

Article 40

The Dynamics of Youth Justice & the Convention on the Rights of the Child in South Africa

Volume 11 – Number 1
March 2009



States Parties shall ensure that... a variety of dispositions ...and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to both their circumstances and the offence.

Child Justice Alliance Diversion Workshop

**held in Pretoria on
1 and 2 December 2008**

by Daksha Kassan

This workshop, hosted by the Child Justice Alliance, was convened shortly after the Child Justice Bill was passed by the National Assembly at its second reading on 19 November 2008. The Child Justice Bill creates a separate criminal justice procedure for children in conflict with the law and for the first time formally incorporates diversion into criminal procedure in South Africa. While diversion has been occurring in practice over the last 15 years, the Child Justice Bill is the first piece of legislation to provide a legal framework for diversion in the criminal justice system.

Therefore, the Child Justice Alliance was of the opinion that a workshop on diversion would be of great relevance. The workshop was aimed primarily at providers of diversion services, as well as government officials who will work closely with service providers in ensuring that more children are diverted away from the criminal justice system.

Continued on page 2

EDITORIAL

This edition is a bittersweet one for me personally. It demonstrates, in Lukas Muntingh's article, how far the child justice sector has come since 1990, with the figures of children in prison dramatically down, and positive trends in place. So too, Daksha Kassan's piece on the diversion workshop hosted by the Child Justice Alliance illustrates the enthusiasm being generated around issues of implementation and preparation for the coming into operation of the Child Justice Bill in 2010.

However, it also marks my last edition of Article 40 as editor. I am leaving the Community Law Centre to take up a position lecturing at the Law Faculty of the University of the Western Cape. This means I will also no longer serve as co-ordinator of the Child Justice Alliance. However, I will not be neglecting child justice completely as it will be one of the courses I teach.

I would like to take this opportunity to thank everyone that has supported Article 40 over the last eight years: our funders, who make every edition possible; all the contributors who have willingly given up their time to produce articles on new developments in child justice; our graphic designers and printers who make the editions aesthetically pleasing to read; the Article 40 Editorial Board who have always supported me with ideas and comments (and articles); the staff of the Children's Rights Project at the Community Law Centre for their hard work at making every edition special; and finally, you, the readers, who are all committed to child justice issues and ensuring a fair and rights-based criminal justice system for children. Thank you for your support and making my task as editor worthwhile.

Jacqui Gallinetti

Continued from page 1

The workshop sought to achieve a number of purposes. First, it aimed to examine the new regulatory framework on diversion introduced by the Child Justice Bill. This entailed, examining the provisions on diversion – which children can be diverted, under what circumstances can children be diverted, who has the authority to decide on diversion, how are recommendations for diversion formulated, and by whom. Second, it was aimed at examining the provisions in the Bill that deal with who can provide diversion services – what are the provisions regarding accreditation and registration of diversion services and programmes, what are the time periods involved, which government departments are involved, and so forth. Finally, the workshop sought to examine issues such as the following: the minimum norms and standards for diversion programmes and services developed by the Department of Social Development (DSD); monitoring and evaluation of such programmes; effective programming; and the implications of these issues for diversion service providers on the one hand and government officials recommending or deciding on appropriate diversion programmes on the other.

Who was invited and who attended?

Given that the workshop was primarily aimed at diversion service providers, the Child Justice Alliance extended an invitation to all organisations rendering diversion services across South Africa. Representatives from organisations such as NICRO, the Teddy Bear Clinic, Khulisa, Childline, the President's Award, Outward Bound, the Restorative Justice Centre, Youth Development Outreach and Bosasa all attended the workshop.

In light of the fact that the government, particularly the Department of Social Development and other relevant departments such as the National Prosecuting Authority (NPA), would need to ensure that children are diverted away from the criminal justice system and would therefore need to work closely with diversion service providers, invitations were also sent to officials at the DSD (national and provincial), officials at the NPA, the NPA's community prosecutions division, the Department of Correctional Services (DCS), and the Department of Justice as Chair of the Inter-Sectoral Committee on Child Justice (ISCCJ). Government representatives that attended the workshop included officials from the National Prosecuting Authority Sexual Offences and Community Affairs (SOCA) Unit, the Department of Correctional Services, and various provincial departments of social development such as Mpumalanga and North West.

The presentations

One of the main motivations for holding the workshop was to discuss and examine in detail the provisions relating to diversion in the Child Justice Bill. The idea was to 'unpack' the clauses in the Bill and determine their implications and meaning.

The following presentations were made:

- Brief overview on the law reform process leading up to the drafting and ultimate passing of the Child Justice Bill – Ann Skelton
- The particular provisions of the Child Justice Bill dealing with diversion, such as the purpose of diversion (s 51), when diversion can be considered (s 52), when a prosecutor may divert a matter (ss 41 and 42),



“The Child Justice Bill is the first piece of legislation to provide a legal framework for diversion in the criminal justice system”

In order to ensure that the Bill is adequately implemented and that the roles and responsibilities of all government officials and service providers are fulfilled, the groups raised various issues, some of which are already provided for in the Bill and others which would require further regulation. These included:

- diversion at the stage of the preliminary inquiry (ss 47, 48 and 49), diversion by the child justice court (s 67) and also a discussion on the diversion register (s 60) – Jacqui Gallinetti
- The diversion levels and options provided for in the Child Justice Bill and the selection of these options – Ann Skelton
- The provisions of the Bill dealing with monitoring compliance of a diversion order, what happens when a child fails to comply with a diversion order and the legal consequences of diversion – Daksha Kassan
- The minimum standards applicable to diversion as contained in section 55 – Lukas Muntingh
- The accreditation of diversion programmes and diversion service providers as contained in section 56 – Ann Skelton

The feedback

After the presentations, the participants were divided into groups and carefully structured questions were posed in order to get the participants to think practically about how the provisions in the Bill will need to be implemented. The feedback received is intended to provide insight on potential problems and how these could be overcome. What follows is a summary of some of the points made by the participants during the small group work.

Group work 1

This discussion centred on what was in the Bill concerning the roles and responsibilities of the various actors in the criminal justice system and to what extent this would affect the current way in which they worked. The purpose of this group discussion was to get participants to start planning for the implementation of the Bill in terms of their respective roles and responsibilities.

- Diversion service providers and probation officers need to develop and formalise relationships.
- Service providers, probation officers and prosecutors must work together closely and communication must be more effective as this will help with case-flow management. This speaks to the fact that the Bill seeks to promote inter-sectoral co-operation, and the suggestions can be seen as providing insight on how that co-operation could be achieved.
- Service providers must provide feedback to the prosecutor about the child’s compliance or non-compliance in attending the diversion programme. Feedback mechanisms must be put in place. This will probably fall to the Regulations, which still need to be drafted.
- Service providers must undertake their own in-depth assessment of the child to decide if the child is suitable for a specific programme, and must provide a report to the probation officer. This appears from the minimum norms and standards developed by DSD, but it is nevertheless important that service providers identified this as a critical factor.
- Since probation officers are normally the ones recommending diversion, they must be aware of all the diversion options and the criteria for recommending diversion. They must also be aware of when prosecutors can order diversion. In other words, training and practice guidelines are essential.

Continued on page 4

- The Department of Social Development needs to become more involved in ensuring that diversion service providers are known by the prosecutors and probation officers. In this regard, DCS, Justice, NPA and DSD should identify the different service providers and ensure that all available services are outlined and published to be easily accessed by the prosecutors/magistrates.

Group work 2

The primary purpose of this group-work discussion was to get service providers to start identifying which types of programmes are still needed in terms of diversion levels. Such programmes need to be developed to ensure that all children have the benefit of being referred to appropriate diversion programmes in accordance with their age, needs and the type of offence committed.

All the diversion service providers present listed the various programmes that they currently render and identified which of their different programmes could qualify as either Level 1 or Level 2-type programmes. They also agreed that some of their Level 1-type programmes could be offered as a Level 2-type programme by including longer time-frames to the existing programme and possibly adding on mentoring and follow-up services.

The following gaps were identified:

- Although not diversion, more programmes for children under the age of 10 years are required as interventions. Although these type of programmes are currently being offered by Khulisa and the Teddy Bear Clinic, there is a need for them in other areas where they are not being offered. Participants also felt that programmes for children under the age of 10 years should be more therapeutic given the young age of the children.
- Programmes need to be developed for children who have committed serious offences.
- Parallel programmes for parents of children committing crime and who are in diversion programmes need to be developed.
- Community service programmes in rural areas are required.
- There is a need for more programmes in rural areas. However, it was mentioned that sometimes it may be more useful for a child from a rural area to travel to an urban area to attend a programme, because group programmes are better than having a one-on-one programme with a single child.
- It was noted with concern that there is a lack of an inter-disciplinary approach in the design of the programmes.
- It was also noted that there is a lack of programmes addressing substance abuse.

In relation to monitoring a child's compliance with a diversion order, the participants raised the following:

- That the suitable person identified to monitor the child's compliance with the diversion order must keep in mind and note the child's behaviour change during the programme. Monitoring a child's compliance should not totally be dependent on 'policing' the child.
- Regulations need to identify a list of possible persons that could be considered as suitable to monitor the child's compliance with the diversion order. In this regard, religious leaders, child- and youth-care workers

and auxiliary social workers were identified as possible persons that could be considered suitable to monitor a child's compliance.

- A strict service-delivery model with strict time-frames should be developed to ensure that there is consistency with regard to monitoring children's compliance with diversion orders. The Department of Social Development should include this model in their National Policy Framework.
- An effective information management and data-capturing system must be developed within organisations undertaking monitoring.

Group work 3

The focus of this session was to identify ways in which access to diversion programmes can be improved. Participants were divided into groups according to the organisations they came from. They were asked to undertake an audit of their own programmes and indicate where each of their programmes is delivered in order to identify the areas in which services were lacking. In this regard, organisations were asked to complete a questionnaire for each programme their organisation rendered as well as answer the following specific questions:

Question 1: What basket of services should be available in each magisterial district?

- All interventions a child needs, such as family services, socio-economic needs, basic needs, presence of social development services, etc. should be made available. In addition, the following programmes should also be available: life-skills programmes based on cognitive behavioural approaches that address substance abuse, inappropriate sexual behaviour and sexual offending; service-learning programmes linked with community service and programmes aimed at aggressive behaviour; developmental programmes that run together with compulsory school-attendance programmes; and skills-training programmes that include parenting programmes.
- Children attending programmes are often hungry, therefore the provision of food must be built into the budgets of service providers.
- Some participants noted that it was problematic to offer a basket of services in different districts. In cities and urban areas, service providers are able to provide most programmes, but in rural areas this is often

difficult. The court should therefore make orders that are supported by the services being offered in the community and perhaps design 'holiday-type' programmes so that more children from rural areas can be accommodated.

Question 2: How do we ensure that services are made available where they are needed?

- A first step should be to undertake a 'community needs analysis' to see what is needed and then evaluate the capacity of the emerging NGOs and other NGOs in the area to establish whether they are able to meet the needs in that specific community. The 'needs analysis' must also look at the root causes of the problems placing children at risk. It might be useful to have a forum like the Child Justice Forum at a local level to identify these issues and work towards ensuring that the services needed are made available.
- The dynamics involved in designing programmes that address the different types of crime committed by children should be taken into account, and the special training needed before such programmes are delivered should also be considered. For example, training facilitators to deliver programmes for sex offenders.
- When undertaking the 'needs analysis' it would be useful to have statistics on how many children are being diverted in that specific area so that diversion services can be put in place only where they are needed. In this way, resources can be used responsibly.
- In certain areas it might be more beneficial to develop relationships with other stakeholders who could link up with service-delivery organisations and in this way render programmes. For example, an organisation could train and utilise religious leaders and educators to render programmes as opposed to setting up an office in that area. Partnerships with other organisations could also be developed to render diversion programmes.

Question 3: How can the expertise of experienced diversion service providers be made accessible in rural and peri-urban settings?

- There should be strong emphasis on developing close co-operation and rendering

support between the experienced organisations and the smaller emerging ones.

- Hosting organisations must assist the smaller ones to improve their services and develop their capacity until they are able to operate independently. In this regard, mentors should be utilised.
- Every large hosting organisation should link up to a smaller organisation.
- A roll-out process to link organisations should be put in place where the Department of Social Development is the driving agency. This process of roll-out should be a consultative process.

Group work 4

During this group-work session, participants were asked to reflect on the content and requirements of the accreditation system for diversion service providers and programmes as contained in section 56 of the Bill and discuss in small groups how the needs of the government and service providers could be met equally in relation to the requirements.

The following feedback was received:

- NGOs need to be educated on the National Policy Framework as well as the process of accreditation and NGOs need to have input into this document before it is finalised.
- A capacity-building process for emerging NGOs will also be needed to assist them in complying with the requirements of section 56 and the National Policy Framework.
- The Child Justice Alliance should approach the government to enquire about the process involved in the drafting of the National Policy Framework so that input from service providers can be facilitated.
- Any accreditation process should cater for 'conditional accreditation' to be granted in order to fix things. In other words, a developmental approach should be adopted. The process should also make provision for appeal procedures. This should be dealt with in the Regulations.
- Caution was expressed that the Department of Social Development should not be too prescriptive and that some allowance must be made for flexibility.
- The Department of Social Development should start a dialogue with the service providers on issues relating to accreditation of programmes.

The way forward

In concluding the workshop it was agreed that:

1. A report of the workshop be compiled and sent to all who attended the workshop.
2. The Child Justice Alliance set up a meeting with officials from the National Department of Social Development to discuss the concerns of service providers raised during the workshop and also furnish the Department with the recommendations made by service providers in relation to certain issues pertaining to the diversion provisions.
3. That the Child Justice Alliance provide update articles on the implementation of the Child Justice Bill either in Article 40 or on the Child Justice Alliance website.

The minimum age of criminal responsibility in selected African states

by Kelly Anne Ramages



The last decade has ushered in a remarkable wealth of children's rights and law reform. The minimum age of criminal responsibility (MACR) falls within the scope of child justice. It has been identified as one of the elements making up a child rights-centered juvenile justice system. The purpose of establishing a minimum age is to prevent children from entering into the criminal justice system as it would undoubtedly have an adverse effect on young immature children. The problem ultimately arises when this minimum age needs to be established and States Parties differ as to what the MACR should be. A study done by the United Nations Children's Fund (UNICEF) has described the MACR as the lowest age at which a State or international community is willing to hold someone liable for alleged criminal acts. In determining what this age should be, regard should be had for the Beijing Rules, General Comment No.10, the recommendations of the Committee on the Rights of the Child (CROC), as well as best practice models.

The following comparison of the MACR in selected African states is based on available information in relation to each country.

Uganda

Shortly before Uganda ratified the UN Convention on the Rights of the Child (UNCRC) in 1990, an independent Child Law Review Committee (CLRC) was appointed by the Minister of Children's Welfare. A group of six consultants from Africa and Europe joined the CLRC helping them with law reform in a broader context. The CLRC began its work in drafting children's legislation that would benefit disadvantaged children and children in conflict with the law. It divided its work into three distinct areas, 'young offenders', 'child care' and 'domestic relations'. The CLRC agreed on the principles that should underpin and guide its work. The first principle was that the UNCRC, the African Charter on the Rights and Welfare of the Child (ACRWC) and other relevant non-binding UN Rules be the guide when legislating for children. In 1992 the CLRC handed over the final report detailing child law reform to the relevant ministry. A few years later they produced the draft Bill and sent it to Parliament's National Assembly for the Bill to be debated. In 1996, the Bill became a Statute when Parliament enacted it as the Ugandan Children's Statute No.6 of 1996. Prior to the promulgation of the Children's Act the MACR was raised from 7 years old to 12. It is not clear why the age of 12 years and not 14 years as recommended by the CLRC was chosen. The increase in the MACR from 7 years to 12 years is a positive step for Uganda in complying with the provisions of the UNCRC and the ACRWC.

Ghana

Ghana was the first African country to ratify the UNCRC within the first year of its adoption. In 1992, Ghana promulgated a new Constitution which, in section 28, was aimed at protecting children's rights. Following the promulgation of the Constitution, a Child Law Reform Advisory Committee was elected by the National Commission on Children to review Ghana's existing child laws and recommend law reform to the government. The law reform process by the multi-sectoral Advisory Committee led to the enactment of the Children's Act in 1998 dealing with issues of child care, social welfare, guardianship, adoption etc. A separate Act was enacted in 2003 to deal solely with child justice issues such as protecting the rights of children and providing rights for young offenders. By 2005 Ghana had adopted new legislation

which was in conformity with the UNCRC, including an Amendment to the Criminal Code (Act 554) in 1998 and an increase in the MACR from 7 to 14 years old. Thus, Ghana has met its minimum international treaty obligations with regard to the MACR.

Ethiopia

Ethiopia is the only African country under the present study that has arguably not been colonized and that follows a partly monist approach to international law. This means that international treaties automatically become binding law in the State upon ratification. Such binding law can only be directly invoked and applied once ratification is published. Ethiopia is a party to both the UNCRC and ACRWC and has submitted its third periodic report to the CROC under article 44 of the UNCRC.

The 1995 Constitution recognises all international agreements ratified by Ethiopia as law of the land and any national laws and constitutional human rights shall be interpreted in accordance with these international agreements. Article 36 of the Constitution is dedicated to children and their rights. The principles and the provision of the UNCRC influenced the drafting of this section as it was already ratified by Ethiopia at the time the Constitution was being drafted.

Two weaknesses reflected from the periodic reports to the Committee on the Rights of the Child are the failure of the State to publish the UNCRC in the official Gazette and the need for much development in the administration of juvenile justice. On 9 May 2005, Ethiopia adopted a new Criminal Code in keeping with its treaty obligations of adopting legislation as a way of realising children's rights. The Code stipulates three distinct ages, namely, 'infants', 'young persons' and 'adults'. Infants are children below the age of 9 years old who cannot be held criminally responsible for their (criminal) acts as they lack accountability. Young persons are children aged 9 to 15 while children aged 15 to 18 are treated in the same manner as adults. The Criminal Code thus sets the MACR at 9 years old and the upper age limit at 15 years old despite CROC's numerous recommendations for the State to raise the minimum age to an internationally acceptable level.

Malawi

Malawi ratified the UNCRC at a time when the State was ruled by a dictatorship. Thus, implementation of its provisions was pretty much at a standstill until the end of the Banda regime. The end of the Banda regime brought with it a new multiparty government and a new Constitution containing a justiciable Bill of Rights in 1994.

The State appointed a special ministry for women and children and tasked the Malawi Law Commission to deal with comprehensive law reform. In 2001 a Special Law Commission was appointed to deal with reform relating to children. This resulted in one comprehensive piece of legislation called the Child (Justice, Care and Protection) Bill. At present the Bill is still pending enactment.

A concern raised by the CROC was Malawi's MACR that is set at 7 years old. The Malawi Penal Code provides that children below the age of 7 years lack criminal capacity. Children between the ages of 7 and 12 years are presumed to lack criminal capacity until proven otherwise. According to State

Continued on page 8

practice and public opinion the MACR should be set at 12 years, yet the Malawi Law Commission has recommended that the MACR be raised from 7 to 10 years contrary to State practice as submitted in Malawi's initial report to the CROC. The rebuttable presumption would then apply for children between the ages of 10 and 14 years.

Conclusion

Upon ratification all four countries under study needed to review their laws pertaining to children and bring them in accordance with international law principles. The MACR has not been given much attention in the past but it has definitely moved up on the juvenile justice agenda. It is also a substantive provision that must be incorporated into any piece of legislation affecting children in conflict with the law.

This brief article looked at selected countries' child law reform initiatives to bring their laws in accordance with the principles of the UNCRC and the ACRWC. However, despite lengthy and consultative reform processes, not all countries have met the MACR standards prescribed by the international instruments. There is therefore much work still to be done until compliance with this standard of international and regional law is met.



Sources used in this article

GO Odongo (2005) 'The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context' (Unpublished LLD Thesis).

J Sloth-Nielsen (2001) 'The role of international law in juvenile justice reform in South Africa' (Unpublished LLD thesis).

DJ Cipriani (2005) 'South Asia and the minimum age of criminal responsibility: Raising the standard for children's rights'. Available at [http://www.unicef.org/rosa/Criminal_Responsibility_08July_05\(final_copy\).pdf](http://www.unicef.org/rosa/Criminal_Responsibility_08July_05(final_copy).pdf)

GO Odongo (2004) 'Child Justice law reform in Africa and international standards on the rights of the child' Vol. 6(2) Article 40.

Mbazira, C (2006) 'Harmonisation of national and international laws to protect children's rights: The Uganda case study' (Unpublished Report).

A Assefa & S Yohannes (2006) 'Harmonisation of national and international laws to protect children's rights: The Ethiopia case study' (Unpublished Report).

The African Child Policy Forum (2007) 'Realising rights for children: Harmonisation of laws on children: Eastern and Southern Africa'. Available at <http://www.africanchild.info/documents.asp?page=3>.

The Criminal Code of the Federal Democratic Republic of Ethiopia.

CRC/C/ETH/CO/3, 01 November 2006, para 78(a) (Adopted at 43rd session).

Chirwa, D.W (2006) 'Harmonisation of national and international laws to protect children's rights: The Malawi case study' (Unpublished Report).

DM Chirwa & T Kaime (2008) 'Where are the missing pieces? Constructing a mosaic of the CRC and the African Children's Charter in Malawi's law and policy' Vol 2(1), Malawi Law Journal.

A Stapleton (2000) 'African focus: The role of juvenile justice in Malawi' Vol. 1(1) Article 40.

DW Chirwa (2006) 'Harmonisation of national and international laws to protect children's rights: The Malawi case study' (Unpublished Report).

"There is much work still to be done until compliance with this standard of international and regional law is met"

Children in prison in South Africa: 2000 to 2008

by Lukas Muntingh



Looking back over the past 16 years of child justice reform, culminating in the passing of the Child Justice Bill on 19 November 2008, it must be remembered that the initial impetus for child justice reform was the large number of children detained in prisons in the early 1990s; a legacy of detention without trial during the 1980s. The unsuitability of prison for children, the lack of alternatives to prison, and the general lack of procedures for dealing with children as children in the criminal justice system, motivated civil society organisations over a broad spectrum to advocate for child justice reform. Children in prison are therefore an important feature of child justice reform in South Africa.

This article will look at more recent trends regarding children in prison in South Africa since 2000. Particular attention will be given to:

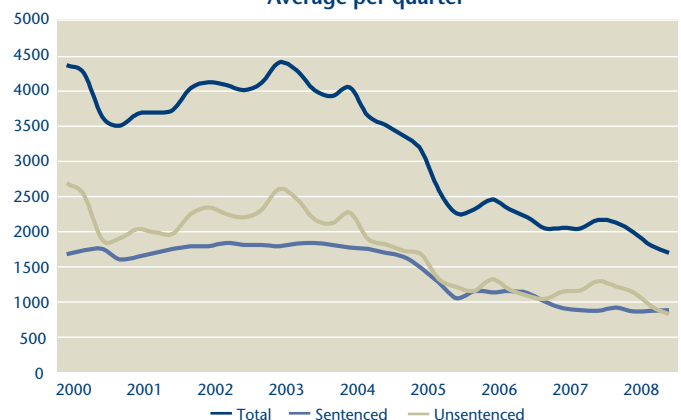
- Overall trends
- Age profile of sentenced and unsentenced children
- Sentence profile
- Offence profile and gender.¹

Trends in the total number of children

Figure 1 shows the total number of children in custody in prisons from 2000 to 2008,² given as the average per quarter for each year. Over the entire eight-year period, the highest number of children in custody was in the first quarter of 2003; a total of 4 389. Since then the total number of children in prison has shown a steady decline, albeit with some seasonal fluctuations, but not to the extent that it reversed the overall trend. The sharpest decline occurred in 2005 when the Department of Correctional Services (DCS) implemented a programme of special remissions to reduce overcrowding in the general prison population. Children, who generally serve shorter sentences, benefited significantly from the remissions programme, as can be seen in Figure 1. Following the remissions of 2005, the total number of children in prisons remained between 2 000 and 2 500 for the next two years. In 2008 there was a further decline and the number dropped below the 2000 level for the first time.

The steady decline in the number of children in custody since 2004 can be ascribed to a range of variables and care should be taken not to be deterministic. Moreover, since 2003 the total number of admissions of all sentenced prisoners has declined by 47%.³ The decline in the number of children may well be part of this overall trend.

FIGURE 1: Children: Total, Sentenced & Unsented 2000-2008
Average per quarter



Continued on page 10

¹ All statistics presented in this article were supplied by the Judicial Inspectorate for Correctional Services and the author is most grateful for the assistance rendered by Mr G Morris and Ms J Jacobs.

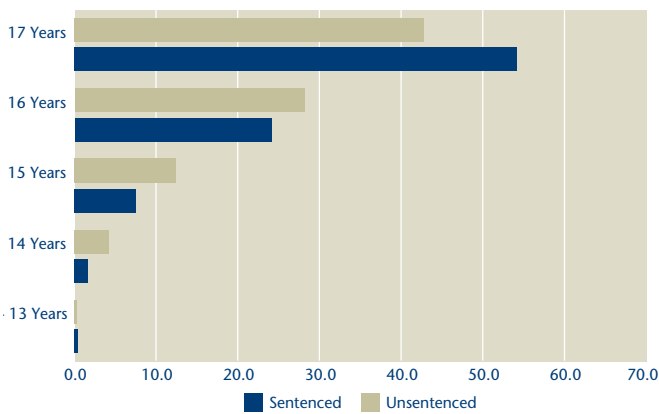
² Note that the figures for 2008 are for the first three quarters of the year as the fourth quarter's figures are not yet available.

³ Muntingh L (2008) Don't expect prisons to reduce crime, SACQ 26, p 3-9.

Age profile

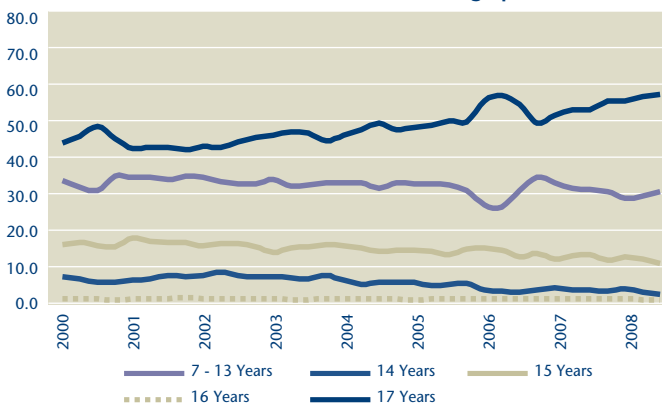
Unsentenced children tend to be a little younger than sentenced children, as shown in Figure 2. This is most probably a function of children being arrested for a crime committed when 15 or 16 years of age and then spending several months in custody before their cases are adjudicated. Children arrested when aged 17 will subsequently be classified as adults when they turn 18 years and will therefore not be visible in this dataset. Despite the prohibition of detaining unsentenced children under the age of 14 years in a prison, there has throughout the eight-year period been a small number of children (between 1 and 12) falling in this category in custody (see also Figure 3).

FIGURE 2: Children: Age profile sentenced and unsentenced, average proportion 2000-2008



An analysis over time of the age profile of unsentenced children in prison indicates some positive developments, as shown in Figure 3. In respect of the age categories 14 years, 15 years and 16 years, there has been a slight but consistent decline in the proportion of children held in prisons. This is interpreted to mean that fewer children 16 years and younger are detained or, if they are detained, that they are detained for shorter periods (thus affecting the quarterly average) and then released or transferred to other facilities.

FIGURE 3: Children: Unsentenced - Age profile



Sentenced and unsentenced children

The number of sentenced children (see Figure 1) in prison mirrors the trend in the overall total. The release of sentenced children as part of the remissions programme in 2005 is clearly visible. Since 2007 the number of sentenced children has remained fairly stable at below 1 000. It is however reason for concern that nearly for the whole period, the number of unsentenced children exceeded the number of sentenced children (see Figure 1). This distribution in a prison population is typical when cases are not being adjudicated and there are long delays.⁴ This is an issue that requires further investigation, but it can be safely assumed that there is a proportion of unsentenced children who have been charged with serious offences and that their trials are taking fairly long to finalise in the regional courts.

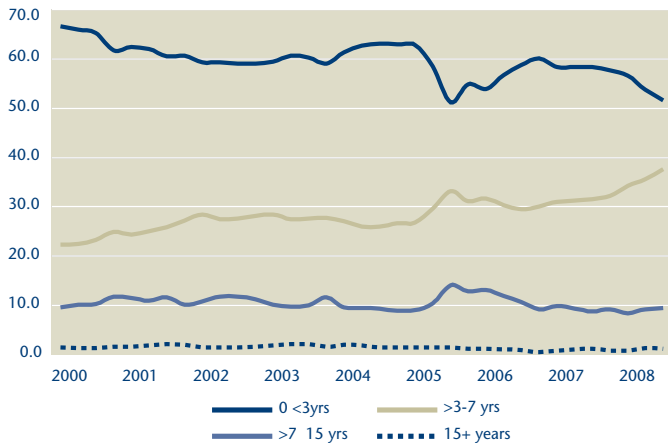
“The overall impression is a positive one – there are now fewer children in prison than at any point since 1990”

Sentence profile

Even though the total number of children serving prison sentences has declined sharply since 2000, there are indications that those who are sentenced to imprisonment are serving longer sentences. Figure 4 presents the proportional distribution of sentences for children in custody per quarterly average. The overall profile was affected by the 2005 remissions as the 0–3 year category benefited most from the remissions. Consequently the proportional share of the longer sentence categories increased immediately in the aftermath of the releases. In 2000, 66% of sentenced children were serving a sentence of less than three years imprisonment, but by 2008 this proportion had dropped to 52%. This decrease in proportional share is mirrored by the next sentence category, namely longer than three years, but up to and including seven years. The proportional share of this category increased from 22% in 2000 to 38% by 2008. The two longer sentence categories, >7–15 years and longer than 15 years, have remained fairly stable over the eight-year period, save for the spike of the former at the time of the remissions. Children serving sentences longer than 15 years have on average been 1,5% of the total number of sentenced children in prison. To put this in perspective, as at end September 2008, there were 11 children serving sentences longer than 15 years.

⁴ For example, in Liberia 98% of the prison population is awaiting-trial prisoners.

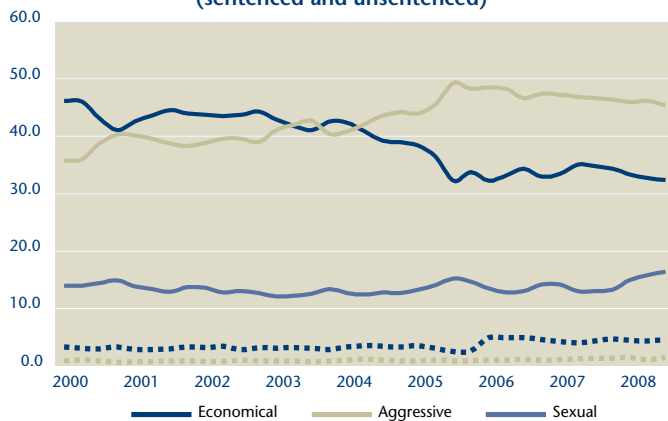
FIGURE 4: Children: Sentence profile 2000 - 2008



Offence profile

The offence profile of children in prison should be treated with circumspection and should not be used as an indicator of crime trends among children in general as it is dependent on law enforcement and other variables, for example the availability of alternative options for custody and sanctions. A very encouraging trend, as shown in Figure 5, is that the proportion of children in custody for economic crimes (property crimes) has declined to a level below that of violent crimes and has since 2006 remained at roughly a third of the total. The proportion of children in custody for violent crimes surpassed the proportion of children in custody for economic crimes in 2004 and has remained as such since then at just below 50% of the total. The proportion of children in custody for sexual crimes has remained fairly stable throughout the period with minor fluctuations. In respect of children in custody for narcotics there appears to be a slight increase from 2007, although the numbers are very low and it would be premature to draw any conclusions.

FIGURE 5: Children: Offence profile (sentenced and unsentenced)

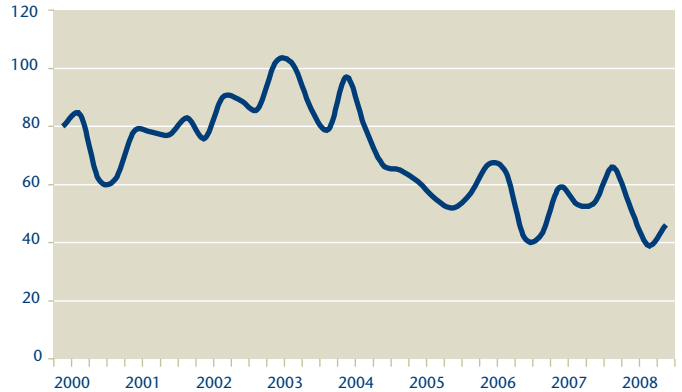


Female children

On average, female children constituted 2,2% of the total number of children in custody during the period under

review. This is consistent with the figures for the total prison population. There has also been a significant decrease in the actual number of female children in custody in line with the overall trend (see Figure 6). The highest number reached was in 2003. Following the remission in 2005, the numbers have fluctuated between 40 and 70, dropping below 40 once only.

FIGURE 6: Children: Females in custody 2000 - 2008



Conclusions

The overall impression is a positive one – there are now fewer children in prison than at any point since 1990. However, such a rapid decline, especially since 2003, also raises questions. First, why did the number decline, and can this decline be linked to positive reasons (e.g. improved services to children in conflict with the law) or negative reasons (e.g. increased ineffectiveness in the criminal justice system)? Bearing in mind that the admission of all sentenced prisoners has dropped by 47% since 2003, there is good reason to believe that the decline can at least, in part, be explained by criminal justice system ineffectiveness. This is not to suggest that services for children in conflict with the law did not improve; there is indeed much evidence of a concerted effort by stakeholders to improve these services. But if the police are arresting fewer or the wrong people, the quality of investigations are declining and the Director of Public Prosecutions is withdrawing criminal cases *en masse*,⁵ caution must be exercised in assessing the encouraging results described above.

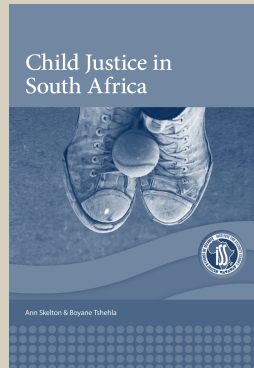
Second, assuming that at least part of the reason for the decline can be attributed to problems in the criminal justice system, what will happen if these are addressed? In a scenario where the police arrest correctly, investigate properly and the prosecution service can work with well-prepared dockets, it is more than likely that there will be an increase in the number of children in prison. It is in this scenario that the Child Justice Bill and the structures to implement it will be tested. The review of the criminal justice system undertaken by the government should result in improvements, but these will once again present challenges to the child justice reform sector.

⁵ Karth V, O'Donovan M and Redpath J (2008) Between a rock and hard place – bail decisions in three South African courts, OSF(SA), Cape Town, p. 18.

NOTICE-BOARD



NEW PUBLICATION ON CHILD JUSTICE



In September 2008 the Institute for Security Studies released Monograph No 150 entitled *Child Justice in South Africa* by Ann Skelton & Boyane Tshehla.

The Monograph deals with the following issues:

- General developments in child justice
- International instruments pertaining to child justice
- Overview of South African developments
- Probation services
- Current law and the child justice bill compared

The Monograph can be downloaded from:

<http://www.iss.org.za>

(http://www.iss.org.za/index.php?link_id=3&slink_id=6708&link_type=12&slink_type=12&tmpl_id=3)



Editor

Jacqui Gallinetti
Tel: 021 959 2950/1
Fax: 021 9592411
E-mail: jgallinetti@uwc.ac.za

Editorial board

Ann Skelton – Centre for Child Law,
University of Pretoria

Cecilia Dawson – Nicro

Lukas Muntingh – Civil Society Prison
Reform Initiative (CSPRI)

Francois Botha – Consultant

Pieter du Randt – Department of
Justice

Julia Sloth-Nielsen – Faculty of Law,
University of the Western Cape

Website

www.communitylawcentre.org.za
www.childjustice.org.za

Layout and design

Out of the Blue Creative
Communication Solutions

Tel: 021 947 3508
E-mail: lizanne@outoftheblue.co.za

This publication was made possible by the generous funding of the Open Society Foundation for South Africa (OSF).

Copyright © The Children's Rights Project, Community Law Centre, University of the Western Cape.

The views expressed in this publication are in all cases those of the writers concerned and do not in any way reflect the views of OSF or the Community Law Centre.