Promoting Crime Prevention and Responding to Sexual Offending in the Child Justice Bill

Submission to the Portfolio Committee on Justice and Constitutional Development on the Child Justice Bill (B49 – 2002)

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RAPCAN WISHES TO MAKE AN ORAL SUBMISSION TO THE PORTFOLIO COMMITTEE AT ANY PUBLIC HEARINGS THAT MAY OCCUR ON 5 FEBRUARY 2008 OR ANY OTHER TIME SPECIFIED, AND HEREBY REQUESTS THE OPPORTUNITY TO DO SO.

About RAPCAN

RAPCAN (Resources Aimed at the Prevention of Child Abuse and Neglect) is a non-governmental and non-profit organisation that was established in 1989. It is a registered section 21 Company that is devoted to child protection and the promotion of children's rights and responsibilities. RAPCAN's delivers direct services to children and families (RAPCAN prepares child victims for testimony in Sexual Offences Court proceedings and undertakes prevention work with children in schools); it provides training to professional and non-professional practitioners and it participates in law and policy reform processes to advocate for child protection and children's rights.

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1. Introduction

This submission is made from RAPCAN's perspective as a service provider to child victims of crime, especially victims of sexual offences. The focus of this submission is specifically on how the Child Justice Bill may promote crime prevention and safety in South Africa for all citizens, and particularly, for victims of crime. This submission also specifically focuses on the provisions in the Child Justice Bill relating to sexual offences. We also make a brief comment at the end of this submission in relation to the issue of research, monitoring and evaluation.

We argue in this submission that this Bill will not only create a system for managing children when they come into conflict with the law, but it will also set in place principles for the broader social project of crime management in the country. The latter is a significant task in South Africa at this time of high crime rates, high levels of victimisation and increasingly punitive public sentiment. It demands great forethought and circumspection on behalf of the Portfolio Committee. We argue also that it requires that this process of public policy-making be informed by evidence from local and international research and not only by public opinion. We argue that evidence-based policy is more likely to be effective in ensuring community safety, and should be the foundation for developing this policy.[3]

Before getting into the substance of our recommendations in relation to the Bill, we would like to make three preliminary comments:

1.1. The Complicated Nature of the Bill

The current version of the Child Justice Bill is exceptionally complicated. This constitutes a substantial departure from the 2002 version of the Bill which was a model of clarity. The complexity of the Bill arises from the fact that the Bill has stratified the treatment of children based on both the age of the child and the offence with which the child is charged. Based on these distinctions, the Bill creates a multitude of different pathways through the criminal justice process for accused children. We believe that this complexity will result in great confusion on the part of the criminal justice officials that will be responsible for the implementation of the Bill.

Apart from the complexity and the confusion that may result, the stratification of accused and convicted children in terms of age and offence denies certain basic services to some children. Services such as assessment and the preliminary inquiry are central to providing vital information to decision-makers in the system, and for giving meaning to some of the central objectives of the Bill such as promoting the rights of children, preventing children from exposure to the adverse effects of the system and reinforcing children's respect for human rights and the fundamental freedoms of others. The stratification is particularly true of sexual offences which are dealt with in different ways in the Bill. The Bill recognises the serious nature of sexual offences and attempts to deal more seriously with young offenders in this category. However, in so doing, it excludes many young people accused of sexual offences from accessing assessment and the preliminary inquiry. It is through these mechanisms that decisions can be made relating to the management of the case that can have impact in preventing further sexual offending by that child in the future; in

[3] Levenson & D'Amora. 2007; Douglas, Cox & Webster. 1999; Grove & Meehl, 1996 in Fortney T, Levenson J, Brannon Y & Baker JN. 2007. Myths and Facts about Sexual Offenders: Implications for Treatment and Public Policy *Sexual Offender Treatment,* Volume 2 (2007) Issue 1.

addition it is these processes that ensure that the best decisions are taken in relation to the further safety of the community and the victims in the period before trial.

1.2. The Treatment of 16 and 17-year-olds

We note, with great concern, the manner in which the Bill deals with children aged 16 and 17 years old. This age group is specifically singled out by this Bill and children in this age category are denied access to basics that are central to ensuring that their rights are upheld, including access to legal representation, reviews and appeals and the expungement of records. The targeting of this age group is entirely without foundation - there is no evidence that children within this age group are a greater threat to public safety than any other group. Even if this were the case, the targeting of children within this age category represents an attack by the state on the rights guaranteed by the Constitution, and is irrational in the context of legislation that is intended to promote the rights and protection of all children and promote public safety.

1.3. Formalisation of Systems and Procedures Already in Place or in Development

We would like to note that, in relation to many aspects of this Bill (e.g. assessment, diversion) the provisions of this Bill will represent a formalisation of practices that are already in place, and that have been developed over the past 10 years. The delays that this Bill has experienced over the past 4 years have seen practice overtake the legislative process. The changes in practice have developed in response to the real problems identified in the system. The work particularly of the Inter-ministerial Committee on Young People at Risk in the late 1990s identified and developed responses to issues such as: the high numbers of children awaiting trial in police cells and prisons, the deaths of children in custody, the need for a diversity of diversion programmes, etc. We would like to commend all the government departments for the strides made in developing new systems, and particularly the Department of Social Development and the National Prosecuting Authority for their work in relation to assessment and diversion.

It should also be noted that, in some cases, legislation and policy has been developed to formalise new procedures and services. The Probation Services Amendment Act makes provision for the assessment of all children and this is a responsibility that is accepted by the Department of Social Development and within current practice. This Bill, however, excludes some children from assessment (discussed in more detail below), which constitutes a step backwards. The Department of Social Development has also developed minimum standards for diversion programmes, which includes guidelines for assessment. This document does not preclude any child from diversion as does this Bill.

The significant role played by civil society organisations must be noted here. Non-governmental organisations (NGOs) such as Nicro and Khulisa are at the forefront of the development and delivery of diversion programmes (Nicro was responsible for the delivery of the first diversion programmes in South Africa which it introduced in the early 1990s). A great many other more regional and localised NGOs collectively offer the majority of diversion services delivered in the country. Civil society organisations also play an important role in oversight and policy development. Organisations such as the Community Law Centre (UWC), the Centre for Child Law

(UP), the Institute for Security Studies and the CSIR conduct research into the functioning of the child justice system thereby creating valuable data to assess the functioning of the system. The contribution of civil society organisations must both be recognised by government and respected. At the current time, notwithstanding the important contribution of these organisations, access is denied to the most basic information relating to the functioning of the system. This needs to be addressed in the provisions of this Bill.

2. Overview of the Positive and Problematic Elements in the Child Justice Bill

We recognise that the current version of the Child Justice Bill differs significantly from the version of the Bill presented to Parliament in 2002 in a number of important ways.

The above notwithstanding, we summarise briefly below both the positive and problematic elements of this Bill from our perspective.

2.1. Positive Elements

- The Bill promotes diversion of young offenders from the criminal justice system
- The introduction of diversion by the prosecutor for some offences is an important innovation and will facilitate the children being moved out of the system as quickly as possible (Clause 42 (1))
- The inclusion of Restorative Justice and the principles of ubuntu are important elements of this Bill and will promote the involvement of victims in the criminal justice system, and facilitate children taking responsibility for their offending behaviour
- The introduction of the Preliminary Inquiry is an important innovation in this Bill
- The inclusion of 18 – 21 year olds is an important addition given the need for crime prevention in relation to this group as well
- The Bill requires reporting to Parliament on issues relating to children in the system.

2.2. Problematic Elements

- The Bill is exceptionally complicated, which we believe will lead to problems in implementation (discussed above)
- The Bill stratifies the management of children in conflict with the law in relation to age and offence to such an extent that there unequal treatment of children (for no apparent reason), the targeting of some children (16 and 17-year-olds) for extremely harsh treatment, and generally no comprehensive, reliable seamless system for child justice that satisfies South Africa's international obligations in relation to all children that come into conflict with the law (discussed above).
- The Bill does not promote crime prevention for all children (discussed below)
- The Bill does not promote crime prevention in relation to sexual offenders (discussed below).
- There is inconsistency in the Bill in relation to the principles being applied. For example, in relation to the objectives of sentencing, the Bill seeks to promote an 'individualised response which is appropriate to the child's circumstances

and proportionate to the circumstances surrounding the offence'. This principle is not applied to all children in the system as an individualised response is denied to those children that are excluded from assessment and the preliminary inquiry.

3. Promoting Crime Prevention in the Child Justice Bill

Given the high levels of crime and victimisation in South Africa, and the consequently high levels of fear of crime, we believe that no criminal legislation or policy in South Africa at this time can afford to ignore the need to promote crime prevention, community safety and the rights and needs of victims. We argue in this submission that, given the significant social and economic impact of crime and violence on South African society, if there is an important area for investment, it is in ensuring the longer-term safety of our society. We believe that one of the most critical avenues for this is investing in crime prevention relating to children. The United Nations Committee on the Rights of the Child is emphatic about the importance of promoting the prevention of crime through juvenile justice legislation. The Committee states: 'a juvenile justice policy without a set of measures aimed at preventing juvenile delinquency suffers from serious shortcomings.'[4]

It is our view that the central effects that must be achieved by the administrative provisions that are created by the Child Justice Bill are:

- The protection of children that come into conflict with the law
- Holding children accountable for offending behaviour
- Preventing child offenders from repeating offending behaviour.

We argue in this submission that many of the provisions of this Bill are not oriented towards the prevention of further offending, and may in fact serve to further criminalise children. We emphasise that one of the most important ways of serving the rights and needs of victims, and to ensure a safer society is to ensure that all efforts are made to reduce the chances of offenders committing further offences. This means that resources need to be targeted at those at risk of further the offending in order to prevent further harm being caused.

3.1. Why are Offenders Important Targets for Crime Prevention?

Crime prevention may be defined as 'disrupting the mechanisms that cause crime events'[5]. The most obvious entry points for intervention are focusing on victims and offenders. Offenders, in this case, child offenders are important targets for crime prevention efforts for 3 main reasons:

Firstly, many years of studies in criminology show that the best predictor of future behaviour is past behaviour.[6] It is likely that unless the risk factors for offending are addressed, offenders will continue to offend.

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[4] United Nations Committee on the Rights of the Child. General Comment No. 10: Children's Rights in Juvenile Justice. 2 February 2007. p.5.

[5] Pease, K. Crime Prevention. In M Maguire, R Morgan and R Reiner (eds) The Oxford Handbook of Criminology, 2nd edition, Oxford University Press. New York. P.963.

[6] Loeber R, DP Farrington and D Petechuk, Child Delinquency: Early Intervention and Prevention, *Child Delinquency Bulletin Series*, May 2003

Secondly, offenders in the criminal justice system are extremely accessible for intervention. They are not amongst the undefined masses of people in the community who may be committing crime. They have come to our attention and therefore we can know many things about them including their names, where they live, their offending history, risk factors for offending, etc.

Thirdly, years of evidence from other countries indicates that a relatively small percentage of offenders are responsible for a high proportion of offences.[7] The Home Office in the United Kingdom reported last year that 50% of all crime is committed by just 10% of offenders, and that the 5 000 most active offenders in the country are estimated to be responsible for a staggering one in ten offences.[8] These trends also relate to child offending: the National Crime Prevention Council in the United States reported from its data that an estimated 6 to 8% of young offenders are responsible for 80% of juvenile crime.[9] International comparative surveys indicate that 6-7% of young males commit between 50 and 70% of all crime and 60 – 85% of serious and violent crime.[10] South Africa does not produce information of this kind, but there is no data to suggest that these trends would be significantly different here. The implication of this is that if we are able to identify and intervene in relation to this specific group of young offenders, we would be able to reduce a significant amount of the crime in the country. It is exactly this approach that is being taken by other countries. A very prominent and successful example of this is the Prolific and other Priority Offenders (PPO) programme of the government of the United Kingdom.

Two additional facts are important:

- It is accepted, based on many years of research, that adolescence is the most common age period for law-breaking throughout the life-span. Given South Africa's youthful population (42.3% of the population is under the age of 19)[11], the implications of this are simple. We are to expect that our criminal justice system will be dealing with a high proportion of young people; and we need to put in place systems and programmes (through this Bill) that ensure these children do not become further criminalised, as we hold them accountable and seek to prevent re-offending. It is critical to accept the evidence-based fact that the vast majority of child offenders (including sexual offenders) will not grow up to become adult offenders. It is equally important to note the damage that can be done by the criminal justice system in terms of creating or exacerbating the risk factors for offending.

- There is a very strong relationship between child victimisation and child offending. Firstly, children and young people are disproportionately represented as victims of crime. This has been demonstrated in South Africa where 41.6% young people between the ages of 12 and 22 were found to have been victimised over the period of a year.[12] This is twice as high as the levels of victimisation measured in the National Victimisation Survey of adults, undertaken in 2003.[13] Another international trend that has been demonstrated

[7] Shaw, M. 2004. Investing in Youth: International Approaches to Preventing Crime and Victimisation. Quebec: International Centre for the Prevention of Crime.
[8] UK Home Office, http://www.homeoffice.gov.uk/crime-victims/reducing-crime/
[9] National Crime Prevention Council, www.ncpc.org
[10] Tolan and Gorman-Smith, 1998 in Shaw, M. 2004. Investing in Youth: International Approaches to Preventing Crime and Victimisation. Quebec: International Centre for the Prevention of Crime.
[11] Statistics South Africa. 2007. Statistics in Brief. Pretoria: Statistics South Africa.
[12] Leoschut, L and P Burton. 2006. How Rich the Rewards?. Cape Town: Centre for Justice and Crime Prevention.
[13] Burton, P, Du Plessis, A, Leggett, T, Louw, A, Mistry, D and van Vuuren, F

through research is that victims of violence were significantly more likely than non-victims to become violent offenders, and that violent victimisation and violent offending share many of the same risk factors, such as previous violent victimisation and offending, drug and alcohol use, and depression.[14] From our own work, RAPCAN has witnessed several cases in the last year of children that come to our attention for problematic sexual behaviour, who are found to have been victims of sexual offences in the past, and who did not receive the programme interventions to assist them. These findings are particularly important because they suggest that interventions directed at preventing victimisation could also reduce offending, and vice versa.[15]

3.2. How Can the Child Justice Bill Promote Crime Prevention and a Safer South Africa?

The Child Justice Bill in its current form is oriented towards the administration of justice and does not take advantage of the significant opportunities available for the promotion of crime prevention and reduction amongst child offenders. In fact, some of the provisions of this Bill reduce the possibilities of crime prevention interventions being applied due to certain children being excluded from certain procedures and services.

In the discussion below, we discuss how certain provisions in the Bill may not promote crime prevention, and make recommendations regarding changes.

Chapter 5: Assessment of Child

Assessment is the process that is intended to take place directly on the child's entry to the criminal justice system. Its primary function is to gather information to enable decision-making regarding further actions in relation to the child and the alleged offending behaviour. The purposes of assessment are noted in clause 36 of the Bill. From a crime prevention perspective, assessment is the first important step in the process as we can start to understand the individual child, his/her history and background, previous offending behaviour (if any), and the risk factors that relate him/her, previous interventions, etc. This, and other information that should be gathered through the assessment process, is critical to decision-making about how to proceed. Information gathered at this early stage will also be vital when it comes to later phases of the criminal justice process such as sentencing. Most importantly, assessment is central to each child being understood in terms of his/her own problems, needs and risk factors – all of these are critical to preventing further offending.

This Bill, however, will exclude many children from the assessment process. Under the current provisions of the Bill, children charged with an offence listed in Part 1 of Schedule 3, and items 2, 5, and 6 of Part 2 of Schedule 3 are not required to be assessed. This means that a 15-year old who shows a picture of a topless woman on his cellphone to his 15-year old consenting classmate could be charged with an

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2004. *National Victims of Crime Survey: South Africa 2003.* Pretoria: Institute for Security Studies Monograph 101.

[14] Schaffer, J.N and R B Ruback. Violent Victimisation as a Risk Factor for Violent Offending.Juvenile Justice Bulletin. Office of Juvenile Justice and Deliquency Prevention. December 2002.

[15] Schaffer, J.N and R B Ruback. Violent Victimisation as a Risk Factor for Violent Offending.Juvenile Justice Bulletin. Office of Juvenile Justice and Deliquency Prevention. December 2002.

offence under Schedule 3 of this Bill and not have access to assessment (as well as further provisions to which other children would have access such as the Preliminary Inquiry or diversion).

This provision is illogical given that current practice in the system (which is to assess all children) has been developed to contain and manage some of the problems experienced in the past. Provision is made for this in section 4B of the Probation Services Amendment Act (Act 35 of 2002). Given this recent advance in the system, we submit that this provision would constitute a move backwards.

The Bill also suggests in clause 35 that a probation officer should be responsible for the assessment. Given the scarcity of this skill (currently, probation officers are social workers, which is a skill in short supply in South Africa) we recommend that this provision be broadened to enable any other person that has been suitably trained to undertake assessments.

Recommendation:

- The limitations created in clause 35 of the Bill in terms of which children should be assessed should be removed to make provision for all children to be assessed.
- Clause 35: change 'probation officer' to 'probation officer or other suitably qualified persons as prescribed'.

Chapter 7: Preliminary Inquiry and Diversion

The Preliminary Inquiry is an important innovation of the Child Justice Bill. It offers a process within the criminal justice system which is inquisitorial in nature and which focuses on understanding more about the circumstances of the case and the accused child in order to facilitate decision-making relating to diversion and the nature of diversion programmes, release, etc. The current version of the Bill, however, excludes some children from this procedure (children accused of offences listed in Part 1 of Schedule 3 and Items 2, 5 and 6 of Part 2 of Schedule 3).

Diversion from the criminal justice system is internationally accepted best practice in relation to child justice. It achieves two important goals: (1) limiting children's contact with the criminal justice system, and (2) channelling them into appropriate intervention programmes aimed at reducing the risks of re-offending. The provisions in clause 50 (1) of this Bill exclude many accused children from diversion. This is a significantly problematic provision that constitutes a step backwards in terms of child rights in South Africa. Current practice enables all children to be considered for diversion. This limitation would create a situation where the law would allow for any accused adult to be diverted from the criminal justice system (there are no legal limitations to this), while some children would expressly be excluded by this law. This is illogical given South Africa's Constitutional provisions that promote the best interests of the child (section 28 (2)), and section 28 (1) (g) that clearly illustrate the intention of the Constitution to afford special protections for children who come into contact with the criminal justice system. South Africa's ratification of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child further confirms South Africa's acceptance of this principle to afford special protection to children as well as its obligation to ensure that its domestic laws are compliant with the provisions contained in these treaties. The UN Committee on the

Rights of the Child is specific in its recommendation that diversion should not to limited to those children that have committed minor offences.[16]

From a crime prevention perspective, the exclusion of some children from both the preliminary inquiry and diversion is illogical, and contrary to the objectives of the Bill. Inquiring into the nature of the problem, and diversion at this stage of the system would promote children's access to appropriate intervention programmes and would also limit their contact with the criminal justice system. The objectives of the Bill to reinforce the child's respect for human rights and the fundamental freedoms of others; support reconciliation by means of a restorative justice response; and involve parents, families, victims and community where appropriate; and prevent children from being exposed to the adverse effects of the criminal justice system are all critical to crime prevention and would not be achieved due to the limitations noted above.

It is important to emphasise here that intervention programmes are critical to effective crime prevention. Over the last 10 years, South Africa has developed an increasingly wide and diverse range of intervention programmes that may serve at the level of diversion and sentencing. The Department of Social Development has recently also invested in the development of minimum standards for diversion programmes which are critical to ensuring the quality and effectiveness of programmes. It should be noted that there is no question that intervention programmes are an effective means for ensuring that offenders do not re-offend, provided that such programmes are based on effective assessments and built on evidence-based principles. The Department of Social Development's minimum standards for diversion programmes will ensure that all programmes conform to these principles.

We note also that the current version of the Bill has excluded the objectives of the Preliminary Inquiry, which had been included in the previous version of the Bill. We believe that this description would be important in facilitating the implementation of the Bill.

Recommendations:

- Clause 44 of the Bill should make provision for the Preliminary Inquiry to be held in respect of every child prior to plea.
- The objectives of the Preliminary Inquiry stated in the 2002 version of the Bill should be inserted into Clause 44 of this Bill.
- Clause 50 (1): remove reference to section 11 (c)
- Delete clause 57

Chapter 9: Sentencing

Sentencing also represents a significant opportunity to promote the principles of crime prevention within our legislation. All the objectives noted in Clause 70 (1) are central to sentencing acting as a leverage point for crime prevention and are important inclusions in this Bill.

[16] United Nations Committee on the Rights of the Child. General Comment No. 10: Children's Rights in Juvenile Justice. 2 February 2007. Parry-Williams, J. 2007. 'Without resorting to judicial proceedings': How most child offenders can be better treated. Paper for the Third World Congress on Children and Adolescents' Rights. Barcelona. 14-17 November 2007.

From a crime prevention perspective however, the need to ensure that all non-custodial possibilities for sentencing have been exhausted before custodial options are utilised is absolutely critical. The Bill needs to take all possible measures to ensure that sentencing officers make every effort to apply the Constitutional principle of 'detention as a measure of last resort'. Clause 70(1)(e) specifically articulates this need and is an acceptance of the view that custodial sentences and particularly long custodial sentences may have limited chances of promoting crime prevention and may undermine the objective of creating a safer society.

We therefore propose that clause 70(3) should be strengthened by a requirement that the child justice court consider the potential of the contemplated custodial sentence to achieve the desired result of preventing the child from committing further offences. This would require that the court enquire from the residential facility or prison as to the available intervention programmes; 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.

Clause 71 promotes the utilisation of victim impact statements in the sentencing of a child. We believe that it is important for the needs and views of victims to be taken account of within criminal justice proceedings. However, given the fact that such statements are not utilised in criminal proceedings relating to adult offenders, we believe that introducing this practice only in relation to child offenders may result in the unequal treatment of children. We believe that the needs and rights of victims may best be addressed by Restorative Justice processes (where these are appropriate), where victims can play an active role in the proceedings and outcomes.

Recommendations:

- Add the following factors to be considered by the child justice court to clause 70(3): the court enquire from the residential facility or prison as to the available intervention programmes; 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.
- Delete clause 71

4. Specific Comments relating to Sexual Offences and the Child Justice Bill

4.1. Introduction

One of RAPCAN's primary activities is working with child victims of sexual offences. In this section we particularly wish to address the provisions of the Bill in relation to the management of young sexual offenders.

We are concerned that current responses to young sexual offenders do not take a long-term preventive approach. We argue that our current responses to sexual offending, which are to a great extent perpetuated by the provisions of this Bill, are hugely inadequate and have the effect of removing sexual offenders from society for a limited period, after which many return and are likely to continue to offend. This approach perpetuates cycles of violence and victimisation rather than intervening to interrupt these. It is important to note also that many young offenders enter the system and are themselves victimised sexually and otherwise. Recent research indicates that prevention efforts that target young sexual offenders have a significant impact on breaking the cycle of offending.

We present the information in section 4.2. below to offer the Portfolio Committee the most recent information in relation to young sexual offenders and their management. This information is essential in order to ensure that the policy framework and programmes respond appropriately to the situation with the long term goal of reducing the rates of these offences in society.

4.2. Young Sexual Offenders and Responding to this Problem

4.2.1 The Extent of the Problem in South Africa

Information systems in relation to crime are weak in the country, and this also relates to our knowledge about sexual offending. Some information is gathered by government departments, but this is not reported publicly. Due to these problems with information, it is difficult to obtain an accurate picture of the nature and scope of sexual offending by children in the country. In the discussion below, we utilise information available from other localised studies to build a picture of the problem.

Research into the rate of arrest of children for sexual offences in the Western Cape indicates that between 1998 and 2001, an average number of 417 children were arrested for sexual offences each year. In 2000, only 5% of the total number of arrests for rape, attempted rape and indecent assault related to children.[17]

More reliably, statistics from the Child Protection Unit in the East Metropole area in Cape Town from April 2000 to January 2002 show that 23% of persons arrested for sexual offences were under 18.[18] While these findings relate only to arrest, they are consistent with trends in the United States, United Kingdom and Canada which indicate that between 20% and 30% of sexual offences are committed by

[17] Redpath J. 2003. South Africa's Heart of Darkness: Sex crimes and child offenders: some trends *SA Crime Quarterly No4* June 2003
[18] Redpath J. 2003. *Ibid.*

adolescents.[19] Studies indicate that it is this portion of the sexual offending population that responds most favourably to treatment interventions. From a prevention perspective, the implications are very encouraging: effective interventions targeted at this group could go a significant way to reducing the overall rate of sexual offending in the country.

In examining the numbers of children in prison for sexual offences from 1997 to 2007, it is clear that these numbers have remained low over this 10 year period. The highest number of sentenced children in prison for these offences was just over 250 in 2002. Since then, these numbers have steadily declined to figures of less that 150 sentenced children in 2007.[20]

4.2.2. Recidivism: Young sexual offenders do not all become adult sexual offenders

Research clearly indicates that the majority of young sexual offenders do not become adult sexual offenders.[21] Literature on young offenders in general shows that young people who commit crimes are less likely to continue to do so as they get older.[22] Recidivism rates for young sexual offenders are even lower when compared with non-sexual offences of both a violent and non-violent nature. This is important as it implies that there is likely to be a significant subgroup of young sexual offenders who do not continue to commit sexual offences as adults.[23]

A meta-analytical study in 2006 analysed the findings of 33 studies on recidivism rates of young sexual offenders. It found that the overall recidivism rate for young sexual offenders was 11.8%.[24] The study shows that recidivism rates for young sexual offenders are significantly lower than the rates for young offenders who commit non-sexual crimes whether violent or not. Recidivism rates in these other categories ranged from 22.5% for violent non-sexual offences to 29% for non-violent and non-sexual offences. These studies indicate that a child convicted of a sexual offence is about half as likely to re-offend as a child convicted of violent non-sexual offences.

It is widely accepted that the current criminal justice and correctional systems increase the risk of young offenders (sexual or not) being exposed to sexual offences in police and holding cells, places of safety and prison. This is of serious concern given that research indicates that a high incidence of sexual victimisation in childhood is a risk factor for continued sexual offending in adulthood. Research indicates that exposing lower risk youth to more delinquent youth within residential

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[19] Centre for Sex Offender Management: Myths and Facts About Sex Offenders August 2000 p5; and The National Organisation for the Treatment of Abusers *Frequently Asked Questions: What is the Prevalence of Sexual Offending?* www.nota.co.uk/faqrisk_a.htm accessed on 7 January 2008

[20] Muntingh L 2008. *Children in Prison: Sex Offences, Sentenced and Unsentenced. CSPRI Summary of statistics supplied by the Judicial Inspectorate of Prisons. January 2008.*

[21] Carter M & Morris L. 2007 *Enhancing the Management of Adult and Juvenile Sex Offenders: A Handbook for Policymakers and Practitioners* Centre for Sex Offender Manatgement, U.S. Department of Justice p6. This research cites three significant studies between 2004 and 2006.

[22] Tolan & Gorman-Smith. 1998. Cited in Righthand S & Welch C, 2001, *Juveniles who have sexually offended: A Review of the Professional Literature*, Office of Juvenile Justice and Delinquency Prevention p15

[23] Weinrott. 1996 and Kinght & Prentky. 1993 in Righthand S & Welch C. 2001 Op Cit. p13

[24] Reitzel L & Carbonell J. 2006. The effectiveness of sex offender treatment for juveniles as measured by recidivism: A meta-analysis. *Sexual Abuse: A Journal of Research and treatment*, Volume 18, Number 4 pp401-421

and institutional settings can result in negative outcomes for that child.[25] The current provisions of the Bill in relation to young sexual offenders can thus potentially exacerbate the situation of sexual offending in the country in the long term.

However in spite of the fact that children who commit sexual offences have relatively low rates of recidivism, a significant number of adult sexual offenders report that they started committing sexual offences while they were adolescents.[26] In many cases, these were what can be considered less serious forms of sexual offences such as voyeurism and flashing, and few of these cases resulted in the offender being held accountable for the offending behaviour at the time. This information suggests that focussing resources on the treatment of young offenders can impact on the rates of adult offenders in the future. Importantly, these treatment programmes must be available as early intervention options for less serious sexual offences.

4.2.3. Treatment Interventions for Young Sexual Offenders

Risk Assessment of Young Sexual Offenders

Numerous studies indicate that there are multiple pathways to sexual offending and recidivism during adolescence and early adulthood. This diversity means that it is important that policy relating to the management of young sexual offenders recognises these differences and provides for different management options for these offenders.[27] Risk of re-offending and motivation to change behaviour varies and different types of interventions are more effective with some young offenders than others.[28] Currently the Bill fails to address this by treating young sexual offenders largely as a homogeneous, high risk and untreatable group.

Experts note that the risk factors for youth who engage in sexually harmful behaviours are different from those for adults.[29] It is thus recognised that young sexual offenders should not be treated in the same way that adult offenders are treated, they are a distinct group from adult sexual offenders with different motivations for offending and different requirements for and responses to treatment. Studies show that the great heterogeneity in young sexual offenders is influenced by the developmental stage and age of the child as well as a range of environmental factors.[30] There are differences in histories of sexual and physical abuse; in their family backgrounds; their social skills; levels of academic functioning; mental illness

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[25] Dodge, Dishion & Lansford. 2006. Cited in Bumby K. 2007. *The Importance of Assessment in Sex Offender Management: An Overview of Key Principles and Practices* Centre for Sex Offender Management; Office of Justice Programs, US Department of Justice.

[26] Ryan G, Lane S, Davis J & Isaac C. In press. Adolescent Sex Offenders; *Child Abuse and Neglect: The International Journal* www.hopefs.org/Behavior/juvenilesexoffenders.htm. accessed 14 October 2007

[27] Boyd, Hagan & Cho, 2000; Hunter, Figueredo, Malamuth & Becker, 2003; Miner, 2002; Sipe, Jensen & Everett, 1998; Waite, Keller, McGarvey, Wieckowski, Pinkerton & Brown, 2005 in Miner M, Borduin C, Prescott D, Bovensmann H, Schepker R, Du Bois R, Schladale J, Eher R, Schmeck K, Langfeldt T, Smit A, Pfafflin F (2006) Standards of Care for Juvenile Sexual Offenders of the International Association for the Treatment of Sexual Offenders *Sexual Offender Treatment,* Volume 1 (2006) Issue 3.

[28] Centre for Sex Offender Management, 2007 *The Importance of Assessment in Sex Offender Management: An Overview of Key Principles and Practices*, Office of Justice Programmes, U.S. Department of Justice. P1

[29] Worling, 2005; Prescott, 2005; Epperson, in press Cited in Miner M, Borduin C, Prescott D, Bovensmann H, Schepker R, Du Bois R, Schladale J, Eher R, Schmeck K, Langfeldt T, Smit A, Pfafflin F (2006) Standards of Care for Juvenile Sexual Offenders of the International Association for the Treatment of Sexual Offenders *Sexual Offender Treatment,* Volume 1 (2006) Issue 3.

[30] Miner M, Borduin C, Prescott D, Bovensmann H, Schepker R, Du Bois R, Schladale J, Eher R, Schmeck K, Langfeldt T, Smit A, Pfafflin F (2006) Standards of Care for Juvenile Sexual Offenders of the International Association for the Treatment of Sexual Offenders *Sexual Offender Treatment,* Volume 1 (2006) Issue 3

and substance abuse.[31] Furthermore there are differences in the nature of the offence, their relationship to the victims, the amount of violence used and the age of the victim.

Over the past decades researchers have identified specific factors associated with recidivism in young offenders. Empirically-validated actuarial risk assessment tools for adult offenders have been developed. Risk assessment and treatment of young offenders is a younger field, however research-based tools for adolescent offenders have been developed. It is clear from the research that these tools have strengthened the ability of practitioners to assess risk more accurately. It is important that we draw on this wealth of knowledge in making decisions relating to the management of young offenders.

Critical decisions relating to the management of young sexual offenders must be informed by assessments. Assessment at an early stage is essential in order to make pre-trial decisions relating to custodial or other placement, diversion and bail conditions that can meet the goals of public safety and rehabilitation. These assessments are an essential element of the formulation of case management plans for young sexual offenders to guide decisions in an individualised, measured and rational manner.

A range of treatment programme options must be available to address the different needs of young offenders. These programmes must relate to the principles of risk, need and responsivity. Thus programmes must take into account the level of risk for re-offending; the specific needs of a particular offender in terms of criminogenic factors present; and the ability of the offender to respond to a specific type of programme. A youth determined to be high risk for re-offence may be most appropriately placed in a residential treatment program, whereas community-based interventions are likely to be more effective for youth who is assessed as lower risk.[32]

According to the Centre for Sex Offender Management in the United States Department of Justice, comprehensive assessments should include a review of the following factors: developmental history; intellectual and cognitive functioning; educational achievement, academic performance; employment, recreation, leisure; physical health; psychological adjustment, mental health, personality; substance use and abuse; sexual development, attitudes, behaviours, interests, preferences; family structures and dynamics; interpersonal relationships, peers/associates, intimate relationships; prior legal involvement, history of delinquent and criminal behaviour and response to prior interventions, motivation to change.

Treatment Interventions

The purpose of treatment programmes is to ensure that the young offender is held accountable and to ensure that they develop techniques to prevent them from engaging in further harmful behaviours in future. Treatment is not a 'soft option' but rather an option which has the interests of victims and the community at its core: ensuring that young sexual offenders have access to these programmes means that

[31] Righthand S and Welch C. 2001. *Juveniles who have sexually offended: A review of professional literature*. pp.3 - 11

[32] Bumby K. 2007. *The Importance of Assessment in Sex Offender Management: An Overview of Key Principles and Practices* Centre for Sex Offender Management; Office of Justice Programs, United States Department of Justice.

they pose a lesser risk of re-offending against other members of the community in the future.

Programmes reported to be the most successful are those that utilise cognitive-behavioural treatment which aim to assist the offender to understand the relationship between thoughts, feelings and actions and to develop healthier thinking patterns and ways of managing emotions. These programmes aim to reduce denial and increase accountability, increase victim empathy, develop insight into events leading up to the offence, address history of victimisation in the offender, provide sex education, modify cognitive distortions, develop social skills and anger management and use conditioning processes to change negative arousal patterns.[33]

While it is important to focus on these aspects at an individual level, research suggests that the motivation of young sexual offenders to offend is embedded in social-ecological contexts. Programmes that utilise Multisystemic Therapy (MST) target the social-ecological context of the child through addressing risk factors that are present at an individual level as well as in the family and peer contexts and including addressing school performance. These programmes have been shown to be more effective than individual therapy. [34]

Most offender treatment programmes, in conjunction with the cognitive-behavioural models include relapse prevention models which focus on high-risk situations that the offender may face and develop the skills of the offender to recognise and manage these situations.

Programmes address some of the following aspects according to the particular risk factors and needs of the young offender: self esteem of the offender; cognitive distortions which often facilitate sexually aggressive behaviour and are used by offenders to justify their offending behaviour; deviant sexual arousal and interests; problematic parent-child relationships; building parenting capacity and skills; problematic relationships between parents and couple/marriage counselling; poor social skills; antisocial values and low empathy for others and particularly for the victims against whom they offend; disengagement from antisocial peers and encouraging participation in positive social settings such as sports and music clubs; addressing school attendance and performance and treatment non completion.[35]

Experts suggest that the timing of accessing treatment can be important in the effectiveness of the programme. Attitudes that lead to offending can be intensified in prisons and other residential facilities as offenders develop excuses and explanations for their behaviour which become entrenched in time; the threatening environment can exacerbate the offender's feelings of being wronged. These must be confronted as soon as possible in order to ensure that the offender understands the seriousness of the crime.[36] Thus while treatment programmes may be used as a diversion option, as an alternative sentence or as part of a custodial sentence it is best that they be available as soon as possible.

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[33]Borduin CM, Henggeler SW, Blaske DM & Stein RJ. 1990. Multisystemic treatment of adolescent sex offenders. *International Journal of Offender Therapy and Comparitive Criminology* 34, 105-113

[34] Borduin et al. 1990. *Ibid.*

[35] Bumby K. 2006. *Understanding Treatment for Adults and Juveniles Who Have Commiotted Sex Offences*. Centre for Sex Offender Management, Office of Justice Programmes US Department of Justice; The National Organisation for the Treatment of Abusers *Frequently Asked Questions: Section D Sex Offender Treatment* UK. www.nota.co.uk/faqrisk_d.htm accessed on 14 October 2007; Borduin et al. 1990 Op Cit

[36] John Q LaFond Quoted in Kersting K, 2003. New hope for sex offender treatment *Monitor on Psychology* Volume 34, No 7 July/August 2003.

Do Treatment Programmes Work?

The 2006 meta-analysis on recidivism shows that young sexual offenders who have access to treatment programmes were significantly less likely to re-offend than those who do not.[37] The recidivism rate for those who had received treatment was 8.6% (based on data on 3730 offenders in 29 studies) and those who did not receive treatment was 19.4% (based on 1605 offenders in 8 studies). These findings indicate that youth who do not receive treatment are twice as likely to re-offend as those who undergo treatment programmes and demonstrates the effectiveness of treatment programmes as a prevention strategy.

While removal from the community may be the only effective management approach for certain young sexual offenders, this is not true of all young sexual offenders. Currently, while the safety of young people in prisons and other residential facilities is not guaranteed, indications are that youth in these settings are at risk of further victimisation including sexual victimisation. This culture of sexual offending within these settings, besides being a gross violation of the rights of the young offender, may, with some offenders, further entrench the sexual offending behaviour to the detriment of the community upon the release of the offender.

It should be noted that, internationally, experts in this field (including representatives from South Africa) have collaborated to develop a set of standards for programme design and delivery. These standards express 'good practice' and are intended to ensure the quality and effectiveness of intervention programmes.[38]

Provision of Treatment Programmes to Young Sexual Offenders in South Africa

There are currently only a few young sexual offender treatment programmes available in South Africa. Unfortunately, few have the capacity to provide the kind of interventions that research suggests is most effective.[39] Through creating an enabling legislative environment, the development of further appropriate programmes will be encouraged, making these programmes available to a larger number of young sexual offenders and ultimately impacting on rates of offending.

4.3. Provisions of the Child Justice Bill relating to Young Sexual Offenders

4.3.1. The Treatment of Sexual Offences within the Child Justice Bill

As noted at the beginning of this submission, the Child Justice Bill creates a complicated system, stratified in terms of age and offence, which determines which pathways a child will follow through the criminal justice process. In order to fully understand the way in which the Bill addresses young accused and convicted sexual

[37] Reitzel L & Carbonell J. 2006. The effectiveness of sex offender treatment for juveniles as measured by recidivism: A meta-analysis. *Sexual Abuse: A Journal of Research and treatment*, Volume 18, Number 4 pp401-421

[38] Miner M, Borduin C, Prescott D, Bovensmann H, Schepker R, Du Bois R, Schladale J, Eher R, Schmeck K, Langfeldt T, Smit A, Pfafflin F. 2006. Standards of Care for Juvenile Sexual Offenders of the International Association for the Treatment of Sexual Offenders *Sexual Offender Treatment,* Volume 1 Issue 3.

[39] Programmes are currently offered by NICRO, Childline South Africa, The Teddy Bear Clinic and the Department of Correctional Services amongst others.

offenders it is important to understand the content of the Schedules to the Bill, and what implications these Schedules have for children accused of offences listed on the Schedule.

The summary in Table 1 below reflects the offences that are considered to be the most serious offences. There are grave implications for children accused of these offences, and their treatment is substantially different from other children. For example:

- Clauses 11(e) and 63(1)(a) state that a child accused of these offences must be brought before the child justice court, clause 68(1)(v) states that the court may not order that these offences be diverted.
- Clause 35 excludes children aged 14 years and above who are accused of these offences from assessment
- Clause 44 (1) (a) (ii) excludes children that are accused of these offences from the preliminary enquiry, and clause 50 (1) prevents the preliminary inquiry from diverting children accused of these offences
- Selected offences within item 4, 5 and 6 of Part I require a sentence of imprisonment if the child is 16 years or older.
- Children convicted of any of the above crimes do not qualify for automatic expungement of their criminal record.

Table 1: Summary of the Most Serious Offences

Schedule 3: Part I	
Item 4	Any rape or compelled rape by a child over 14 Rape or compelled rape by a child under 14 when: gang rape, multiple rape or repeated rape; there is a previous conviction for a sexual offence; victim is – physically, mentally disabled, a baby or elderly person; infliction of grievous bodily harm; the child who knows they have HIV/AIDS
Item 5	Sexual exploitation or grooming of a child, exposure or display of pornography to a child; using a child in or benefiting from child pornography.
Item 6	Sexual exploitation or grooming of a person with a mental disability, exposure or display of pornography to a person with a mental disability; using or benefiting from pornography of persons with mental disability.
Item 7	Trafficking or involvement in trafficking for sexual purposes
Schedule 3: Part II	
Item 2	Sexual assault; compelled sexual assault or compelled self-sexual assault; when involving the infliction of grievous bodily harm.
Item 5	Compelling and causing a child to witness a sexual offence, a sexual act or self masturbation and exposure or display of genital organs, anus or female breasts to children (flashing a child).
Item 6	Exposure or display of or causing exposure of display of child pornography to a person over 18.

Table 2 below provides a summary of those sexual offences that are deemed to be less serious than those listed in Table 1. The implications for children accused of these offences are as follows:

- Clauses 11(c) and 44(1)(a)(ii) enable the possibility of diversion for all children accused of these sexual offences in that they provide that children accused of the sexual offences as described in Schedule 2 and certain items in Part II of Schedule 3 must be referred to a preliminary inquiry for consideration of diversion.

- However clause 57(1) then limits access to diversion for children who are 14 or older and who have been accused of committing the offences listed in items 1, 3 and 4 of Part II of Schedule 3.

Table 2: Summary of Less Serious Sexual Offences

Schedule 3: Part II	
Item 1	Rape or compelled rape by a child under 14 excluding circumstances listed in item 4 of Part I above.
Item 3	Sexual assault; compelled sexual assault or compelled self-sexual assault on a person under the age of 16 years.
Item 4	Acts of consensual sexual penetration with certain children (statutory rape) and acts of consensual sexual violation with certain children (statutory sexual assault).
Schedule 2	
Item 10	Sexual assault, compelled sexual assault or compelled self-sexual assault other than contemplated in items 2 and 3 of Part II of Schedule 3
Item 11	Compelling or causing persons 18 years or older to witness sexual offences, sexual acts or self-masturbation.
Item 12	Exposure or display of or causing exposure or display of genital organs, anus or female breasts to persons 18 years or older ("flashing" and adult)
Item 13	Engaging sexual services of persons 18 years or older
Item 14	Incest, bestiality and sexual acts with a corpse

The implications for children accused of the offences listed in Table 3 below are as follows:

- Clause 11(b) provides that cases of children accused of crimes in Schedule 1 must be referred to a prosecutor who may consider diversion. An assessment must be done in terms of clause 35(c) however a preliminary inquiry is not required for diversion of these matters.
- Cases not diverted in terms of the above provision may go to a preliminary inquiry and may be considered for diversion.

Table 3: Other Sexual Offences

Schedule 1	
Item 9	Bestiality

4.3.2. Categorisation of Offences in the Schedules

We have already demonstrated that many children that this Bill currently excludes could indeed benefit from these interventions, and that this in turn could promote crime prevention in the longer-term.

Further, we believe that especially in relation to sexual offences, the attempt to divide offences into the various levels of seriousness in the Schedules and then deal with them differently is problematic due to the fact that less serious offences are categorised amongst more serious ones. For example, currently a child who is accused of showing pornography to another child (item 5 of Part I of Schedule 3) and exposure of the female breasts or genital organs to a child (item 5 of Part II of

Schedule 3) are considered amongst the most serious level of offences. To treat these acts as seriously as gang rape and to mandate criminal proceedings in these matters is potentially both harmful and counter-productive.

In order to resolve matters in terms of how the seriousness of sexual offences be determined, we refer to the provisions of Act 105 of 1997 as amended by the Criminal Law (Sexual Offences and Related Matters) Amendment Act (Sexual Offences Act).

The offences below are included in the list of offences that require a mandatory minimum sentence of life imprisonment for a convicted offender. The sexual offences included in Schedule 2 of are:

- Rape or compelled rape which results in the death of the victim
- Rape or compelled rape where the victim was raped more than once or by more than one person, where the person has been convicted of two or more offences of rape but not yet sentenced, where the victim was under 16 years old, is physically or mentally disabled or involving the infliction of grievous bodily harm.
- Trafficking in persons for sexual purposes

In terms of the offences listed below, these are included in the list of offences that require a mandatory minimum sentence of 10 years for a first conviction, 15 years for a second conviction and 20 years for a third conviction.

- Rape or compelled rape in circumstances other than those described above
- Sexual exploitation of a child or a person who is mentally disabled
- Using a child or person who is mentally disabled for pornographic purposes

This list implies that these sexual offences are seen as the most serious, it is these offences which should be listed in schedule 3 of the Bill. Offences such as flashing and showing pornography to children must be excluded.

We also note that the inclusion of Bestiality in Schedule 1 is a duplication of item 14 of Schedule 2.

Recommendations

- Less serious sexual offences must not appear in the same schedule as serious offences. The sexual offences listed in Part I of Schedule 3 should include only those offences listed in Schedule 2 of Act 105 of 1997 as amended by the Sexual Offences Act 32 of 2007
- The structure of the schedules and the cross referencing between sections of the Bill and various items within the schedules is unwieldy and likely to be problematic in implementation. The treatment of sexual offences in Schedule 2 and Part II of Schedule 3 must be consistent across different clauses of the Bill. They could be included in a single schedule.
- The reference to bestiality should be removed from Schedule 2.

4.3.3. Access to Assessment, Preliminary Inquiry and Diversion

In spite of the provisions of clause 11(c) and 44(1)(a)(ii) which provide for assessment, preliminary inquiry and diversion of children accused of the less serious sexual offences listed in Schedule 2 and items 1,3 and 4 of Part II of Schedule 3, clause 57(1) then limits access to diversion for children who are 14 or older and who have been accused of committing the offences listed in items 1,3 and 4 of Part II of Schedule 3. This clause states that offences under these items may be considered for diversion at a preliminary enquiry if the child was under 14 at the time of the offence (57(1)(a)) and the matter qualifies for diversion in terms of directives of the National Director of Public Prosecutions (57(1)(b)).

This means that children 14 years and older who are accused of sexual assault or compelled sexual assault on a person under the age of 16; or acts of consensual sexual penetration or sexual violation with children under the age of 16 do not qualify for diversion although they do qualify for assessment and preliminary inquiry.

Sexual assault as defined in the Sexual Offences Act refers to the commission of non-penetrative acts when committed without the consent of another person. This includes forced or coerced acts such as rubbing or touching the genitals, anus or breasts of another person and kissing the mouth, genitals, anus of breasts of another person amongst others, these do not include any penetrative acts.[40] These are acts for which appropriate diversion programmes may be applicable and effective. In addition children aged 14 to 18 are most likely to commit these acts on other children of similar age and thus often against children under the age of 16, this clause would preclude all of these children from accessing a diversion programmes and require the full formal criminal proceedings, with potentially harmful results.

A cause of further concern is that certain offences listed in Parts I and II of Schedule 3 which are treated as the most serious offences and have the most limited access to important procedures are offences for which a child is likely to respond well to treatment. This includes children accused of showing another child pornography or exposing their genitals to another child, these children cannot access assessment, preliminary inquiry or diversion. This makes no sense, normal sexual curiosity and the wide availability of pornography means that it is common for young people to show each other pornography. In addition it is normal for adolescents show each other their genitals and breasts in the course of normal sexual exploration and development; depending on the age of the adolescent some of these behaviours are not problematic and should not be considered criminal let alone be treated in this harsh way. It must be made clear that these examples from schedule 3 refer to acts committed with or without the consent of the other child. Individual assessment for all children can avoid less serious crimes being treated in the same way as very serious crimes.

Most alarming of these categories is the exclusion of children from 14 years who engage in consensual sexual acts (item 4 schedule 3: part II) from diversion, clause 57(1) forces these children's cases into the formal criminal trial process without the option of diversion.

[40] The Criminal Law (Sexual Offences and Related Matters) Amendment Act stipulates that breasts refer to the breasts of a female and not of a male

There has been much debate recently about the issue of consenting sexual behaviour between adolescents in light of developments in the Sexual Offences Act. This Act divides the behaviours into acts of sexual penetration and acts of sexual violation (which involves contact but no penetration of various parts of the body). Penetrative acts include the penetration of the genitals or anus of one person by the genitals, any other part of the body or any object of another person and the penetration of the mouth of one person by the genitals of another person. Non penetrative acts include contact between the body of one person with the genitals, anus or breasts of another person and contact between the mouth of one person on the mouth, genitals, anus or breasts of another person amongst other acts listed. The development of these categories of acts was to ensure that a full range of possible acts are considered under the offences Rape and Sexual Assault when committed without consent.

Clauses 15 and 16 of the Sexual Offences Act attempts to provide greater protection to children under the age of 16 from engaging in consensual sexual relationships with persons over the age of 16. This is particularly important if considering a 14 year old in a relationship with a 28 year old for example. The Act then attempts to protect people under the age of 16 from being prosecuted by requiring that only the National Director of Public Prosecutions can institute prosecution in a matter involving consensual sexual penetration between two children under the age of 16 and that only the Provincial Director of Public Prosecutions can institute prosecution in matters involving consensual non penetrative acts between two children under the age of 16.

The fact that the Bill precludes children over the age of 14 who commit consenting sexual acts, whether penetrative or non penetrative, from diversion is worrying. While the Sexual Offences Act tries to build in measures to avoid prosecution of these matters this Bill makes it difficult to do anything but prosecute or drop charges for children over 14. While still allowing for diversion in cases of children between 12 and 14 years this decision would need to be taken by the National or Provincial Director of Public Prosecutions.

Recommendations:

- Clause 11 (c) and (e), clause 35 and clause 44(1)(a) must be amended to allow for assessment and preliminary inquiry for all children irrespective of the nature of the sexual offence and its location in the schedules.
- Clause 11 (e) should be deleted.
- Delete clause 57

4.3.4. Sentencing and Access to Non-Custodial Sentencing for Children Convicted of Serious Offences

We support the wide range of sentencing options available to children who are convicted contained within chapter 9 of the Bill.

Furthermore, we support the statement in the Bill that imprisonment of a child is seen as a measure of last resort. However, clause 78(3) contradicts this sentiment as it provides that "*Notwithstanding any provision in this or any other law"* the provisions of minimum sentencing legislation (Act 105 of 1997) apply if the child was

16 years or older at the time of the offence. Thus making imprisonment the first resort for children aged 16 and above.

This means that children aged 16 and 17 convicted of the various offences listed in Schedule 2 of that Act, which as amended by the Sexual Offences Act 32 of 2007 and includes many of the sexual offences listed in Schedule 3 Part I of the Bill, will not have access to non-custodial sentencing options and will be sentenced to imprisonment for periods ranging from ten years to life depending on the nature of the offence and if no substantial and compelling reasons exist to impose a lesser sentence.

Recommendations:

- The Criminal Law Amendment Act 105 of 1997 providing for minimum sentences must not to be applicable to children over sixteen. Under no circumstances should a sentence of life imprisonment be applicable to a child convicted of any offence. Delete clause 78(3).
- Children convicted of any offence must have access to alternative sentencing options as set out in clauses 73 to 77 where appropriate.

4.3.5. Automatic Expungement of Records

Clause 88(2) provides for automatic expungement of the criminal record of a child after a stipulated period of time, only if the child is convicted of an offence appearing in Schedules 1 or 2. If convicted of an offence in Schedule 3 there will be no automatic expungement of records. As well as containing extremely serious offences, Schedule 3 includes far less serious offences such as the exposure of the female breasts to a child and consensual sexual acts between certain children.

Recommendation:

- Automatic expungement of records of children convicted of offences listed in Schedule 3 must apply. Clause 88(2) must be deleted and 88(3) amended.

5. The Reporting of Information

As has been highlighted in earlier discussions, the weakness of information systems in relation to child offending is a stumbling block to effective policy development. This has been a historical problem, and it will continue to frustrate efforts to manage and oversee the system in the future if it is not addressed. We therefore support the provisions of clause 95 of the Bill. We would like to emphasise the need for all data relating to the functioning and outputs of the Child Justice system to be reported publicly, at least on an annual basis. Given the significant role played by civil society organisations, both in terms of service-delivery and oversight, such information is critical to ensuring that the system serves its intentions.

Recommendation:

- A provision be inserted into clause 95 that expressly requires the Cabinet member responsible for the administration of justice to report data collected in respect of clauses 95(1)(a),(b),(c); 95 (2)(a)(c)(d) to the public on, at least an annual basis.

6. Conclusion

In this submission we argue that the Bill should be revised in order make use of all available opportunities for crime prevention. This can be done through ensuring that all children have access to assessment, the preliminary inquiry, diversion, non-custodial sentences and programmes when in custody.

We also argue that interventions programmes for young sexual offenders do work. We argue that in its haste to ensure that sexual offenders are punished in this Bill, we should not deny opportunities for crime prevention to young sexual offenders, nor forget the potential of the criminal justice system to exacerbate sexual offending.