
VISITING EXPERTS' PAPERS

REFORMING THE JUVENILE JUSTICE SYSTEM IN SOUTH AFRICA: POLICY, LAW REFORM AND PARALLEL DEVELOPMENTS

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I. A NEW APPROACH: POLICY DEVELOPMENTS FROM 1992 TO 1996

The death of Neville Snyman in 1992 was a watershed moment for the movement working towards reform of South Africa's juvenile justice system. Neville was just 13 years old when he and a group of friends broke into the local shop in Robertson and stole sweets and cold drinks. Neville was detained in police cells with other offenders under the age of 21. He was beaten to death by his cellmates. Non-governmental organizations (NGOs) had been raising the issue of children in the criminal justice system and calling for law reform (Community Law Centre *et al.* 1992). Until this time, however, their calls had fallen on deaf ears. Neville's tragic death led to a public outcry, and the government took action by setting up a national working committee on children in detention.

In the meanwhile, NGOs redoubled their efforts. Lawyers for Human Rights ran a campaign called "Free a Child for Christmas", which resulted in the release of 260 children by Christmas 1992. The NGOs also decided that legislative reform was necessary, and in 1993, they set about drafting proposals for a new juvenile justice system. The proposals were published in 1994 and were based on restorative justice principles, centred on the procedure of family group conferencing (Juvenile Justice Drafting Consultancy 1994). This was drawn from the New Zealand model (Pinnock *et al.* 1994). Although the proposals did not have any official status, they did influence future developments, in particular the rights-based approach and the principle of restorative justice.

In 1994 a new government came to power, and President Nelson Mandela made a promise during his first address to Parliament that the issue of children in prison would be dealt with and that in the future the criminal justice system would be the last resort when dealing with juvenile offenders.

The ratification of the United Nations Convention on the Rights of the Child by the South African government in 1995 set the scene for broad-reaching policy and legislative change. The South African Constitution embodies a section protecting children's rights and includes the statement that children have the right not to be detained, except as a measure of last resort, and then for the shortest appropriate period of time, separate from adults and in conditions that take account of their age. One of the earliest cases to come before the new Constitutional Court was *S v Williams* 1995 (3) SA 632 (CC), which dealt with the sentence of corporal punishment, until then a sentence commonly used for the punishment of children by the courts. The court struck down corporal punishment on the grounds that it was cruel, inhuman and degrading treatment.

The government did act with urgency on the issue of children in prison, as President Nelson Mandela had promised it would. In this regard, however, the country learned that the practice of proceeding with too much haste can create problems of its own. An amendment to an existing law, which was intended to outlaw entirely the imprisonment of children during the pre-trial phase, led to chaos when it was suddenly promulgated. Inadequate consultation between the relevant government departments, as well as a lack of alternative residential facilities for children, caused the application of the new law to be fraught with practical problems. So serious were the consequences of this that within a year the government had to amend the law again, this time allowing children charged with certain offences to be detained in prison awaiting trial. The debacle also had some positive results, however. It led directly to the setting up of a structure called the Interministerial Committee on Young People at Risk (IMC), which became an important agency for policy-making in the field of child and youth care, including the management of children who come into conflict with

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the law. The IMC set up a number of pilot projects to try out its new policy recommendations, and some of these were important incubators for the development of new ways of dealing with children. Of particular relevance to children accused of crimes were projects that dealt with the management of offenders immediately following arrest, and family group conferencing in which young offenders were brought into a restorative justice process together with the victims of crime.

II. FROM POLICY TO LAW REFORM: 1997 TO THE PRESENT

The law-making process began when the Minister of Justice requested the South African Law Commission to include an investigation into juvenile justice in its programme. The Juvenile Justice Project Committee of the South African Law Commission commenced its work in 1997 and a discussion paper with a draft Bill was published for comment in 1999. The project committee followed a consultative approach, holding workshops and receiving written submissions from a range of criminal justice role-players. Children were also consulted on the Bill while it was being developed (Community Law Centre 2000). The final report of the Commission was completed and handed to the Minister of Justice in August 2000 (SALC 2000). The Child Justice Bill was approved by Cabinet in November 2001 for introduction into Parliament, and was introduced into Parliament in August 2002 as Bill No. B49 of 2002. However there have been significant delays in the passing of the Bill, and at the time of writing (2007), the Bill has still not become law. It is important that the reader should verify the current status of the Bill, and also check that the details described below are still features of the Act, as changes may occur during the legislative process.

The Child Justice Bill aims to establish a criminal justice process for children accused of committing offences that protects the rights of children as entrenched in the Constitution and as provided for in international instruments. The objectives clause of the Bill focuses on the promotion of *ubuntu* in the child justice system through the fostering of children's sense of dignity and worth, and reinforcing their respect for the human rights of others. The clause also stresses the importance of restorative justice concepts such as accountability and reconciliation, and the involvement of victims, families and communities.

The Bill applies to any person under the age of 18 years who is alleged to have committed an offence. It is proposed that the minimum age of criminal capacity will be raised from seven to 10 years. It is presumed that children aged 10-14 years lack criminal capacity, but the state may prove such capacity beyond reasonable doubt.

In order to keep children out of police cells and prisons, the Bill encourages the release of young offenders into the care of their parents and entrenches the constitutional injunction that imprisonment should be a measure of last resort for a child. A probation officer will assess every child before the child appears at a preliminary inquiry. A preliminary inquiry is held in respect of every child within 48 hours of arrest and is presided over by a magistrate, referred to as the "inquiry magistrate". Decisions to divert the child away from the formal court procedure to a suitable programme may be taken at the preliminary inquiry stage, if the prosecutor indicates that the matter may be diverted.

If a child is not diverted, the matter will proceed to plea and trial. Any court before which a child appears for plea or trial is regarded as a child justice court. Provisions have also been proposed in the Bill for the establishment of one-stop child justice centres. The Bill provides a wide range of sentencing options for children as alternatives to prison sentences. Children who are 14 years or older may nevertheless be sentenced to imprisonment in certain specified circumstances.

The Bill also proposes monitoring mechanisms for ensuring the effective operation of this legislation, and promotes co-operation between all government departments and other organizations and agencies involved in implementing an effective child justice system.

The Bill, when introduced to Parliament, was accompanied by a budget and implementation plan. The juvenile justice project committee had, with a great deal of foresight, predicted that the Bill would not succeed if questions about implementation could not be answered effectively. Consequently, the project committee made history at the South African Law Reform Commission by being the first project committee to undertake a costing of their proposals (Barberton and Stuart, 1999). Following the handover of the South African Law Commission Report on Juvenile Justice to the Minister of Justice in August 2000, work on

implementation planning began. The Child Justice Project, a United Nations technical assistance project of the government of South Africa, followed up on the costing work already done by assisting the government to produce a comprehensive budget and implementation strategy for the Child Justice Bill. This is an inter-sectoral budget developed with the involvement of the Treasury, and linked to the government's medium term expenditure framework. The Deputy Minister of Justice and Constitutional Development has described it as a model according to which all future Bills should be costed and planned for.

Sloth Nielsen (2003), in her innovative article entitled "The Business of Child Justice" undertakes an in-depth analysis of the pragmatic approach which was followed by the project committee and by government. She concedes that children's rights and restorative justice were important influencing factors in the development of the Child Justice Bill, but she makes the following observation: "The article has described and explained how, in the child justice sphere, a growing realism about the transition South Africa is facing resulted in a measurable shift in emphasis from human rights values (as philosophical constructs), and from a stance based on the righteousness derived from the worthiness of the cause. The increasing reliance for both law reformers and government's technical advisers on arguments and practices related to economic modelling and cost efficiency have been illustrated here in support of the contention that, while providing a useful backdrop, children's rights and restorative justice ideology have been eclipsed by business-speak. This could give the impression that an efficiency model, along corporatist lines, has supplanted the idealism of the endeavour." (Sloth-Nielsen, 2003 at p. 192).

Sloth Nielsen, a well-known South African children's rights advocate and academic, is no doubt being a little provocative in this statement. In the closing remarks of her article she concludes that children's rights ideology and pragmatic management philosophy are not competing discourses if we want to ensure that we provide a system that can actually deliver rights to children.

III. PARALLEL DEVELOPMENTS IN PRACTICE

A. Introduction

The system proposed by the Child Justice Bill is not a completely new one. It incorporates and builds on some sections in existing laws that have in the past provided sporadic, unco-ordinated protection for children accused of crimes. The new system has been in a process of organic development for a number of years. This development has grown through the introduction of reforms and pilot projects by NGOs and government departments, often working in partnership. The implementation of the new child justice legislation will be made easier by the fact that there is an existing infrastructure on which to build.

B. Probation Services

1. Current Practice and Recent Developments

Probation work consists of a body of occupation-specific knowledge and skills (Department of Social Development 2002a). Probation officers are currently all social workers who carry out work in the fields of crime prevention, treatment of offenders, and the care and treatment of victims of crime, as well as working with families and communities.

Over the past decade in South Africa, the importance of probation officers as agents in an integrated criminal justice system has grown. The Department has accordingly strengthened probation services through increasing the number of probation officers and through widespread training. The University of Cape Town was the pioneer of post-graduate specialized training for probation officers, being the first university in the country to offer a social science honours degree in probation practice. The Nelson Mandela Metropolitan University, Rhodes University, the University of Johannesburg and the University of Fort Hare are all now offering honours degrees in probation practice. Probation practice is drawn from a number of disciplines including social work, criminology, penology, criminal law, psychology and sociology.

Probation work is currently carried out in terms of the Probation Services Act 116 of 1991, which provides for the establishment and implementation of programmes to combat crime and for rendering assistance to and treatment of both victims and offenders. An amendment to the Act in 2002 (Probation Services Amendment Act 35 of 2002) inserted certain definitions for terms such as "diversion" and "restorative justice", provided for compulsory assessment of all arrested children within 24 hours of arrest, and introduced home-based supervision as an alternative to detention – both in the pre-trial phase and as a

sentence. Pursuant to the amendments, assistant probation officers can now be appointed and be empowered to carry out certain functions under the Act. Assistant probation officers are not required to have third level education, and this is a very practical way of extending the services that the probation services department can carry out. However, statutory services remain the sole preserve of probation officers. The Department of Social Development has undertaken an intensive drive to appoint new assistant probation officers since the end of 2005.

The Annual Report of the Department of Social Development (2005/2006 Financial Year) points out that whilst there are only 780 probation officers, 940 young assistant probation officers have recently embarked on an 18 month training course (the curriculum developed by the University of Cape Town). The report goes on to say the following: "This complemented efforts to improve the quality of learning in the probation services environment that, during the period under review, saw the Standards Generating Body (SGB) Board for Probation Services come into being in April 2005, with the added result of a Probation Work Certificate Course at NQF Level 4 being registered with the South African Qualifications Authority (SAQA)." (Annual Report 2005/2006: 100)

2. Future Prospects

The Child Justice Bill provides for a more central role for probation officers. They will carry out assessments of every child who comes into conflict with the law, and make recommendations about the prospects for diversion, as well as the release or placement of the child. They will also be required to attend the preliminary inquiry, render pre-sentence reports, and carry out supervision of children in the community. In addition, probation services must ensure that there are sufficient programmes in place to support diversion and alternative sentencing.

C. Assessment

1. Current Practice and Recent Developments

The Interim Policy Recommendations for the Transformation of the Child and Youth Care System stressed the importance of an individual assessment of every child (IMC 1996). The Department of Social Development has adopted a model of developmental, strengths-based assessment, and many probation officers have been trained in the use of this method.

The assessment of children by probation officers during the first 24 hours after arrest and prior to the first court appearance is already the general practice in a number of urban centres. This has now become part of statutory law with the passing of the amendment to the Probation Services Amendment Act.

2. Future Prospects

With regard to the availability of probation officers to carry out these assessments within 24 hours, the major urban areas are reasonably well served. There are some smaller towns and rural areas that may not have sufficient staff to undertake these assessments, and some probation officers are required to cover a large geographical area. The purchasing of such services by contracting on a fee-for-service basis with trained personnel in the private or non-government sector is part of the plan envisaged by the Department of Social Development to ensure the availability of probation services to meet the assessment requirements that the forthcoming legislation will set (Intersectoral Committee on Child Justice 2002).

D. Diversion

1. Current Practice and Recent Developments

Diversion is the channelling of children away from the formal court system into reintegrative programmes. If a child acknowledges responsibility for the wrongdoing, he or she can be "diverted" to such a programme, thereby avoiding the stigmatizing, and even brutalizing, effects of the criminal justice system. Diversion gives children a chance to avoid a criminal record, while at the same time, the programmes are aimed at teaching them to take responsibility for their actions and to avoid getting into trouble again.

Current law does not specifically provide for diversion practised in South Africa. Experiments with diversion of young offenders have been pioneered by NICRO (an NGO partially subsidized by the government) since 1992, with the co-operation of public prosecutors and probation officers (Muntingh & Shapiro 1997).

Although diversion is currently not mentioned in the statutes, it has recently been recognized and pronounced upon by the courts in *S v D* 1997 (2) SACR 673 (C), *S v Z en vier andere sake* 1999 (1) SACR 427 (E), and *M v The Senior Public Prosecutor, Randburg and another* (Case 3284/00 WLD, unreported). Diversion can thus be said to be officially recognized by South African law.

The National Prosecuting Authority (NPA) issued a national policy manual in 1999, Chapter 7 of which deals with diversion. It was tabled and approved by Parliament in November 1999. The manual defines diversion, how it should be implemented, the selection criteria, and the processes to be followed. In addition, training manuals on Child Law have been developed by the Justice College for both prosecutors and magistrates, and each of the manuals contains detailed information about diversion.

In 2000, the NPA conducted a national audit on diversion programmes. The audit revealed that access to diversion was uneven, with children in rural areas receiving few opportunities. The NPA (with the assistance of NICRO and the Department of Social Development) has carried out training throughout the country since that time. Data collection remains weak in this area. The NPA reports that from July 1999 to December 2005, a total of 115,582 matters were diverted. However, a major shortcoming is that the figures do not indicate the kinds of offences and the ages of the children diverted (Tserere 2006: 38).

2. Future Prospects

The Child Justice Bill will make diversion part of the law, instead of being solely dependent on the discretion of a prosecutor, as it is in the current system. The Department of Social Development has developed minimum standards for diversion. These are aimed at ensuring that diversion services will, in the future, be offered by accredited service providers. The quality of the programmes will be subject to evaluation, using the minimum standards as an evaluative benchmark.

E. Restorative Justice

1. Current Practice and Recent Developments

Restorative Justice is recognized as being closely linked to African traditional justice systems. This traditional form of justice preceded colonization and still exists in South Africa today, more commonly in rural areas. Modern restorative justice practice has its roots in victim-offender mediation, which became popular in the Western world during the 1970s. The term "restorative justice" began to be applied to such practices during the 1980s, and was first comprehensively presented as a theorized model in 1990 with Zehr's *Changing Lenses*. South Africa's participation in the modern international movement of restorative justice began in 1992. The first initiatives were taken by a non-governmental organization, the National Institute for Crime Prevention and Reintegration of Offenders (NICRO), in 1992 to establish and later evaluate South Africa's first victim-offender mediation project. A person was employed to get the project going, and he undertook a study visit to the United States. The visit was hosted by the Mennonite Central Committee and included time at a training conference in San Francisco, Los Angeles to observe a victim-offender mediation project, and then on to Elkhart, Indiana to observe the victim-offender programme there.

NICRO's first victim-offender mediation project was established in Cape Town. The results of the project were published in a report that describes Zehr's model of restorative justice as the theoretical framework for the project, and gives several examples of victim-offender mediation projects in North America and Europe as well as a brief description of the Japanese legal system, with reference to a parallel mediation track (Muntingh 2003). The project targeted referrals at both the pre-trial and pre-sentence stages. The report indicated that prosecutors had been reluctant to refer serious cases to the project, and had referred a majority of juvenile offenders, as opposed to adults.

In 1995 an Interministerial Committee for Young People at Risk was established. Restorative justice was adopted as a "practice principle" for the transformation of the child and youth care system. A study tour to New Zealand was authorized by the IMC in 1996 and four South Africans travelled there to consider the applicability of the New Zealand youth justice system to South Africa. Following the study tour to New Zealand, the IMC established a pilot project on family group conferencing in Pretoria that handled 42 cases in 1997, some of which dealt with relatively serious offences. The project was evaluated and the findings were published in a document that is both a practice research study and an implementation manual (Branken and Batley 1998).

The Restorative Justice Centre was established in Pretoria in 1998. From the outset the organization aimed not only to offer victim-offender conferencing as an alternative to the criminal justice system, but also to build capacity within South Africa for the delivery of restorative justice programmes. The Centre has forged links with other organizations in a consortium called the Restorative Justice Initiative.

Several training initiatives have also played an important role in helping to establish restorative justice in South Africa. Since it began to function in 2000, the Restorative Justice Centre has offered a three-day workshop in the theory of restorative justice as well as conferencing skills. This package was adapted for probation officers, first for the North West province in 2001, and later for the whole country as a project of the National Department of Social Development funded by the Royal Netherlands Embassy in 2003. During 2005 and 2006 there has been a rapid growth in training on restorative justice, with the Department of Justice, magistrates' organizations and the National Prosecuting Authority all commissioning training for their officials.

A recent audit by Skelton and Batley entitled "Mapping Progress, Charting the Future: Restorative Justice in South Africa" (2006) has found that there are restorative justice initiatives in all nine provinces in South Africa. The probation sector appears to be the most active, which is probably due to the fact that this sector was the first to receive training. The role of the NGOs has been very important, but government departments are definitely coming on board. Victim-support service involvement has not been very active, which given that restorative justice is a victim-centred process, is disappointing, but it may be due to general weaknesses and lack of funding in that sector.

Very recently, a fledgling jurisprudence has begun to emerge from the superior courts. Justice Bertelsman, in a High Court judgment called *S v Joyce Maluleke* (an as yet unreported case no. CC 83/04 Transvaal Provincial Division, handed down on 13 June 2006) has set the groundwork.

Drawing on other judgments, one from Zimbabwe, *S v Shariwa* [2003] JOL 11015 (ZH) and another from the Transvaal Provincial Division, *S v Shilubane* 2005 [JOL 15671(T)], the judge opened the door in an explicit way to the use of restorative justice in sentencing. He remarked as follows: "In addition, restorative justice, seen in the context of an innovative approach to sentencing, may become an important tool in reconciling the victim and the offender and the community and the offender. It may provide a whole range of supple alternatives to imprisonment."

This judgment was mentioned in one of the dissenting judgments in the recent constitutional case of *David Dikoko v Thupi Zacharia Mohkatla* CCT 62/05, an as yet unreported judgment delivered on 3 August 2006 by the Constitutional Court of South Africa. This case dealt, interestingly enough, not with a criminal matter but a civil claim for damages arising from defamation. Whilst the majority awarded a hefty claim of financial damages, the two separate but concurring minority judgments, by Justices Mokgoro and Sachs, focused instead on a restorative justice approach, making the point that dignity could not be restored through disproportionate punitive monetary claims, and that apology would have been a more powerful tool, more in keeping with African notions of *ubuntu* and our constitutional commitment to dignity.

2. Future Prospects

The development of standards for restorative justice practice are currently being developed, led by the non-government sector, but with active participation by government department officials and consultation with practitioners. The National Prosecuting Authority has announced that it plans to roll out a restorative justice pilot project to numerous courts around the country, in which child offenders will benefit from diversion and alternative sentencing options.

F. Assessment Centres and One-Stop Child Justice Centres

1. Current Practice and Recent Developments

Over the past decade, service arrangements have been developed at grass-roots level in an attempt to streamline pre-trial services to children. Some of these are called assessment centres, others are named arrest, reception and referral centres. These centres, usually based at the magistrate's court, are staffed by probation officers. They are service hubs, designed to streamline the process of children who have been arrested by police being transferred as swiftly as possible to a probation officer for assessment prior to their first appearance (IMC 1998).

A more complex and developed model of a service centre is the One-Stop Child Justice Centre, which has a range of services involving several departments housed under one roof. This model has been operating at "Stepping Stones" in Port Elizabeth since 1996 (IMC 1998). The project has now been incorporated as part of the normal services rendered, with permanently appointed staff. A second One-Stop Child Justice Centre has been established at Mangaung, in Bloemfontein. Although initially these centres were co-ordinated by the Department of Social Development, there have been moves for the Department of Justice and Constitutional Development to take a more active lead in the promotion of such centres. This is in line with the Child Justice Bill, which empowers the Minister to establish such centres in the future system, in consultation with Ministers of other relevant departments. The Department of Justice and Constitutional Development has been leading a process to develop a blueprint for the establishment and maintenance of One-Stop Child Justice Centres.

2. Future Prospects

Assessment and referral centres, and One-Stop Child Justice Centres, are very useful as service hubs (different services are inter-related and form a hub), which enhance efficient service delivery. However, it is not essential that such centres be universally in place for the implementation of the Child Justice Bill. Rather, such centres can be progressively realized and promoted, in an organic manner that suits the specific needs of that particular district or region. In their report on costing and implementation of the Child Justice Bill, Barberton and Stuart (1999) recommended that the distribution of One-Stop Child Justice Centres should seek to maximize impact by being established across metropolitan and certain large urban areas. They proposed that the establishment of 19 such centres would serve at least 30% of the country's arrested children, or possibly more, given the metropolitan and urban bias in child crime rates (Barberton & Stuart 1999). The Department of Justice budgeted R31 million between 2003 and 2005 to be spent on infrastructural costs for One-Stop Child Justice Centres (Intersectoral Committee on Child Justice 2002).

G. Children Awaiting Trial in Detention

1. Current Practice and Recent Developments

The South African Constitution, in section 28(1)(g), gives every child the right not to be detained except as a measure of last resort, in which case he or she may be detained only for the shortest period of time. Despite this provision and numerous ad hoc efforts on the part of the legislature to limit pre-trial detention of children, South Africa has had an ongoing battle with the problem of too many children being detained in prison. The concerted efforts of government to reduce the numbers has paid off, however, and the Department of Social Development reports a 40% reduction of children in prison during the period 2004 to 2006 (Department of Social Development 2006: 97). The annual report issued by the Office of the Inspecting Judge of prisons reports that in December 2005 there were 1,217 children in prison awaiting trial. Dissel (2006: 116) attributes this to the *Interim National Protocol for the Management of Children Awaiting Trial* which was issued by the Intersectoral Committee for Child Justice in June 2001. This is an intersectoral document that clearly sets out procedures to be followed after the arrest of a child. It emphasizes measures to get children released into the care of a parent or guardian, failing which, to have them placed in the least restrictive residential option available.

In addition to children detained in prison, there are also children awaiting trial in facilities run by the provincial Departments of Social Development. In 1998, the Department of Social Development commenced a programme to support the establishment of secure care facilities and funds have been made available by the Treasury for this purpose. The number of children accommodated in these facilities has risen over recent years, which is to be expected as children who were previously in prison may be held in secure care. However, the facilities are still not fully utilized. The Department had provided 2,199 secure care beds by February 2006, but reported that only 71% of these were being occupied on 28 February 2006 (Dissel 2006: 114).

A national workshop on secure care was held in March 2001 in Bloemfontein to consider the development of a protocol for secure care, uniformity of secure care practice and the development of a programme for document quality assurance (DQA); to establish a forum for secure care; to consult on the regulations for secure care; and to finalize an audit of all facilities accommodating children awaiting trial.

2. Future Prospects

The forthcoming legislation, while continuing to allow older children charged with serious offences to be held in prison to await trial, does aim to limit the number by removing the discretionary clause and incorporates as part of law the principle that imprisonment should always be used as a measure of last resort. It is predicted that as a result the total number of children awaiting trial in prison will not rise and is likely, in fact, to be reduced.

A further consideration is the fact that, due to crowded court rolls in the current system, trials are taking longer to complete and this backlog tends to keep detention figures high. The Child Justice Bill encourages the completion of trials within a six-month period from the taking of the plea, as children will not be able to be detained for longer than this (unless they are charged with murder, rape, car hijacking or aggravated robbery). This provision will hopefully speed up trials where children are the accused.

In addition to increasing the number of beds available in residential facilities, the Department of Social Development is committed to providing community-based alternatives to pre-trial detention. The Department, in partnership with the Western Cape Provincial Department, started a home-based supervision project during September 1998. The arrested child is placed in the care of his or her parents under the supervision of a probation officer. The child is then monitored by an assistant probation officer. It is recorded that from September 1998 until February 2002, a total of 379 children were in this programme. An interesting observation is that out of all these cases of children in this programme 188 cases were eventually withdrawn from court. This means that at least that many children could have been in prison awaiting trial for up to a year or longer, their young lives totally disrupted and their schooling interrupted, only to have the charges ultimately withdrawn. It is also noted that such programmes are highly cost effective when compared with the expensive option of residential care.

In the Annual Report of the Department of Social Development 2005/2006 Financial Year it is reported that a blueprint for secure care is being developed to regulate norms and standards in secure care. Secure care is a component of residential care, and the running of such facilities will in future be governed by the Children's Act 35 of 2005, expected to become operational in 2008.

H. Pre-Sentence Reports

1. Current Practice and Recent Developments

Although current statutory law in South Africa does not make pre-sentence reports by a probation officer compulsory, a series of recent High Court judgments have created precedents for the requirement of pre-sentence reports, at least in cases where children are likely to be sent to reform school or prison. *S v Z en vier andere sake* 1999 (1) SACR 427 (E) sent a clear message that due to the importance of understanding the personality and personal circumstances of the child offender, a pre-sentence report is vital. The approach was also followed in *S v Kwalase* 2000 (2) SACR 135 (C), which also stressed the importance of an individualized approach. In the case of *S v J and others* 2000 (2) SACR 384 (C) a 16 year old offender had been sentenced on the basis of an "assessment record" instead of a proper probation officer's pre-sentence report. The court found that the form was inadequate for purposes of sentencing. The role of the probation officer was fully discussed in the Supreme Court of Appeal in *S v Petersen en 'n Ander* 2001 (1) SACR 16 (SCA). In that the case the Director of Social Services had submitted a letter saying that probation officers do not undertake home visits to gang infested areas in Port Elizabeth. The Appeal court firmly stated that the magistrate had misdirected himself when he accepted this excuse, and that he should not have sentenced a young offender without the benefit of a probation officer's report. This case was cited and followed in *S v M and another* 2005 (1) SACR 481 (E). In the same year, the case of *S v N and Another* 2005 (1) SACR 201 (CkH) dealt with the fact that it is preferable for a probation officer to be called to give evidence, rather than just hand in a written report.

2. Future Prospects

The Child Justice Bill provides that pre-sentence reports should be requested in every case, and that this may only be dispensed with if the matter is a petty offence or if the pre-sentence report would cause a delay that would prejudice the child. However, no sentence involving "a residential element" can be imposed unless a pre-sentence report has been presented to, and considered by, the court. It seems likely that the

new system may require the provision of more pre-sentence reports than are required in the current system, and the Bill also requires that a report be completed within one calendar month from the date on which it is requested. However, the fact that a probation officer will have already completed a pre-trial assessment will shorten the process of the preparation of the pre-sentence report. Probation officers are already dealing with pre-sentence reports in the majority of serious matters.

I. Community-Based Sentences

1. Current Practice and Recent Developments

A range of non-custodial sentences are available to the courts for the sentencing of convicted children. It is possible to postpone the passing of sentence conditionally or unconditionally. In the case of unconditional postponement, the court does not pass sentence but warns that the offender may have to appear again before the court if called upon to do so. The postponement may be made conditional to compensation, rendering of a benefit or service to the victim, community service, instruction or treatment, supervision, or attendance at a centre for a specified purpose. Postponement of sentence is used regularly by the courts, particularly for non-violent offences. Also available under the current law is the option of correctional supervision. This provides for an offender to be placed under correctional supervision which takes the form of house arrest, combined with a set period of community service and attendance at a relevant course. This can either be completed as a wholly community-based sentence, or a person can spend a portion of the sentence in prison, and then be released to carry out the rest of the sentence under correctional supervision. Correctional supervision is not designed for child offenders specifically and is not used as frequently as it could be.

In the case of *The Director of Public Prosecutions, KwaZulu Natal v P* 2006(1) SACR 243 (SCA), the Supreme Court of Appeal reviewed a sentence of correctional supervision for a girl who had been 12 years old at the time of the commission of murder. Although the court set the sentence aside, it did not interfere with the correctional supervision part of the sentence, but replaced the postponed sentence to a wholly suspended sentence of imprisonment.

2. Future Prospects

While the courts have for many years had the power to use community-based sentences, they have often opted for less imaginative options from the list available to them, such as postponed sentences (Skelton, in Robinson 1997:174). The Child Justice Bill offers a comprehensive range of options for diversion. In the community-based sentencing section it refers back to the options for diversion, indicating that any of these can also be used as a sentence, or be linked to a sentence, through postponement or suspension.

Probation services will play an important role in ensuring and brokering the availability of programmes for sentences (which in most cases will be the same programmes used for diversion). Probation officers need to be thoroughly trained in this field.

With regard to correctional supervision, the content of this sentencing option should be reconsidered to ensure that it is suitable for the needs of child offenders, and it should then be promoted as a sentencing option. The availability of correctional officials to supervise these sentences also needs to be considered and planned for.

J. Reform School

1. Current Practice and Recent Developments

In the current system, children may be sentenced to reform schools (managed by the Department of Education), which are compulsory residential facilities offering academic and technical education. In 1996, there was a Cabinet-requested investigation into the availability and suitability of such facilities and it was found that there were nine reform schools in South Africa, seven for boys and two for girls. Since then, however, the Western Cape facilities have been "rationalized" and a reform school in KwaZulu-Natal has been closed.

Currently, there are only four facilities receiving sentenced children, namely Ethokomala Reform School (for boys) and Faure Youth Centre (for boys and girls) in Mpumalanga, Ottery Youth Centre (for boys only) in the Western Cape, and Denovo in the Western Cape, which is still being developed. The total number of

beds for sentenced children in these facilities is 420. Due to the fact that these facilities are not evenly spread throughout the country, numerous children who have already been sentenced to reform school have to await designation to such a facility in prison. The situation has been commented upon with concern by the High Court in a series of cases, notably *S v M* 2001 (2) SACR 316 (T); *S v Z and 23 similar cases* 2004 (4) BCLR 410 (E) and *S v Z and 23 similar cases* 2004 (1) SACR 400 (E). In these reported cases, and other unreported ones, the courts have expressed grave concern about the situation where issues relating to provisioning, transport and other practical concerns are leading to a serious violation of the rights of children sentenced to reform school.

2. Future Prospects

The Child Justice Bill is moving away from the terminology of “reform school” and is instead allowing for children to be sentenced to a “residential facility”. The definition of the latter is broad enough to include facilities run by either the Department of Education or the Department of Social Development. This will mean that the former department will be able to consider utilizing schools of industry for the accommodation of sentenced children, and also that currently existing and planned secure care facilities can be utilized for sentenced children and not just for children awaiting trial, as is currently the case. Reform schools will in future fall under the administration of the Children’s Act 35 of 2005, which is expected to become operational by 2008.

K. Prison Sentences

1. Current Practice and Recent Developments

Children can be sentenced to imprisonment and under the current law there is no limit regarding a minimum age for imprisonment of sentenced children. In practice, children under the age of 14 are not often sentenced to imprisonment, but the fact that it happens at all remains a concern. According to the annual report issued by the Office of the Inspecting Judge of Prisons (2005/2006), of the 2,354 children in prison (awaiting trial and sentenced) 12 are under the age of 14 years.

The statistics relating to children being sentenced to imprisonment indicate that the number of children being sentenced to imprisonment is decreasing, but the length of their sentences is increasing on average. According to the annual report issued by the Office of the Inspecting Judge of Prisons (2005/2006), the number of persons serving sentences of imprisonment in December 2005 was 1,137.

The minimum sentences introduced by the Criminal Law Amendment Act No 105 of 1997 may have affected the length of sentences because some courts initially applied the legislation to 16 and 17 year olds. The legal uncertainty on this issue was resolved when the Supreme Court of Appeal ruled in the case of *Brandt v S* [2005] 2 All SA 1 (SCA) that minimum sentences do not apply to persons who were below the age of 18 years at the time of the commission of the offence.

South Africa remains one of only a few countries in the world that retains life imprisonment as a sentence for children, with 32 such prisoners having been identified. In South Africa, a person sentenced to life imprisonment must serve 25 years in prison before he or she can be considered for parole (Du Toit 2006: 13).

2. Future Prospects

The fact that any children under the age of 14 years are being sentenced to imprisonment is cause for concern, and the proposed new legislation seeks to remove the possibility of sentences to imprisonment for children under this age, although other forms of secure residential care will remain available.

With regard to children of 14 years and older, it is not predicted that the Child Justice Bill will bring about any increase in the number of children being sentenced to imprisonment. Hopefully, there will be a reduction in the number of such sentences, especially in those categories of children sentenced to less than two years. Community-based alternatives are being developed and promoted, and may be appropriately used in these matters. The Bill as introduced into parliament included a clause outlawing the use of life imprisonment.

L. Legal Representation

1. Current Practice and Recent Developments

Children have a right to legal assistance in South Africa in cases where a substantial injustice would otherwise occur, and where a child's family cannot afford to pay for the services of a lawyer. State-funded legal representation can be obtained through the Legal Aid Board (Zaal & Skelton 1998:520). Although the percentage of children being legally represented has increased in recent years, it is still estimated to be less than half of all cases appearing in court (Intersectoral Committee on Child Justice 2002). A large number of children who are offered state-funded legal aid decline these services, which indicates a need for the education of children who have come into contact with the criminal justice system. There has previously been little or no specialization amongst lawyers regarding the legal representation of children.

The Legal Aid Board has committed itself to providing legal representation for children. The Board has appointed legal representatives for children – both in child justice and children's court matters – in several of their justice centres.

2. Future Prospects

The Child Justice Bill provides for access to state-funded legal representation when the child is remanded in detention, when there is a likelihood that a sentence involving a residential requirement is to be imposed, and when the child is at least ten years old but not yet 14 years and the matter is to be tried in court. The children in these categories may not waive legal representation.

The idea of non-waiver may appear to be a provision that will cause a large increase in the number of cases that will have to be taken on by the Legal Aid Board. The Legal Aid Board agrees, however, that these categories correspond with the constitutional test of whether a substantial injustice would otherwise occur (Intersectoral Committee on Child Justice 2002). It is also likely that the Child Justice Bill, with its focus on diversion of cases, will result in fewer cases going to trial overall, although the number of serious cases going to trial will probably remain much the same. These serious cases tend to be the ones in which children do have legal representation in the current system.

Planning for legal representation will be done primarily through making the legal aid officers as well as legal aid justice centre managers and staff aware of the requirements of the Bill, and through the training of relevant justice centre staff. Further, efforts to provide some specialization in legal representation of children will be supported.

M. Monitoring

1. Current Practice and Recent Developments

Since its inception in 2000, the government-led Intersectoral Committee on Child Justice has attempted to set up structures and systems to monitor the situation of children in the criminal justice system, although these have focused mainly on pre-trial detention. By 2006 all provinces had set up some form of monitoring structure. However, data collection remains incomplete.

There is a general monitoring system for all prisoners, the "independent prison visitors" model that provides for each prison to have a paid prison visitor, and this nationwide structure is overseen by a judicial inspectorate of prisons. Children have benefited from this system, although the quality of the services does differ from prison to prison. The Office of the Inspecting Judge has taken an interest in children in prison, and does include specific details about them in its annual reports.

The process of automatic appeal in certain cases is also a useful part of the monitoring process. A number of High Court judgments have picked up irregularities and injustices relating to cases involving children in the criminal justice system. This helps to monitor what is happening in the courts and also contributes to law reform and improvement in practice.

2. Future Prospects

The Child Justice Bill does include a section on monitoring. Much of the detail on monitoring that was included in the draft Child Justice Bill, itself included in the Law Commission Report on Juvenile Justice, has

been removed, and the Child Justice Bill as introduced into Parliament includes only a simple framework for monitoring. The detailed provisions are likely to appear in the regulations to the Act.

IV. CONCLUSION

The issue of child justice is very fluid in South Africa, which is why it is necessary to describe a system in the making, as this chapter has aimed to do. It is necessary for the reader to check the current status of the law when using this text, since changes to the Child Justice Bill may occur during the parliamentary process, and the Act that emerges may be different from the Bill as it is described in this paper. To check the status of the law, visit the following website: www.childjustice.org.za .

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