



national institute for crime prevention
and the reintegration of offenders



SUBMISSION BY NICRO ON THE CHILD JUSTICE BILL TO THE PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT

PLEASE NOTE THAT NICRO WISHES TO MAKE AN ORAL SUBMISSION AND ADDRESS THE PORTFOLIO COMMITTEE AT ANY PUBLIC HEARINGS THAT MAY OCCUR AND ACCORDINGLY REQUESTS AN OPPORTUNITY TO DO SO

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1. Introduction

Established in 1910, NICRO is the only NGO providing comprehensive *crime reduction and prevention* services throughout South Africa. It is our vision to build and strengthen a democratic society, based on human rights principles, through crime prevention and people centred development. NICRO is committed to and celebrates many years of active involvement in the transformation of South Africa. Its history is marked by the growing and changing nature of its services, which today, continue to respond dynamically and rapidly to the changing needs of South Africa's people and its communities.

NICRO is an acknowledged leader in the field and can lay claim to a long and proud history of innovative, impactful and excellent service delivery within the criminal justice sector. Examples of these services include early probation service (1930's), community service orders (1980's), diversion and the introduction of restorative justice to South Africa in the 1990's.

NICRO has been providing Youth Diversion services since 1992 and is currently the only Non Governmental Organization that has established Diversion Services nationwide. On a yearly basis NICRO accommodates an average of 10 000 children diverted from courts in formal programming. Recidivism rates of less than 10% over three years by NICRO Diversion beneficiaries have been recorded during a 2002 study. NICRO is currently in the 3rd year of a new study which, investigates the short and long term impact of Diversion services on the psycho social functioning and re-offending rates of children completing these programmes. 1st and 2nd year preliminary results is providing conclusive evidence that NICRO's Diversion Programme effectively facilitates attitudinal and behavioural changes for children included in Diversion services.

As a major role player in the provision of services to the criminal justice system NICRO therefore welcomes this opportunity to make a submission on the Child Justice Bill.

This submission deals specifically with Assessment and Diversion as included in the Bill and include comparative statistics from NICRO diversion practice over a period of 5 years. *NICRO would however like to add supportive comments to previous submissions made by various Civil Society Organizations as related to Criminal Capacity.*

2. Assessment

Kyle is 13 years old and was brought in front of court with several peers after they were arrested for vandalism. They had defaced road signs and deliberately scratched and broken mirrors on vehicles. Kyle has had no previous contact with the juvenile justice system. The school reports that until this year his grades were average, but his work declined in recent months. A urinalysis indicated that Kyle has not used any illegal substances recently, but he and the other boys involved in the incident said they sniff glue on occasion. Kyle's mother reported she and her husband divorced a year ago, and, as a single mother, she has had increasing difficulties managing Kyle and her other children. Kyle was released into the care of his mother while attending a diversion programme

Jennifer is 17 years old and was arrested for indecent assault. There is a record at a welfare organization of involvement with the family because a relative sexually abused Jennifer and a sister. During assessment by a NICRO social worker, Jennifer's urine screen tested positive for THC. She reported that she began smoking cigarettes, using drugs, and drinking alcohol around age 11. When her family was contacted, they said Jennifer frequently runs away and had not been home for several

days. Although Jennifer is enrolled in school, she is often truant and makes very poor grades. Jennifer has never been arrested before, but her parents did arrange for her to spend 6 months in a private treatment center. She claims her best friend is a 21-year-old male who is homeless and has a record of drug-related offenses. Jennifer's parents felt it was not best for her to return home. Jennifer was released into the care of her parents, while attending a diversion programme.

Brad is 16 years old and was arrested for armed robbery. He was with two other males, ages 14 and 15, when they robbed a petrol station attendant at knifepoint. Brad was assessed and diverted. Brad's urine screen tested positive for amphetamines. His records indicate a lengthy list of difficult behavior, beginning at age 11. His first arrest was at age 13, for shoplifting. Brad quit school at age 15. School reports also indicate frequent disciplinary problems, including fights with other students and one incident in which he hit a teacher. His mother has had recurring hospitalizations for a mental illness, and Brad has been traveling between various family member at these times.

The characteristics and situations of youth entering the juvenile justice system are quite diverse, as the first three examples illustrate. Youth may enter the juvenile justice system as a result of committing acts that are considered less serious or more serious offenses, including property and violent crimes. Youth range in age from early to late adolescence. Some have previous records of juvenile justice involvement, while others do not. Many have problems with school, family, drugs and alcohol, and/or peer relationships. At the same time, there are significant challenges facing juvenile justice professionals who must protect the public, effect changes in youth, and manage resources wisely. For these reasons the element of assessment in deciding not only the best disposition for the case but also the best intervention or action to address underlying factors contributing to offending behaviour, restoration of victims and public safety are of utmost importance. It is therefore that NICRO welcomes a chapter dedicated to assessment that highlights the assessment process as necessary to the administration of child justice and not just the delivery of so to speak "welfare" services to individuals in conflict with the law.

Clause 35 – Duty of Probation Officer to assess certain children

In contrast to the 2002 version of the Child Justice Bill which provided for all children to be assessed **NICRO is strongly opposed to the exclusion of certain children from assessment in the 2007 version of the Bill.** The Child Justice Bill is a piece of legislation that is suppose to ensure the appropriate management of all children in conflict with the law, the equal accessibility to services to services addressing contributing factors to the criminal behaviour (best interest of the child) and the enhancement of public safety. Exclusion from assessment will definitely not serve the best interest of the child, the community, the victim or the criminal justice system. If empirically validated assessments of the risk and need areas of all children in conflict with the law are not conducted courts and service delivery organizations will be unable to reliably:

- Judge what level of risk children in conflict with the law currently pose to the public;
- Determine which needs, when addressed, will reduce the likelihood of re-offense;
- Create intervention plans and strategies that take into consideration the whole range of needs, risk areas, and levels of motivation; (whether as part of a sentence or diversion)
- Measure mid- and post-intervention improvements—and whether they are significant enough to warrant release from probation or incarceration (if sentence) or withdrawal (if diversion)

- Decide which option would be most beneficial to which child (to optimize distribution of agency time and monetary resources);
- Evaluate which programs produced which kinds of intervention effects on which kinds of children

For these reasons, assessment is the foundation of Evidence-Based Practices in child justice services. In this regard Gottfredson (1987:10-11) states:

Decision-making applications in criminal justice can be said to be of two kinds, namely, institution policy decisions and individual decisions Planning problems often require estimates of outcomes of criminal justice decisions, including predictions of the persons who, in a given category, will have their probation or parole revoked, or who will not commit crimes at a high rate after release from confinement, or who may reasonably be expected to be paroled at first eligibility. Administrators may require estimates of the incarceration rates . . . of various categories of offenders. And in the long run they often require . . . estimates . . . [of the] effects . . . of differential handling for purposes of treatment or control.

Gottfredson further talks of individual decisions, especially those that may involve an [child's] confinement or determine the context of supervision and/or interventions with that person.. Assessment addresses multiple levels of decisionmaking, ranging from the individual child, to the program or agency, and even to the wider jurisdictional level. Not only do assessment occur at each level, but the way they are implemented and the results of the procedures are often interwoven among the various components and tiers of the juvenile justice system.

Palmer (1984) asserts that the purpose of justice system intervention includes both socially centered and child-centered goals. The socially centered goal is to modify a youth's behavior so it conforms to the law and therefore promotes the protection of society. To do this, however, child-centered goals must be achieved, resulting in modification of the child's behavior and a better adjustment between the youth and his or her environment. Therefore, the most appropriate fit between the child's risks and needs and treatment/intervention resources must be achieved. Palmer emphasizes that assessment predict and prescribe the needs and treatment approaches best suited for a youth.

Therefore a process of assessment for all is essential for matching children's risks and needs with the appropriate type of services along a continuum of graduated sanctions varying from prevention to aftercare. Two fundamental reasons for assessing all children and not only some are asserted. They are (National Council on Crime and Delinquency, 1997:4; Wiebush et al., 1995:174):

- Providing greater validity, structure, and consistency to the assessment and decision-making processes related to the disposition of the child's case
- Allocating limited system resources more efficiently by targeting the most intensive/intrusive/restrictive interventions on the most serious, violent, and chronic offenders.

In addition, as stated by Gottfredson (1987), programming and policy decisions often depend on assessment procedures. Resources are always limited, and assessment help channel children into the least restrictive, least intrusive, and usually least expensive program resources that reasonably can be expected to control and change their behavior and protect the public. Within programs, children often need to be divided into groups based on similarity of needs. Then, each group is provided with similar

services that can be expected, within reasonable limits, to produce the desired outcome. Assessment also helps programs and jurisdictions identify youth with greater and lesser potential for continued involvement in the criminal justice system. Such information makes possible more effective planning to prepare sufficient program resources for children. Finally, program evaluation is connected to assessment. Once children are directed to the appropriate programs and subgroups within programs, it is expected that the socially centered and offender-centered goals will be achieved successfully. Program outcomes can be measured for program evaluation, and if necessary, program components can be adapted to more closely accomplish these goals

THEREFORE NICRO SUBMITS THAT ALL CHILDREN WHO ARE ARRESTED, SUMMONSED OR WARNED BY POLICE SHOULD BE ASSESSED, IRRESPECTIVE OF AGE OR OFFENCE.

INCLUDING A CHILD IN ASSESSMENT PROCESSES DOES NOT AUTOMATICALLY MEANS THAT THE CHILD WILL BE DIVERTED. ASSESSMENT IS A NECESSARY PROCESS THAT IF APPLIED AND USED APPROPRIATELY WILL PROVIDE ASSISTANCE TO THE CRIMINAL JUSTICE SYSTEM IN DECIDING THE BEST WAY TO DEAL WITH THE CHILD. EVEN IF A CHILD IS SENTENCED ASSESSMENT WILL ASSIST WITH SENTENCE PLANNING.

NICRO IS ACCUTELY AWARE OF THE CHALLENGES THAT EXISTS AROUND RESOURCES IN SOUTH AFRICA, SPECIFICALLY QUALIFIED SOCIAL WORKERS. IT IS NICRO'S OPINION THOUGH THAT A LACK OF RESOURCES WILL ALWAYS BE A CHALLENGE. WE HAVE TO STOP USING THIS AS A REASON NOT TO ACHIEVE CERTAIN THINGS WE SET OUT TO ACHIEVE. WE HAVE TO ADDRESS THE PROBLEM AND NOT JUST ADJUST THE SYSTEM AROUND THE PROBLEM IN ORDER TO ACCOMMODATE THE PROBLEM.

The assessment of children in conflict with the law is indispensable to the decision-making process regarding which children can be contained in the community and which children pose a danger to themselves and society and how these children should be managed and dealt with.

3. Criminal Capacity

In support of the recommendations made in previous submissions related to the raising of the age of criminal capacity to 12 years NICRO wishes to add the following:

NICRO acknowledge that the extreme violent nature of crimes perpetrated in South African society is a big cause for concern about public protection and the belief that there is no good reason to exercise leniency with young offenders in the South African context. This view rejects though the conventional wisdom behind child justice policy and legislation as a means to create a separate system for dealing with children who commits crimes, not a system that favors some children as children and other children as adults.

The legal system has long held that criminal punishment should be based not only on the harm caused, but also on the blameworthiness of the offender. How blameworthy a person is for a crime depends on the circumstances of the crime and of the person committing it. Traditionally, the courts have considered several categories of mitigating factors when determining a defendant's culpability. These include:

- Impaired decision-making capacity, usually due to mental illness or disability(like brain damage)
- The circumstances of the crime—for example, whether it was committed under duress,

- The individual's personal character, which may suggest a low risk of continuing crime.

Such factors don't make a person exempt from punishment—rather, they indicate that the punishment should be less than it would be for others committing similar crimes, but under different circumstances.

Should developmental immaturity be added to the list of mitigating factors? Should children in conflict with the law in general, be treated different from adults? A major study by the Research Network on Adolescent Development and Juvenile Justice now provides strong evidence that the answer is yes.

The Basics of the Human Brain

The human brain has been called the most complex mass in the known universe. This is a well deserved reputation, for this organ contains billions of connections among its parts and governs countless actions, involuntary and voluntary, physical, mental and emotional. The largest part of the brain is the *frontal lobe*. A small area of the frontal lobe located behind the forehead, called the *prefrontal cortex*, controls the brain's most advanced functions. This part, often referred to as the "CEO" of the body, provides humans with advanced cognition. It allows us to prioritize thoughts, imagine, think in the abstract, anticipate consequences, plan, and control impulses. Along with everything else in the body, the brain changes significantly during adolescence. In the last five years, scientists, using new technologies, have discovered that adolescent brains are far less developed than previously believed.

Neuro scientist Jay Giedd (National Institute of Mental Health) and neurologist Paul Thompson (University of California) found one of the most significant changes to be in the frontal lobes or prefrontal cortex. It is these areas, among other things, which control impulses, calm emotions, provide an understanding of the consequences of behavior and allow reasoned, logical and rational decision making processes. These "executive functions" do not fully develop until the early twenties.

In conjunction with the development of the pre-frontal cortex during adolescence, other studies show that throughout this period adolescents use an alternative part of the brain in their thought processing: the amygdala. This area of the brain is associated with emotional and instinctual responses. Studies by Dr. Deborah Yurgelun-Todd and colleagues at Harvard Medical School using MRI scans show that adolescents when interpreting emotional information use this part of the brain rather than the rational decision making region: the prefrontal cortex. Conversely, adults in the same experiment relied more heavily on the frontal cortex. In assessing the results of the tasks set to the two groups, Dr. Yurgelun-Todd found that all of the adult participants interpreted the emotional information correctly in comparison to under half of the adolescents. *"These results suggest that adolescents are more prone to react with 'gut instinct' when they process emotions but as they mature into early adulthood, they are able to temper their instinctive 'gut reaction' response with rational, reasoned responses" . . . "Adult brains use the frontal lobe to rationalize or apply brakes to emotional responses. Adolescent brains are just beginning to develop that ability."*

It is clear therefore, that the normal adolescent brain is far from mature or operating at full adult capacity. The physiological structure of the adolescent brain is similar therefore to the manifestation of mental disability within an adult brain.

These are not however the sole developments within the adolescent brain. It has further been found that cable of nerves (the corpus callosum) that connects the two sides of the brain appears to grow and change significantly through adolescence. This cable of nerves is involved in creativity and problem

solving. The lack of a properly formed prefrontal cortex and corpus callosum indicates an impairment of the rational decision and thought making process instead placing heavy reliance upon the emotional and instinctual response area (amygdala). The ability to regulate emotions is therefore impaired and this can result in quite severe acts with little regard for the consequences.

Brain trauma: exacerbation and physical effects.

The problems associated with adolescent brain development are further exacerbated by trauma and shocking experiences. It has been accepted for some time that psychological consequences arise from exposure to violence, abuse, neglect, abandonment and other childhood trauma. However now it has been found that these experiences may cause physical changes in the brain

4. Diversion

The practice of Diversion has over the past 15 years taken up a prominent role in the administration of child justice in South Africa. In anticipation of the promulgation of the Child Justice Bill (2002) diversion practice has developed without a legislative framework regulating it. During this period a number of children of various ages, whom have committed various types of offenses have been diverted into programmes at NICRO and has successfully attended programmes and managed to change their behaviour. Therefore NICRO supports the idea of diversion and welcomes the inclusion of diversion in the Bill so that it can function within a legislative framework.

NICRO however, strongly objects to the exclusion of children from the possibility of diversion based on their age and the type of offence they are charged with. Our objection is based on the fact that diversion is not an automatic hand down to a child that has committed an offence, but that inclusion is dependent on a combination of factors and not just one factor such as age or type of offense. Over the past 15 years trends that have emerged in diversion practice included increased referrals of children that have been charged with more serious crimes. Summarised crime type profile of children accommodated in diversion for the period April 2003 to December 2007 is presented in table 1. The following are evident from the profile:

- Over a five year period there has been a steady increase in referrals of children whom have been charged with more violent crimes to diversion programmes. Parralel to this a decrease in property crimes is evident over the 5 year period.

Crimes against the person as reflected in these profiles includes crimes such as murder, attempted murder, culpable homicide, common assault, assault GBH, rape and robbery. Increased use of diversion programmes to address issues related to these type of crimes shows that diversion is not only suitable for children charged with less serious offenses, but that diversion interventions works for children who has a high level of "treatment readiness" and "treatment responsiveness" regardless of the type of crime.

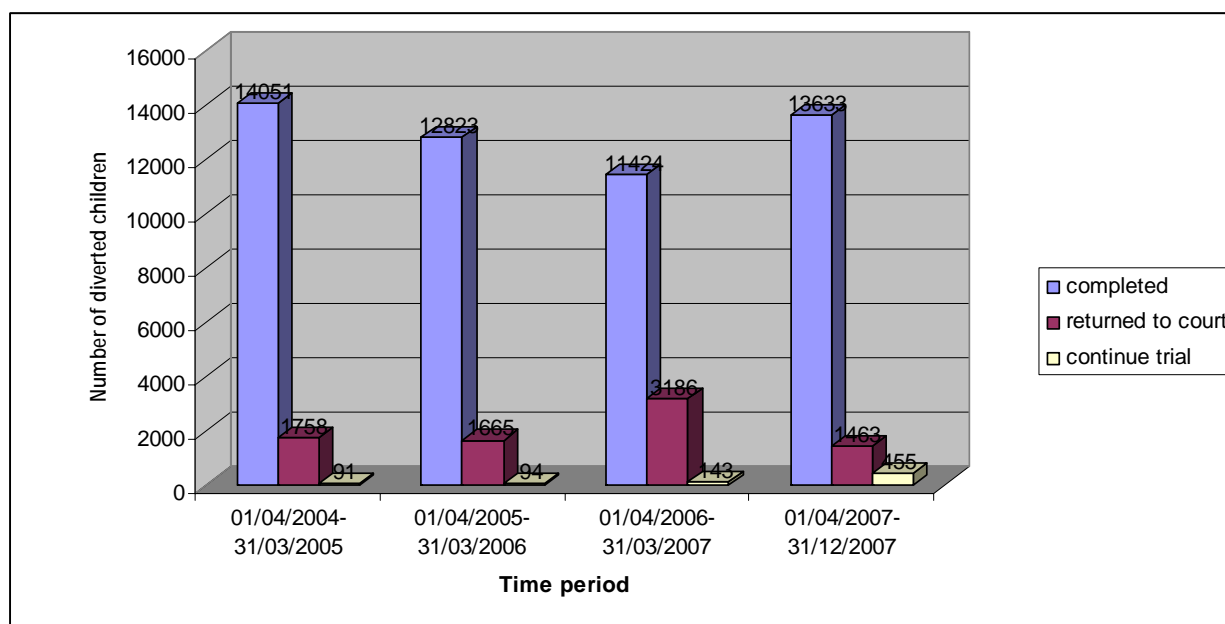
Table 1: Crime profile comparison for children referred to diversion programmes for the period April 2003 to December 2007

TYPE OF CRIME	PERIOD									
	1 st Year		2 nd Year		3 rd Year		4 th Year		5 th Year	
	April 03 – Sept03	Oct 03- March 04	April04- Sept 04	Oct04- March05	April05- Sept05	Oct05- March 06	April 06- Sept06	Oct 06- March 07	April 07- Dec 07	
Victimless	21%	13%	12%	10%	11%	9%	14%	17%	20%	

Crime against the person (violent)	15%	19%	24%	30%	29%	32%	31%	34%	33%
Property crimes	64%	68%	64%	60%	60%	59%	55%	49%	47%

From Figure 2 below it can be noted that the majority of children that have been in diversion programmes have successfully completed the programmes. Only an average of 1 – 3 % of children have not complied and were sent back to court for continuation of trials.

Figure 2: Comparative profile of the results of children referred for diversion programmes for the period April 2004 – December 2007



Of the total number of 60791 children accommodated in diversion programmes from April 2004 to December 2007 in NICRO only 2 464 (7%) children have had records of previously being diverted for other criminal charges. Preliminary results of a current study of a sample of 2400 children in diversion programmes suggests that the success of diversion programmes at reducing offending behaviour and heightening psycho-social functioning appears unrelated to the child's offence history.

Judging then from emerging research results, amenability to treatment is the most practical basis on which to decide upon the inclusion or exclusion from diversion and consequently intervention, because it makes little sense to invest the rehabilitative resources of the justice system in individuals who are unlikely to change. In practice, judgments about amenability are made on an individualized basis with decision makers taking into account a child's current circumstances, psycho-social profile and response to prior interventions if any. Therefore the age of the offender and the type of crime, generally speaking is less important than his or her particular history.

In addition an over reliance on incarceration hinders the ability of communities to develop ways of managing members' behavior to control and prevent crime. Children are viewed as future resources in the community even though they may, at times, cause harm or create fear. Removing them weakens the family and community and may deprive the community of present or future contributions from the children. Losing children from a community is somewhat like having a tear or imperfection in woven fabric. More stress is placed on the remaining members, and the whole community is weakened and depleted of some of its resources. This is graphically depicted by the comparison shown in Figure 1 below.

Figure 1: Loss of youth resources due to incarceration



THEREFORE NICRO SUBMITS THAT THE POSSIBILITY FOR DIVERSION BE ALLOWED FOR ALL CHILDREN REGARDLESS OF AGE OR OFFENCE.

NICRO FURTHER OBJECTS TO THE ALLOCATION OF A MAXIMUM TIME PERIOD RELATED TO DIVERSION OPTIONS. ALL CHILDREN DO NOT RESPOND THE SAME TO BEHAVIOURAL INTERVENTION AND SOME CHILDREN WILL TAKE LONGER TO ACHIEVE OUTHCOMES THAN OTHERS. STRATEGIES EMPLOYED IN DIEVERSION PRACTICE AND INTERVETNION SHOULD MAINLY BE SHOR TERM SOLUTION FOCUSSED THERAPIES WITH COGNITIVE BEHAVIOURAL ASPECTS ATTACHED TO IT. IT WOULD THEREFORE BE MORE BENEFICIAL IF THE TIME PERIOD DEFINED IN THE BILL RATHER SPEAKS TO THE MINIMUM TIME PERIOD THAN TO A MAXIMUM. NICRO THUS SUBMITS THAT THE MIMIMUM TIME FRAME FOR LEVEL ONE DIVERSION OPTIONS SHOULD BE SET AT NO LESS THAN 3 MONTHS AND LEVEL TWO DIVERSION OPTIONS AT NO LESS THAN SIX MONTHS. A PROVISION SHOULD BE INCLUDED THAT IF THE CHILD DOES NOT ACHIEVE SET OUTHCOMES WITHIN THAT PERIOD OF TIME, THE ORDER CAN BE R"RENEWED" AFTER THE COURT IS SATISFIED THAT THE CHILD NEEDS MORE TIME TO ACHIEVE OUTHCOMES.