the Department of Social Development is planning for the establishment of 11 new centres across the country.

In order to continue the trend of reducing numbers, it is vital that magistrates become more familiar with non-custodial options for youth pending trial, and these should be strengthened where they exist.

The Children's Amendment Bill<sup>37</sup> provides for the establishment, or conversion of secure care centres into child and youth care facilities for children awaiting trial and sentence, and makes these subject to the minimum norms and standards of the Child and Youth Care System as prescribed.<sup>38</sup> Although standards have also been developed in Correctional Services and in respect of the police, it is important to ensure that similar standards apply across the sectors. There also needs to be regular monitoring and reporting on compliance with the standards in all the facilities that accommodate children, especially secure care facilities which now constitute the primary mechanism for the detention of children. However, in addition to internal oversight, it is also important that this information is more accessible in the public domain, and particularly for the courts which refer children to them on a daily basis.

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<sup>37</sup> *Introduced in the National Council of Provinces as a section 76 Bill, published in the Government Gazette No.29030 of 14 July 2006.*

<sup>38</sup> *Section 209.*





# Children's involvement in gangs and violent crime

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Security Studies

## The COAV Cities Project and its implications for South Africa

### Introduction<sup>2</sup>

"Children in organised armed violence" (COAV) is an awkward concept in the current child rights discourse. It does not fit within the neat categories that have been established, and may not be defined either as child offending or as relating to children in armed conflict. Yet, it is a real and demonstrated phenomenon.

In 2003/04, the Institute for Security Studies (ISS) collaborated in a 10-country study to explore this issue.<sup>3</sup> The study explored the experiences of ten countries in this regard and described a phenomenon that had, up to that time, not been identified as a specific problem within the international human rights arena. The research in South Africa focused on the issue of gangs in Cape Town.

In 2005/06, the ISS and RAPCAN<sup>4</sup> collaborated to co-ordinate the COAV Cities Project<sup>5</sup>, a one-year intervention intended to focus on developing solutions to the unique problems relating to COAV experienced in Cape Town.

This paper provides an overview of the findings of the original 10-country study, as well as the work undertaken thus far in Cape Town in relation to the COAV Cities Project. This paper also reflects on the discussion and recommendations that have emerged thus far, and assesses the implications of this project for South Africa.

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1 This paper is adapted from an article originally published in SA Crime Quarterly. C Frank. "Young Guns: Children in Organised Armed Violence", 2005, SA Crime Quarterly, No. 14.

2 Cheryl Frank is the Director of RAPCAN. The COAV project is co-ordinated in South Africa as a joint initiative between RAPCAN and the Institute for Security Studies (ISS).

3 L Dowdney (ed) Neither War nor Peace. International Comparisons of Children and Youth in Organised Armed Violence, 2004, ISER/IANSA/Viva Rio.

4 RAPCAN (Resources Aimed at the Prevention of Child Abuse and Neglect) is a children's rights organisation based in Cape Town. It undertakes direct work with children, provides training and capacity building, produces a range of children's rights resources and also undertakes research and advocacy relating to specific children's rights issues.

5 The progress of this international project is documented on the COAV website at [www.coav.org.br](http://www.coav.org.br)

## Children in Organised Armed Violence (COAV)

The idea of “children in organised armed violence” is a relatively new one, and was coined to describe the situation demonstrated by earlier work undertaken by a Brazilian NGO, Viva Rio, in Rio de Janeiro.<sup>6</sup> For the purposes of the 10-country study, which sought to describe and analyse the phenomenon in more depth, the term was intended to describe “children and youth employed or otherwise participating in organised armed violence where there are elements of a command structure and power over territory, local population or resources”.<sup>7</sup>

### The ten-country study<sup>8</sup>

The ten countries that were examined in the study were Brazil (*drug factions* operating in poor communities known as *favelas*), Colombia (criminal groups operating in poor communities known as *bandas delincuentes* that relate to larger para-military organisations), Ecuador (local urban youth gangs called *pandillas*, and organised national youth gangs known as *naciones*), El Salvador and Honduras (organised youth gangs known as *maras* and *pandillas*), Jamaica (area gangs and corner gangs), Nigeria (armed vigilante groups and ethnic militias), the Philippines (civilian vigilante groups), South Africa (street gangs), and the United States of America (institutionalised street gangs).

The discussion that follows describes the findings of the ten-country study, with a particular focus on the children that became involved in organised armed groups.

#### CONTEXTS OF ORGANISED ARMED GROUPS, STRUCTURE AND HISTORY

The first part of the study was dedicated to describing the nature, structure and history of the armed groups identified for the study. An interesting fact noted is that in eight of the ten countries studied, the armed groups did not have criminal origins, although all were involved in criminal activities at the time of the research. Groups initially formed around a range of purposes including the protection of neighbourhoods, and even the development of the community. The study argues that external factors prompted the shift of these armed groups towards becoming violent (or more violent), and towards criminal activities. The two primary external factors enumerated by the study were illicit drugs and access to firearms.

Involvement in informal and illicit economies was noted to be a feature of all the armed groups that were studied. Crime was noted to be the most common form of economic gain with offences such as armed robberies, robbery, car theft and kidnapping being reported from the ten countries. Involvement in the drug trade was noted in relation to nine of the ten groups studied. In two cases it was noted that armed groups obtained economic benefit by extorting protection money from community residents. In two countries (Colombia and South Africa), it was reported that armed groups made efforts to engage in or control legal business interests. In five cases (Brazil, Colombia, Nigeria, South Africa<sup>9</sup> and Ecuador), armed groups were noted to pay members fixed salaries, primarily for armed services.

All of the groups studied were involved in armed violence. In eight of the countries, this was noted to relate to territorial disputes with rival groups, and in seven countries, armed violence was reported in relation to rivalry with opposing groups. Armed groups in five of the countries reported participation in vigilantism and/or carrying out executions. Armed groups in four countries were reported to participate in armed confrontation with state forces.

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6 LT Dowdney “Children of the Drug Trade: A Case Study of Organised Armed Violence in Rio de Janeiro” 2003 Viva Rio/ISER, Rio de Janeiro.

7 L Dowdney, 2004, *op cit*, 15.

8 The full study may be accessed at <http://www.coav.org.br>

9 Payment for services was noted to take place during times of “war” with rival gangs, and where hit men were paid a fixed monthly salary of R1 000,00.

The study found that there were significant commonalities in the contexts within which the armed groups in question operated. Generally, these geographical areas were found to be primarily urban, and more specifically, communities that could be described as poor and underdeveloped. These communities were noted to be distinct from the larger urban areas that surrounded them. These areas were also found to have high population densities, as well as high percentages of children and youth in these populations. Another feature of these areas was that while there were high expectations for youth to engage in work, these areas offered relatively few opportunities for employment.

In terms of structure, six of the ten groups studied were found to have a quasi-military, hierarchical structure, with a ranking system for members. Many of the institutionalised street gangs in the study were found to have a formalised structure. In two countries, an informal horizontal structure was noted.

The armed groups studied, mostly had a relatively long history. In six out of the ten locations, the armed groups were noted to have originated before or during the 1970s. Four out of the ten groups were noted as defining themselves in terms of ethnicity or clan allegiance.

All the armed groups studied were observed to be territorial in nature, defining their territories on neighbourhood, clan or ethnic lines. Dowdney identified two categories of group characteristics that influenced relationships with the community. Firstly, in six out of the ten countries studied, the armed groups did not carry arms openly in the community, although they did use weapons when confronting rival groups. In these cases, the research found that although community members reported fear of these groups, they were generally free to move between rival group territories. Generally, if non-involved community people stayed away from armed groups, they were left alone. In the second instance, representing the experiences of four out of the ten countries, these groups were openly armed and their activities included armed patrols in their territories.

The study distinguished between two types of relationships between government officials and the armed groups, direct and indirect. In seven of the ten countries studied, government officials were noted to have an indirect involvement in the activities of the groups. This primarily related to police officers and their indirect role was noted to include such activities as selling guns to group members, taking bribes from group members and selling confiscated drugs back to group members.

In the remaining three countries in the study, the direct relationship noted was between the armed groups and government officials through working together (in the case of the Philippines) and the provision of direct support such as in Nigeria, where local government authorities use armed group members (the Oodna People's Congress (OPC) boys) to help collect local taxes. 10-20% of the taxes were noted to go to the local council, with the rest staying with the OPC boys.

The study noted the following risk factors as being common to the emergence and continued existence of organised armed groups:

- Urban enclaves of poverty;
- High percentages of youth, disproportionately low levels of education and disproportionately high levels of unemployment;
- Limited or differentiated State presence;
- State corruption;
- Violent state apparatus;
- Access to illicit economies;
- Access to small arms.

## THE CHILDREN INVOLVED IN ORGANISED ARMED GROUPS<sup>10</sup>

Amongst the common features shared by the children in the organised armed groups studied, single-parent families were noted to be a striking feature. Violence in the home, poor relationships within the family and overcrowded housing were also noted. In terms of education, the main issue of commonality was that children had dropped out of school either immediately before or after joining their respective armed groups. Poverty was noted to be a factor relating to children dropping out of school, either because they could not pay school fees or due to the fact that they dropped out of school in order to work. Another trend noted was that these children generally did not see school as worthwhile, as it was considered unlikely that schooling would lead to a job.

Children were found to have become members of armed groups at a relatively young age (at an average age of 13 years and 6 months), and it was also found that the age of recruitment to these armed groups was decreasing. The process of “recruitment” into armed groups was demonstrated to be a gradual process, rather than an event. This was characterised by children’s initial exposure to these groups in their neighbourhoods, and their introduction to the group, most often, by a family member or friend.

The research also explored with children the question of why they joined armed groups. The responses received included: poverty, access to consumer goods, lack of alternatives, access to guns, status and girls, preference for spending time on the street with others in the armed groups which offered friendship and surrogate families, and revenge.

The study found that children gained access to arms at a very young age (on attaining full membership of the armed group), at an average age of 13 years and 6 months. In some cases, children were provided with training relating to the use of arms. The children who became active in gangs were reported to routinely witness armed violence and death, while most of the children reported having been shot at or actually hit by gunfire. Children from all the countries that were examined reported that they shoot at and kill other people.

In discussing the issue of leaving armed groups, it was noted by children across the ten countries that this could be a dangerous undertaking, and may involve a number of complications. However, in most cases, it was noted that if done in the correct manner, it is possible.

In assessing trends in government responses to children’s involvement in organised armed groups, the study found that in most of the countries examined, governments used repressive approaches to deal with children in these groups.

## The COAV Cities Project

### BACKGROUND TO THE PROJECT

The COAV Cities project was established with the intention of engaging five cities in the development of policy recommendations for more effective responses to children’s engagement in organised armed violence. At the outset, the cities involved were Cape Town, Medellin (Colombia), New York City (United States), Niteroi (Brazil) and Zacatecoluca (El Salvador).

The primary methodology adopted for this process was a series of workshops in each city involving government representatives, researchers, practitioners and others with the intention of developing recommendations for responding to children’s engagement in organised armed groups.

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<sup>10</sup> It should be noted that the analysis provided is based on a relatively small sample (i.e. 120 children, 111 boys and 9 girls).

In Cape Town, the following issues were identified for debate:

- Research and information relating to gangs
- The role of the criminal justice system in responding to gangs and youth violence
- Law reform
- The role of social services in responding to gangs and youth violence
- Prevention, intervention and exit programmes

Apart from these planned discussions, the COAV Cities Project in Cape Town also commissioned a child consultation study. The intention of this study was to engage children in developing recommendations as to how to address the problem of children's involvement in gangs and violence. 300 children (in schools, institutional settings and community settings) were engaged in the study that was conducted by the Human Sciences Research Council.

Four of the above workshops had been held at the time of writing. Observations from these workshops are presented below.

#### PROJECT OBSERVATIONS THUS FAR

##### *Relevance of the issue in South Africa*

While the project had been focused on the issue of gangs in Cape Town, it was immediately apparent that the work being done would be applicable beyond the phenomenon of gangs in the Western Cape. This was so because the kinds of risk factors identified through the original study, as well as recent research findings relating to the issue of children used by adults to commit crime,<sup>11</sup> indicate that this issue may apply far more broadly.

##### *Law enforcement is the dominant approach*

As was found in the ten-country study discussed earlier, it was found that law enforcement approaches dominated both policy and rhetoric in the Western Cape. The strongest illustration of this was to be found in the fact that the provincial Anti-Gang Strategy (which was developed in 2003) is overwhelmingly focused on the policing and prosecution of gangs. It should also be noted that the Western Cape is the only province that has been attempting to utilise the Prevention of Organised Crime Act 121 of 1998 (POCA) to prosecute gang members, although the National Prosecuting Authority has made the decision not to utilise this legislation to prosecute child offenders.

In workshop discussions relating to this project, however, practitioners in the criminal justice system (including the police and court personnel), have been unanimous in the view that the problem could not successfully be addressed through this approach only.

It is of concern therefore that the changes that were made to the Child Justice Bill during the 2003 parliamentary hearings did not seek to reverse this trend. In fact, many of the changes (such as excluding children accused of violent offences from diversion) will only serve to entrench the view that law enforcement approaches will resolve these problems.

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<sup>11</sup> C Frank and L Muntingh. "Children's Perceptions of their Use by Adults in the Commission of Offences", 2005, Pretoria: International Labour Organisation.

### *The lack of a common vision for children*

Based on presentations from various government departments in discussions thus far, it seems as if there is the lack of a common vision for what should be achieved for children. While this is obviously not an issue that is faced only in the Western Cape, participants in discussions have noted that there is a great tension amongst government role-players as to when children need to be protected and assisted, and when they need to face the full might of the criminal justice system.

### *The weaknesses in programme interventions*

Discussions thus far have noted that there is a proliferation of intervention programmes aimed at children and young people in the Western Cape. Different government departments provided information about the range of programmes available. However, it was noted that there is very limited co-ordination between departments and others relating to these programmes, possibly leading to the duplication of some services. It was also noted that the quality of programmatic interventions has received little attention. Key weaknesses in programmes noted thus far include: the absence of evidence-based programme design, the lack of sustained interventions in communities and limited or ineffective monitoring and evaluation.

More specifically in relation to the issue of COAV, targeted interventions relating to gang involvement and violent offending by children were absent.

## RECOMMENDATIONS THUS FAR

A range of recommendations have emerged thus far in workshop discussions. These will be developed into a Policy Paper, which will be the final product of the COAV Cities Project in Cape Town, for 2005/06.

### *The need for legal reform*

Discussions have noted that there are several weaknesses in legislation and particular recommendations have been made in relation to the Child Justice Bill and the Prevention of Organised Crime Act.

The Child Justice Bill needs to create a stronger foundation for intervention for children that are involved in gangs and that may be accused of serious or violent offences. This should include access to diversion services, a stronger focus on prevention and early intervention.

The Prevention of Organised Crime Act needs to be revised to ensure that its provisions are not used against children.

### *Programmatic interventions*

There is a need to co-ordinate and rationalise programmes and fill the gaps that exist in the province. Discussions thus far have indicated a strong preference for utilising an existing structure in the province to act as a co-ordinating mechanism to ensure delivery on this objective.

The need for greater attention and investment in programme quality has also been recognised. Apart from better co-ordination noted above, the need for increased attention to programme design, implementation and evaluation has been strongly noted.

The need for targeted interventions relating to entry into gangs and exit from gangs in specific geographical areas was also highlighted.

The discussions thus far have noted that some of the 'good practice' principles for working with children involved in gangs have not permeated current practice and should be integrated into the design of new interventions.

These principles include:

- Projects should be small-scale (serving small numbers of children e.g. up to 50), and located in the communities that they are intended to benefit.
- Interventions need to establish close mentoring relationships between practitioners and beneficiaries where expected behaviour is modelled and life skills are taught.
- Interventions need to be designed to utilise those things that draw children into gangs to attract them out (e.g. belonging, respect, power, masculinity).

#### *Other recommendations*

Presentations in workshops thus far have noted the extent to which contact with the criminal justice system, especially in prisons and other institutions (such as places of safety) serve to entrench contact with and involvement in gang culture. A key recommendation that emerged was to reduce children's contact with the criminal justice system, especially with these institutions mentioned above.

Other recommendations included:

- Focus on young offenders to prevent recidivism;
- Targeted interventions relating to entry into and exit from gangs; and
- Address the drivers of violent crime such as drugs and weapons (firearms, knives).

## Implications for South Africa

While the phenomenon of gangs has always been seen to be a concern only in the Western Cape, there is evidence to indicate that children being engaged in criminal activities by organised adult offenders is much more commonplace than currently believed.<sup>12</sup>

The COAV Cities Project raises a number of useful debates for South Africa, given its obligations.

### THE NATURE AND EXTENT OF GANG ACTIVITY IN CAPE TOWN: MORE QUESTIONS THAN ANSWERS

Recent information about the problem of gangs and organised crime, and the extent to which children are involved, is exceptionally limited notwithstanding new information generated through the ten-country study. While some efforts had been made in the past to estimate numbers and characterise the nature of "gangs" and their effects on the communities in which they operate, to a great extent, these issues remain elusive. Standing has demonstrated that there is little evidence to support current views about gangs (i.e. that they are clearly definable social entities, with identifiable membership, that they are becoming more organised and sophisticated, etc.), yet much of the gang policy that has been developed thus far is based on these ideas.<sup>13</sup>

It is also problematic for South Africa that discussions relating to organised armed groups have been focused on coloured gangs of the Cape Flats. Recent research and anecdotal evidence indicates that there are different levels of criminal organisation in other parts of the country and that children are being engaged in the activities of these criminal groups.<sup>14</sup> While some of the activities of such groups may be examined under the rubric of organised criminal "syndicates", little is known about the lower levels of organised criminal activity, and children's engagement in this.

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<sup>12</sup> C Frank L and Muntingh, 2005, *op cit*.

<sup>13</sup> A Standing "The Threat of Gangs and Anti-Gangs Policy", 2005, *Institute for Security Studies, Occasional Paper, 116*.

<sup>14</sup> C Frank and L Muntingh, 2005, *op cit*.



Overall, this points not only to the need for greater knowledge generation about these issues, but also for this to feed the development of new strategies to respond to the problem.

## GANGS AND CHILDREN'S RIGHTS

This issue has received little attention from the child rights sector, both locally and internationally. While child rights advocates in South Africa have a long history of concern for children that come into conflict with the law, little attention has been given to the existence of organised groups that may recruit children for use in criminal enterprise; and the nature of impact that may be experienced by children in these circumstances. This weakness is demonstrated by the fact that there is little language within the child rights sector to engage with this particular problem, with neither "child offending" nor "child soldiers" offering an adequate description.

The COAV Cities Project may offer an opportunity for the child rights establishment internationally to engage with this particular problem and ask whether provision has been made for it within the existing children's rights machinery. Recent work in South Africa by the Community Law Centre, on behalf of the International Labour Organisation and the Department of Labour, in relation to the issue of children being used by adults to commit crime may also have opened the door to a far deeper engagement with children's experiences of organised forms of crime and violence. Most importantly, the findings of the ten-country study, Standing's research,<sup>15</sup> and Frank and Muntingh,<sup>16</sup> raise the thorny issue of the agency of children, and the choices that they make in becoming involved with armed groups. Such choices indicate that the alternatives available to them may be limited, unattractive, or unresponsive to their specific needs, and it is these that require further examination.

## THE POLITICS OF POLICY DEVELOPMENT AND LAW REFORM

Legal reform and policy development efforts in recent years have been influenced to a significant degree by government efforts to demonstrate a stance that is tough on crime. This has also permeated policy and law reform efforts relating to child offending, creating a dangerous tension between these sentiments and the country's obligations in terms of the United Nations Convention on the Rights of the Child. These tensions have had their most public showing in the 2003 hearings in parliament relating to the Child Justice Bill. All indications from that skirmish are that the 'tough on crime' view had definitely won that round. The question that has to be asked is whether a 'tough on crime' approach, evidenced in the more severe treatment of serious and violent offenders, will deliver the kinds of crime reduction outcomes that are expected.

A further question relating to policy lies in the area of crime prevention. Notwithstanding early interest by government in proactive crime prevention approaches (evidenced in the National Crime Prevention Strategy), there have been limited efforts to promote a crime prevention ethos in South Africa. This may have serious implications given that the risk factors relating to gang involvement and serious and violent offending continue to exist, and will continue to drive these kinds of problems in the future.

## PROGRAMME DELIVERY

The state of programmes for children who may be engaged in gangs and violent crime are also quite limited, with there being many more programmes at the level of diversion, than there are focused on prevention. While many innovative programmatic interventions have been specifically developed for children and youth that have been engaged in violence (such as the National Peace Accord Trust's Ecotherapy) and while some organisations have developed considerable expertise and models of practice for working with violent young people (such as Khulisa),

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<sup>15</sup> *Standing, op cit.*

<sup>16</sup> *Frank and Muntingh, op cit.*

these programmes represent only a small fraction of the range of programmes that are required. More importantly, the programmes most required to assist children to exit gangs and reintegrate back to homes and neighbourhoods do not exist.

In terms of prevention, school-based programmes seem to offer the greatest potential, yet there has been little effort to define the best strategies to implement in this context. While “school safety” interventions have abounded, both at a national level and in the Western Cape, few have grappled with the question of how schools may contribute to reducing the vulnerability of children to organised armed groups.

#### ADDRESSING STATE FAILURE AND/OR COLLUSION

Standing has noted that there is considerable evidence to support the contention that corruption, and the collusion of state functionaries with gangs, may promote their continued existence.<sup>17</sup> However, the 10-country study also alerts us to the effects of the failure of other government services, such as those related to the social support of children and families. This failure relates not only to the issue of making services accessible to people, but also to the failure of services to specifically orientate themselves to the needs of the particular children, families and others.

## Conclusion

The COAV Cities Project, which follows on from the ten-country study discussed above, offers a significant opportunity to engage in discussion and debate relating to policy responses to children's involvement in gangs and in other forms of organised armed groups. As such, it offers the unique opportunity to bring together a range of perspectives including children's rights, child labour, criminal economy, urban renewal, child justice, organised crime and gangs, etc.

Given the youthfulness of South Africa's population, and current trends relating to poverty and unemployment, the risk factors for children's involvement in organised armed groups as recorded by the ten-country study should serve as a resounding early warning to us that strategic action on this issue must be taken.

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<sup>17</sup> A Standing “Reconceptualising Organised Crime” 2003 African Security Review, Volume 12, Number 2.



# Summary of deliberations and conference outcomes

During the Portfolio Committee on Justice and Constitutional Development debates in 2003 on the Child Justice Bill 49 of 2002, the Committee proposed certain changes to the Bill. These proposed amendments have not been made public. There is also no official version of the Bill released after the 2002 document that set out these changes discussed by the Portfolio Committee. These amendments are set against the backdrop of an escalating crime-rate and rising public fear. They seek to ensure that punitive responses are available for those children charged with serious offences such as murder or rape. If these proposals arising from the Committee discussions become reality they will result in an erosion of the original ethos of the Bill that sought to promote procedural fairness for all children accused of committing crimes and not just those charged with less serious offences.

There are a range of possible amendments that were discussed at the parliamentary deliberations. However, for the purpose of the conference deliberations, three key issues of concern were identified because of their potential to impact fundamentally on the protections and rights offered to all children in the original Bill introduced to parliament in 2002. What follows is a summary of the issues as posed to the delegates and their responses appear in bullet-form hereunder.

The first of these was whether mandatory minimum sentencing and life sentencing should be applied to children. There appears to be hesitancy on the part of the Portfolio Committee to abolish life sentencing for children. This is so, despite the Supreme Court of Appeal in the *Brandt* judgment holding that the minimum sentencing provisions as currently drafted do not apply to 16 and 17 year olds. However, it has been argued that the judgment lends itself to different interpretations that do not necessarily support this finding. Therefore the possibility remains that the Portfolio Committee could redraft the applicable provisions and graft them on to the existing sentencing provisions of the Child Justice Bill.

In response to the issue of whether mandatory minimum sentences should apply, delegates noted the following:

- The point was made that in terms of our international obligations, article 37 of the United Nations Convention on the Rights of Child as well as the African Charter on the Rights and Welfare of the Child, provide that no child should be subjected to life sentences upon conviction. These instruments also entrench the principle that the detention of children should only be considered as a matter of last resort and be for the shortest appropriate period of time.
- It was highlighted that there is a growing body of knowledge proving that long periods of incarceration are unlikely to have a rehabilitative effect on offenders.

- To the contrary children serving long sentences have less access to programmes and services and it has been shown that long periods of imprisonment are likely to have a detrimental effect on the development and well-being of children.
- There are those that argue that the imposition of life sentences will act as deterrent to other potential offenders. Participants were in agreement that the old adage still holds true that the fear of arrest and successful prosecution is a far stronger deterrent than any long sentence that may be imposed. It is therefore critical that in light of the high crime rate, South Africa should concentrate on addressing the social causes of crime, improving the investigative skills of the police and supporting the successful prosecution of accused persons in addition to creating a coherent sentencing framework for children.
- Participants recognised that there are children who commit serious offences and should be sentenced in a manner that gives cognisance to the seriousness of the offence and needs of society and such sentence may even include a lengthy term of imprisonment. However there was consensus that life sentencing was not appropriate for such children based on the reasons stated above. It was further agreed that minimum sentencing is problematic as it limits the discretion of the sentencing officer to impose a sentence that would give effect to the “shortest appropriate period of time” principle.

The second issue of concern arose on account of the fact that the Portfolio Committee expressed disquiet at the provisions in the Child Justice Bill that prohibited any form of imprisonment for children under the age of 14 years - either awaiting trial or as a sentence - and is proposing that the lower limit of 14 years should be removed for both instances. In terms of current law, children under the age of 14 may be imprisoned as a sentence. However, section 29 of the Correctional Services Act (1959) provides that no child under 14 years may be held in prison for awaiting trial purposes. The South African Law Reform Commission proposed that no child under the age of 14 years should be detained in prison either awaiting trial or as a sentence. In response to this issue:

- Participants noted that recent developments in the media and the Jali Commission of Inquiry have highlighted serious and deep rooted problems in our correctional system and although this is not a principled reason to not imprison children under 14, it must be of important consideration.
- In addition they point out that young children are especially vulnerable and need a suitable, yet serious, intervention in order to impact on their behaviour and make a real attempt at rehabilitation with a view to reintegration into society. A South African prison is not the place to achieve this.
- Furthermore, it was pointed out that the fact of the matter is that children under 14 are generally not sentenced to imprisonment even under our present system.
- Importantly, the Department of Correctional Services in its *White Paper on Corrections* (2005) specifically states that prisons should not house children below the age of 14 years. In addition, the Department of Correctional Services has on numerous occasions stressed that they are not geared towards programmatic service delivery for very young children. They are of the opinion that these children will be better served by diversion, alternative sentencing or, in extreme circumstances, placement in a facility managed by the Departments of Social Development or Education.
- Finally, it was overwhelmingly agreed that the proposed amendment to the Child Justice Bill allowing for imprisonment of children under the age of 14 years awaiting trial is inconsistent with the current law and would amount to a retrogressive step as the current section 29 of the Correctional Services Act (1959) prohibits the incarceration of children under the age of 14 years awaiting trial in prison.

The third key issue raised related to the proposed amendments regarding diversion and the fact that the Portfolio Committee has mooted the possibility that diversion will be excluded for certain children who have committed serious scheduled offences. This again runs contrary to the spirit and intention of the original Child Justice Bill which did not differentiate between children and their eligibility for diversion based on the offences committed. Rather, it directed that each child should be assessed individually and that the unique circumstances of such child

should be taken into consideration when making a decision with regard to diversion. The conference delegates noted the following:

- There are various types of young offenders and the motives for committing the various types of offences differ drastically from case to case. In addition the circumstances of the accused and the offence are individually dynamic and it would therefore be counter-productive to focus on the general nature of the offence and not the offender and specific details of the crime by excluding certain offences from diversion.
- Participants re-iterated that current developments are moving further and further away from the original intention of the Bill and that decisions are being made on the basis of crime categories and that the individual best interests of individual children are being lost in this process.
- It was noted that international experience has shown that diversion can be used successfully even in the most serious cases. In New Zealand, for example, cases of children who have committed offences as serious as murder, have been successfully diverted with no undue consequences.
- Participants generally agreed that diversion for serious offences should be promoted; however, they noted that this would be problematic in the absence of appropriate programmes and interventions for children who have committed these types of offences.
- The point was made that resources need to be allocated to the development of diversion programmes and the training of service providers both within government and civil society. It was particularly stressed that the bulk of current diversion services are rendered by civil society organisations and that a concerted effort needs to be made to adequately fund these organisations in order to ensure the implementation of quality programmes that cater for various levels of offending. Unless this problem is addressed, it is unlikely that judicial officers will buy into the concept of diversion for serious offenders.

Finally delegates were asked to explore ways in which the Child Justice Bill could be brought back onto the parliamentary agenda. Ultimately, delegates agreed that it was critical to not only raise awareness of the issues among legislators and implementing agencies but also among the public to help involve society in the broader objectives of protecting children's rights. After two successful days of deliberations the outcomes of the conference re-affirmed the fact that there was an urgent need for the enactment of the Child Justice Bill.



# Closing remarks: from the sandpit?

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I would like to divide my closing remarks into three sections. First, I would like to highlight key themes that have emerged over the last two days. Second, I would like to dwell shortly on the unfinished business of the Child Justice Bill. Last, in the traditional “way forward” section, I would like to present ten possible strategies for taking child justice development forward. Note that these are personal and untested suggestions, which you are free to adopt or discard for what they are worth!

## Key themes

The first obvious conclusion to be drawn is that implementation of facets of the emerging child justice system has continued to move forward apace. We have had evidence of the vast increase in children’s access to diversion through the auspices of the National Prosecuting Authority, with more than 125 000 diversions recorded as having occurred between 2000 and 2005. We have been reminded of the deepening diversity in the provision of services to children in conflict with the law, including diversification in programmatic development, ongoing specialisation in the field broadly speaking and the signal contribution of probation service in beginning to characterise a more mature child justice system. A short few years ago, the mention of the word “diversion” would have necessitated at least a cursory introduction to explain what diversion meant and what the basic principled reasons for advocating diversion were. Now, the concept is embedded, and explanations and justifications can be done away with. In short, we are all sitting in the same sandpit!

Further, the sector has continued to flourish as regards the research agenda which has continued to become more nuanced, more responsive to specified issues within the overall child justice context, and to focus efforts beyond legal drafting and dedicated legislative provisions, to encompass prevention and social reintegration studies in a more cohesive way. I refer specifically to the work presented by Cheryl Frank on Children in Organised Armed Violence in non-conflict urban situations (COAV), the research and programme implementation being undertaken by the Children’s Rights Project of the Community Law Centre on Children Used by Adults in the Commission of Offences (CUBAC) for the Programme Towards the Elimination of the Worst Forms of Child Labour, the analysis of recent data on children deprived of their liberty by Amanda Dissel, the substantial investment and research underpinning the development of the National Minimum Standards on Diversion, as we heard from Lukas Muntingh, and so forth. This is testimony to the ongoing involvement of a vibrant and well-networked research community which has built up a wealth of experience in the sector, and which writes and publishes findings on a regular basis.

Finally in this section, the approach to child justice development that can be discerned from the presentations at this conference is one premised on building on “what works”. So we have learnt that the Case Review Teams set up in the Western Cape by Advocate Bronwyn Pithey and which have proven hugely successful in reducing the numbers of children in pre-trial detention, are to be replicated. So too, there appears to be considerable support for the roll-out of one stop child justice centres. A further key example of this mode of ongoing development is the evident ongoing strengthening of the Inter-Sectoral Child Justice Committee at national level, and the proposed replication of this structure at provincial level.



## Unfinished business: the Child Justice Bill

An issue that this whole conference has skirted around in the public arena is the question of why the Child Justice Bill still languishes. Apart from a few corridor conversations, and the presentation of Dr Ann Skelton illuminating the number of times courts have already cited this (non- legislated) Bill as “authority”, we have all assiduously avoided asking the hard questions that we maybe need to do. First, we need to ask whether we really want the Bill enacted, given that we know that the Portfolio Committee has derogated from original proposals in key areas, and what might come out is not entirely child rights compliant. Put differently, do we need to “fix” what is patently increasingly not that broke? Bear in mind the salutary point that we are not easily going to get another bite at the cherry, and it is not even clear that, should the Bill be re-tabled in parliament, opportunities for public debate and input will also be reopened.

But what, conceivably, are the reasons for the delay? I throw out a few options:

1. Lack of political will? Is there a lack of impetus at the ministerial level? Unconfirmed speculation suggests that the investiture of a new Minister who had to come to grips with her new portfolio in 2004 was partly to blame, but that is surely a matter of the past, given that time has elapsed. Also, the Deputy Minister, having been chairperson of the Portfolio Committee initially seized with dissecting and redrafting the Bill, was more familiar with it than virtually anyone else!
2. Was it simply that other matters were prioritised, such as issues around the judiciary, the courts, and so forth? This is possible, since the Sexual Offences Bill, which lay in limbo in the same way, was brought to the fore again when the judicial legislation was withdrawn. However, surely this too is not the only factor.
3. A third rumour that has been circulating relates to government fearing inability to fully implement the provisions, were the Bill to be enacted, and the concomitant possibility of being sued for damages. There is no gainsaying that government is alive to the mounting claims against the state, and in a variety of contexts, most notably maybe after the Constitutional Court's finding in the *Metrorail* case.
4. A newly emerging theory relates to what was initially conceived as, and used in the initial parliamentary process, as a best practice, and which has been internationally hailed as such: namely the costing that was undertaken first, in relation to the Law Commission Discussion Paper, and, thereafter, in relation to the Bill that was tabled. Have we shown government that too many resources are required for the Bill to be passed and promulgated, and that it is not worth the candle trying (especially when things are moving along nicely anyway via the efforts of the Department of Social Development, NGOs, the National Prosecuting Authority and so forth, as I mentioned above?) In short, did we inadvertently shoot ourselves in the foot?

If we proceed from the premise that the Bill may not in the foreseeable future become a reality, what strategies can we adopt to further children's rights in the child justice system in absence of a primary legislative tool? I conclude with a few suggestions. They are not presented in any particular order, nor do I comment on their feasibility or relative impact.

## Strategies to promote children's rights construction for child justice development

1. First, continued support for the Department of Social Services in the development of diversion, assessment, alternative sentencing, and various alternatives to detention in prison seems crucial, not only to ensure the delivery of child friendly services to children in conflict with the law, but ultimately because the Department of Justice will never be convinced that the Bill is feasible and possible unless we can highlight successes in actual service delivery.

2. Judicious use of the courts in a sensible litigation strategy must be regarded as one weapon in the arsenal, not only to highlight and prevent breaches such as unwarranted detention and inappropriate sentencing, but also to advance service delivery, as in the *Centre for Child Law v MEC Education* case, relating to the provision of deliverables and the development of quality processes for children in schools of industries. There needs, in this regard, to be more attention paid to the issue of remedies, and care should be taken not to foster the idea that awards of damages are an ideal solution for litigants.
3. Support to other processes which appear to have high level approval may bear fruit. The Department of Correctional Service *White Paper* (2005) which expressly states that correctional centres are not places for children aged under the age of 14 was approved by Cabinet and that message should be re-inforced over and over again.
4. It might bear fruit to consider using alternative legislation strategies, possibly outside the remit of the Department of Justice. The Children's Act 38 of 2005, the Children's Amendment Bill and the potential regulations might pose an avenue, for instance, as we saw the transformation of the residential care sector taking place via amendments to the regulations to the Child Care Act 74 of 1983 effected in 1999. We can learn a valuable lesson in this regard from the amendments to the Probation Services Act 116 of 1991 effected in 2002 and promulgated in 2003. These were initially thought to be a "bad practice" by some of us in the sector, as they would cause division and legal conflict upon the enactment of the Child Justice Bill. In retrospect, however, there have been huge benefits, not the least of which has been the increased budget allocation from the Department of Treasury to fulfil the legislative mandate contained in the requirement of assessment services. Please note, though, that I am not necessarily going as far as saying re-insert all the key child justice provisions by way of amendments to the Probation Services Act!
5. Section 29 of the Correctional Services Act 8 of 1959 is still in operation after a decade, when it was supposed to "die" in 1998. It is the only provision of that Act still in operation, the remainder having been replaced by the "new" Correctional Services Act 111 of 1998. It is time for section 29 to go, it is an anachronism, an embarrassing relic of the past.
6. Ongoing training and speaking targeted at relevant role-players within the criminal justice system has born immense fruit. Initiatives such as the Child Law Manual for Prosecutors, the Child Law Manual for Magistrates and the accompanying training the Justice College has undertaken are what have led to the sandpit phenomenon, where one battles to encounter a magistrate who has not at least heard of diversion. Mention must also be made of the efforts of the Department of Justice's Office of Children and Vulnerable Groups to organise periodic targeted training on issues around children and various aspects of child justice, which have undoubtedly made an impact. This practice should be continued and deepened, for instance training for the Legal Aid Board, diversion service providers, probation officers and so forth.
7. International law in the child justice sphere has become increasingly "mainstreamed" in case law, practice (e.g. reviews of facilities) and by other means, e.g. setting standards. We need to continue to assert the well developed international standards, guidelines, indicators and other tools, as a way of moving our child justice system towards compliance with international standards, even absent a comprehensive legal statute.
8. We could consider harnessing voices from unexpected and non-traditional sources in the quest to further the law reform agenda. The voice of reason from the NPA at times during parliamentary debates caused surprise in some quarters (the prosecution authorities are supposed to be prosecution- minded, yet unqualified support for diversion was provided). Other potential allies could be the Programme Towards the Elimination of Child Labour, Provincial Safety and Liaison Departments, the Office of the Inspecting Judge of Prisons and so on. Some thought needs to be given to which adherents (converts) can be captured to diversify the child rights lobby.

9. More advocacy and lobbying, not to mention monitoring so that successes (and possible gaps) can be documented, highlighted and built upon, is needed. Here the availability of decent data – statistical and otherwise – is crucial. The Inter-sectoral Committee on Child Justice must redouble efforts to collect improved, more nuanced and more reliable data to assist in the development of an improved child justice system, and at a minimum, be able to meet the UNICEF/UNODC indicators for juvenile justice within a specified period of time. We still cannot say how many children are detained in police cells, meaning that we cannot meet even the *first* indicator required (how many children are in detention), indicating a certain lack of development and refinement in the decade that legislative drafting has been on the cards.
10. Much of what is needed for the further development of the system of child justice (as opposed to finalising a statute) is not rocket science –we know a lot, we have a good idea of what works, we know many of our failings, and we can identify gaps. We know committed people and inter-sectoral co-operation can make a bigger difference (e.g. in getting the number of children in prison down) than words on paper (e.g. the Interim Protocol on the Management of Children Awaiting Trial (2002), which in my view had little practical impact). So what we really need to do is enlarge our sandpit, add more grains, and aim for a beach!

