

CIVIL SOCIETY PRISON REFORM INITIATIVE

**SUBMISSION BY THE CIVIL SOCIETY PRISON REFORM
INITIATIVE TO THE PORTFOLIO COMMITTEE ON
JUSTICE AND CONSTITUTIONAL DEVELOPMENT ON
THE CHILD JUSTICE BILL [B49 OF 2002]**

January 2008

***CSPRI REQUESTS AN OPPORTUNITY TO MAKE AN ORAL SUBMISSION TO
THE PARLIAMENTARY PORTFOLIO COMMITTEE ON JUSTICE AND
CONSTITUTIONAL DEVELOPMENT IN RESPECT OF THE CHILD JUSTICE
BILL***

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Introduction

The Civil Society Prison Reform Initiative (CSPRI) is a project of the Community Law Centre at the University of the Western Cape and was established in 2003 to address prison reform in South Africa. It engages in research and advocacy focusing on promoting prisoners' rights and building capacity amongst civil society organizations in the field. We welcome this opportunity to make a submission on the Child Justice Bill.

This submission deals with the following aspects:

- Research, information and monitoring of child justice
- Children in police custody
- Children in prison
- Sentencing of children
- Legal representation of children
- Parole for children sentenced to imprisonment

The submission proposes alternatives to the wording of the current Bill on a number of occasions. These proposals are presented in the Appendix 1 on p. 20.

Research, monitoring and evaluation

Since the early 1990s, when government and civil society commenced with the reform of the child and youth care system, the lack of accurate data collection and monitoring mechanisms were identified as a significant shortcoming. In many regards this situation persists, with the exception of the Department of Correctional Services (DCS) that is able to provide accurate and up to date quantitative information on the children placed in its care. The intentions of Clause 95(2)(c), providing for the collection of data on children in conflict with the law is therefore supported. The collection of quantitative and statistical data on child justice is not an end itself – it contributes to three important objectives aimed at protecting children's rights:

- It promotes transparency by describing what is happening to children in the criminal justice system
- It enables accountability structures (domestic and international) to hold government accountable in respect of services to and treatment of children in the criminal justice system
- It informs the development and review of policy to ensure that policy is based on knowledge and not perceptions.¹

The Committee on the Rights of the Child (CROC), in a recent commentary, lamented the absence of comprehensive and reliable statistical information on children in conflict with the law in country reports:

The Committee is deeply concerned about the lack of even basic and disaggregated data on inter alia the quantity and the nature of offences committed by children, the use and the average length of duration of

¹ See Bullock H (2001) *Better Policy Making*, Centre for Management and Policy Studies, <http://www.policyhub.gov.uk/docs/betterpolicymaking.pdf>

*pre-trial detention, the number of children dealt with by the use of measures without resorting to judicial proceedings (diversion), the number of convicted children and the nature of the sanctions imposed on them. The Committee urges the States Parties to systematically collect disaggregated data relevant for the information on the practice of the administration of juvenile justice, and necessary for the development, implementation and evaluation of policies and programmes aiming at the prevention and at effective responses to juvenile delinquency in full accordance with the principles and provisions of the Convention on the Rights of the Child.*²

Without accurate and reliable quantitative information it is difficult, if not impossible, to measure progress. Realising the difficulties in this regard, UNICEF in cooperation with UN Office on Drugs and Crime (UNODC) developed a user-friendly and detailed guide for states to develop the system and collect the right information on children in the criminal justice system: *Manual for the Measurement of Juvenile Justice Indicators*.³ It is therefore recommended that South Africa uses this manual as a basic structure to facilitate the collection of quantitative information on children in the criminal justice system. Apart from the benefit that such information will bring to managing the child justice system, it will also enable the South African government to provide the required information to the CROC when submitting its periodic reports.

It is therefore proposed that Clause 95(2)(c) be accordingly amended. See Appendix for the proposed wording.

Monitoring children in police custody – Clause 28

Clause 28 of the Bill deals with the protection of children detained in police custody. In several ways these measures are more protective than the measures contemplated in the 2002 version of the Bill and the drafters are commended for this.

In November 2006 South Africa's *Initial Report* in respect of the UN Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT) was considered by the UN Committee against Torture. The Committee in its *Concluding Remarks* made specific reference to the detention of children in police cells, urging South Africa to implement measures supportive of Articles 11⁴ and 16⁵ of UNCAT: *The State Party should adopt effective measures to improve the conditions in detention facilities, reduce the current overcrowding and meet the fundamental needs of all those deprived of their liberty, in particular regarding health care; periodic examinations of prisoners should be carried out. The State Party should also ensure that detained children are kept in facilities separate from those for adults in conformity with international standards, reconsider the systematic pretrial detention for certain crimes, especially for children,*

² Committee On The Rights of the Child *General Comment No. 10 (2007) Children's rights in Juvenile Justice*, Forty-fourth session, Geneva, 15 January-2 February 2007, para 34.

³ UNODC & Unicef (2007) *Manual for the Measurement of Juvenile Justice Indicators*, United Nations, New York, 2007. The manual is also available on-line at http://www.unodc.org/pdf/criminal_justice/06-55616_ebook.pdf

⁴ Article 11: Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

⁵ Article 16: 1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

and establish an effective monitoring mechanism for persons in police custody. Against this background the proposals in clause 28 are welcomed.

It should also be borne in mind that after South Africa ratified UNCAT in 1998, it signed the Optional Protocol to UNCAT (OPCAT) in 2006. OPCAT is, as the name suggests, an optional protocol that States Parties to CAT can sign and ratify to further contribute to preventing torture, cruel, inhuman and degrading treatment or punishment in their jurisdictions. Article 1 of OPCAT describes this well: *The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.*

OPCAT provides for international and national visiting mechanisms to places of detention. The international visiting mechanism is known as the Sub-Committee on the Prevention of Torture (SPT) and consists of ten experts, elected by States Parties to the Protocol (Article 2). The national visiting mechanism, known as the National Preventive Mechanism (NPM) is established and/or designated by the States Parties to OPCAT in their jurisdictions (Article 3). The Protocol grants the SPT and NPM(s) access to all places of detention, people detained there, and documentation at such places. States Parties to the Protocol are also required to cooperate with the SPT and NPM, and is obliged to ensure the functional independence of the NPM and furthermore that it has sufficient resources to fulfil its mandate.

Monitoring places of detention refers to the process, over time, of regular examinations of all aspects of detention. The scope of monitoring visits would cover:

- The legal and administrative measures applied in places of detention
- The living conditions during detention
- Access to medical care
- The regime of the detention facility
- The organisation and management of detained persons and of personnel as well as the relations between personnel and detained persons.

There is at present no independent oversight mechanism in respect of police cells and the Independent Complaints Directorate (ICD) does not, as a matter of policy, conduct proactive visits to police cells to monitor conditions and the treatment of detainees. The protective mechanisms outlined in clause 28 are by and large reactive and complaints-driven. While this is important, it has been demonstrated that proactive announced and unannounced visits by independent bodies or persons to places of detention is the most effective mechanism to prevent torture, cruel, inhuman and degrading treatment or punishment.⁶ It is unfortunately the case that an NPM has not been designated in South Africa as is envisaged under OPCAT. The Committee's attention is therefore drawn to the urgent need to designate a NPM in respect of police stations to monitor not only children but adults as well.

In view of the above the following are proposed to address the current shortcomings and establish a more preventive approach towards the monitoring of children detained in police cells:

- Each police area commissioner must designate in his/her area of command the police station(s) that have sufficient and suitable capacity and services to detain children.
- The identification of police stations suitable to detain children should be done with a view to centralize the detention of children in an area in order to facilitate

⁶ Ludwidge F (2006) *The Optional Protocol to the Convention against Torture: a major step forward in the global prevention of torture, Helsinki Monitor* No. 1, p. 70

monitoring and access by other stakeholders to such children. The intention is that there would be in a police management area, one or more police stations that area designated as suitable to be used for the detention of children. This should strike a balance between need and available resources.

- In the event that a child is detained in a police cell, the arresting officer must inform the probation officer responsible for that area that a child is in detention at that specific police station.

See Appendix for proposed wording.

Children in prison

The description below provides statistical information on children in prison and will be referred to in subsequent sections. Particular attention is paid here to age, offence and sentence profiles of children in prison. A brief description is also provided on Constitutional obligations and the requirements for limiting a constitutional right with reference to the imprisonment of children.

General

It is well known that South Africa's total prison population increased rapidly from 1990 onwards. While capacity remained fairly stable at approximately 114 000, the total prison population reached 180 000 by 2005. This prompted a remission programme resulting in the release of some 35 000 prisoners. More recent figures indicate that the prison population has again climbed from approximately 150 000 in 2005 to 162 000 by the end of 2007.

Children

Although children constitute a fairly small percentage of the total prison population (approximately 2%), this proportion does amount to roughly 2000 children who are either sentenced or unsentenced prisoners. This is significantly less than in the past, when in excess of 4000 children were in prison. Government and its partners are commended for the reduction in numbers. It should also be kept in mind that even though these figures have come down significantly, there is a much larger number of children who are circulating through the prison system on an annual basis, estimated to be at least three times the average number in custody.

Table 1 provides the age profile of sentenced and unsentenced children in prison as on 31 July 2007. A number of remarks are warranted:

- There were 4 unsentenced children under the age of 14 years **being held illegally** in prisons (see section 29 of Act 8 of 1959)
- Approximately 14% (or 286 of 2144) of the total number of children were under the age of 16 years and the remainder were aged 16 and 17 years old
- 17% of unsentenced children (or 206) were aged younger than 16 years
- 9% of sentenced children (or 80) were aged younger than 16 years
- There were **more children awaiting trial in prison than sentenced children** in prison (59% of the total number of children). This is an extremely worrying trend compared with the adult prison population with only 25% being unsentenced prisoners.

Table 1⁷

UNSENTENCED CHILDREN(YOUNGER THAN 18 YEARS) IN CUSTODY: 31 July 2007						
Gender	7 - 13 Years	14 Years	15 Years	16 Years	17 Years	Total
Female	0	2	6	9	13	30
Male	4	31	163	388	653	1,239
All Genders	4	33	169	397	666	1,269
SENTENCED CHILDREN(YOUNGER THAN 18 YEARS) IN CUSTODY: 31 July 2007						
Gender	7 - 13 Years	14 Years	15 Years	16 Years	17 Years	Total
Female	0	1	2	9	11	23
Male	3	8	66	224	551	852
All Genders	3	9	68	233	562	875
TOTAL CHILDREN(YOUNGER THAN 18 YEARS) IN CUSTODY: 31 July 2007						
Gender	7 - 13 Years	14 Years	15 Years	16 Years	17 Years	Total
Female	0	3	8	18	24	53
Male	7	39	229	612	1204	2,091
All Genders	7	42	237	630	1228	2,144

The offence profile of children in prison, both sentenced and unsentenced, is presented in Table 2 and the following are noted:

- A total of **7 children under the age of 14 years were in custody**; of which only 1 was held for an aggressive offence and 1 for a sexual offence. The balance being held for property and other offences.
- Approximately a third of unsentenced children are detained for economic offences and approximately one half for aggressive offences
- 38% of the 875 sentenced children were convicted of economic offences; 43% of aggressive crimes, and 12% of sex offences.
- The offence profile of unsentenced children aged younger than 16 years indicates that a third (32%) were charged with an economic offence; 46% with an aggressive offence and 15% with sexual offences
- The offence profile of sentenced children aged younger than 16 years indicates that nearly half (46%) were convicted of property offences; a third of aggressive offences and 14% of a sex offences.

⁷ Statistics provided by the Judicial Inspectorate of Prisons.

Table 2⁸

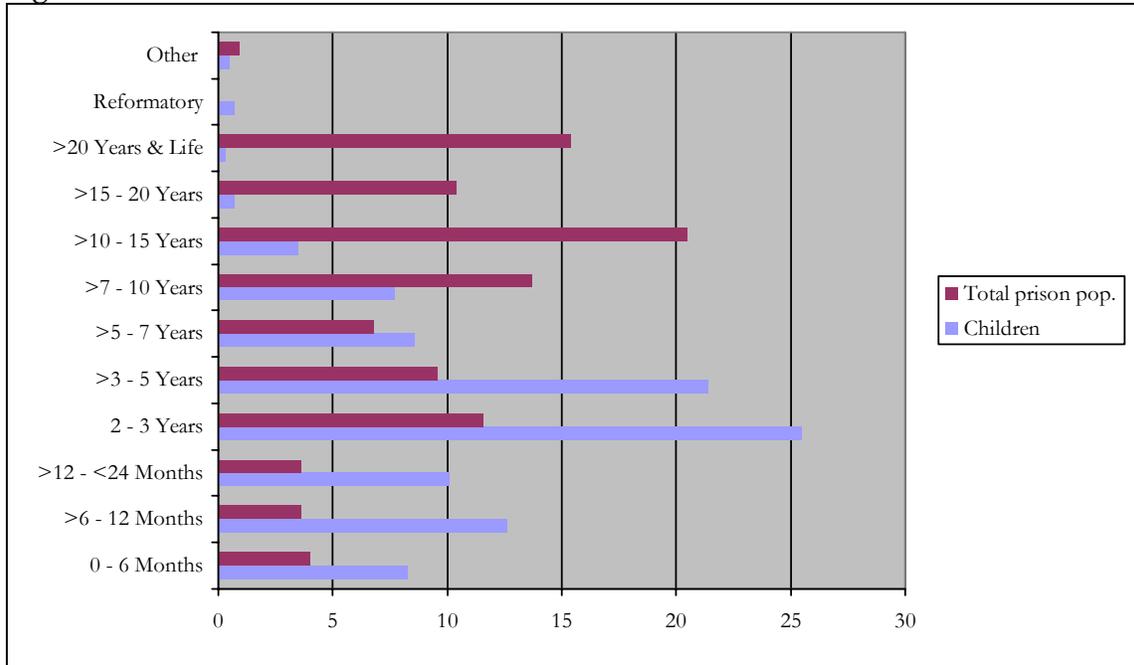
UNSENTENCED CHILDREN(YOUNGER THAN 18 YEARS) IN CUSTODY PER CRIME CATEGORY : 31 July 2007						
Crime Categories	7 - 13 Years	14 Years	15 Years	16 Years	17 Years	Total
Economic	1	15	52	126	213	407
Aggressive	0	9	80	201	328	618
Sexual	1	7	24	50	85	167
Narcotics	0	1	5	5	11	22
Other	2	1	8	15	29	55
All Crime Categories	4	33	169	397	666	1,269
SENTENCED CHILDREN(YOUNGER THAN 18 YEARS) IN CUSTODY PER CRIME CATEGORY : 31 July 2007						
Crime Categories	7 - 13 Years	14 Years	15 Years	16 Years	17 Years	Total
Economic	2	7	28	88	206	331
Aggressive	1	0	27	103	248	379
Sexual	0	1	10	31	64	106
Narcotics	0	0	1	3	10	14
Other	0	1	2	8	34	45
All Crime Categories	3	9	68	233	562	875
TOTAL CHILDREN(YOUNGER THAN 18 YEARS) IN CUSTODY PER CRIME CATEGORY : 31 July 2007						
	7 - 13 Years	14 Years	15 Years	16 Years	17 Years	Total
Economic	3	22	80	214	419	738
Aggressive	1	9	107	304	576	997
Sexual	1	8	34	81	149	273
Narcotics	0	1	6	8	21	36
Other	2	2	10	23	63	100
All Crime Categories	7	42	237	630	1228	2,144

A summarised sentence profile in percentages for 2006 is presented in Figure 1; for comparative purpose the sentence profile of the total prison population is included. The following are evident from the profile:

- The overwhelming majority of children sentenced to imprisonment, are sentenced to terms of less than five years
- There is also a growing proportion of children serving sentences of longer than 5 years and even as long as life imprisonment.
- There are significant differences between the sentence profiles of the total prison population and that of children.

⁸ Statistics provided by the Judicial Inspectorate of Prisons.

Figure 1⁹



The Constitution is clear regarding the detention of children: it should be used as a measure of last resort and for the shortest possible period of time.¹⁰ The reference to ‘as a measure of last resort’ places the obligation on the state to explore all other options first and after finding them unsuitable for reasons that are constitutionally justifiable in respect of section 36 of the Constitution, it may detain the child or impose a sentence of imprisonment. To limit a right, in this case the right to freedom, the following needs to be taken into account:

- the importance of the purpose of the limitation (i.e. imprisonment)
- the nature and extent of the limitation (i.e. for how long and under what conditions)
- the relationship between the limitation and its purpose (i.e. will imprisonment reduce re-offending and promote public safety?)
- are there less restrictive means to achieve the same objective?

International law also places strong emphasis on restricting the use of imprisonment for children. Article 37(b) of the Convention on the Rights of the Child uses similar wording to that of section 28 of the Constitution:

‘No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.’

This position is further supported by Rule 1 of the UN Rules for the Protection of Juveniles Deprived of their Liberty (UNJDLs).¹¹ The Constitution and international law therefore place an obligation on the state to **draft legislation that would give effect to imprisonment as a measure of last resort** and furthermore, that when it is done, for the shortest possible period under conditions that take account of the child’s age. It should furthermore be added that the Department of Correctional Services’ White Paper on Corrections in South Africa states clearly:

⁹ Statistics provided by the Judicial Inspectorate of Prisons.

¹⁰ Section 28(1)(g)

¹¹ Adopted by General Assembly resolution 45/113 of 14 December 1990

*Children should not be in correctional centres, and should as far as is possible be diverted from the criminal justice system. Where this is not an option, they should be accommodated in secure care facilities that are designed for children*¹²

and furthermore that

*Children under the age of 14 have no place in correctional centres.*¹³

In view of the above, the submission will now turn to specific issues that are regarded as problematic in the Bill with reference to the imprisonment of children.

Age of admission to a prison

In the mid-1990s when the situation of children in prison was under intense focus by government, the decision was taken that prisons are unsuitable for children and that when circumstances require a custodial setting, that secure care facilities for children would be the most suitable option.¹⁴ Available data indicate that government has made good on these plans and that by 2006 there were space in secure facilities for 2260 children¹⁵ and that plans are afoot to create more secure care facilities.¹⁶ **From a law reform perspective it is therefore important to direct decision-makers in the criminal justice system towards these resources and away from using prisons as a custodial setting for children.**

At the outset it is acknowledged that there is a very small percentage of child offenders who present a significant risk to society and the administration of justice. Furthermore, that there is a similar proportion of children who commit serious offences, and are similarly in need of intensive residential services over a prolonged period of time.

The above age profile (Table 2) showed that of the total number of children in prison on 31 July 2007 (2144 in total), **286 (or 14%) were younger than 16 years of age.** In view of the undesirability of placing children in prison, the number of children involved and the available resources in the form of secure care facilities as alternative to imprisonment, **it is proposed that 16 years of age be set as the minimum age for admission to a prison as either a sentenced or unsentenced prisoner.**

It should also be noted that secure care facilities are indeed secure and that private sector operators of these facilities go to great lengths to not only prevent escapes, but also to ensure that safety and security are maintained internally and that children receive proper services. See Appendix 2 for a description of the security measures operated by Bosasa at its Youth Care Centres.

It is furthermore proposed that in exceptional cases where a child under the age of 16 years commits a serious crime and that the sentencing court is of the opinion that a prison sentence is the most appropriate sentence, that the child will start serving the sentence in a secure care facility and be transferred to a prison when he or she reaches the age of 16 years to serve the remainder of the sentence there.

¹² Department of Correctional Services' *White Paper on Corrections in South Africa, Pretoria*, p. 162 para 11.2.2

¹³ Department of Correctional Services' *White Paper on Corrections in South Africa, Pretoria*, p. 162 para 11.2.3

¹⁴ Submission by the Department of Social Development to the Portfolio Committee on Justice and Constitutional Development on the Child Justice Bill, February 2003.

¹⁵ Muntingh L (2007) *A quantitative overview of children in the criminal justice system – 2007*, Child Justice Alliance, Cape Town, p. 13.

¹⁶ A tender was recently put out for three more secure care facilities in KwaZulu-Natal.

Setting the minimum age of admission to a prison, either as a sentenced or unsentenced prisoner, at 16 years of age would bring a number of advantages:

- It protects those children younger than 16 years of age from victimisation in prisons and especially from recruitment into gangs at such a young age. These young children are extremely vulnerable to violence and sexual assaults.
- It will enable the more effective and efficient use of the currently under-utilised secure care facilities (these facilities are under-utilised in all provinces).¹⁷ The secure care facilities have space available, whereas prisons are overcrowded. The expansion of secure care facilities is also being planned and well underway.
- It will facilitate access to education for children of compulsory school-going age as the secure care facilities are better geared towards providing education and other training.
- It will enable these younger children to have access to programmes that are appropriate to their age that are currently not being rendered by the DCS.
- It will support the policy objectives of the DCS by reducing the number of children in prison.
- It will reduce the demand for diversified services placed on the DCS, bearing in mind that it has to cater for a very wide range of individuals, as described in the White Paper on Corrections.
- It will be supportive of the general spirit of the UN Convention on the Rights of the Child and the UN Minimum Rules for the Treatment of Juveniles Deprived of their Liberty.
- It will address the falling away of the protection afforded by Section 29 of Act 8 of 1959 which is to be repealed. Section 29 currently prevents the detention of unsentenced children under the age of 14 years in a prison. The repeal of this section needs to be addressed by a similarly protective mechanism. The Child Justice Bill presents an opportunity to improve on the protection originally created by section 29 of Act 8 of 1959.

See Appendix for proposed wording.

Sentencing of children

Factors to be considered – Clause 70

The objectives of sentencing set out in clause 70 are laudable and will go a long way in guiding presiding officers to impose sentences appropriate for children. The more specific guidelines outlined in clause 70(3) provide further guidance to presiding officers in an effort to ensure that custodial sentences are used as ‘a measure of last resort’, although this particular phrase is not used. The requirement in clause 70(3)(e), referring to the desirability of keeping the child out of prison, provides further impetus to this objective. This notion of desirability should also reflect on the fact that imprisonment and long term imprisonment in particular, as has been shown by research, may in indeed be counterproductive in assisting the offender to lead a crime free life after release and consequently undermine the overall objective of creating a safer society.¹⁸

It is submitted that these measures will be strengthened by a requirement compelling the sentencing court to reflect on the potential of the contemplated custodial sentence to achieve the desired results of assisting the child to lead a crime free life in future. Such a requirement would necessitate the court to:

¹⁷ Muntingh L (2007) *A quantitative overview of children in the criminal justice system – 2007*, Child Justice Alliance, Cape Town, pp. 12- 13.

¹⁸ Dünkel F & Van Zyl Smit D (2001) ‘Conclusion’ in Van Zyl Smit D and Dünkel F *Imprisonment Today and Tomorrow*, Kluwer, The Hague, p. 846

- enquire from the residential facility or prison as to the available services;
- the shortest possible period of detention to benefit from services and interventions at the facility;
- the proximity of the facility or prison to the child's parent or caregiver in order to facilitate contact, and
- the effectiveness of existing services and interventions at the residential facility or prison in reducing re-offending.

See Appendix for proposed wording.

Victim impact statements - Clause 71

The use of victim impact statements in South Africa is new and is not provided for under any other legislation, save for the participation of victims in Correctional Supervision and Parole Board hearings, in which event the aims are slightly different; focusing on the release of the offender as opposed to sentence determination. The Victim's Charter, developed by the Department of Justice and Constitutional Development does not provide for the use of victim impact statements and merely refer to the right of victims to offer information and attend hearings.¹⁹ The use of victim impact statements are also contentious for its impact on sentencing and whether its use truly reflect the aims and objectives of restorative justice as articulated in the purpose of the Bill (see p. 3). The use of victim impact statements are also not provided for in the sentencing of adults and were rejected for use in the Sexual Offences Bill. Its use in the sentencing of children **may indeed affect children adversely by deviating from the principle of equality before the law**. It should furthermore be recognized that the Bill consistently refers to the consultation of victims and prosecutors have always had the discretion and mandate to consult with the victims of crime in reaching their decisions. It is submitted that clause 71 be omitted from the Bill.

Pre-sentence reports - Clause 72

The importance given to pre-sentence reports when imposing a custodial sentence, as described in clause 72, is well-founded and supported. Well prepared pre-sentence reports, compiled by a probation officer or other suitably qualified person, are invaluable to the courts. The pre-sentence report is the primary tool in the hands of the court to obtain a comprehensive picture of the child and craft a sentence that adheres to the principles set out in clause 70. The quality of pre-sentence reports and the availability of probation officers to prepare these are however areas of major concern across all nine provinces.²⁰ The reference to 'a probation officer or other suitably qualified person' in clause 72(1)(a) is therefore supported as this would increase the number of people eligible to prepare pre-sentence reports.

In view of these observations and to strengthen the intentions of clause 72, the following are proposed:

- The Department of Social Development must through regulations specify the requirements for a person, other than a probation officer, to be regarded as competent to prepare a pre-sentence report.

¹⁹ Department of Justice and Constitutional Development (2007) *Service Charter for Victims of Crime in South Africa - the consolidation of the present legal framework relating to the rights of and services provided to victims of crime*, Pretoria, p. 2.

²⁰ In 2006 CSPRI co-facilitated a series of workshops involving over 100 magistrates on alternative sentencing for children. The general poor quality and delays experienced in receiving pre-sentence reports was a consistent complaint from magistrates across all nine provinces.

- The format and issues to be covered in the pre-sentence report need to be standardized through regulations. This should, amongst others, clearly indicate the persons to be interviewed, the different sources of information to be consulted, and clearly solicit the views of the person preparing the report on a proposed sentence.
- Pre-sentence reports concerning children who are in custody must be submitted to the sentencing court within 20 working days, whereas pre-sentence reports for children who are not in custody must be submitted within 30 working days after being requested by the court.
- Where a custodial sentence is contemplated, in either a residential facility or a prison, the person preparing the report, must enquire not only about the availability of accommodation, as required in clause 72(3), but must also report on the availability and types of services (e.g. programmes, education and training) at the facility or prison aimed at assisting the child to lead a crime free life.

See Appendix for proposed wording.

Sentence of imprisonment - Clause 78

Clause 78 deals with the imposition of a sentence of imprisonment. As noted above with reference to the Constitution, international law and international instruments pertaining to child justice, the imprisonment of children must always be a measure of last resort and then for the shortest possible period. The Constitution further states in section 28(2) that ‘A child’s best interests are of paramount importance in every matter concerning the child’. The objects of this Bill, described in clause 2, give more precise meaning and guidance in this regard and these are indeed commendable. At the same time it must be acknowledged that the debate on what exactly ‘the best interests of the child’ are, is far from settled and our courts have provided varying views on this.²¹ There is unfortunately no checklist that we can give to the courts to guide them on what indeed the best interests of children are.²² Because children and their circumstances differ and the Bill emphasizes an individualized response when imposing sentence [see clause 70(1)(b)], it would be wiser to create a legislative framework that enables presiding officers to gather as much information as possible, not to limit their decision-making, and encourage sentence options that are in adherence with the objects and spirit of the Bill.

Minimum sentences legislation

Consequently, clause 78(3) with its reference to the sentencing provisions of Act 105 of 1997 (commonly known as the minimum sentences legislation), becomes problematic. In short, this legislation requires that if a child who is older than 16 years but younger than 18 years at the time of the offence, is convicted of an offence referred to in Schedule 2 of the Act, that a specified minimum term of imprisonment must be imposed unless there are substantial and compelling reasons to deviate from the prescribed minimum term of imprisonment. The amended section 51 of Act 105 of 1997²³ brought one significant change in respect of children (when it came into force in December 2007), namely that a child convicted of a Schedule 2 offence must still receive the minimum prescribed sentence (unless there are substantial and compelling reasons to deviate), but that up to half of the sentence may be suspended as provided for in section 297(4) of the Criminal Procedure Act.

²¹ Bonthuys E (2006) ‘Children’ in Currie I and De Waal J *The Bill of Rights Handbook*, Juta, Cape Town, pp. 617-620

²² The Children’s Act has now provided presiding officers with such a checklist, but these factors would not apply entirely to criminal proceedings involving children.

²³ Act 38 of 2007 Criminal Law (Sentencing) Amendment Act

The central problem arising from this provision is that it effectively creates sub-categories of children within the constitutional definition of what a child is, namely a person under the age of 18 years. No mention is made in the Constitution of children older than 16 years but younger than 18 years. The provision in clause 78(3) with its reference to the Criminal Law Amendment Act is a thinly disguised attempt to create mini-adults based on two variables.

Firstly, the age of 16 years has been chosen without any substantive motivation indicating that a person above this age is more mature and has a better understanding of right and wrong, and is therefore better able to understand the consequences of his or her actions. It is exactly because of the uncertainties and great disparities in personal development that children is defined as broadly as persons under the age of 18 years and moreover that, until very recently, children only reached the age of majority when they turned 21 years of age.

The offence for which the child is convicted constitutes the second variable. In essence, the argument is that if a child is 16 years old and commits a certain type of offence, then he/she should be punished like an adult; the possibility of suspension of half of the sentence provides little recognition of the child's status as a child. This neat line of reasoning is dangerous in its simplicity. It argues that when sentencing a child for an offence that he/she committed on the day before his/her 16th birthday, there is a whole range of factors that need to be considered, as described in clause 70. However, if the offence is committed on the day after the child's 16th birthday, all these factors can be ignored and only the child's age and the offence are of significance. While clause 72(1)(b) does require a pre-sentence report as mandatory before a child can receive a custodial sentence, the possible impact of the pre-sentence report is significantly diluted by the 'substantial and compelling' requirement in the Criminal Law Amendment Act. The categorization of children in age cohorts linked to offences and prescribed sentences undermines the objects of sentencing described in clause 70 and in particular the individualization of the response [Clause 70(1)(b)]. This formulaic approach to sentencing children cannot be accepted as in line with the requirements and spirit of the Constitution, nor the objects of sentencing described in the Bill itself. We submit that clause 78(3) be omitted from the Bill.

Maximum tariff of imprisonment

Clause 78(5) sets the maximum period of imprisonment at 25 years with reference to the Schedules accompanying the Bill. If Clause 78(3) is accepted, it follows that certain children are exposed to the extremely punitive sentences, including life imprisonment, under the Criminal Law Amendment Act. The increase in sentencing tariffs from 1995 to date is well documented and a rapid increase in the proportion of long term prisoners has been observed.²⁴ This was achieved firstly through the increase in sentence jurisdiction of the district and regional courts and secondly, through the imposition of mandatory minimum sentences. Despite these punitive provisions there is as yet **no evidence to suggest that longer prison sentences have had any impact on crime trends nor that it acted as a deterrent to would-be criminals**. Importantly, research on sentencing has showed that when sentence jurisdictions were increased in 1997, that presiding officers almost immediately started imposing sentences to the maximum of the court's jurisdiction.²⁵ It is because of this known trend that the stipulated maximum prison sentence of 25 years for children in clause 78(5) is dangerous – it will not be used selectively and sparingly, but generally. It should also be noted that when courts have the discretion in sentencing that they do

²⁴ Giffard C and Muntingh L (2007) *The impact of sentencing on the size of the prison population*, Open Society Foundation, Cape Town.

²⁵ Giffard C and Muntingh L (2007) *The impact of sentencing on the size of the prison population*, Open Society Foundation, Cape Town.

impose lengthy custodial sentences on children convicted of serious crimes. In *S v Brandt*²⁶ the court convicted the offender of murder and imposed a prison term of 18 years and in *S v Nkosi*²⁷ the court also sentenced the offender to an effective 18 years' imprisonment for murder, housebreaking, and theft.

Although the principle of discretion is important as outlined above, the quantum of 25 years itself cannot be ignored as this provides a tariff with reference to proportionality. There is general agreement amongst commentators that South African sentencing has become extremely punitive and the use of life imprisonment is indicative of this trend. Not only did this category of prisoners jump from less than 400 to over 7500 in the past 12 years, but the meaning of life imprisonment has changed substantially. Prior to 1990 life imprisonment allowed that a prisoner may be considered for parole after 10 years although the practice was that such prisoners were considered for release after 15 years. In the early 1990s, through a policy directive, this changed to 20 years before consideration for parole. The promulgation of the Correctional Services Act in 2004 lifted this bar further to 25 years before consideration for parole. **In its immediate consequences there is therefore little difference between the maximum tariff of 25 years, as provided for in clause 78(5) and the imposition of life imprisonment.** The only difference would be that the person sentenced to life imprisonment would be on parole for the remainder of his/her life.

The issue of proportionality is a vexing one and has occupied scholars and philosophers for many years. For comparative purposes it is useful to reflect on the sentence provisions and some of the sentences imposed by the International Criminal Court (ICC). The fact that South Africa is party to the Rome Statute, has enacted legislation to this effect, and that the Bill refers to it, supports the validity of such a comparison. It furthermore indicates South Africa's mindfulness and acceptance of the spirit and objects of the Rome Statute. Jurisprudence emanating from the ICC and its tribunals therefore hold special meaning for South Africa.

This court, through its tribunals and special courts, deals with the most heinous crimes against humanity such as genocide and torture. The sentencing provisions of the Rome Statute provides for, amongst others, determinate prison sentences and life imprisonment. When life imprisonment is imposed, the sentence must be reviewed after 25 years to determine whether it should be reduced. The International Criminal Tribunal for the Former Yugoslavia (ICTY) sentenced the freelance torturer Duško Tadić to twenty years imprisonment (with a 10-year minimum to be served) on eleven counts of crimes against humanity. Croatian general Tihomir Blaskić was sentenced to 8 years imprisonment for directing the inhumane treatment of prisoners of war and Bosnian Serb general Radislav Krstić to 35 years imprisonment for aiding and abetting genocide for his involvement in the massacre of more than 6000 people.²⁸ These offenders committed some of the most heinous offences under international law and were responsible for or contributed to the deaths of large numbers of people. In sentencing these individuals the court's intentions are clearly focused on punishment and the safety of the community; rehabilitation would not play a significant role. Compared with the sentences imposed by the ICTY cited above, **the 25 years maximum prison sentence and the prescribed minimum sentences in the Criminal Law Amendment Act appear excessive, vengeful and unbalanced.**

It is submitted that the sentencing of children be left in the discretion of the sentencing courts. We submit that clause 69 of the version of the Bill that was tabled in 2002 be returned to the Bill.

²⁶ *S v Brandt*, Supreme Court of Appeal, Case no. 513/03

²⁷ *S v Nkosi* 2002 (1) SA 494 (W)

²⁸ Robertson G (2006) *Crimes against Humanity*, Penguin, London, pp. 396 and 405.

See Appendix for the wording of Clause 69 of the 2002 version of the Child Justice Bill.

Legal representation at state expense - Clause 83

The efforts proposed in the Bill to divert children from the formal legal processes through diversion are commendable and in line with the general principle of limiting children's exposure to the criminal justice system. When children do appear in court, it is of critical importance that the hearing be conducted in a fair manner and that the child's rights are protected throughout. Legal representation is an important mechanism to achieve this objective and the Constitution guarantees the right to legal representation in section 35(2)(b). The Constitution goes further in section 35(2)(c) than merely guaranteeing this right and creates the mechanism for providing legal representation by the state at state expense if substantial injustice would otherwise result. It also places the duty on the state to inform the accused of this right. Case law provides guidance on what substantial injustice could constitute and factors to consider are: the complexity of the case, the severity of the potential sentence, and the ignorance or indigence of the accused.²⁹

Clause 83 presents a number of features placing it at risk of falling short of the requirements of section 35(2)(c) of the Constitution. The use of age categories (below 14 years and below 16 years) present the first problem as these are not supported by case law and do not refer in any way to the test for substantial injustice. For example, there is no evidence to suggest that a child aged 17 years is less ignorant than a child aged 16 years and that the former is therefore not entitled to legal representation at state expense and the latter is. Furthermore, excluding 16 and 17 year olds from legal representation at state expense merely as a function of their age would constitute discrimination based on age. The three factors listed above as the test for what a substantial injustice would constitute, make no reference to age.

Under the current provisions and as proposed in the Bill, it would effectively mean that a child aged 17 years can be sentenced to life imprisonment without the assistance of a legal representative at state expense. This is an untenable situation and cannot be accepted as in line with the Constitutional requirement to prevent substantial injustice.

Clause 83(1)(c) requires that if it is likely that a child will be sentenced to a residential facility (clause 77) that the presiding officer must refer the child's case to the Legal Aid Board. Unfortunately, and possibly as an oversight on the part of the drafters, it excludes the possibility that the child may be sentenced to imprisonment, as provided for in clause 78. These children should even more so enjoy the benefit of legal representation at state expense.

In view of the above, it is submitted that legal representation at state expense must be offered when:

- the child is in detention;
- the child is under the age of 14 years, or
- the child is facing the possibility of a custodial sentence.

See Appendix for proposed wording.

Appeals and automatic review

Clauses 85 and 86 deal with appeals and automatic review. These are important safety mechanisms protecting the offender from substantial injustice. The current wording of clauses 85

²⁹ Schwikkard PJ (2006) in Currie I and De Waal J *The Bill of Rights Handbook*, Juta, Cape Town, p. 762

and 86 place the emphasis on two issues, namely age and the sentence of imprisonment. Imprisoning children incorrectly or for longer than absolutely necessary, would constitute a substantial injustice.

Attention is hereby drawn to the recent amendment of section 309 of the Criminal Procedure Act by section 6 of the Criminal Law Amendment Act (Sentencing) (38 of 2007). The amended section 309 extends the direct appeal procedure to:

- all children sentenced to imprisonment who were under the age of 16 years at the time of the offence;
- children older than 16 years who were not assisted by legal representation at conviction;
- all person's sentenced to life imprisonment by a regional court under section 51(1) of the Criminal Law Amendment Act .

The amended section 309 is therefore more progressive in effect than the current wording of clause 85 of the Bill. However, given the increase in sentence jurisdiction of the district and regional courts by the Criminal Law Amendment Act and the Magistrates Amendment Act, the direct appeals provision needs to be dealt with thoroughly in order to ensure that children are not incorrectly imprisoned or for longer than absolutely necessary.

It is in particular 16 and 17-year old children who are attracting longer prison sentences and measures should therefore be in place to give recognition to the offender as a child. In view of this, it is submitted that all children who have received a custodial sentences of longer than 5 years have a right to direct appeal. The tariff of five years is motivated by the fact that this is the shortest sentence provided for under the Criminal Law Amendment Act and therefore represents a particular tariff point recognised in law.

The automatic review procedure referred to in clause 86 is problematic for the same reasons as it excludes certain children based on their age, namely those aged 16 years and older. This is in fact more restrictive than the provisions in the Criminal Procedure Act as section 302 places no restriction in respect of age. Apart from the confusion it causes, we submit that the intentions of clause 86 are regressive.

It is therefore submitted that:

- custodial sentences imposed by a magistrate's court on a child who is younger than 14 years be placed on automatic review
- custodial sentences longer than three months imposed by a magistrate's court on a child who is older than 14 years be placed on automatic review
- all children sentenced to a custodial sentence by a regional court or high court have access to direct appeal if unrepresented upon conviction
- children sentenced to a custodial sentence of longer than five years have access to direct appeal even if represented upon conviction.

Parole for offences committed as a child

In the management of sentenced prisoners, parole is an important tool at the disposal of prison authorities to incentivise good behaviour and participation in programmes aimed at rehabilitation. The possibility of release before the expiration of sentence is a critical factor in keeping prisoners' attention focused on life outside of the prison as opposed to becoming immersed in prison culture; for example in prison gangs.

The current **parole regime applies to children and adults alike and no distinction is made in law.** The parole system presents a further opportunity in law reform to give effect to the constitutional principle that imprisonment should be for the shortest possible period.

The sentence profile presented in Figure 1 above shows, when the sentence categories are grouped, that 31% of children serving prison sentences are serving sentences of less than two years; 57% are serving sentences of less than three years, and 78% are serving sentences of less than five years. Under the current parole regime the majority of these cases will be considered for parole after serving half of their sentences.³⁰ With the majority of children serving shorter sentences of less than three years, it follows that they will in all likelihood still be under the age of 21 years when released, even if they are not released on parole after serving half their sentences, as provided for under section 73(6) of the Correctional Services Act. Although the age of 21 years has lost its legal significance when the age of majority was reduced from 21 years to 18 years, it remains a significant age cut-off point recognized by the DCS in the White Paper³¹ and the accompanying regulations to the Correctional Services Act.³² The Child Justice Bill, in Clauses 4(2)(b) and 77(2), also recognizes the importance of this age cut-off point bringing under particular circumstances young adults under the scope of the Bill.

The current parole regime, with all its complicated categories³³, does not give expression to the fact that a sentenced prisoner was a child at the time he or she committed the offence and may indeed still be a child. For all intents and purposes the person is treated as an adult even though a child. It should be noted that consideration for parole does not mean release and that the DCS is entitled to detain a person for the full period of his or her sentence. Consideration for parole by the Correctional Supervision and Parole Board does, however, represent an important milestone in the serving of a prison sentence. Moreover, it provides the prisoner with the opportunity to engage with the Correctional Supervision and Parole Board (predominantly made up of community members and not DCS officials) on progress made in serving the sentence.

Release on parole is also made conditionally and the Correctional Supervision and Parole Board can, based on recommendations from the Department of Correctional Services, set down such conditions as it sees fit to promote the development of the offender and encourage a crime free life.³⁴ Offenders violating their parole conditions can be re-called to prison to serve the remainder of their sentences in custody. Parole is therefore not a means to empty the prisons but rather a mechanism aimed at supporting the rehabilitation and reintegration of the offender in the community by recognizing the progress the individual has made while serving a prison sentence.

The Child Justice Bill presents an opportunity to give further expression to the principle that imprisonment of children should be for the shortest possible period by setting parole provisions that are different for children than for adults. The Child Justice Bill hints in this direction at clause 78(2) but is not directive. It is submitted that these intentions need to be made clear in law. Based on the sentence profile presented above and aimed at limiting children's imprisonment, it is proposed that **prisoners convicted of an offence committed as a child be considered for parole when he/she has served one third of a determinate sentence or after five years, whichever comes first.** This would bring a number of advantages:

³⁰ Section 73(6)(1)(a) Correctional Services Act

³¹ Department of Correctional Services' *White Paper on Corrections in South Africa, Pretoria*, p. 162, para 11.3.1. the DCS in fact assumes a slightly wider scope and refers to offenders aged 18 to 25 years.

³² Regulation 3(h) Regulation Gazette No. 8023 30 July 2004.

³³ These have been described in summary format by Prof. J Sloth-Nielsen in a submission to the Portfolio Committee on Correctional Services on the Correctional Services Amendment Bill.

³⁴ Section 52 of the Correctional Services Act sets out the conditions in this regard.

- These offenders would be able to serve the larger proportion of their sentences in the community under the supervision of the DCS with access to a broader range of services aimed at rehabilitation and reintegration. This would also provide access to services provided by non-governmental organizations. Research has shown that appropriate programmes supported by community-based interventions are more effective in reducing re-offending than custodial sentences alone.³⁵ This position is further supported by the *White Paper on Corrections in South Africa*.³⁶
- It would exclude these offenders from the extremely punitive provision of section 73(6)(b)(v) of the Correctional Services Act, requiring that a person sentenced under sections 51 and 52 of the Criminal Law Amendment Act (105 of 1997) must serve four fifths of the term of imprisonment imposed or 25 years, whichever is shorter, before he or she can be considered for parole.
- It will reduce significantly the time that children in general spend in prison serving their sentences before they can be considered for parole. For example, a child serving a two-year sentence can be considered after eight months as opposed to 12 months, and if released, be placed on parole in line with the sentence plan developed by the Department of Correctional Services.³⁷
- By creating a mechanism for early release, it would reduce the inherent danger of institutionalisation of children in the prison system and counter the effect of prisons as ‘universities of crime’.
- This proposal would be supportive of the DCS vision for young people emphasizing community based interventions.³⁸

See Appendix for proposed wording.

Conclusion

Government has to be commended for the practical steps taken and measures put in place over the past ten years to improve the situation of children in the criminal justice system. The increased availability of probation officers, the accessibility of diversion programmes through its NGO partners, and the establishment of one-stop child justice centres are testimony to this. The Child Justice Bill is therefore an important step to consolidate the significant advances made to date and it should affirm the progressive nature of practices that have developed over the years.

The 2002 version of the Bill was in a very real sense close to the voices of stakeholders that contributed to its drafting, with specific reference to officials, SA Law Reform Commission, NGOs and children. The current version of the Bill departs fundamentally in key areas from the 2002 version. Of particular concern is the targeting of 16 and 17-year old children for harsh punishment. This is manifested in various provisions of the Bill and linked legislation. The above submission has described these in more detail and they are listed below:

- the Criminal Law Amendment Act (sentencing)(see clause 78(3))
- the sentencing provisions of the Bill (see clause 78(4))
- exclusion from legal representation at state expense in general (clause 83(1)(b))

³⁵ Dünkel F & Van Zyl Smit D (2001) ‘Conclusion’ in Van Zyl Smit D and Dünkel F *Imprisonment Today and Tomorrow*, Kluwer, The Hague p. 822

³⁶ Department of Correctional Services’ *White Paper on Corrections in South Africa*, Pretoria, p. 142, para 9.13.8.

³⁷ Sentence plans are required for all prisoners serving a sentence of longer of 12 months. See section 38(2) of the Correctional Services Act.

³⁸ Department of Correctional Services’ *White Paper on Corrections in South Africa*, Pretoria, p. 163, para 11.3.2

- exclusion from legal representation from state expense when facing a sentence of imprisonment (see clause 83(1)(c))
- exclusion from direct appeals when sentenced to imprisonment (see clause 85)
- exclusion from automatic review (see clause 86)

The net effect of these measures is that the odds are stacked against a small group of offenders by excluding them from critical safety measures in the administration of justice.

There is to date no evidence indicating that this age cohort is disproportionately responsible for crime or that they commit more serious offences than adults. They constitute indeed a very small percentage of the prison population and consequently a small percentage of the total offending population. Seen for their combined effect, the above measures leave one with the impression that 16 and 17 year old children are being made the scapegoats of South Africa's crime problem by encouraging and facilitating long custodial sentences.

Referring to the 16-17-year old age cohort, the Bill leaves one with the impression of a high-handed and uninformed approach. Instead of addressing the fault lines in the existing criminal justice process as well as the lack of prevention and reintegration services, it creates new fault lines of a far more dangerous nature. In view of these concerns and acknowledging the all too human inclination to be retributive, we respectfully submit that vision, understanding and greatness of spirit guide the drafting of the Bill.

End

APPENDIX 1

Note that underlined text indicates proposed insertions and text that is ~~stroked through~~ indicates proposed deletions.

Research, evaluation and monitoring

Clause 95 (c) Provide for the establishment of an information system collecting data on children in the criminal justice system as prescribed with reference to:

- (i) Children in pre-sentence detention, describing the total number of children in detention, the proportion of children in detention in the different stages of the criminal justice process, and the average length of detention.
- (ii) Duration of detention as per sentence category and type of sentence
- (iii) The number of children coming into contact with the child justice system with reference to number of arrests, diversions, trials and adjudication.
- (iv) Description of the child justice system with reference to the existence and accessibility of specialised courts, procedures and/or dispositions or measures applicable to children.
- (v) The availability of appropriate specialised staff per 1000 arrested children with reference to judges, lawyers, prosecutors, police, social workers and probation officers
- (v) Proportion of children in detention who are not separated from adults in police cells, prisons and other detention facilities.
- (vi) Measures for control of quality of services to children in detention with reference to oversight mechanisms to places of detention and access of parents to children in detention facilities.
- (vii) Protection from torture, violence, abuse and exploitation with reference to the existence of legal provisions prohibiting torture, inhuman and degrading treatment or punishment; the existence of safe, accessible and child-sensitive complaint mechanisms for children; the number of reported cases of violations, and number of reported cases followed by criminal or administrative sanctions
- (viii) The existence of a national programme for the prevention of child offending that has at least the following components: family support services; community-based programmes for vulnerable groups; programmes for prevention of drugs, alcohol abuse; educational support programmes, and involvement of mass media in prevention
- (vii) Number of children in detention benefiting from an after-care programme lasting at least six months following release.

~~[a single database, containing quantitative and qualitative data relating, among others, to—~~

- ~~(i) arrest or methods of securing attendance at criminal proceedings;~~
- ~~(ii) assessment;~~
- ~~(iii) preliminary inquiries;~~
- ~~(iv) diversion;~~
- ~~(v) children awaiting trial;~~
- ~~(vi) bail and placement;~~
- ~~(vii) trials;~~
- ~~(viii) sentencing;~~
- ~~(ix) appeals and reviews; and~~
- ~~(x) children below the age of 10 years; and]~~

Protection of children in police custody

- Clause 28 (1) (d) (i) Each police area commissioner shall identify and designate from amongst those police stations in his/her command area the police stations that are suitable to be used for the detention of children as required by section 28(1)
(ii) The identification and designation of police stations as required by section 28(d)(1)(i) shall be done with a view to centralise the detention of children in a police management area to facilitate monitoring and ensuring conditions of detention suitable for children.
(iii) In the event that a child is detained in a police station, the arresting officer shall without delay inform the designated probation officer or other person designated by the Department of Social Development of the detention of the child.

Children in prison

30.(1) Subject to section 31(5), a presiding officer may only order the detention of a child referred to in section 29 in a specified prison, if—

- (a) an application for bail has been postponed or refused or bail has been granted but one or more conditions relating thereto have not been complied with;
- (b) the child is aged 16 years or older
- (c) such child is accused of having committed an offence referred to in Part I or II of Schedule 3;
- (d) such detention is necessary in the interests of the administration of justice or the safety or protection of the public or such child or another child in detention; and
- (e) there is a likelihood that the child, upon conviction, could be sentenced to imprisonment.

(2) A child who is at least 10 years but under the age of 14 years may only be detained in a prison if, in addition to the factors referred to in subsection (1), the Director of Public Prosecutions or a prosecutor authorised thereto in writing by him or her issues a written confirmation that he or she intends charging the child concerned with an offence referred to in Part I or II of Schedule 3 and stating that there is sufficient evidence to institute a prosecution against the child.

78 (7) A child sentenced to imprisonment who is below the age of 16 years at the time of sentencing may not be admitted to serve the sentence in a prison until he or she has turned 16 years of age. Until the child reaches the age of 16 years, the sentence shall be served in a designated secure care facility following which the child may be transferred to a prison to serve the remainder of the sentence there. The proportion of the sentence served in a secure care facility shall be deemed as part of the sentence served for all further decisions.

Sentencing of children – factors to be considered

- 70 (3) When considering the imposition of a sentence involving compulsory residence in a residential facility or imprisonment, the child justice court should take the following factors into account:
- (a) The seriousness of the offence;
 - (b) the protection of the community;
 - (c) the severity of the impact of the offence on the victim;
 - (d) the previous failure of the child to respond to non-residential alternatives; and

- (e) the desirability of keeping the child out of prison
- (f) the proximity of the designated facility or prison to the child's community, parent(s) or care giver(s)
- (f) the prevailing conditions at the facility or prison and the availability, appropriateness and effectiveness of existing services and interventions at the designated residential facility or prison.

Sentencing of children – pre-sentence reports

72.(1) (a) A child justice court imposing a sentence must, subject to paragraph (b), request a pre-sentence report prepared by a probation officer or any other suitable person prior to the imposition of sentence.

- (i) The member of cabinet responsible for social development must through regulations specify the requirements in respect of other suitably qualified persons referred to in paragraph (a)
- (ii) The member of cabinet responsible for social development must through regulations specify the format and scope of a pre-sentence report with specific reference to the sources of information to be consulted, persons to be interviewed and drafting sentence recommendations.

(b) A child justice court may dispense with a pre-sentence report where a child is convicted of an offence referred to in Schedule 1 or where requiring such report would cause undue delay in the conclusion of the case, to the prejudice of the child, but no child justice court sentencing a child may impose a sentence involving compulsory residence in a residential facility or imprisonment unless a pre-sentence report has first been obtained.

(2) The probation officer or other suitable person must complete the report as soon as possible but no later than 20 working days if the child is in custody or 30 working days if the child is not in custody ~~one calendar month~~ following the date upon which such report was requested.

(3) Where a probation officer recommends that a child be sentenced to compulsory residence in a residential facility or prison, such recommendation must be supported by a sworn statement or facsimile copy thereof, as prescribed, obtained by the probation officer from the person in charge of such facility, containing current information regarding:

- (i) the availability or otherwise of accommodation for the child in question;
- (ii) the range and purpose of educational, developmental and therapeutic services available, and
- (iii) the effectiveness of services referred to in paragraph (3)(ii) in reducing re-offending

(4) A child justice court that imposes a sentence other than that recommended in the pre-sentence report must record the reasons for the imposition of a different sentence.

Clause 69 of the 2002 Child Justice Bill

69. (1) A sentence of imprisonment may not be imposed unless-

- (a) the child was over the age of 14 years of age at the time of commission of the offence; and
- (b) substantial and compelling reasons exist for imposing a sentence of imprisonment, which may include conviction of a serious offence or a previous failure to respond to alternative sentences, including sentences with a residential element.

(2) No sentence of imprisonment may be imposed on a child-

- (a) in respect of an offence referred to in Schedule 1; or

(b) as an alternative to any other sentence contemplated in this Act.

(3) If any child fails to comply with a condition of a sentence imposed on him or her, the child may, in the prescribed manner, be brought before the child justice court which imposed the original sentence for reconsideration of an appropriate sentence which may, subject to subsections (1) and (2), include a sentence of imprisonment.

(4) A child justice court imposing a sentence of imprisonment must announce the period of imprisonment in an open child justice court and the coming into effect of the term of imprisonment must be antedated by the number of days that the child has spent in prison prior to the sentence being announced in child justice court.

Legal representation

83.(1) Where a child appears before a child justice court in terms of Chapter 8 and is not represented by a legal representative of his or her own choice, at his or her own expense, and -

(a) the child is below the age of 14 years;

(b) ~~the child is in detention~~ ~~the child is below the age of 16 years and is in detention in a prison;~~ or

(c) it is likely that a sentence contemplated in section 77 or section 78 may be imposed if the child is convicted of the offence in question, the presiding officer must refer the child to the legal aid board referred to in section 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969), for the matter to be evaluated by the board as contemplated in section 3B(1)(b) of that Act.

(2) The prosecutor must indicate to the child justice court whether he or she is of the opinion that the matter is a matter contemplated in subsection (1) before the child is asked to plead and, if so, no plea may be taken until the child has been granted a reasonable opportunity to obtain a legal representative or a legal representative has been appointed.

Parole

78.(1) A child justice court, when sentencing a child to imprisonment, must only do so as a measure of last resort.

(2) In compliance with our international obligations, no law, or sentence of imprisonment imposed on a child, including a sentence of imprisonment for life, may, directly or indirectly, deny, restrict or limit the possibility of earlier release in terms of any relevant law of a child sentenced to any term of imprisonment.

(3) Unless a shorter non-parole period is provided for or specified by the sentencing court, a child sentenced to a determinate period of imprisonment shall be considered for release on parole or correctional supervision after he or she has served at least one third or five years of the term of imprisonment, whichever comes first.

APPENDIX 2

Information submitted to CSPRI by Bosasa on security measures at the Youth Care Centres operated by Bosasa. Submitted by Angelo Agrizzi of Bosasa.

The Bosasa Group of Companies has looked to international benchmarking standards with regards to security applications for both Secure Care Facilities as well as High Volume, High Risk detention facilities.

With its understanding of the South African environment and fifteen year track record in dealing with Youth in conflict with the law, Bosasa has developed pro-active measures to counteract potential hazardous situations that could occur.

The impeccable statistics at our facilities are achieved by implementing both technology and cultivating an ethos amongst staff members responsible for the “young people”. Although BOSASA has different contracts with various Provinces, the following is what is proposed as an option to them. Some facilities will have all of these below and others only some.

Technology

Bosasa has employed the services of Sondolo IT to oversee the “Hard” security systems used at the facility; whilst the systems are discreet they remain robust and have been extremely successful in the various environments. The systems are not product specific, making them cost effective and adaptable, most importantly reliable.

The solutions are technologically based, and include the following;
The equipment:

- Electronic Locking mechanisms for gates – monitored locally at a fully equipped control room, with fail proof system backups
- Metal detectors / X Ray scanners – user friendly and integrated into the control room software, allowing for the verification by independent control room operators, both on-site and offsite with portability functionality. This in essence allows for an independent person in a control room to see what the equipment operator is seeing, whilst taking a snapshot of the visitors and the operator during the screening process, and has proven invaluable in averting collusion, as well as smuggling of contraband items into the centre.
- Static Cameras – Fixed high quality cameras are placed in strategic places, e.g. passageways, communal areas, receptions, clinic, workshops, visiting areas to allow for “focused” viewing of potentially problematic areas.
- Fibre Optic sensors – strategically placed in “no go” areas, such as parapets of walls / fences.
- Use of aesthetically pleasing fence products that are visually attractive with no barbed wire and electric deterrents
- High Mast Pan Tilt Zoom Cameras are used, with both fixed and pre-programmed roaming, allowing the control room operators the ability to focus in on potentially problematic occurrences.
- The design of the ceilings are unique, preventing both easy access as well as remaining aesthetically child friendly

The Software

- Sondolo IT has a team of software developers that have been integrally involved with the dynamics of the youth centres, and have developed proprietary software that meets the needs of our facilities
- All equipment is integrated, allowing the operator easy access, one screen response
- Youth centres have integrated into an off-site national control centre, which allows an independent third party operator to view, not only the facility within a secure environment but also oversees the on-site control rooms and its staff's activity. In the event of a major disruption or failure at the individual site the site can be remotely accessed via a secure line by the Unit Manager, alternatively by the National Control Room.
- Traditionally systems employed are not of a networkable structure, the network at our facilities allow for the remote storage of data, as well as remote access of stored data, eliminating potential collusion.

The Control Rooms

- Each individual site has its own run control room comprising of video walls that display the various cameras, as well as the computers required to manage the facility.
- Control rooms are monitored – via video – at a national centre, which acts as an emergency backup
- Staff members (Control Room Operators) are PSIRA registered, and undergo specific training via Dr. Denise Bjorkman and Dr. Thembi Modungwa, where they are trained to identify “Subliminal / Behavior patterns” that could result in riots / suicides / escapes / smuggling etc. Staff members once trained are certificated and registered by P.A.C.S.T. – The Pan African Council for Surveillance Technologists.

Staff and young people must feel safe within the secure care facility. The facility should be equipped with security officers that are PSIRA registered and they are present in the facility on a daily basis. Young people, staff and visitors are searched to ensure that no illegal and dangerous substances enter the facility. CCTV cameras also ensure for a softer yet more effective measure of security. These cameras should be placed in positions so as not to invade private spaces such as the inside of the rooms, bathrooms and toilets. Negotiations will therefore be entered into with the various Departments regarding the implementation thereof.

Security is an integral part of the daily operations of the youth centre, in the light that the young people awaiting trial need to be in a secure and safe environment. BOSASA believes in continued investments in the development of new technological trends to ensure quality services.

Access Control

All security employed by BOSASA are trained to do access control as per set procedures. The best interest of the child will always have preference and thus a safe environment has to be ensured within the facility. Access control measures depend on a combination of hardware, software, standard operating procedures and site specific requirements. Examples of access control measures used by BOSASA in the different facilities include; registers, turn styles and access control cards, walk through scanners and parcel scanners.

Perimeter Surveillance and Security

The perimeter of the facility will be monitored to determine any security risks and to ensure the safety of the young people and staff in the facility. Adequate lighting is however required to assist in the process. CCTV cameras are installed at strategic points to assist in perimeter surveillance, this could enhance the security aspect.

Detection of Unauthorised Items

Security officers are responsible for routine and random searches on an ongoing basis, and the following methods can be utilised depending on the equipment available to ensure early detection of such unauthorised items:

- metal detectors (walk-through and wand)
- visual or touch inspection of property
- body searches

All searches will be conducted by trained personnel and it has to be conducted in a reasonable manner, with the least intrusive method possible as determined by the circumstances.

Administration and Information Technology

BOSASA has developed an innovative and comprehensive method of capturing and storing the young people's data on computer. An individual is registered on the database together with an ID (if available), first name and surname and an extraction of a chosen fingerprint to produce an identity card containing all their details and their photograph. The database captures the name, date of birth, home address, case number, next court date, and alleged crime, standard of education, room and bed allocated to each young person as well as educational progress. A copy of the identity card (student card) is placed on the young people's file and when they are released or readmitted, the identity card information and "live" fingerprint must match the photograph and fingerprint on the computer. This is the most effective method of keeping track of individual's progress.

The card is used during mealtimes, classroom and workshop attendance and for participation in various activities and accessing services.

All interventions and activities are recorded in registers or on the young persons file which forms part of the quality management system as outlined in the policy and procedure manual.

Health and Safety

BOSASA complies with all the regulations of the Occupational Health and Safety Act. The required safety provisions for all staff are provided for. OHS Act training is provided to all employees, to ensure understanding and elimination of unsafe work practices Health and Safety committees are elected and the OHS Act requirements implemented at each unit. First Aiders are trained at each unit, and fire fighting equipment is serviced regularly to ensure that it is in good working order at all units.

Emergency & Safety Practices

Young people and staff are informed of the emergency procedures relating to fire, riot and any other hazards. These are available in the Policy and Procedure Manual. Fire drills are held with young people and staff.

All young people and staff engaged in workshops wear protective clothing as a safety measure.

Fire extinguishers will regularly be checked. A layout plan of the facility will have to be made to organisations checking the equipment so as to assist in them in advising us on legislation regarding fire safety within the Centre.

Emergency numbers of the Fire Department and SAPS will be made available at reception.

Medication and hazardous substances are controlled and locked away.
Medical waste and “sharps” are appropriately disposed of.

No firearms are allowed in the Youth Centre. Firearms are handed in at the main entrance gate. SAPS staff members are not allowed further than the reception area with their service firearms. Health and Safety signs will be displayed throughout the Centre.

Communication Methods

Communication is through memorandums, directives, verbal and electronic communication including two-way radios. All directives, occurrences, events and incidents are recorded. Cellular communication is also used as backup.

All units are equipped with Voice Over IP protocols.

Quality Management System

BOSASA has been certified ISO 9001:2000 compliant by TUV Rhienland. This implies that BOSASA has a quality management system and has been verified by external auditors TUV.

The Compliance Division is responsible to ensure that the Youth Centres comply with the applicable Standards (ISO 9001:2000 - Quality Management System Standard is currently being used as based standard), applicable legislation and contractual requirements.

To ensure this compliancy, the Compliance Division has established and documented a Policy Manual (for the Group) which explains the Board's (Top Management) commitment and what aspects / functions are required to manage the Company.

Secondly the Compliance Division has developed and introduced a Standard Procedure Manual which explains in detail how the Company will comply with all the requirements.

The Youth Development Centres have also established and documented Standard Operating Procedures which explain the functions and processes to comply with in the management of a facility.

With an effective and efficient system in place, the Compliance Division conducts regular Site Monitoring, Compliance Training and Internal Audits to ensure that they comply to there requirements.

Once a year, an External Certification Body (currently utilising TUV Rhineland) certify that the Company comply with the requirements of ISO 9001:2000.

Compliance also manages the fire fighting equipment, First Aid equipment, Pest Control Services and Micro Biological Testing Service Providers which currently provides a service for the Youth Development Centres.