ARTICLE 40
Volume 2 No. 3 September 2000
Editors:
Prof. Julia Sloth-Nielsen
Zola Madotyeni

From the Editors

LM Muntingh

Since the previous issue of Article 40, there have been a number of significant events in child justice in South Africa. After four years of hard work, extensive consultation and numerous research projects, the SA Law Commission submittedits report on child justice to the Minister of Justice in early August 2000. The report signifies a turning point in the child justice debate in South Africa. The Law Commission made a point of consulting widely, nationally and internationally, and with the children of South Africa. It can therefore be concluded that the report isrepresentative of the views of the various stakeholders working with children. The next step is to have the bill passed by parliament. This should, however, not be regarded as an automatic process as it will be scrutinised by legal advisers and politicians. The fact of the matter is that those who are working with children and the children themselves have developed a proposal for legislative change that seeks to balance the rights of children with those of the community and the justice system. The next few months will tell whether or not the bill will withstand the magnifying glass and political agendas of parliament.

The second significant event was that government was taken to court regarding the detention of childrenawaiting trial. The case in Cape Town attracted slightly more media attention as Member of Parliament, Ms Patricia De Lille from the PAC, went marching to Pollsmoor Prison to investigate the conditions there. In Durban, the South African Prisoners Organisation for Human Rights (SAPOHR) took the government to court on behalf of two boys detained there. Both these cases have illustrated that litigation can be effective, but in retrospect it should be said that litigation is not a cure-all; but ratheran option that should be used with caution. Litigation is worthless if there are not systems and resources in place to implement the court's decision.

The third event is that since May 2000 the number of children awaiting trial in prisons has declined from approximately 2 700 to 2 200.Although one swallow does not make a summer, it is reason for optimism. On the other hand, it should be stated that 2 200 is still excessive and that much more remains to be done to bring this number to an acceptable level. All previous efforts to keep this figure down have failed for various reasons. The problems in the system, as identified by the task team of the Child Justice Project, are by and large not novel and have been with us since the early 1990s. What is required, is the political will on all levels and in all sectors to solve these problems and prevent them from reoccurring.

This editorial will however not be fair if it does not mention the tragic and barbaric events that recently took place at Pep Stores in Pietersburg where a girl was stripped and painted white by members of the staff because she allegedly shoplifted from the store. Zapiro's cartoon reflects part of the reasons for this inexcusable treatment of a child. The Pep Stores incident also tells us that respect for due process of the law, human rights and especially children's rights are often very thin on the ground and can easily be cast aside. Since 1990 a lot has been achieved in terms of child justice but the above-mentioned incident leaves one

nearly with a sense of despair. It also serves as a very real reminder that a lot remains to be done to protect children in South Africa.

Children Awaiting Trial in Prisons Investigated

By Ann Skelton

In the past few months the Child Protection Project of the UNDP has been working hard on the issue of children awaiting trial in prisons and police cells. Earlier this year it became apparent that the number of children awaiting trial in prison was steadily rising, and in April 2000 this had reached an all-time high of 2 700.

An inter-sectoral team was set up to gather information and make recommendations for specific intervention. The team was led by the Department of Justice and was made up of representatives from the Departments of Justice (Directorate for Children and Youth, NDPP's office), Social Development (formerly Welfare and Population Development), Correctional Services and Safety and Security, and the UN Child Justice Project. The Child Justice Project co-ordinated the investigation.

Objectives of the Investigation

The investigation had the following objectives:

- Visit Gauteng, KwaZulu-Natal, Western Cape and Eastern Cape within six weeks of the inception of this plan to gather first-hand information;
- Gather all available written information and statistics, including departmental circulars;
- Identify root causes of the blockages in the criminal justice system as it pertains to children;
- Propose solutions to reduce the number of children awaiting trial in prisons;
- Obtain commitment from all relevant role players, at national and provincial level for the implementation of necessary interventions and the sustainability thereof;
- Facilitate effective collaboration, both in problem identification and problem solving between all relevant departments; and
- Report within three weeks of the last visit, setting out the problems discovered and making clear and specific recommendations for action.

The visits to each of the provinces referred to above included:

- Visits to prisons in Johannesburg, Durban, Port Elizabeth, Cape Town;
- visits to secure-care facilities and other relevant welfare facilities in the four earmarked provinces;
- visits to the courts dealing with child offenders;
- pre-arranged meetings with staff from Departments of Justice, Welfare, SAPS and Correctional Services, relevant NGOs; and
- meeting with the awaiting-trial project staff (Integrated Justice System).

Summary of the findings of the task team

The Deputy Minister for Justice and Constitutional Development officially launched the investigation on 1 June 2000 (International Day of the Child) and also visited the Johannesburg Prison with the National Commissioner of Correctional Services. The Director-General for Justice and Constitutional Development accompanied the task team on visits to the Eastern Cape and Western Cape, holding meetings with the various departments in the provinces. Some of the major reasons for the high number of children in prison that were identified can be summarised as follows:

- Parents and guardians are not contacted and children therefore cannot be re-leased into their care on first appearance.
- Children are not always assessed by probation officers (particularly in regional court cases) and/or courts do not always follow recommendations regarding placement.
- Regional courts are the focal point of the problem of children remaining in prison for long periods of time.Cases take a long time to be completed, and several reasons were cited for this, including crowded court rolls, lawyers requesting distant trial dates and slow investigation of cases by police. There is no specialisation relating to the trials of children in regional courts, regional court magistrates tend to be out of touch with alternatives to imprisonment such as secure care, and many take the view that the children they are dealing with should be in prison.
- The issue of bail for children is a cause of confusion. The new provisions on bail contained in the Criminal Procedure Act seem to "pull in the opposite direction" of the provisions contained in section 29 of the Correctional Services Act. Regional court magistrates in particular tend to proceed along the lines set out in the Criminal Procedure Act, which provides very stringent conditions for release on bail in serious offences. This makes it difficult for the spirit of section 29, which is basically "imprisonment as a measure of last resort", to be achieved. The team came across several cases where bail of less than R500 had been set, but families had been unable to pay this, and children were thus still in prison.
- The rule included in section 29 of the Correctional Services Act requiring that children detained in prison must appear before the court every 14 days. Although this rule was originally conceptualized as a procedure to promote the protection of children in prison, those working in the courts are of the view that not only is the rule not assisting children, it is actually creating problems in the form of crowded court rolls, and parents not coming to court because the remands are so frequent.
- There is a discretionary clause in section 29 which allows magistrates to detain children in prison on any offence "in circumstances so serious as to warrant such detention." It was found that this sometimes results in inappropriate placements of children.
- With regard to the provision of secure care for the accommodation of children awaiting trial, it was found that in some regions there are insufficient secure-care beds. Secure-care facilities are not evenly spread, resulting in children having to betransported children long distances (or being unlawfully remanded in police cells). Magistrates also lack faith in the security of alternative facilities. In addition, there is a lack of other alternatives, such as release under the supervision of a probation officer.
- There is a lack of a proper inter-sectoral management system to deal with children in the early stages.
- The attitudes of staff and lack of specialised knowledge which is linked to the high turnover of court staff was found to be a problem in some instances.

Recommendations

The task team has compiled a set of recommendations. These have been signed by the Director-General of Justice and have been referred to the Minister of Justice for his approval. A similar process is being followed by the other departments involved. The recommendations for the Department of Justice focus on speeding up trials and careful consideration of placements by magistrates. They include:

- Providing extra courts at regional court level in Cape Town, Durban, Johannesburg and Port Elizabeth. These courts will focus primarily on cases involving children accused of crimes, even if co-accused with adults.
- Establishing local inter-sectoral case review teams to visit prisons holding children awaiting trial and thoroughly assess children's cases. The team will include a social worker and a lawyer.
- Conducting 14-day remands at prisons (Westville, Pollsmoor, North End and Johannesburg Central) once a week. Once this procedure is established other venues for this procedure should be identified and established.
- Holding discussions to consider regional court jurisdiction vis vis One Stop Child Justice Centres.
- Ensuring improved quality of legal representation through a meeting between Department of Justice, Legal Aid Board, Association of Law Societies and the General Council of the Bar.

The recommendations to the Department of Social Development (formerly Welfare) focus on the following:

- The provision of adequate secure-care alternatives to imprisonment
- The development of probation supervision as a pre-trial release alternative
- The appointment of additional probation officers
- The development of additional family finders programmes

The recommendations for the Department of Correctional Services relate mainly to minimum standards for the management of children awaiting trial in prisons, as well as improved monitoring systems.

The recommendations for the South African Police Service are that the issue of children in police cells should be urgently investigated, as children in police cells were not included in the scope of this investigation, and that police should find ways to improve the service of contacting parents and guardians.

Some of the recommendations are not the responsibility of only one department, and are inter-sectoral recommendations:

- A national protocol for the management of children awaiting trial has been drafted and will be consulted on by all relevant departments.
- Inter-sectoral monitoring system to be established at national, provincial and local level, and initially co-ordinated by the Child Justice Project.
- The development of a national inter-sectoral policy and guidelines for the establishment of One Stop Child Justice Centres.

Expected Outcomes of the Investigation

The expected outcome is a sustainable model of monitoring and intervention which will:

- Ensure the reduction of the numbers of children in prison;
- ensure effective inter-sectoral co-operation regarding children awaiting trial, through working agreements or a protocol;
- prepare for the smooth and effective implementation of the proposed new child justice system;
- improve the conditions of children in detention;
- shorten the trial period for children in detention; and
- provide additional alternatives to imprisonment for children.

The implementation of the recommendations, once approved by the Ministers, will be overseen by the Directors-General of the relevant departments.

A step-by-step approach to children awaiting trial in prison

Carl Niehaus - Executive Director of NICRO

Extract from address to the National Symposium on Correctional Services, 1 - 2 August 2000, Pretoria

It was Charles Dickens who wrote about the terrible conditions in the Vietnam prisons and said that one must take into consideration that it is not just the physical scars that are left behind on the bodies of the people who end up in those prisons. One must also consider the psychological scars, and the way in which these scars remain with people even more deeply than the very visible physical ones.

When I returned from the Netherlands about a month and a half ago, I had an unsettling experience of deja vu. As I was driving into Cape Town to come to my office at NICRO for the first time, there on the street lamp posts were posters of the The Cape Times. They were about overcrowded prisons, and children who are kept in our prisons. I felt as if I was in a kind of a time warp. Four years ago when I boarded the plane for the Netherlands, I left those posters behind.

But I do think we can make a very tangible contribution. Our challenge is to form a broader alliance with the government and other organisations in civil society and with the business community, where we talk about true partnerships and collective responsibility. We must stop doing what we have been doing during the last couple of weeks with regards to the children in our prisons - everyone is blaming everyone else. I turned on my television for New Hour last Sunday, and there were the various representatives from the various government departments. And the one said "No it is not my fault it and it is Welfare's fault", and Welfare said "No, we've done all we could and it's actually Justice that is causing the problem", and Correctional Services was also there. I must say I had the most sympathy for Correctional Services because I understand that they are at the end of the process. But you see, this is precisely the textbook case of how not to deal with the problem. We must also realise that we cannot achieve our goals overnight. I was there in May 1995 when we released all the children from our prisons, and within a couple of months my joy turned into despair. This is because the kind of thinking that we had behind the release of juvenile prisoners was not well thought through, and we did not have good practical programmes in place. Often we allowed the children to simply get out onto the pavement and

onto the street, and we should not have been surprised that some of them reoffended. And we should furthermore not be surprised that there was then a reaction from the public and the media. Within a year we had reached a situation where some of us were feeling that we had to reintroduce legislation (I am saying this as the person who did so) to allow some children and juveniles to be kept in prison again.

I remember that we then said that it would only last for a year. The children are still in prison. Recently we have had a lot of media interest in these children, and some of them have been released. However, we have also had some very senior politicians in decision-making positions who said that those children will stay in prison because the particular department I am involved in, is not capable of dealing with te children when they are released. I understand the reason why this is being said and I understand the fear. Perhaps if we weren't so anxious to do everything in such a short period, and if we were prepared to rather have a long-term step-by-step plan to build this social partnership between government and our communities, we could have achieved much more. Because today we are still sitting with a situation where there are not enough places of safety and that some of the places of safety that do exist are in a terrible condition, and some of the places of safety have even been sold by provincial governments. Staff members are also often not adequately trained, and security is often inadequate.

If we can use this matter of children and juveniles in prison as a practical example from which we can learn, we may very well end up saying we should forget about great idealism that children should not be kept in prison at all. Yes, that is the ideal and yes, we must be committed to achieving this ideal in the long term, but in the short and medium term shouldn't we rather ask ourselves what happens within the walls where those children are kept? How do we ensure that they are kept totally separate from other criminals, and adult criminals especially? How do we ensure that there are proper programmes that will truly be able to assess what the children do and truly be able to accompany them from the day that they are imprisoned until the day that they are released, in order for them to have a real chance of reintegration into society? Furthermore, how do we ensure that a large number of those children who have not committed serious offences do not get tangled up in the justice delivery system, but actually end up in diversion programmes and within community programmes?

These things are achievable, I am absolutely sure of this, but it will demand some courage from all of us. We will have to accept that we will have a fairly high prison population for a long time. We have to acknowledge that we will not et rid of this large prison population quickly. "Bursting" has never worked, and it will not work in the future. Six months to a year after a bursting, one is back to the same numbers of prisoners.

Instead we need to ask how we are going to manage to slowly bring down the prison. This will involve a step-by-step process, which must go hand in hand with a concerted effort of public education. We will have to publicise the kind of success stories with diversion, and that community sentencing is not a soft option and that it can indeed be a tough option.

We can make it clear that such an approach has nothing to do with having gone soft on crime, but that it has everything to do with common sense and realism - and everything to do with being as tough as possible under our circumstances to fight crime.

ARTICLE 40

The Child Justice Project: A UN technical assistance project of the government of South Africa

By Ann Skelton

The United Nations and the South African government have entered into an agreement for UN technical assistance in the field of child justice, giving rise to the Child Justice Project. The project falls under the Department of Justice, as part of the Directorate on Children and Youth Affairs. The main objective of the project is to assist government with the implementation of a new law dealing with children accused of crimes which is to be put into operation in the near future. The project will assist with the development of the new system for dealing with children accused of crimes in a number of ways:

- Enhancing the capacity and use of programmes for diversion and appropriate sentencing of children. The project will work with NGOs, CBOs and government to make sure that there are sufficient effective programmes to which children can be referred instead of going to trial or as a sentence if their trials have been concluded.
- Finding ways to protect children in detention. The project will collaborate with all government departments and NGOs working with children who are deprived of their liberty. The aim is to seek alternatives to detention and to set minimum standards regarding how children should be cared for when they are detained.
- Supporting the implementation of the new law. The project will provide information to all government and non-governmental role-players about the new law. It will assist with the drafting of regulations, and with planning for its implementation by providing cost estimates and other information regarding the resources needed to underpin the new system.
- Increasing awareness and training of staff. The project aims to increase awareness among the general public about children accused of crimes and new ways of dealing with them. Children themselves will be targeted as part of this awareness campaign. The project will also assist government departments with developing curricula and training materials in respect of the new system for staff working within the child justice system.
- Helping to establish a monitoring process. The proposed new law requires that there should be a monitoring procedure in place to protect children and to help maintain an efficient and effective system of justice for children accused of crimes. The project will assist with setting up and training of committees in the provinces and will assist in the development ofa monitoring procedure at a national level.

Contact details for the Child Justice Project:
The Child Justice Project
Directorate: Children and Youth Affairs
Department of Justice
Private Bag X81
Pretoria 0001
Room 11.11, Merino Building, cnr Pretorius & Bosman Streets, Pretoria

National Project Co-ordinator: Ann Skelton - askelton@un.org.za
Assistant Project Co-ordinator: Buyi Mbambo - bmbambo@un.org.za
Administrative Assistant: Tina Tshuma - ttshuma@un.org.za
Telephone: (012) 315-1809/ 315-1205/ 3151204
Fax: (012) 315-1808

ARTICLE 40

Penal Reform International Ten point plan for juvenile justice

By Nikhil Roy

On 22 September 2000 in Geneva the UN Committee on the Rights of the Child devoted a day of discussions on state violence against children. This issue was divided into two sub-themes namely, mistreatment, abuse and neglect of children in the care of the State and violence against children in the context of law and order concerns. Penal Reform International (PRI) made a submission in the form of a ten-point plan for reducing violence in juvenile justice systems. PRI is an international NGO involved in prison reform and developing alternatives to imprisonment. The organisation has been active in Africa for a number of years in developing alternatives to imprisonment and has had particular success in Zimbabwe with the introduction and establishment of community service orders.

The ten-point plan focuses on ways of reducing violence within juvenile justice systems around the world. The plan builds on relevant international instruments: the UN Convention on the Rights of the Child, the Standard Minimum Rules for the Administration of Juvenile Justice and the UN Rules for the Protection of Juveniles Deprived of their Liberty. PRI believes that the proper administration of juvenile justice cannot be achieved without a strong education and social welfare system. Helping young people in conflict with the law to become law-abiding adults is more the job of parents, teachers, socialworkers and psychologists than the police, courts and prisons.

PRI believes that juvenile offending should be dealt with outside the formal criminal justice and penal systems as far as possible. It is important to ensure that alternative systems - particularly those involving institutional care - take proper steps to protect children from violence and abuse.

Arrest and Interrogation

Arrest of children (defined as those under the age of 18 years) should be a measure of last resort and detention in police custody should be for the shortest time and in no case more than 48 hours. Use of police bail or bond with or without surety should be encouraged. Those arrested by the police should be separated from adults and held in child-friendly rooms rather than conventional cells. Questioning should be undertaken by selected and trained officers in the presence of parents, guardians or other suitable adults. Children should be informed of their rights.

Age of Criminal Responsibility

Countries should set as high a minimum age of criminal capacity as possible, and children below this age who are accused of crimes should not be taken through the criminal justice system. Measures should be found for dealing with such children that provide them with appropriate services while protecting their rights.

Diversion

There is a need for diversionary community alternatives to prosecution when children admit to their offences. Warnings, cautions and admonitions can be accompanied by measures to assist the child at home, with education and with

problems or difficulties. Conferences which involve the victim and members of the community may be particularly useful provided that there are safe-guards to protect the well-being of the child. Prosecuting authorities should develop guidelines to assist diversion in the lower courts.

Pre-trial Detention

Children should, where possible, be released into the care of their families or guardians to await trial in their own homes. Conditional release should be accompanied by measures to support and supervise the child and family. A maximum time limit should be set for keeping a child on bail according to age and offence. Pre-trial detention should not be used for children other than in exceptional circumstances and under 14s should never be detained in prison establishments. Where detention is used, it should be for the shortest possible time, with a cut-off period for which a person may be held awaiting trial, after which the child should be released on bail. Bail and other forms of conditional release should be accompanied by measures to support and supervise the young person and his or her family.Separation from adult detainees and strict monitoring of the conditions of children detained pre-trial are imperative.

Alternative Sentences

A wide range of alternative sentences is needed, particularly those which emphasise the values of restorative justice and seek to meet the needs of young people.Intensive programmes should be developed for more persistent and serious young offenders. Fostering and residential placements in educational and treatment facilities should be available where necessary.

Youth Courts

Special child courts or tribunals with less formal proceedings should be established for dealing with under 18s. Such courts should be held in camera and the presence of the parent/guardian is important. Judges should receive special training and concern themselves with the application of sanctions and measures as well as sentencing. Sentencing should be based on a careful assessment of the needs of the young person as well as the circum-stances of the offence. Legal representation should be encouraged and where a child is facing the possibility of a custodial sentence the State should automatically provide immediate legal support and aid.

Custodial sentences

Custodial sentences should be used as a last resort and for the shortest time, and only in exceptional cases. Small open facilities with minimal security measures should be developed for children serving such sentences. Education and rehabilitation should be the main priorities. Decisions about the placement of young offenders in establishments should balance the need to maintain family contacts with the need for specialist regimes. A minimum age for placement in prison establishments should be set and should not be lower than 14 years.

Detention Facilities

Children should at all times be separated from adult detainees. In large prison establishments, adult prisoners should not be used as guards in the unit where

children are held. Regimes should be constructive with education, sporting and cultural activities provided during the day and in the evenings.Adequate numbers of staff should be trained and vetted. Non-governmental organisations should be encouraged to play an active role in the life of the institution. Facilities should have an anti-bullying policy and systems for mediating disputes between detainees. Appropriate methods of discipline, control and restraint should be used, based on the minimum necessary use of force. Records of such incidents should be kept and inspected. Needs and risk assessments should be under-taken on admission, with more serious offenders separated from less serious ones.

Inspection

Systems of independent scrutiny and inspection should be established for institutions for children. These should comprise government inspectors and representatives from the local community. Complaint systems with an independent element should be established. Independent visitors should be encouraged to befriend young people and advocate on their behalf. Non-governmental organisations working on human rights issues should play a role in monitoring institutions for children or any other institutions where children are held. Matters for scrutiny should include the children's rights to privacy, to make complaints, to be held in open institutions unless security is necessary for the safety of the child or the public, the right to contact with family and the right to access educational, leisure, health and rehabilitative programmes.

Family Links

Every effort should be made to encourage contact between detained children and their families and communities. Visits should take place in private settings and children should be permitted to make visits to their family homes. Plans should be developed to assist the reintegration of the child into his or her family and community when he or she is released from detention. Re-integration programmes should be developed to help children return to, and become contributing members, of their communities.

Penal Reform International can be contacted at:
Unit 114, The Chandlery, 50 Westminster Bridge Road
London, SE1 7QY, United Kingdom
Tel: +44 (0) 20 7721 7678
Fax: +44 (0) 20 7721 8785
e-mail: headofsecretariat@pri.org.uk
Website: http://www.penalreform.org

Case Reviews

In the following two review judgements, *S v J and Others* and *S v N and Another*, the importance of the probation officer's assistance to the court is once again stressed. In the first case a pre-sentence report was not obtained and in the second, the magistrate used an incomplete assessment document as a pre-sentence report. In both instances the sentences imposed were altered on review.

In S v N and Another the review court had to consider sentences imposed on two 16 year-old offenders who were convicted, on their guilty pleas, of housebreaking with the intention to steal and theft. The magistrate had imposed a two-year jail

term in respect of each offender. The sentence in respect of Accused One was wholly suspended for a period of three years on appropriate conditions.

It appeared during the review process that no pre-sentence report had been submitted to trial court before it considered the sentence in respect of both offenders. The only information before court in respect of each offender was in the form of short statements in mitigation, wherein they individually stated their ages and their desire to return to school. The record showed that trial court had sentenced both offenders without the benefit of a probation officer's pre-sentence report.

The review judge confirmed their convictions but set aside their sentences. The trial magistrate was also directed to seek and consider the probation officer's report as well as any other information that would be placed before court for the purposes of imposing an appropriate sentence. The review judge observed that the importance of the probation officer's pre-sentence lies in the fact that it provides more information about the personal circumstances of the child and that it also provides a way of accurately determining the exact age of the child. This information is not only important for the purposes of imposing an appropriate sentence, but also, where possible, for structuring a sentence that can give direction to the young offender who has somehow gone astray.

In the *S v J and Others* the review judge set aside the sentence imposed on one of the three accused (Accused One, a 16-year-old first offender) when it appeared that he was sentenced without the benefit of the pre-sentence report. It appeared that before the commencement of his trial, Accused One was detained in police cells after the police officials and a probation officer had completed the relevant sections of a document entitled "Arrest, Detention and Assessment Record of Young Persons in Conflict with the Law".

The probation officer completed the part of the document entitled "Developmental Assessment Format". The provincial office of Social Services informed the review judge that the document had been completed under the auspices of Project Go, an initiative spearheaded by the Inter-Ministerial Committee onavoiding criminal conviction). The aim of the report was also to assist the prosecutor and other relevant officials in determining whether or not to continue with the prosecution of the child. The review judge held that the magistrate had not obtained the pre-sentence report in respect of Accused One prior to the imposition of the sentence, and had relied on the contents of the "Detention and Assessment Record" obtained at the pre-trial stage.

Accordingly, this was incorrect and inappropriate in that the magistrate had failed to use the mechanisms at his disposal to elicit information concerning the personal circumstance of the accused before the imposition of the sentence. He had also failed to give proper consideration to the determination of an appropriate form of punishment and the adaptation of that punishment to suit the needs of Accused One.

The review judge considered the suspended sentence imposed by the magistrate to be inappropriate in the circumstances, in that it did not fulfil the important purpose of monitoring and follow-up in respect of young offenders. The sentence will also not do much to promote the accused's reintegration and his assumption of a constructive role in society, as required by article 40(1) of the Convention on the Rights of the Child. The court replaced the suspended sentence and postponed the passing of the sentence for a period of three years on condition

that the accused submits himself to the supervision of the probation officer until he reaches the age of 19.

Enforcing children's rights through litigation

By Zola Madotyeni

The two recent High Court cases in Durban and Cape Town, in which the members of the public intervened on behalf of imprisoned children, once again demonstrates the role of litigation in advancing children's constitutional rights. The first case was an urgent application brought before the High Court in Durban by the South African Prisoners Organisation for Human Rights (SAPOHR), a voluntary organisation, on behalf of two boys aged thirteen and fourteen. These children were kept in a local prison in contravention of the provisions of the relevant legislation and in violation of their constitutional rights. The court ordered the immediate transfer of the two boys to a place of safety.

The second case was also an urgent application brought before the Cape High Court by a Member of Parliament (Ms P. de Lille, PAC) on behalf of a group of children held at Pollsmoor Prison under unhygienic and overcrowded conditions. The application succeeded in obtaining some limited concessions from the relevant government departments in respect of health-related issues and an undertaking that deserving children would be transferred to places of safety. A number of children who required medical attention were given medical treatment for various ailments. A substantial number of children were either transferred to places of safety or released into the custody of their parents or guardians. It appears that the applicant in this matter intended to have all children held in Pollsmoor released or transferred to places of safety regardless of the offences they were charged with or their ages. The present legislation permits detention of children in a juvenile section of a prison.

In both cases the applicants derived the right to litigate on behalf of the children concerned from the Constitution. The Constitution allows members of the public and interested parties to litigate on behalf of anyone who is unable to litigate on his or her own. All that the applicant has to do is show that he or she has an interest in the matter or that the matter concerns an issue that is of public interest.

Litigation, if used prudently, can be a potent weapon in advancing children's rights. The main advantage of using litigation in advancing children's rights is that it brings certainty. Once the highest court has pronounced on a particular matter, its decision becomes law and is binding on every person within the jurisdiction of that court.

The other advantage lies in the fact that the court is more flexible than the legislature and can, through the process of interpretation of a particular right, shape the right to conform to the prevailing norms. Since the legislature cannot make laws for each and every conduct, the courts are well placed to give life to the rights entrenched in the Constitution. This requires the members of the public to be vigilant and to always be on the lookout for any possible violations. This will require the judiciary to play an active role in order to transform children's rights into tangible realities. Litigation, like all strategies, is also limited by many factors and cannot be used in all circumstances.

The fundamental limitation to litigation is the prohibitive costs of pursuing this strategy. This is compounded by the fact that most members of the public are generally ignorant of their constitutional right to pursue matters on behalf of another who cannot bring the action on his or her own, or the right to pursue matters of public interest. The high costs of bringing cases before the High Court means that only the well off will be able to consider litigation as an option. This may contribute to theviolation of children's rights by state authorities continuing, often unchallenged.

There is a danger that legal challenges to violations of children's rights will be restricted to high profile cases that are pursued by public figures.There is also the danger of a case being lost, and this may in certain circumstances have negative consequences for the development of children's rights. This makes it incumbent on any person who wishes to pursue litigation as a strategy to weigh any possible gains against potential losses that may arise in a given case. The option of going the litigation route may be limited or excluded by practical considerations. Litigation would not be a viable option if there were no structures in place to give effect to a particular right that is being enforced through litigation.It is clear that litigation must be used wisely and in conjunction with other strategies in promoting and enforcing children's rights. These strategies include education, documentation, empowerment and enforcement by alternatives. In reality, these strategies overlap with and can be used in conjunction with litigation. It is the duty of the state and the NGOs to promote children's rights through education programmes and media campaigns. This will help empower the general population by providing a basic understanding of the children's rights issues and appropriate remedies that may be employed in redressing cases in violation of children's rights. Public awareness of these will cause the public to be vigilant to any violations and to respond appropriately when such violations occur.

The ratification by our country of the international treaties dealing with children's rights provides another avenue of enforcing children's rights. These treaties give members of the public, through local NGO's, an opportunity to report any violations of children's rights to designated international bodies formed under these treaties and to whom the republic is accountable. This requires systematic documentation of cases of violation and reporting these cases to the appropriate bodies formed under these treaties. Although this option may sometimes be labourious at times, it remains one the most cost-effective remedies in enforcing the rights of the child.

While litigation remains a risky and expensive option, it is still one of the most effective remedies. Its advantage lies in the fact that it can be used to bring an immediate relief in cases that require urgent attention. The choice of remedy will depend on the particular circumstances of the case. In certain cases the urgency of the matter will require an urgent remedy - a remedy that can only be obtained through litigation.

Book review

Sonia Human

The Draft Justice Bill:Consultation With Children On The Draft Child Justice Bill 1999

ARTICLE 40

The SALC Project Committee established to draft legislative proposals for a new child justice bill intended to consult as widely as possible as part of the law reform process.As part of this process children were involved in a very specific way.

A broad spectrum of children were consulted ranging from those in a diversion programme to those serving a prison sentence and even children who had had no contact with the formal legal system. Participation was on a voluntary basis and groups consisted of no more than ten children.The children were grouped according to certain stages in the criminal justice system in order to determine if there were different opinions between those entering the system, those being tried, sentenced or serving time. Children under the age of twelve who had been accused of offences were represented in a group as well as children who had had no contact with the law and who acted as a control group.

The responses of the children to the nine key themes represents the voices of children in conflict of the law.The themes were aimed at obtaining specific information for the project committee, such as assessment, diversion, compulsory legal representation, the preliminary inquiry procedure, etc.The process ensured child participation in accordance with Article 12 of the Convention on the Rights of the Child on matters that directly affects their interests.As their comments are included in the Report to the South African Law Commission there can be no doubt that their involvement serves to inform legislative reform.Their views and opinions will, in all likelihood, help to shape the chapters of new legislation.

The involvement of children in order to introduce a children's rights oriented juvenile justice system was in actual fact non-negotiable.The Project Committee gave children their rightful opportunity to be involved in a dignified way - this is part of the process of true law reform and the committee must be commended for their efforts.