RAISING IDEAS FOR THE CREATION OF A JUVENILE JUSTICE SYSTEM FOR SOUTH AFRICA.

by Ann Skelton

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Ann Skelton[1]

In developing a Juvenile Justice system for South Africa there is a need to be radical. The reason for this is that in the past children have been invisible within the mainstream of the Criminal Justice System. For many years the greater public did not know that children awaiting trial were sitting in bleak police cells , or crowded into prison cells with older criminal offenders. The public did not know that a child arrested in the summer months who was still in custody in the winter months had no warm clothing to sheild him or her from the bitter cold which seeped up through the cold concrete on which he or she slept. The Police knew, of course, and the Department of Prisons (now called Correctional Services.) But obviously they did not care. They said nothing, they did nothing , for years. A few overworked social workers and the odd lawyer knew about it but felt powerless to do much. They were caught up with fighting a small battle with the local Station Commander or Prison Head, and the national battlefield of children's rights remained strangely quiet.

It is only very recently, in 1992 that, sparked by media programmes and articles, the public woke up to the facts, and were shocked. Given this encouragement, the social workers and lawyers came out of hiding, the few lone voices became louder. Even the Police and Correctional Services and other government departments joined the verbal bandwagon of indignation.

So here we are in 1993. The stage is set for change, and it needs to be radical because it is no good tinkering with a system which has failed so miserably to deal with children in trouble with the law. We have learnt that if we allow too much discretion to lie in the hands of state officials they opt for the easiest options. We have learnt that judicial officers also use their discretion in a way which has limited rather than enhanced the rights of children. The Supreme court is the upper guardian of all minors (it's a phrase we lawyers like to bandy about) but what has it meant, what has the Supreme court done about children in prison? For these reasons we need to create an entirely new system based on the experiences of the past. The legislation needs to be entirely unequivocal, it must spell out to those people dealing with juvenile offenders exactly what the correct procedures are. There must be no loopholes.

I have referred several times to the rights of children. But it must be born in mind of course that the Criminal Justice system must serve the interests of every citizen , the interests of the victims of crime as well as the perpetrator.
I think its important to acknowledge that every offender under

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[1] BA LLB (Natal) , Project Director, Applied Criminal Justice, Lawyers for Human Rights.

the age of 18 cannot be treated in the same way. The public will probably be comfortable to accept that a 14 year old charge with theft must not be held in custody, or get a criminal record. They will feel differently about a 17 year old charged with murder , rape or armed robbery. So in setting out on the task of developing a comprehensive system of juvenile justice we must be mindful of these realities. We will also be faced with certain fiscal realities. On this issue, we must blend creativity and boldness with realism. Any money spent in this cause will be an investment , not only in the future of each youth, but also in the future for all of us. If we want to do something about the crime rate of tomorrow, then we must nip the problem in the bud, and the obvious place to start is the moment that a young person is arrested for the first time. Or, through preventative methods, even before that.

I am now going to raise some ideas for possible legislative changes. The suggestions are not exhaustive, nor are they in any way prescriptive. They simply serve as a springboard for discussion.

1 PREAMBLE AND DEFINITION

The Act might begin with a short preamble setting out the aims of the Juvenile Justice System. Although this is not a common feature in Statutes, it may be helpful to set out certain concepts which will guide judicial discretion. These concepts might, for example, include the notion of restorative justice, and the "best interest of the child". This last phrase is, I know, a very problematic one on which we must have further discussion. Perhaps if " the best interest of the child " or some similar phrase was clearly set out in the preamble or in the definition section, it may assist the court to give full meaning to the concept.

2 SETTING UP STRUCTURES AND PERSONNEL

The first section of a new Juvenile Justice Act would probably set out the structures which need to be established, such as Reception and assessment centres, Family Youth Councils, Places of safety, Childrens Courts and Juvenile Courts.
It could also lay out the staffing requirements , detailing the qualifications and specialised training which the officers of these centres and courts will need.

3 ARREST

At the moment children who are arrested are generally held in police cells for 48 hours before being brought before a magistrate. The child can be released into the care of the guardian by police (in cases of less serious offences), but the police generally fail in their task of locating the guardian. There is no sanction on the police for this failure. The effect of just one night in a police or prison cell can be devastating.

It is therefore necessary to change completely the procedure on arrest.

The establishment of a Reception and Initial Assessment centre, perhaps attached to a police station or to a place of safety could provide a suitable first stop for the child after arrest. Once brought in by the arresting officer, immediately after arrest, the child could be dealt with by a social worker who would ascertain whether the child has parents or guardians, check records to see if the child is a first offender, take down details of age , personal circumstances and the type of offence alleged. A police reception officer (a specially trained officer employed by Police, seconded to the Reception and Initial Assessment centre) could then go out to locate the parent/guardian, and as a general rule the child could be released into the care of the parent or guardian.

If the charge is a serious one the police reception officer would have to get a signed order from a magistrate authorising the holding of the youth in a secure lock up until he/she can be brought before a Magistrate for a formal custody hearing.

In less serious cases, where no parent /guardian is traceable, the social worker would arrange for the child to be held in a Place of Safety, pending a Children's Court Inquiry.

There are possible problems with a Reception and Initial Assessment centre. The centres would obviously have to be open 24 hours a day, and would therefore need to have sufficient staff to work on a shift system.

A major problem is that whilst this type of centre can easily be envisaged in urban areas, the situation in rural areas would be very different. There may not be enough cases involving children in certain areas to warrant the cost of having the facilities of such a centre. For this reason a safety net has to be built in to protect all children from being held in custody unnecessarily.

This could perhaps be done by having firm restrictions on the holding of children in custody. Firstly, it would be appropriate to outlaw the holding of any child aged 14 or younger in a prison or police cell under any circumstances. The rationale for the under 14 / over 14 division already exists in our law in the form of the doli capax/doli incapax presumptions.

The police would be directed by the law to attempt by all means to release a child who is 14 or younger into the care of the parent/guardian, and only where this is not possible, to place the child in a place of safety pending a Children's Court Inquiry.

As for children over the age of 14, only those committing a serious offence should held in custody in a secure lock up, or in a place of safety for a less serious offence. In addition to this , an absolute maximum period for which any person under the age of 18 can be held for any offence could be set, alterable only by an order of a court after hearing evidence regarding reasons for the delay . This would encourage speedy trials in the

cases of juveniles held in custody on serious charges.

What is meant by a secure lock up? I am not sure whether there will be sufficient funds to set up completely separate secure lock ups intended only for awaiting trial juveniles between 15 and 18, or whether this is actually necessary. What is certain, though , is that if youths are to be held in the juvenile section of a prison, the so called juvenile sections will have to be very different from the way they are now. They must be staffed by people trained to deal with youthful offenders, and the youths in custody must have access to some educational programmes as well as adequate exercise facilities. Once again the small rural prison may present problems in this regard. Insisting that awaiting trial juveniles are held in a completely separate section from other prisoners may result , in areas with small populations , in the child being held in solitary confinement. This obviously should not be allowed, and the legslation will have to be very creative in providing for these two important, but almost contradictory protections.

The current definition in the Prison Act of a juvenile as someone under the age of 21 must be altered to come in line with the Criminal Procedure Act and Child care Act definitions.

The first task of a Reception and Intial Assessment centre is, as we have seen , to determine where the child should be held immediately after arrest. The next task is to decide what the best options are for the arrested youth , giving consideration to the particular circumstances.

3 DIVERSION.

The entire Juvenile System should, I believe , be premised on the aim of avoiding most children going through the Criminal Courts. The way in which this can be achieved is through the process of diversion. Diversion takes many forms, and it requires the child to acknowledge that he or she did commit the offence, and to take responsibility for his or her actions.

(i) Children's Court Inquiry.

This is the only avilable means currently on our statute books to divert a child who has been arrested on a charge from going into the mainstream criminal justice system. It can be done in any cases where it appears to the magistrate that the child does not have a parent or guardian or that it is in the interest of the safety or welfare of the child to do so. Despite the fact that this describes a great many children appeaing before the courts, there are very few conversions to a Children's Court inquiry. The magistrates have failed to use this provision to protect children. Therefore, any new legislation must not make the mistake of giving the court too much discretion.

I propose that all children under the age of 14 should go through a Children's Court inquiry, whether or not they have a parent or guardian, and regardless of the seriousness of the offence.

In addition, any youth over the age of 14 for whom a parent or guardian cannot be traced, or in whose case the social worker deems it appropriate, shall be brought before a Children's Court. In cases of serious offences , where the child has no parent or guardian, a Children's Court inquiry will be held first but the Children's Court presiding officer may recommend that the matter proceed to the Juvenile (criminal) Court thereafter.

There are certain problems which we need to keep our eye on with regard to redrafting legislation pertaining to the Children's Court .

Firstly, it will require the amendment of both the Child Care Act 74 of 1983 and the Criminal Procedure Act 51 of 1977.

Secondly, the use of magistrates as Commisioners of Child Welfare which is currently the situation provided for by the Child Care Act is a practical idea, and saves a lot of money. However , if we decide to continue with this method, then radical retraining of the magistrates will be imperative.

Thirdly, the Children's Court inquiry tends to lead to delays, and this is obviously untenable in the case of children who are being held in custody. Emphasis must be put on a speedy resolution of these matters.

(ii) Caution.

For first offending children from stable backgrounds, a caution may be a suitable way of dealing with very minor offences. This method is not used in any formal way in our current system. If, during the initial assessment, the social worker considers this to be an appropriate method, the child could be brought before a Senior Police officer to be cautioned. A record will be kept of this, so the assessment centre can keep note of first offenders who have been given this opportunity.

(iii) Pre Trial Community Service.

Although not on our Statute books as a pre trial option, this is being used in a few centres in South Africa, spearheaded and organised by NICRO with the cooperation of the Senior Public Prosecutors in those centres.
The child could be assessed for suitability for this process by social workers at the Reception and Inital Assessment centre and given an appropriate placement . At the moment these cases are done through the court system, with the charges being withdrawn upon successful completion of the service. However, it is possible to take the pre trial community service completely out of the realms of the court. It would be better renamed to something like diversionary community service.
A question to be borne in mind is what NICRO's role in this and other diversionary options would be in the future, and how much responsibility should fall to the State.

(iv) Juvenile School.
Used in the same type of cases as the pre trial community

service, and sometimes used in conjunction with pre trial community service, this option is also being offered by NICRO in a few centres in the country. Particularly favoured for the younger offenders, the courses offer counselling , streetlaw education and life skills training. This would be a useful option to be expanded in the future.

(v) Victim Offender Mediation
This is being offered on a very small scale by NICRO. It is an alternative dispute resolution method of dealing with offenders, and makes offenders face up to the responsibility for their own actions in a very direct way.

(vi) Family Youth Council.
Based on a New Zealand model, this provides a broad reaching method of diversion. It could incorporate all of the above diversionary options. In a paper entitled "The Search for Justice in a Juvenile System" , Morris[2] sets out the picture of a Family Youth Council for South Africa
" A Family Youth Council would consist of representatives of the extended "family" , the juvenile, the victim, a social worker , a police officer , a community representative or teacher or an interested NGO representative and will be overseen by a Youth Justice Officer"
She goes on to explain that a Family Youth Court is authorised to find alternatives to prosecution in dealing with an offender who admits guilt, and these alternatives could include any of the above.

The attractive aspect of the Family Youth Court is its involvement of the family and the community, as well as the victim. This is a satisfying way of dealing with wrongs, as people feel very involved with the process. The lack of this feeling of involvement is one of the criticisms levelled at the criminal justice system. A possible disadvantage is that it might be cumbersome and difficult to convene.

4 JUVENILE COURT.

Once the majority of arrested juveniles have been diverted, the number of children who will proceed through the criminal courts will be much smaller. Only those charged with serious offences where diversion is not an option will go through the Criminal Courts.

The plea and/or trial will proceed according to the general rules of Criminal Procedure and evidence, with certain special protections for the juvenile. These might include,

(i)The setting up a Juvenile Court. In larger centres where there is a steady stream of juvenile offenders, it will be

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[2] Michelle Morris , Community Law Centre, University of the Western Cape, "The Search for Justice in a Juvenile System" Published in "Towards Juvenile Justice" compiled by R.Shapiro and M.Morris, August 1992.

possible to set aside a court specifically for juveniles. However ,in smaller centres the court will simply reconstitute itself as a juvenile court, and proceed according to special juvenile court rules.

(ii)The court shall be held in camera, and should be less formal than courts dealing with adults.

(iii) All juveniles will be provided with a legal representative.

5 LEGAL REPRESENTATION.

There is no doubt that all juveniles need to be legally represented in criminal proceedings. Ideally the legal representative should be provided as soon after arrest as possible. As soon as the social worker has assessed the juvenile and found that in the circumstances he or she is unsuitable for diversion, a legal representative should be appointed immediately, and will assist the youth at a custody hearing. I envisage a shifting of the onus with regard to custody of juveniles. In other words, The release of a juvenile at the first appearance before a Magistrate should be the standard or automatic practice. If the State is opposed to this , the prosecution must show good cause why the juvenile should be held in custody. For example, if they can satsify the court that there is a high risk of abscondment, then the court may order that the child be held in custody (subject to a statutory pre trial time limit)

What method should be used for providing legal representation for juveniles? There are a few options we could look at.

(i) Legal Aid
This method, where lawyers in private practice have their names on a roster and are then paid by the state to handle a particular case is problematic for various reasons. Juvenile court will require a certain amount of specialised knowledge in terms of sentencing options. It is very difficult to control the quality of legal representation in these cases. Some lawyers acting on Legal Aid are very good, and put much energy into their cases. Some do not. The only advantage of this system is that one can be represented by the lawyer of one's choice, if the lawyer in question is prepared to act on a legal aid brief.

(ii) Youth Advocate
Morris[3] favours the setting up a Youth Advocacy Unit, within which " a separate branch of lawyers and paralegals will assume responsibility for the counsel and representation of offenders". This is an interesting idea, and I am in favour of the idea of a Youth Advocacy Unit to act as a watchdog to monitor any abuses within the system we are attempting to set up. As far as the provision of legal representatives is concerned, however, we need to know who is going to pick up the bill.

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[3] Michelle Morris,"The Search for Justice in a Juvenile System" supra , at page 39.

(iii) Public Defender.
For this reason , I favour the option of a specialised public defender service for Juveniles, paid for by the State. The defenders would be specially trained with regard to the particular needs of juvenile clients, and be encouraged to develop a strong defence ethos.

We need to consider carefully these and other possibilities. We may , in the end, opt for a combination of mechanisms to provide legal representation.

6 CRIMINAL RECORD

After a juvenile has been convicted of a crime within our present system, that juvenile has a criminal record. A recent amendment of the Criminal Procedure Act, section 271A allows for criminal records in certain cases to fall away , after a period of ten years has elapsed.

We need to decide for the future whether juveniles who are convicted should get a permanent criminal record, whether the record should fall away automatically at the age of 18, or after a certain number of years, or whether there is a more appropiate way of dealing with the issue of juvenile criminal records.

In order to make accurate assessments immediately after arrest as to whether the child is unsuitable for diversion because of previous criminal acts, the records will need to be up to date and easily accessible. This certainly is not the case at the moment. The police take between four and six weeks in most cases to get the criminal records from the South African criminal bureau.

7 PROBATION OFFICER'S REPORTS

Probation officer's pre sentence reports must be made compulsory in all cases where a custodial sentence is a possibility.

One difficulty with pre sentence reports is that they tend to cause delays. A statutory time limit should be set for the preparation of a pre sentence report in the case of a juvenile who is in custody.

It will need to be decided as to which government department the social worker will fall under. It might be a good idea to have a social worker unit attached to the court.

8 SENTENCING OPTIONS.

Any new legislation must provide sentencing guidelines for judicial officers. The underlying principle should be the avoidance, where possible, of custodial sentences. Imprisonment of juveniles should only be considered as a last option after the judicial officer is satisfied that no other sentence would be appropriate.

There are a host of options for sentencing which can be considered;
(i) Postponement of passing of sentence. This is already available to magistrates in terms of S297 of the Criminal Procedure Act. The sentence is not designed specifically for juveniles, but is very useful , and allows for creative sentencing. The postponement of sentence may be unconditional, or the court may set one or more of the following conditions.
(a) compensation
(b) rendering of some benefit or service to aggrieved person
(c) performance of community service
(d) submission to instruction or treatment
(e) submission to supervision (e.g. of probation officer)
(f) compulsory attendance at a centre for a specified purpose.
(g) good conduct
(h) any other matter.

(ii) Community service, victim -offender mediation and juvenile school which we have already seen are useful as diversions, can also be used as sentences, either individually or in combination.

(iii) Correctional supervision is a new sentencing option on our statute books. The effectiveness and suitability either for the offender or the offender's family of this type of sentence has not yet been tested. However it does have value as an alternative to imprisonment , and will therefore need to be carefully considered when exploring suitable sentence options for juveniles.

(iv) Placement under the supervision of a probation officer or other suitable person designated by the court. This is an option currently available in terms of the Criminal Procedure Act, though not often used. The probation officer's role would have to be more clearly defined if we are to use this method in the future.

(v) Reform School. The suitability of the existing reform schools, as well as the lack of facilities needs to be looked at very carefully.

Whipping should be abolished, but if this is done, we must ensure that there are suitable alternatives in place.

9 IMPRISONED JUVENILES

If the diversion options and sentencing guidelines operate effectively, it should be a small core of offenders who end up getting a sentence of imprisonment. With smaller prison numbers it will be more feasible to offer sound educational programmes and job skills training opportunities to juveniles in prison.

The problem is that to provide good facilities it will be cost effective to bring juveniles to one of a few well equipped juvenile prisons which might be set up. This means that we would be moving them far away from their families, and could have a detrimental effect. It is important to encourage juveniles to

maintain involvement with their families, as this facilitates their reabsorption into society on release.

Much of the work done by those of us working in the juvenile justice field at the moment tends to concentrate on the pre trial and trial stage. We must ensure that the juvenile justice system which we create follows through to the sentenced youths as well.

10 CONCLUSION

These, then , are some ideas about what can be done. The development of a comprehensive juvenile justice system may seem to be a daunting task. But we are fuelled by our knowledge of the damage done to South Africa's children in the courts, prisons and police cells every day. We have a vision for the future, let us take the opportunity to make this vision a reality.