

# Article

# 40

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

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Cover photograph courtesy of Caterina Pechell

***Section 28(1)(g)(ii)  
of the South African  
Constitution:***

*Every child has the right to be detained in conditions that take account of the child's age.*

## ***What does the new Correctional Services Act say about children in prison?***

*by Julia Sloth-Nielsen*

The Correctional Services Act 111 of 1998 lay largely dormant after it was passed by Parliament in November 1998 (apart from the chapters introducing the Judicial Inspectorate and the National Council on Correctional Services). However, it has now been promulgated (on 30 July 2004), bringing the bulk of the provisions of the legislation into immediate effect. Not all of the new provisions were put into effect from this date – a second tranche of provisions, mostly concerning the implementation of a new parole system, has come into operation on 1 October 2004. The Act, with some amendments which were brought about in 2001, can be found on the website of the Department of Correctional Services at [www.dcs.gov.za](http://www.dcs.gov.za). The regulations to the Act which flesh out the provisions were also promulgated on 30 July and can be accessed in the

Government Gazette No. 8023 dated 30 July 2004, obtainable from the Government Printers.

The Correctional Services Act was developed principally to bring legislation governing prisons in line with the 1996 Constitution. This article reviews those provisions of the new Act which can be isolated as being specifically applicable to children in prison as of now. Where there are new regulations which govern the (different) treatment of children, these will also be explained.

## EDITORIAL

*Many of the articles featured in this edition indicate the prevalence of extremely positive developments in the child justice sector. Whilst the numbers of children detained in prison awaiting trial in the Western Cape Province have declined markedly due to excellent team work by role-players, diversion programmes are spreading to rural and semi-urban areas through the commitment of both non-government organisation and government role-players, as the Restorative Justice Centre's work in Mpumalanga shows.*

*However, of considerable concern is the fact that the Child Justice Bill has spent another year in the Parliamentary process with no timetable for finalisation on the horizon. Whilst the absence of a sound legislative framework is obviously not fatal, when viewed against the ongoing progress in the sector, the fact remains that South Africa as a country committed itself to the passing of separate legislation to underpin a child-rights-based child justice system in its presentation to the Committee on the Rights of the Child when delivering the Initial Country Report on the UN Convention on the Rights of the Child. Half a decade has since elapsed, and the failure to prioritise this is surely going to draw adverse comment when South Africa next reports on implementation of the UN Convention (and this second report is already due!).*

*Considerable efforts have gone into legislative drafting, consultation, costing, and programme development over a period of nearly a decade. The editors would like to publicly express the hope that this will not have been a wasted exercise, and that Parliament will expedite the conclusion of the law-making process.*



The starting point is the definition of a child. The Act provides that a child is a person under the age of 18 years. This is in contrast to the old Act 8 of 1959, which defined a 'juvenile' as a person aged under 21 years. (The regulations do, however, require that prisoners between the ages of 18 and 21 years must be detained separately from prisoners who are older than 21.)

Section 7 of the Act requires prisoners who are children to be kept separately from adult prisoners, and in accommodation appropriate to their age. No further details are provided on the meaning of 'accommodation which is appropriate to their age'. The Act does not specify a minimum age at which a child may be detained in a prison – such limitations, if enacted, will have to be established in the law dealing with Child Justice<sup>1</sup>.

Section 8(2) further highlights that different nutritional requirements may be established for certain categories of prisoners. Children are one category that is mentioned specifically, as the adequate diet that must be provided for all prisoners 'must make provision for the nutritional requirements of children'. The

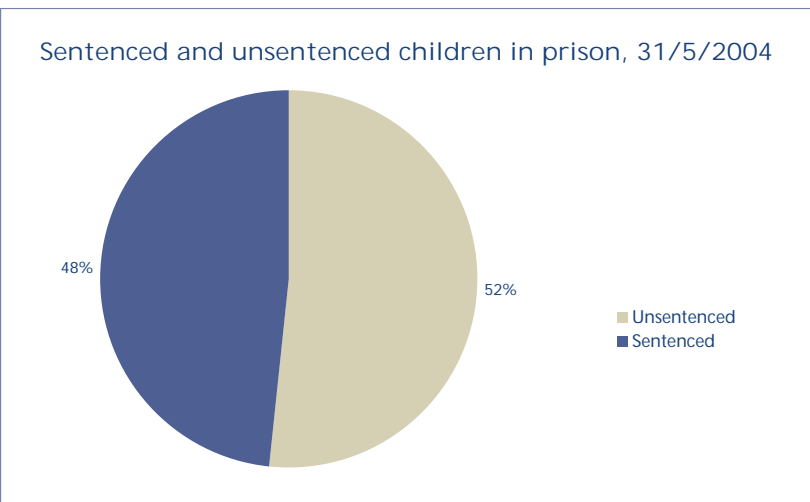
nutritional standards are further elaborated in the regulations. These specify that while the minimum protein and energy content of food must contain 2 500 kilo calories per day for adult male prisoners, the allocation for children must be 2 800 kilo calories per day where children are aged between 13 and 18 years, and of this, at least 0,8 grams per kilogram of body weight per day must be from the protein group.

Section 12 deals with health care. Section 12(4)(c) requires the written consent of legal guardians to surgery where minors are concerned (although the Act does not define a minor, it presumably means a person under the age of 21, rather than only children aged under 18). If this is not possible, or if it is not practical to delay surgery in order to obtain such written consent, consent can be given by the medical practitioner who is treating the prisoner.

Section 13 covers the question of a prisoner's contact with his or her community and family. Specifically in the instance of children, the Act (in s 13(6)(c)(i)) provides that 'in the case of a prisoner who is a child, the Commissioner must notify the appropriate state authorities who have statutory responsibility for the education and welfare of children as

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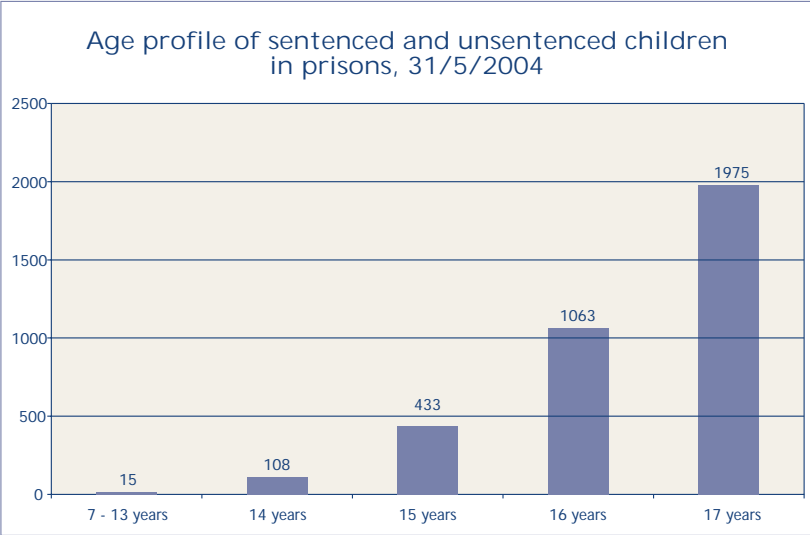
well as the parents of the prisoner' when the child is admitted to prison or after transfer to another prison. This not only gives effect to the important rights of children to maintain contact with parents and families, but lays the basis for a further elaboration of children's entitlements at a later point in the Act. Therefore, section 19, which is the primary provision in the 1998 Act relating to children, commences with the requirement that every prisoner that is a child and subject to compulsory education, must attend and have access to such educational programmes (s 19(1)(a)). This covers children aged up to 15 years who, if they were not in prison, would be subject to compulsory school attendance.



It is noteworthy that the Act also spells out that children may be required to attend educational programmes. Section 41(2) provides that sentenced prisoners who are illiterate or who are children may be compelled to take part in educational programmes. (Indeed, section 41(1) is also worthy of particular mention, although it does not refer to children alone: it requires the Department to provide or give access to as full a range of programmes and activities as is practicable to meet the educational and training needs of all sentenced prisoners).

Section 19(2) provides that 'the Commissioner must provide every prisoner who is a child with social work services, religious care, recreational programmes and psychological services'. This section is phrased in language which leaves no doubt that any limitation of these services is not permissible. No children or categories of children are exempted from access to these services. For instance, it will not be valid to argue that the prison concerned does not have access to those services – they will have to be put in place in a great number of prisons where children might at some point be incarcerated, either as sentenced or as awaiting-trial prisoners.

Finally s 19(3) requires the Commissioner, if practicable, to ensure that prisoners who are children remain in contact with their families through additional visits and other means. This provision does not appear to have been further developed in the regulations, though. The question that arises is what additional obligation the new provision could be regarded as imposing upon the Commissioner – must he provide transport for families, or telephone access, or writing paper?



*Section 19(1)(a):  
'all children who are prisoners and subject to compulsory education must attend and have access to such educational programmes'*

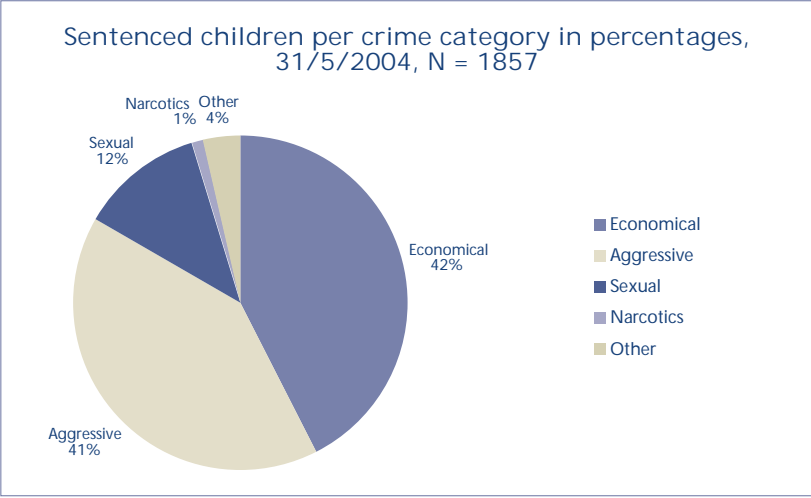
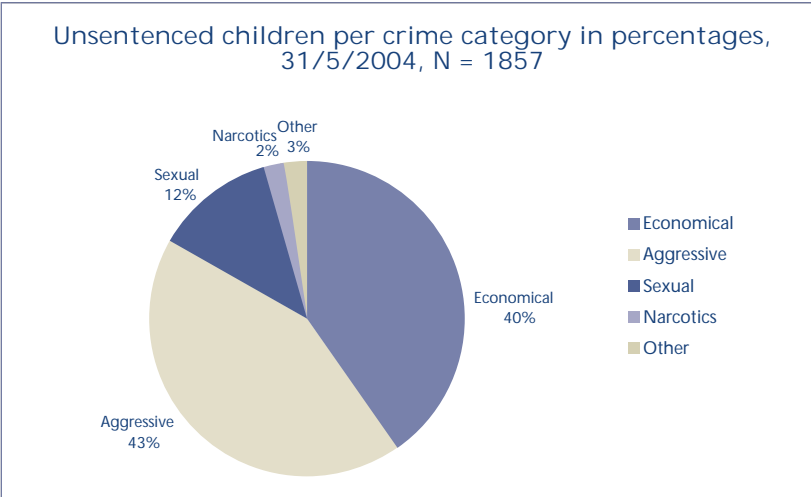
The provision is not limited in any other respect; however, it appears to apply to sentenced and unsentenced children alike, and is not in any way limited to any particular category of sentenced children, for instance those serving sentences of longer than one or two years. The category of beneficiary children is therefore probably much wider than those presently receiving educational services in prison.

Section 19(1)(b) continues to provide that 'where practicable, all children who are prisoners not subject to compulsory education must be allowed access to educational programmes'. Whilst this provision is qualified to an extent by the reference to practicalities, the peremptory nature of the word 'must' suggests that extremely good reasons would have to be adduced to justify any lack of access to educational programmes for children aged 15 and older. Moreover, the provision does not distinguish between sentenced and unsentenced children, and applies equally to both categories.

An interesting series of provisions in the new Act relates to work to be done by prisoners. The essential principle is that sufficient work as is practicable must be provided to keep all sentenced prisoners active for a normal working day – and prisoners may be compelled to do such work. However, subsection 40(3)(b) limits the scope of child work, providing that ‘a child who is a prisoner may only do work for the purposes of training aimed at obtaining skills for his or her development’. This seems to imply that ‘chores’ such as sweeping the yard all day, or polishing floors, would not suffice.

Section 43(4) affirms the possibility that still exists (legally speaking) that the Commissioner, in consultation with the Director General of the Department of Welfare<sup>2</sup>, may transfer a sentenced child to a reform school contemplated in the Child Care Act 74 of 1983. The Act provides further that section 290 of the Criminal Procedure Act will apply as from the date of transfer. On the face of it, this provision does not appear to be limited to transfer of children who actually received a reform school sentence – it is arguably applicable to any child serving a sentence in prison. If this meaning is correct, it would enable the conversion of prison sentences into sentences which involve a lesser level of deprivation of liberty in appropriate cases.

Section 69, entitled ‘Additional conditions for children,’ falls in the chapter of the Act which deals with Community Corrections. If a child is subject to community corrections (such as correctional supervision), this provision allows extra conditions to be added to the usual ones (such as attendance at programmes, house detention and community service). First, a child may be required to attend educational programmes, whether or not he or she is otherwise subject to compulsory education, as an element of his or her community correction plan. Secondly, in addition to any programmes that the child may be required to attend as part of the community corrections sentence, the Commissioner must ensure that, if the child requires support, he or she has access to social work services, religious care, recreational programmes and psychological services whilst serving a sentence of community corrections.



The special efforts to ensure that children, a vulnerable group with specialized needs, have access to educational and reintegrative programmes is much evident in the Act’s provisions. The task that lies ahead is to ensure that this vision results in the improvement of services to children at the level of individual prisons. Given the shortage of social workers, psychological services and educational programmes in many of the country’s correctional facilities, the enormity of this challenge cannot be underestimated. However, there can be no shying away now from these statutory obligations. •

1 The Child Justice Bill 49 of 2002 is still being considered in Parliament. Any future limitation on the age at which children can be detained could relate either to the setting of the minimum age for criminal capacity – meaning that children below this age cannot be prosecuted or convicted, and hence detained – or by setting a minimum age for referral to prison whilst awaiting trial or upon conviction.

2 Now the Department of Social Development.

The editors wish to thank Lukas Muntingh of NICRO National Office for compiling the graphs used in this article.

# Dragon boat racing

## *opens its paddles to children at risk*



*Paddling away – the Brandvlei Juvenile Prison team in action.*

**T**he Mitchell's Plain District Office of the Western Cape Provincial Department of Social Services has implemented a number of programmes for children at risk and in conflict with the law. One of these is a Dragon Boat diversion programme, introduced by Moegsien Jacobs, which began in January 2004.

This programme involves teaching children the skills of dragon boat racing, a sport that has its origins in China. The Western Cape presently has two dragon boat racing locations, one at the V & A Waterfront and one at Zeekoei Vlei. There are both junior and senior leagues. These children have been participating in the junior league in 2004.

Apart from the actual dragon boat racing, the focus areas of the diversion programme also include interpersonal life skills, self-esteem building, team building and discipline. A total

of 11 young children at risk and in conflict with the law were referred from the Mitchell's Plain District Office. In addition 14 young people from the community were assessed as being at risk and were invited to join the team.

The programme has resulted in the children:

- winning a bronze medal in the junior league at the IDBF World Club Crew Championship held in Cape Town in April 2004
- winning two gold medals and one silver at the National Junior Regatta held in Gauteng
- winning a gold medal at the Junior Interprovincial Championship held in Gauteng.

This is only one example of the work being undertaken by the Mitchell's Plain District Office in attempting to intervene in the lives of children who are at risk and who have come into conflict with the law.

Recently the Western Cape Dragon Boat Association participated in the Breda's Kloof Festival by hosting a dragon boat racing regatta. The regatta was held on the dam at Brandvlei Prison. The prison entered a team from the juvenile facility in the corporate division of the event. Despite their relative lack of experience, the children nevertheless managed to attain second position in the finals of the corporate division. •

# *Restorative Justice Centre reaches rural Mpumalanga: A process for implementation*

*By Delia Nation*

*Since February 2002, the Restorative Justice Centre has facilitated a process to develop diversion practice in the Mpumalanga province. The project grew out of concern about the fact that most diversion is still taking place in urban areas. The project was funded by the Open Society Foundation for two years. Mpumalanga is divided into three regions, Kangala (formerly Kwa-Ndebele), Gert Sibande (Lowveld) and Ehlanzeni (East Vaal). All these regions are mainly rural and semi-urban, with high levels of poverty and unemployment; towns are far apart and resources are thinly spread.*

*The Child Justice Bill states that diversion should be accessible to all children in conflict with the law and should seek to address their developmental needs; this obviously includes children in rural areas. The model used in this project can be adapted to accommodate the needs of the area and community, keeping in mind the developmental approach in working with communities with little or no resources. Essentially the model is focused on identifying resources that could be useful, and linking them to the child justice system.*

## **Context**

In establishing diversion services in these areas the following had to be considered:

- Dealing with poverty issues.
- Integrating the concept of diversion with the services to children with behavioural problems and children in need of care, including orphans and Aids victims. All of these were regarded as priorities by the Department of Social Services.
- Social service-related NGOs were scattered in these regions, and were only providing services in a few areas.

Statistics compiled by the National Prosecuting Authority (NPA) presented the following picture:

## *The Kangala Region:*

- July 2000 – June 2001: No children diverted.
- July 2001 – June 2002: 314 children diverted.

## *The Gert Sibande and Ehlanzeni regions:*

- July 2000 – June 2001: 307 children diverted.
- July 2001 – June 2002: 450 children diverted.

## *Total number of children diverted for Mpumalanga Province*

- July 2000 – June 2001: 527
- July 2001 – June 2002: 1 014

The increase in the number of children diverted can be attributed to the efforts of the NPA in training prosecutors, the indabas presented by the UN Child Justice Project, as well as the work of the project under discussion.

## **The model**

The point of departure was based on the belief that in every community there are projects and community-based activities from which young people can benefit, and that communities should utilise what is available to them. This is a person-centred approach to community development that assumes communities have the ability to take respons-

ibility for their needs and can develop resources to address them.

An intervention team in each area was put in place to draw together all relevant stakeholders. It was envisaged that this team would meet regularly to discuss issues relating to young people in conflict with the law, encourage the development and implementation of diversion programmes, and monitor and evaluate the implementation of child justice in the area. In some ways, these teams came to be seen as fulfilling the role of the preliminary enquiry described in the Child Justice Bill. However, this was not at all feasible, and the teams gradually developed as a network of key role-players. They became concerned with general oversight which included a monitoring and advocacy role as well as the development of other crime prevention projects. This is more in keeping with the role outlined for child justice monitoring committees in the Child Justice Bill. The fact that the functions of the intervention teams changed is in keeping with the developmental approach that adapts a model to local circumstances.



*Participants at the training*

### ***Involvement of role-players***

Consultations were held with critical stakeholders in the regions, mostly from government, to define roles and gain commitment to the process. Regular follow-ups and meetings were held with these government departments to get a commitment from their representatives in the diversion process. Representatives were selected to participate in the intervention team for the various areas/regions.

### ***Community role players***

The role-players in the various communities, i.e. NICRO, youth clubs, life centres, local clinics, and sport and recreational clubs participated in the process through regular consultation meetings with the assistant probation officers from the Department of Social Services to get their commitment and “buy-in” in the process. This is important because these role-players are the structures that would be utilised to implement and run diversion programmes in the respective communities and areas.

### ***Training***

Participants in the Kangala, Gert Sibande and Ehlanzeni regions received training on restorative justice applications, with special emphasis on the implementation of diversion in rural areas as provided in the Child Justice Bill. The expectation after the training was that the assistant probation officers would lead and guide the implementation process. However, during the project worker’s site visits in the different regions, it became apparent that, while the APOs had some knowledge, they did not have the necessary leadership and management skills. This was rectified later with the appointment of two chief probation workers who provided guidance to the APOs in managing the project.

*... the developmental approach adapts a model to local circumstances.*



*Eager trainees ready to start restorative justice initiatives.*

The following is an overview of programmes offered throughout the province by NGOs and the Department of Social Services:

- Life skills combined with mentoring and counselling.
- Community service (voluntary work at a specified place and time under supervision).
- Adopt-a-cop programme (creating awareness and preventing crime).
- Referral to the tribal authority for intervention.
- Victim/offender conferences/family group conferences (these sometimes include local religious leaders).
- Vocational skills training.
- Home-based care projects and clinics to do pre-trial community service and life skills programmes and establish vegetable gardens.
- Cultural groups in the community addressing moral regeneration in the life skills groups.
- Development of soft and craft skills, i.e. basket-weaving with the Tentele Association for the Physically Disabled and Seapele Centre for the Aged in Nelspruit.
- Utilising the local libraries for community service and to enhance reading and information skills.
- Home-based supervision.
- Local sports and recreational facilities to assist the child in reintegration into the community and mentorship after diversion.
- Linking diverted children to ABET classes and life skills at the Moses Shilangu Centre in Kabokweni.
- In the Gert Sibande region, the chief probation officers are piloting a credit system that allows for the child to be monitored in the community and to take part in his/her own development and progress by being awarded credits for doing something right and alternatively demerits if tasks assigned are not completed. This is in line with the Child Justice Bill section on orders and the monitoring of the orders. (Examples of the credit system are available on request.)

### **Problems and challenges**

- Sometimes in offences relating to economic crimes, the community takes matters into its own hands, preventing case referral.
- A lack of infrastructure within the Department of Social Services, such as no proper procedures for claiming for use of personal telephones/ cell phones, not enough cars to visit the areas, insufficient office space (workers have to share offices). This is very demotivating.
- A lack of support from middle and senior management, including long delays in appointing urgently needed staff.
- There was no programme dealing with substance abuse.
- The Department of Justice and the SAPS are not fully 'on board' in some areas. More advocacy and lobbying have to be done.
- There are problems in placing children from rural areas in suburban areas for the programme because of schooling and vice versa.

### **Conclusion**

It is clear that over the past few years considerable development has taken place in implementing diversion in Mpumalanga. Despite numerous obstacles and difficult circumstances, it is slowly becoming a reality; the chief probation officers and assistant probation officers have proved that diversion can be done in rural areas. Where diversion options do not exist, it is possible to find creative ways to utilise existing resources and to develop programmes. The Child Justice Bill provides an extremely helpful and practical framework within which this can take place. Sustained and concerted efforts are necessary to ensure that the progress that has been made is not lost.

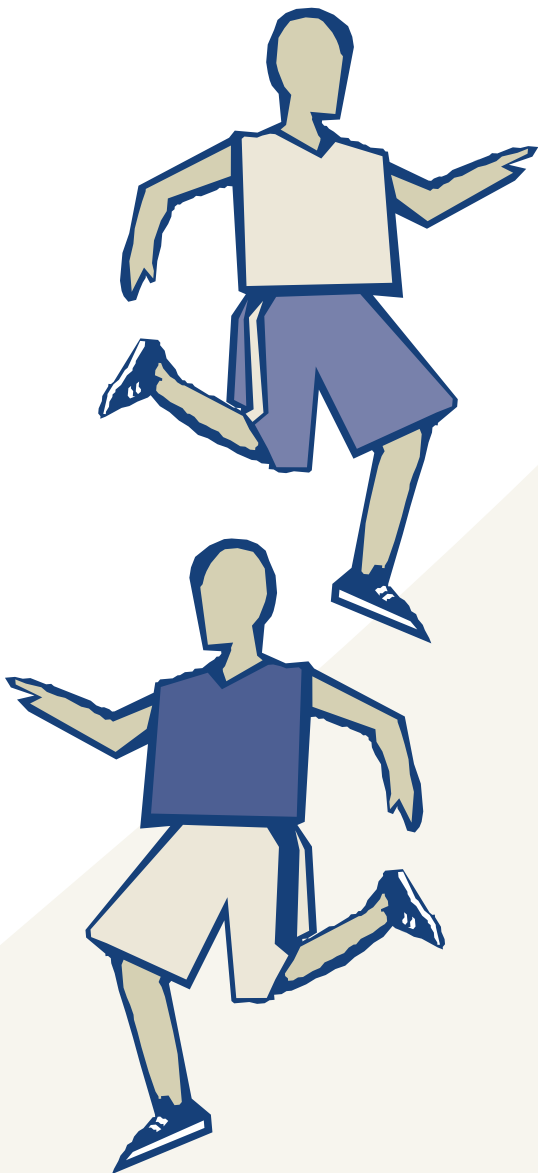
Two project reports which explain the project in more detail, are available on request. These are an evaluation report for the Kangala region and a resource book. •

Contact Delia on 012 440 1479 or write to her at the Restorative Justice Centre, PO Box 29516, Sunnyside 0132.



# Two lads

## from Amsterdam



**A**msterdam in Mpumalanga was the scene of two cases with which the Restorative Justice Centre's Project became involved soon after its launch. Amsterdam is a small town not far from Ermelo. The protagonist of this story is an Ermelo-based attorney, Dirk Marx. Dirk would be the first to admit that he did not know much about child law or children in detention before these two cases, but here's a lawyer who knows injustice when he sees it, and was not prepared to turn a blind eye!

Dirk was in court one day when he heard the magistrate complaining that a 15-year-old boy, who was awaiting trial for theft but had not been legally represented, was still in the police cells although an order had been given to have him moved to a place of safety at Hendrina.

The police had failed to take him. In the meantime he had been raped by adult men with whom he had (illegally) been held in a police cell. Dirk was appalled by the story, and acted immediately to obtain a High Court order to have the boy moved to safety. Long car journeys back and forth to Pretoria led to a successful result – the boy was moved to safety.

Barely two months later the Amsterdam police cells once again saw a teenage boy awaiting trial for theft being held with adults and despite an order already given by the magistrate (some 30 days previously) that he had to be transported the place of safety at Hendrina. On hearing the news, Dirk was back at drafting papers late into the night and making long car journeys to Pretoria. The police were slow to respond, and the case made headlines when the judge stayed a warrant of arrest for the National Commissioner of Police. Later that day, the boy was moved. •

*Reprinted with permission from CHILDLAW MATTERS (ISSUE 1, JULY 2004), the newsletter of the Centre for Child Law based at the University of Pretoria. The cases profiled above give some indication of the work of the Centre's Children's Litigation Project. Visit their website at [www.childlawsa.com](http://www.childlawsa.com) for further information and news.*

# Swaziland:

## Children

## *in conflict with the law*

*The Children's Rights Project at the Community Law Centre recently undertook a study in Swaziland for Save the Children (Sweden) .*

*Part of this project involved investigating the situation of children in conflict with the law.*

*The following article takes a look at the work done by the Swaziland Association for Crime Prevention and the Rehabilitation of Offenders (SACRO).*

There is one juvenile facility, the Juvenile Industrial School, in Swaziland where children who have been sentenced or are on remand are being held. On 10 September 2004 a total of 38 children was being detained at the facility for offences ranging from house-breaking and theft to murder.

The children's daily schedule consists of going to school in the morning, doing gardening for an hour in the afternoon and receiving supper at 16:00. At 16:45 they are locked in for the night. The children used to only be locked in at 20:00 as the facility had a television which the children would watch. However, the television is now broken and con-

sequently, the children are locked in much earlier. Despite the facility falling under the auspices of the Swaziland Department of Correctional Services, it relies on donations for their equipment and other amenities for the children.

The facility also offers a library for the children, as well as the opportunity for children to play soccer, volleyball and tennis during the week.

The children serve a maximum of two years at the facility before returning to the community. However, according to the officer in charge of the prison, most children don't go back home after their release from the facility. The facility is supposed to provide transport for the children to go home, but due to a lack of vehicles, they are unable to do so. In addition, according to the social welfare officer, the children are entitled to family visits; however, these usually do not take place. His experience has



shown that parents are not interested in visiting their children once they have been incarcerated.

The facility has 28 warders, including the administrative personnel, a permanent nurse and a social worker on the premises. A doctor who is assigned to visit all of Swaziland's prisons, visits the facility on a regular basis. The social worker's tasks include counseling the children on admission to the facility and undertaking a pre-release interview with each child prior to discharge. His duties should also include visiting the various homesteads around the country to encourage the children's parents to visit their children. Due to a lack of transport these visits are not presently being undertaken.



*The school's garden.*

SACRO's general mission is to work for the adoption of crime prevention strategies, so as to reduce the number of offending juveniles, provide rehabilitative care and advocate for a fairer criminal justice system. In addition to its work at the juvenile facility, SACRO's second focus is on crime prevention. This is undertaken through the operation of a drop-in-centre in Mbabane. The centre caters for vulnerable children who are not in school and who have been referred by health and social welfare

officials. The centre has 37 children on a full-time basis and provides the following:

- life skills training
- psycho-social support for abused children and children affected by HIV/Aids
- a school curriculum for children to prepare them for mainstream school.

Unfortunately, there is not much of a focus on child justice in Swaziland. There is also a shortage of interventions available for children



*The library at the Juvenile Industrial School in Swaziland.*

A rehabilitation programme is offered to the children. This is not implemented by the Department of Correctional Services, but rather by the Swaziland Association for Crime Prevention and the Rehabilitation of Offenders (SACRO). This rehabilitation programme is voluntary and is based on group work. The length of the programme depends of the length of the sentences being served by the children who participate in each group. The programme's content is based on imparting life and entrepreneurial skills. In addition, the organisation provides follow-up services for the children once they leave the facility, which include home visits for the children who have gone home.

who come into conflict with the law. Despite this, the officials at the juvenile facility and the SACRO workers show a clear commitment to their work with children accused of committing crimes. •

*The officer in charge of the Juvenile Industrial School made a request for any donations of books for their library or a television set for this facility.  
If any of our readers are able to assist, kindly contact:  
Officer in Charge, Juvenile Industrial School,  
PO Box 88, Malkerns, Swaziland  
Tel: +268 528 3101.*

# NOTICE-BOARD



## Upcoming events

- The website of the International Juvenile Justice Observatory ([www.oijj.org](http://www.oijj.org)) is a useful resource. Visit the link to their 6th newsletter on juvenile justice (September 2004).
- 'New frontiers in Restorative Justice: advancing theory and practice' is an interdisciplinary conference to be held in Auckland, New Zealand from 2-5 December 2004 (for details see <http://justpeace.massey.ac.za>)
- Workshops to debate the preliminary findings of the research team working on minimum standards for diversion are being convened by NICRO as follows:

Western Cape: 4-5 October 2004

Eastern Cape: 7-8 October 2004

KwaZulu-Natal: 14-15 October 2004

Northern Cape and Free State: 19 – 20 October 2004

North West and Gauteng: 25-26 October 2004

Limpopo and Mpumalanga: 28-29 October 2004

For further details, contact Rene van Staden (NICRO, Western Cape) at [rene@mplain.nicro.co.za](mailto:rene@mplain.nicro.co.za) or tel 021 397 6060/1/2.



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