Article 40

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

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Article 37 (b)

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time

Examining the age of criminal capacity

by Ann Skelton

Criminal Appeal: Eight years' imprisonment for 13-year-old overturned, but questions about guilty pleas and the* doli incapax *presumption remain unresolved.

On 24 May 2006 the Centre for Child Law represented a 13-year-old boy in his appeal before the Pietermaritzburg High Court. The appeal raised interesting questions in the field of child justice. Of particular interest was the issue of whether children below the age of criminal capacity could plead guilty by way of a written statement in terms of section 112(2) of the Criminal Procedure Act. The appeal was against his conviction and against the sentence handed down by the regional court.

The conviction

The child, M, was 13 years and 3 months old when he stabbed a 14-year-old boy from the neighbourhood. He appeared in the Pietermaritzburg court on a charge of murder.

M pleaded guilty to the charge in September 2003. His legal representative prepared a statement in terms of section 112(2) of the Criminal Procedure Act (Act 51 of 1977) and handed it into court. The statement was prepared by the legal representative and signed

EDITORIAL

Welcome to the first issue of Article 40 *for 2006. It has been published later than usual and there will only be three editions for 2006 as opposed to four as has been the case in previous years. The reason for this is that funding for the publication has been difficult to secure for this year. However, we are immensely grateful to the Open Society Foundation for South Africa and the Swedish International Development Agency for their generous support in ensuring the continued publication of* Article 40.

It is extremely encouraging to report that South Africa has finally enacted the Children's Act (Act 38 of 2005). This is the first of three pieces of child law reform legislation – the other two being the Child Justice Bill and the Sexual Offences Bill. The Children's Act, whilst focusing on issues such as child protection and welfare, is of some importance to the child justice system as it regulates secure care facilities and children's court inquiries, the procedure that comes into operation after a conversion in terms of section 254 of the Criminal Procedure Act. However, it should be noted that the Children's Act has not yet been promulgated and is therefore not in operation. This will probably only occur once certain amendments relating to the section 76 version of the Children's Bill have been debated and enacted.

We welcome Raesibe Tladi, Director Child Justice and Family of Law in the Department of Justice and Chairperson of the Intersectoral Committee on Child Justice to the Editorial Board. We are, however, saddened to bid farewell to Johanna Prozesky and Coenie du Toit who have both left the Department of Social Development. Article 40 *is immensely grateful for their dedicated support and valued contributions over the last seven years.*

by M in the presence of his mother.

The statement contained the following admissions on behalf of M:

I admit that my actions in stabbing the deceased with a knife resulted in the deceased's death. Further to the above I admit that my actions were unlawful and intentional.

The statement was read out in court, in the presence of M and his mother. M confirmed the statement as read out by his legal representative. The prosecutor indicated that the plea was in accordance with the state's version.

The magistrate then addressed M, stating that he was satisfied that the statement had been freely and voluntarily made, that M had admitted all the elements of the offence of murder, and that he did not have a valid defence to the charge. The magistrate did not put any questions to M, and found him guilty as charged, based solely on the section 112(2) statement. The question of whether M had criminal capacity was not raised at any time, by any of the parties.

Sentence

The trial court postponed the matter for sentencing to 20 October 2004 and indicated that a "pre-sentencing report from the social worker" should be obtained. On 20 October 2004 M again appeared before the trial court. A report had been compiled, not by a social worker or probation officer, but by a correctional official. The purpose of the correctional officer's report was to establish if M was a suitable candidate for a sentence of correctional supervision. The report found that he was not, and the correctional officer recommended that he be sent to a prison, described by the correctional officer as "Ekuseni Juvenile Detention Centre".

It was explained to the magistrate that Ekuseni Youth Development Centre near Newcastle generally admitted people between the ages of 15 and 21 years of age, who had been sentenced to a minimum of two and a maximum of 10 years. The correctional officer, however, had been given a telephonic undertaking that Ekuseni would take M despite the fact that he was just 13 years of age.

The State called M's mother to give evidence on sentence. She was asked questions about the community's sentiment towards her son. She said the community was outraged by the offence. The prosecutor asked her if she realised that the court might consider sending M away to "another town or school", to which she said she would be grateful. She said she thought that 10 years away from home would be suitable, in order to protect him from the victim's family. The legal representative agreed with the view of the correctional officer that M be sent to "Ekuseni Youth Centre".

Other sentencing possibilities, such as those included in section 290 or 297 of the Criminal Procedure Act were not considered. A pre-sentence report by a probation officer would in all likelihood have canvassed such sentencing options, but no such report was submitted to the court. The trial court sentenced M to eight years' imprisonment.

On appeal the sentence was set aside, and referred to the regional court for further consideration by the presiding magistrate, based on a report by a probation officer. The court agreed with counsel's argument that the sentence of eight years imprisonment for a 13-year-old boy was shockingly inappropriate and found as follows:

"At very least, a social worker's report or a probation officer's report ought to have been obtained and there should have been a consideration of a wider range of sentencing options than those considered by the magistrate. In this regard, the court ought to have been guided by the principle of proportionality which includes the best interests of the child and the least possible restrictive deprivation of a child's liberty." In support of this finding, the court cited **Brand v S** 2005 (2) SA 1 (SCA) and **Director of Public Prosecutions KwaZulu-Natal v P 2006** (1) SACR 243 (SCA).

Arguments on the conviction rejected by appeal court

The appeal court was not convinced by counsel's arguments on the merits of the case. It was strenuously argued before the court that the trial court had erred in finding M guilty on the basis of his section 112(2) statement. The misdirection was based on a failure to establish the criminal capacity of the child. This requirement arises from the following well-established legal premises:

- Under South African law a child between the age of seven and 14 years is presumed to be *doli incapax*.
- The *onus* is on the State to rebut the presumption that the child lacked criminal capacity, and criminal capacity must be proved beyond a reasonable doubt.
- Although the presumption weakens the closer the child gets to the age of 14 years, the onus still rests on the State to prove that the accused is *doli capax*.
- Criminal capacity underpins intention and as such is an element of the crime that has to be proven.
- If the State fails to discharge the onus to rebut the *doli incapax* the court must acquit the accused.

It was argued that the legal representative should not have conceded that his client had acted intentionally and unlawfully, as the presumption of *doli incapax* had not been rebutted. The error was compounded and resulted in a failure of justice when the court accepted the child's guilty plea tendered in terms of section 112(2). Where a guilty plea is tendered by way of a statement made in terms of section 112(2), the court can only convict the accused on the strength of such statement if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty, provided that the court may put any question to the accused in order to clarify any matter raised in the statement.

The court must be satisfied that every element of the offence has been admitted. The court had no evidence or information before it regarding the rebuttal of the *doli incapax* presumption and the magistrate did not ask the child any questions. Counsel was of the view that the court should have raised the issue *mero motu* and at the very least should have asked questions about criminal capacity. Counsel averred that a plea of "not guilty" should have been entered, so that evidence could have been led for the rebuttal of criminal capacity. It was further argued that this procedure should be followed in the case of all persons who were between the ages of seven and 14 years at the time of the commission of the offence, or alternatively, at least in such cases where the presiding officer was of the opinion that the offence merited imprisonment or any other form of detention.

However, counsel had to concede that this would have far-reaching consequences and therefore offered an alternative suggestion that, in cases involving children below the age of 14 years, the presumption of *doli incapax* should be expressly dealt with through the asking of questions by the presiding officer, in accordance with the proviso to section 112(2), or it must be clear from the section 112(2) statement that the legal representative had canvassed the issue. The legal representative could for instance attach a psychologist's report dealing with the issue of criminal capacity. It should at least be clear that the issue of criminal capacity had been dealt with.

The court was not convinced. The judges were of the view that because M had been legally represented, the court was entitled to accept what was said in the section 112(2) statement without questioning the accused. The court pointed to the fact that the words "unlawfully and intentionally" were included in the statement in relation to the killing, and this, the court believed, implied that the legal representative had canvassed the issue of criminal capacity.

The court was not moved by arguments that the section 112(2) statement was formulaic, and that there was no evidence that the legal representative had canvassed this issue. The court was nonplussed when counsel raised points such as whether legal representatives have sufficient knowledge to be able to make an assessment on criminal capacity, and that the child, who was supposed to be giving instructions, could hardly be expected to give instructions on whether or not his lawyer could concede in a section 112(2) statement that he had criminal capacity.

An application for leave to appeal on the merits has been filed, and the Centre for Child Law is waiting for a court date to argue the application. ●

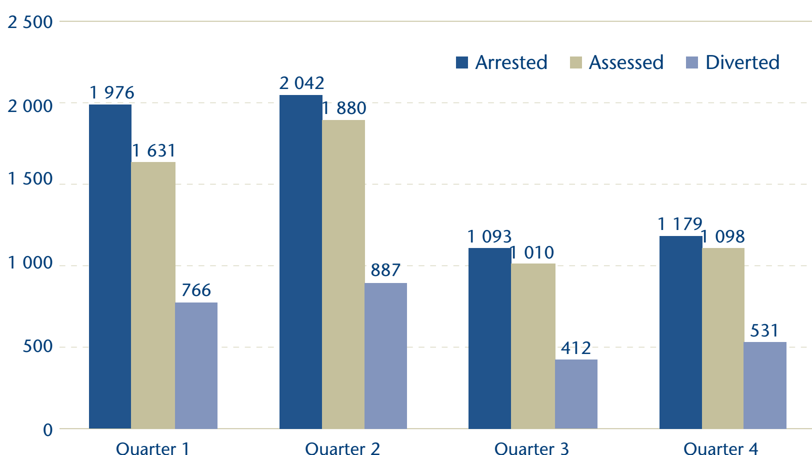
Update on the Eastern Cape Probation Unit

At a training session for magistrates held in East London by Justice College and the Department of Justice, Dolly Ngqangweni from the Eastern Cape Department of Social Development spoke on recent developments in that province.

Probation services in the Eastern Cape fall under the Department of Social Development's Crime Prevention and Support Programme. Eastern Cape probation officers are stationed in seven district municipalities covering 24 area offices and 92 towns.

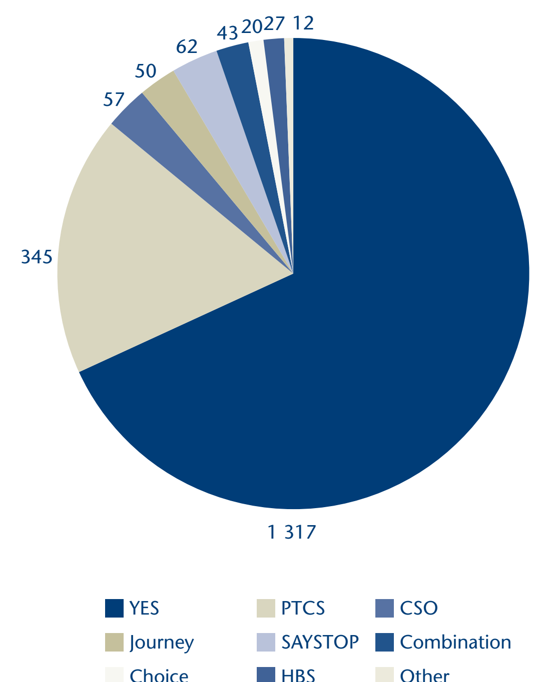
Graph 1 illustrates the number of children diverted in the province for the 2005/06 financial year. The reason given for the numbers being so low in the third quarter is that this period fell over the holiday season, therefore fewer referrals took place.

Graph 1: Number of children diverted in Eastern Cape in 2005/06



Graph 2 shows the different programmes and referrals that were made during the 2005/06 financial year.

Graph 2: Programmes and referrals made during 2005/06



At present the only residential secure care facilities in the Eastern Cape are Enkuselweni Secure Care Centre in Port Elizabeth (beds for 60 boys) and John X Merriman Place of Safety in East London. Erica Place of Safety in Port Elizabeth has a wing specifically for children awaiting trial. However, because of staffing problems, it is empty at present and unable to accommodate any children. A further place of safety is presently being finalised in Mthatha, namely Sikanselekile, with capacity for 50 boys and ten girls. The facility is expected to be finished and fully staffed by the end of 2006.

However, the Department has secured R30 million for next year and R50 million for the following year to increase residential facility capacity in the province. Table 1 sets out the planned facilities for the Eastern Cape.

Table 1: Planned facilities for the Eastern Cape

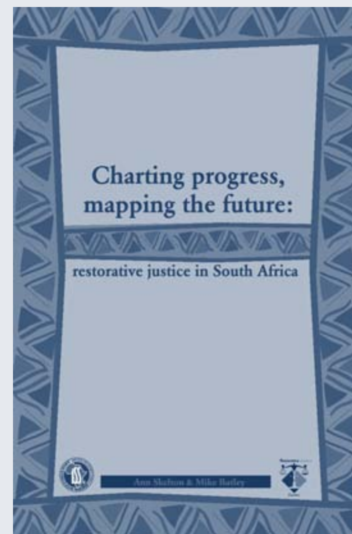
FACILITY	LOCATION	CAPACITY
Place of Safety	*Grahamstown*	*50 boys*
Place of Safety	*Aliwal North*	*60 boys*
Secure Care Facility	*Qumbu*	*60 boys*
Secure Care Facility	*East London*	*50 boys and 10 girls*

Therefore, by 2008 there should be capacity for 430 places for awaiting-trial children in Department of Social Development facilities in the Eastern Cape. There is the concern, however, that if one looks at the number of children awaiting trial in prison in the Eastern Cape – on 31 March 2006 it was 213 – the increased capacity for awaiting trial in welfare facilities may encourage detention of children rather than release into the custody of a parent or guardian pending finalisation of the matter. This concern would be assuaged if the Child Justice Bill were passed, as the legislation would put a legal framework in place to ensure that detention was the last resort. ●

NEW RELEASE

New book on Restorative Justice released

In this ground-breaking report on restorative justice in South Africa, Ann Skelton and Mike Batley tackle many of the questions that are currently being raised about this topic. Acknowledging that, from the early 1990s, there have been attempts to implement restorative justice in South Africa, they nevertheless ask: What progress has actually been made? Who is delivering direct restorative justice services to victims and offenders? What are the scope and quality of these services? What are the issues faced by these service providers? And how can the experiences of other countries like Canada, Australia and New Zealand assist South Africa in responding to these concerns? The report describes more than sixty projects on restorative justice being carried out countrywide, offers a number of answers to the questions and then outlines the crucial role that could be played by civil society. The authors also address the important issue of setting standards. Reports from all the projects surveyed are presented provincially, framed within the authors' particular approach to restorative justice. Their recommendations aim at mainstreaming restorative justice in South Africa.



Copies can be obtained from Mike Batley, Executive Director, Restorative Justice Centre, PO Box 29516, Sunnyside 0132. Tel 012 323 2926, Fax 012 323 2984, email: mike@rjc.co.za

Children's involvement in gangs

Developing appropriate responses

by Cheryl Frank, executive director, RAPCAN

Introduction

Since November 2005, the Institute for Security Studies (ISS) has been collaborating with the Brazilian NGO Viva Rio and partners in three other countries to undertake the Children in Organised Armed Violence (COAV) Cities Project.

This project emerged out of a ten-country study[1] undertaken in 2003/04 that described the phenomenon of children being involved in armed violence in countries that were NOT in armed conflict. South Africa was one of the countries studied, with the focus being on gangs in Cape Town. Some of the other countries included in this study were Brazil (drug factions operating in poor communities known as *favelas*), Colombia (criminal groups operating in poor communities known as *bandas delincuentes* that relate to larger para-military organisations), El Salvador and Honduras (organised youth gangs known as *maras* and *pandillas* respectively), Jamaica (area gangs and corner gangs), Nigeria (armed vigilante groups and ethnic militias), and the Philippines (civilian vigilante groups).

One of the main findings of this study was that, in all the countries that were surveyed, the response of the governments was to focus on law enforcement as the primary means for responding both to organised armed groups, and to children's involvement in these armed groups.

What is COAV?

The concept "Children in Organised Armed Violence" (COAV) is a relatively new one, and was coined to describe the situation demonstrated by earlier work undertaken by the Brazilian NGO, Viva Rio, in Rio de Janeiro.[2] For the purposes of the ten-country study, which sought to describe and analyse the phenomenon in more depth, the term was intended to describe "children and youth employed or otherwise participating in organised armed violence where there are elements of a command structure and power over territory, local population or resources".[3]

The COAV Cities Project 2005/06

In this next phase, five cities around the world are participating in the COAV Cities Project which is aimed at developing recommendations for responding to the issue of children's involvement in organised armed violence. Cape Town is one of the cities that have been selected for this process, which also includes New York City (USA), Medellin (Colombia), Niterói (Brazil) and Zacatecoluca (El Salvador).

The COAV Cities Project focuses on the development of local, city-based solutions to the problem of children's involvement in organised armed violence. Its intention is to bring together key government and civil society stakeholders to engage in the generation of solutions that move beyond the traditional law enforcement approaches. The results of discussions from the five cities are being shared on a website created by Viva Rio for

1 Dowdney, L T. 2003. *Children of the Drug Trade: A Case Study of Organised Armed Violence in Rio de Janeiro*, Viva Rio/ISER, Rio de Janeiro.

2 Dowdney, L. 2004, op cit, p. 15.

3 Dowdney, L (ed). 2004. *Neither War nor Peace. International Comparisons of Children and Youth in Organised Armed Violence*, ISER/IANSA/Viva Rio.

this purpose and can be accessed at www.coav.org.br (click on COAV Cities Project).

The project's intention is that discussions in each of the five cities will culminate in the production of a policy paper, which will present the recommendations that have emerged from the discussions. In Cape Town, a series of five workshops relating to substantive issues was planned (four of which have been completed). These issues are:

- Research and information relating to children's involvement in gangs and violence – 10 February 2006
- The role of criminal justice agencies in responding to children's involvement in gangs and violence – 10 May 2006
- Law reform issues relating to children's involvement in gangs and violence – 14 June 2006
- The role of social service delivery in responding to children's involvement in gangs and violence – 28 June 2006
- Prevention, early intervention, reintegration and exit programmes relating to children's involvement in gangs and violence – September 2006.

All discussions thus far have been recorded and may be accessed at the website listed above. A Rapid Assessment undertaken by the project in December 2005 is also available on the website.

Key issues and debates in the COAV Cities Project workshops thus far

The four workshops held thus far have included representatives from government and civil society, and both the provincial Department of Community Safety and the Department of Social Services and Poverty Alleviation have collaborated in the co-hosting and planning of these meetings. The following are some of the key issues that have emerged from the workshops conducted thus far:

The inadequacy of legal measures in South Africa

This project relates to children that have become involved in gangs and those that may have committed violent offences. The project has specifically examined the Prevention of Organised Crime Act (POCA) (Act 121 of 1998) and the Child Justice Bill for their provisions that relate to this group of children. Participants in workshops have expressed grave concerns that POCA, which seems to include several child-friendly provisions, could indeed be used to prosecute children for what it may define to be gang membership.

While the Child Justice Bill represents South Africa's main effort to respond to child offending, it has been noted in workshops that what is known of the redrafted contents of the Bill (based on Parliamentary hearings in 2003) indicated that most children accused of committing violent offences, especially if older than 15, would be excluded from provisions such as diversion. If the Bill does re-emerge from Parliament in this form, South Africa will be continuing with the worrying trend noted in the COAV ten-country study of focusing only on the ineffective use of law enforcement measures to respond to violent crime committed by children.

Intervention programmes

Workshop discussions have noted the existence of numerous programmes relating to prevention, early intervention and reintegration, run both by the government and civil society. Although there is certainly no shortage of these programmes, one of the concerns raised was the quality of intervention programmes, and whether they are achieving their intended impact.

Strategies for constructing programmes, the inclusion of 'good practice', and the need for monitoring and evaluation of programmes were also noted. Programmes will be the subject of the final workshop, to be held in September 2006, where experts from around the country will be invited to share their expertise in this regard.

The need for greater coordination of service delivery

Participants in workshops have noted the complex nature of the gang problem in the Cape Town area, and the need for different government departments and other service providers to work together in a complementary way. This was noted by participants to be a significant challenge at present. The need for greater coordination of services was raised, together with the need for better role definition between the different service providers, and the prevention of duplication.

Conclusion

The COAV Cities Project is meant to be concluded in October 2006. Apart from the policy discussions undertaken thus far, the project is also undertaking a child participation study to ensure that children's views are integrated into policy recommendations.

Overall, this project has offered an important opportunity to engage in discussion and debate relating to policy responses to children's involvement in gangs and other forms of organised armed groups. It has also offered the unique opportunity to bring together perspectives from a number of different arenas, including children's rights, child labour, criminal economy, urban renewal, child justice, organised crime and gangs.

Further information about the project may be obtained from the author at cheryl@rapcan.org.za, or visit www.coav.org.br (click on COAV Cities Project).

THE NEW CRIMINAL CODE OF ETHIOPIA:

What does it mean for child offenders?

by Benyam D Mezmur, doctoral intern, University of the Western Cape

Introduction and background

In the course of life, change is inevitable. Social dynamism, in particular, leads to rules and regulations which allows society to be governed and changed. Against this background, the penal law of Ethiopia is among the laws that have been going through a reform process in the country. As a result, on 9 May 2005, the new Criminal Code of Ethiopia (Proclamation No. 414/2004) came into force and replaced the Penal Code of 1957 which had existed for nearly half a century.

As declared in the preface to the new Criminal Code, "the radical political, social and economic changes that have taken place" since 1957 are the main reasons why it would be inappropriate to allow the continuance of the enforcement of the 1957 Penal Code. It is further mentioned that these major changes also include "the recognition by the Constitution and international agreements ratified by Ethiopia of … human rights, and most of all the rights of social groups such as women and children."

Therefore, among other issues, the new Criminal Code attempts to address the problem of juvenile delinquency which is said to be increasing at an alarming rate. This is mostly as a result of the HIV/Aids pandemic, family poverty, migration, high drop-out rates from school and a lack of opportunity for gainful employment or training and other related factors. "It is not only the increase in number that should be of concern," one writer rightly warns "… but also the seriousness and the proportion of offences committed by young people as compared with adults"[1]. An additional concern is the treatment of these children by the justice system.

Age of criminal responsibility and definition of a child

The new Criminal Code, just like the old one, stipulates different ages for no criminal intent, diminished criminal intent, and full criminal intent respectively. Accordingly, it classifies child offenders into three distinct categories, namely "infants", "young persons" and those considered as adults.

1 Geset, M. (2002) Critical evaluation of the juvenile justice administration in Ethiopia. Addis Ababa.

> *... in compliance with the Convention on the Rights of the Child, separation from adults during their imprisonment and exemption from capital punishment are recognised ...*

The first group, called "infants" is totally exonerated from application of the penal law. According to article 52, infants are children who have not reached the age of nine. They are not criminally responsible for their actions and where an offence is committed by an infant, appropriate steps may be taken by the family, school and guardianship authority to ensure their proper upbringing.

Although considerations concerning the age at which children are capable of understanding consequences differ widely across cultures, and even within a particular society, the age of nine years as the minimum age of criminal responsibility, assessed against the concluding observations of the United Nations Committee on the Rights of the Child (CRC) and international law in general, is considered to be very low. In particular, in a country where the birth registration system is close to non-existent, nine years as the minimum age of criminal responsibility increases the possibility of even younger children being subject to the criminal justice system.

Therefore, the present legal age of criminal responsibility – nine years – is very low and is also not in compliance with the recommendations of the CRC to Ethiopia to increase the age of criminal responsibility from nine years.[2] Indeed, the concepts of "responsibility" and "criminalisation" need to be separated.

The second group, which is known as "young persons", are children between the ages of nine and 15 inclusive. This sets the age of delinquency to be between nine and 15 years, despite the Human Rights Committee's general comment and the CRC's concluding observations that the upper limit be 18. Therefore, Ethiopia's new Criminal Code, like its predecessor, effectively considers children aged 15 to 18 years to bear the same criminal responsibility as adults, albeit with the possibility of the application of lesser penalties than those applied to adults.

Sentencing and detention of child offenders

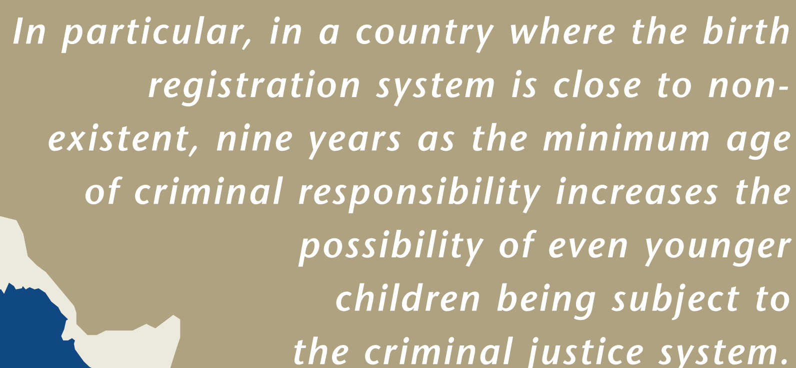
As far as possible, saving children from "adult" courts and "adult" punishments is a basic principle of international juvenile justice standards. Therefore, although in Ethiopia the rules governing child justice are a part of the criminal system as a whole, certain guidelines and restrictions apply regarding punishment to be imposed and the standards of detention for a child offender, irrespective of the offence committed.

For juveniles in Ethiopia, there are special punishments and measures upon conviction. They are not subject to the ordinary penalties applicable to adults. The measures to be imposed upon young offenders who are found guilty are stipulated under articles 157-175 of the new Criminal Code. These measures are educative and corrective. Imprisonment may be imposed only as a last resort and juveniles may not be kept in custody with adult offenders (article 53). Indeed, it is trite to say now that housing young offenders and adult prisoners together is self-destructive and self-defeating. Article 36(3) of the Ethiopian Constitution also stipulates that children should be kept separately from adults once they are admitted to corrective or rehabilitative institutions. This could be read to imply that children will be admitted to corrective and rehabilitative institutions only, as opposed to prison.

Nevertheless, with regard to the detention of children, the practice contradicts this. There is only one centre for child offenders in the country, which has the capacity to accommodate 150 inmates. Children are also not imprisoned for the minimum possible time. Moreover, unfortunately, the new Criminal Code still fails to recognise many non-institutional measures. The sentence of imprisonment for "young persons" provided for in the law as one of the applicable penalties, constitutes an important deviation from the principle of rehabilitation and reintegration through restorative justice.[3]

2 CRC, 26th session 2001, CRC/C/15/Add. 144.

3 See V Quere. Justice for children: Good practices and remaining challenges in the area of "justice for children" in Ethiopia. Unicef report (December 2005).



Regarding children between the ages of 15 and 18, the special protection they are accorded is the possibility of mitigation of their sentence (article 56(4)) due to their tender age. Under certain conditions, the measures of the penalty scheme for young offenders could be applied in toto. Moreover, in compliance with the Convention on the Rights of the Child, separation from adults during their imprisonment and exemption from capital punishment are recognised (articles 56(2), 118 and 182).

The old Penal Code (article 172) stressed the possibility to sentence children to corporal punishment at the sole discretion of the judge. Accordingly, corporal punishment was ordered if the court considered it likely to secure the juvenile offender's reform. When imposing corporal punishment, the court will take into consideration the age, development, physical resistance and the good or bad nature of the offender, as well as the gravity of the offences committed (articles 172(1) and (2)).

However, in the new Criminal Code, the provision that used to entitle the court to order corporal punishment has been repealed. This is also in accordance to General Comment No. 8 of the CRC which, among other things, highlights that corporal punishment as a penal sanction is in violation of the provisions of the Convention on the Rights of the Child, and that states should as a matter of urgency take action to abolish legislations that provide for such kind of a punishment.

Finally, one shortcoming of the new Criminal Code which has a direct bearing on the sentencing and detention of children is the lack of requirement for compulsory legal representation to a child that is in conflict with the law, and limitation of the right to counsel when the child may be represented by his or her parents or legal guardian during legal proceedings. Although the Constitution merely provides for the right to legal representation at the expense of the state only where the interests of justice so require, in practice, legal aid is available only to the indigent in serious criminal offences.

Concluding remarks

Ethiopia is a party to both the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. If reporting is of any guidance, Ethiopia is one of the 16 countries (and the only one from Africa) that has reported three times so far to the Committee on the Rights of the Child. However, the juvenile justice system of Ethiopia is not well developed yet and, at times, in violation of international standards.

The promulgation of the new Criminal Code has positively improved a few concerns, but there remains much to be done to improve the juvenile justice system of the country in order to realise the vowed goal of protecting the rights of children in conflict with the law. Although the problems facing the emergence of a strong juvenile justice system in Ethiopia has not been so much the absence of legislation as opposed to implementation, inadequate laws have played a role, as shown above.

The ongoing revision of the Criminal Procedure Code could still be used to positively influence the rights of children in conflict with the law, especially in the area of providing a more comprehensive approach to child justice administration in line with international standards. It could also be used to underscore, in line with the best interest of the child, the minimal use of formal justice procedures and promote the use of alternative means to deal with children. Emphasis should also be placed on important role-players such as social welfare and probation officers, parents and the police. ●

Reversing the trends

by Camilla Nevill[1] and Amanda Dissel[2]

The following article examines the steady increase in children awaiting trial in prison since 1995, as well as the combined efforts of stakeholders which have begun to reverse that trend. Figures supplied by the Department of Correctional Services on children awaiting trial in prison as well as figures from the Department of Social Development on those awaiting trial in secure care facilities are analysed with reference to the present situation. Finally, we draw some conclusions and make recommendations regarding the management of the number of children awaiting trial in prisons.

Background

The international principle that children should not be detained except as a measure of last resort, and for the shortest time possible, is enshrined in the Constitution (section 28(g)). Section 29 of the Correctional Services Act, 1959[3] (Act 8 of 1959) was amended in 1994[4] to effectively prohibit pre-trial detention in a police cell or prison of anyone under the age of 18 years beyond 48 hours. However, as a result of difficulties in the implementation of the section,[5] this was amended in 1996 to allow for the extended detention in prison of children who are 14 years or older and who are charged with a scheduled serious offence or in circumstances of such a serious nature as to warrant such detention. The Act provides that such children should be brought before the court every 14 days to enable the court to reconsider the decision.[6]

Intended as a short-term measure for one year until Parliament introduced suitable legislation governing children in prison, the amended section 29 has remained intact, even surviving the complete rewriting of the Correctional Services Act in 1998.[7] The Child Justice Bill,[8] was designed to develop a new child-friendly system, giving effect to the various international instruments. It prohibits awaiting-trial detention of those under 14 years of age, and aims to give effect to the principle of detention as a measure of last resort for all children by making provision for diversion, release into the custody of the parents, and other mechanisms. However, the Bill has been held up and has not yet been brought before the legislature for consideration. The White Paper on Correctional Services is silent on the issue of awaiting-trial prisoners generally, believing that they should be dealt with under the auspices of another government department, but it advocates that "Children under the age of 14 years have no place in correctional centres."[9] Unfortunately, the remissions programme which saw the release of 1 156 children from prison did not affect the number of children awaiting trial in prison as the remission programme targeted only sentenced prisoners.[10]

The changes in the legislation, as a reflection of broader policy, can be seen to impact on the number of children in custody. Following the section 29 amendment of 1996, the

1 *Camilla Nevill has a degree in experimental psychology from the University of Oxford and a Masters in Forensic Psychology from the University of Surrey. She works at the National Centre for Social Research in London, but was an intern at the Centre for the Study of Violence and Reconciliation (CSVR) at the time of writing.*

2 *Amanda Dissel is programme manager of the Criminal Justice Programme at the CSVR.*

3 *Section 29 of the Correctional Services Act, 1959 (Act 8 of 1959) was retained, despite the bulk of the Act having been repealed and replaced by the Correctional Services Act, 1998 (Act 111 of 1998).*

4 *Amended in terms of the Correctional Services Amendment Act, 1994 (Act 17 of 1994).*

5 *See for instance Godfrey Odongo and Jacqui Gallinetti (2005), The Treatment of Children in South African Prisons – A Report on the Applicable Domestic and International Minimum Standards, CSPRI Research paper, No. 11, Cape Town, p. 6.*

6 *Section 5(a) of Correctional Services Act, 1996 (Act 14 of 1996).*

7 *The new Correctional Services Act, 1998 (Act 111 of 1998), effective mostly from July 2004, contains no specific reference to children awaiting trial. Although the whole of Act 8 of 1959 was repealed, section 29 of this Act was left in place.*

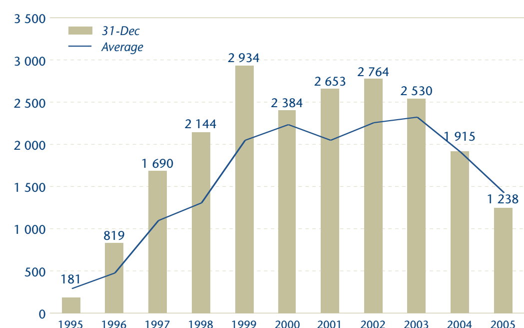
8 *Bill 49 of 2002. The Bill has not yet been passed into legislation.*

9 *Paragraph 11.2.3. Department of Correctional Services (2005), White Paper on Corrections in South Africa, p. 162.*

10 *A special remission of sentence programme in June to August 2005, applicable to sentenced prisoners, saw the reduction of sentences of up to 14 months, and resulted in the overall release of 30 704 prisoners, and the discharge of 33 972 offenders on community corrections.*

number of children held in places of safety and police cells decreased, but the number in prison awaiting trial increased dramatically by over 358% in four years between 1996 and 1999 (Graph 1), reaching a high of 2 934 in 1999. In early 2000 an inter-sectoral team set up to gather information on the reasons for the high number of children awaiting trial found that the inconsistent use by magistrates of the above amendment sometimes resulted in the inappropriate placements of children (Skelton, 2000).

Graph 1: Children awaiting trial in prison: 1995 - 2005



Recent successful interventions

More recently, there have been some grounds for optimism, and the upward trend appears to have been reversed. Since 2002 the number of children awaiting trial in prisons has decreased by more than half from 2 764 to 1 238 on 31 December 2005. By 31 March 2006 this figure had been further reduced to 1 138. The proportion of the total unsentenced prison population that are children has decreased from a high of 4,2% in 2003[11] to less than 3% in 2005.

The reduction in the number of children awaiting trial may be attributed largely to the success of the Interim National Protocol for the Management of Children Awaiting Trial that was agreed to by Parliament in 2002 and follows the principles outlined in the Child Justice Bill. The Interim Protocol aims to ensure the appropriate management of children accused of crimes before the more comprehensive legislation of the Child Justice Bill has been enacted and implemented. It outlines various provisions, including an inter-sectoral task team that sits once a week with the aim of reducing the number of children awaiting trial in prison. It does this through diversion away from the criminal justice system to alternative programmes such as victim offender mediation, as well as looking at other awaiting-trial options, including secure care facilities or release into the custody of a guardian.

There have also been a number of other, more targeted initiatives aimed at reducing the number of children awaiting trial. For example, the Children Awaiting Trial Project in the Western Cape involves Case Review Teams based at local level who are responsible for the consistent screening and fast-tracking of child cases (Pithey, 2005). In addition, it is anticipated that the Child Justice Bill will make provision for the design of specialised child justice courts or one-stop justice centres. The Mangaung One-Stop Child Justice Centre in Bloemfontein and the Stepping Stones One-Stop Child Justice Centre in Port Elizabeth are examples of such centres that already exist and, having been piloted since 2002, are already proving their success. Such centres streamline the process of arrest to the formal court proceedings with all major services including police, probation, courts, holding cells, assessment rooms, and diversion programmes situated in the same building. This ensures that children spend shorter periods of time awaiting trial.

Another initiative is that provided by the Probation Services Act[12] which requires arrested children to undergo reception, assessment and referral to appropriate programmes or interventions within 48 hours of their arrest. Seven RAR (Reception, Arrest and Referral) centres currently operate in Gauteng, and they have seen a substantial growth in the number of children receiving assessments (Brown, 2005). These processes can help to ensure the appropriate placement of children awaiting trial.

It would appear then that these initiatives, in the absence of comprehensive legislation, have impacted favourably on the number of children awaiting trial in prison.

Children awaiting trial in prison

However, despite these recent successes there is still a long way to go before South Africa comes into line with its own Constitution and international instruments that require that children should only be detained as a measure of last resort and for the shortest period of time.[13] Department of Correctional Services statistics on 31 March 2006 showed that there are still more unsentenced than sentenced children in prison with 52% of the total child prison population awaiting trial (Graph 2).[14] Comparatively, only 31% of the total adult[15] prison population is awaiting trial. These figures show that, despite recent efforts, children's cases are still not being processed at an acceptable rate, hampered by ongoing delays. According to Ann Skelton, reasons for the delays may include confusion surrounding the law, magistrates who are out of touch, overcrowded court rolls exacerbated by the 14-day remand rule for child prisoners awaiting trial, a perceived lack of secure care capacity and the

11 Muntingh (December, 2003) reported that children constituted 7,8% of the total awaiting-trial prisoner population in South Africa.

12 The Probation Services Act, 1991 (Act 116 of 1991) was amended in 2002 (Act 35 of 2002) to include this provision.

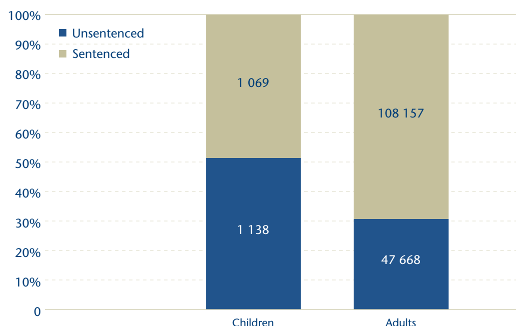
13 See for instance section 28(1)(g) of the Constitution of the Republic of South Africa, 1996, and article 37(c) of the Convention on the Rights of the Child.

14 Department of Correctional Services Statistics, courtesy of the Judicial Inspectorate of Prisons.

15 "Adult" refers here to those aged 18 and over.

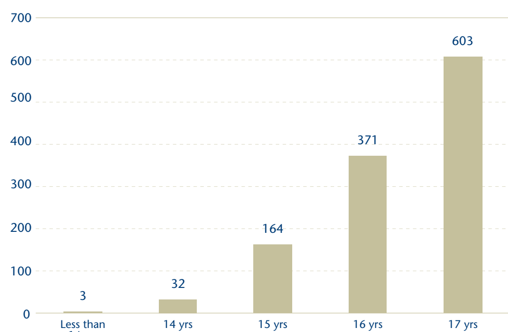
lack of a proper inter-sectoral management system to deal with children in the early stages after arrest (Skelton, 2000).

Graph 2: Proportion of unsentenced to sentenced prisoners on 31 March 2006



Despite the Correctional Services Act prohibiting the detention of children under the age of 14 years, there are still small numbers of very young children being held awaiting trial. According to a recent name list of children in prisons on 7 March 2006, obtained from the Judicial Inspectorate of Prisons, three children under the age of 14, and 35 children under the age of 15 were being held awaiting trial (Graph 3).[16] It is also unsatisfactory that so many 14-year-olds are being held in prisons rather than in child-friendly secure care facilities.

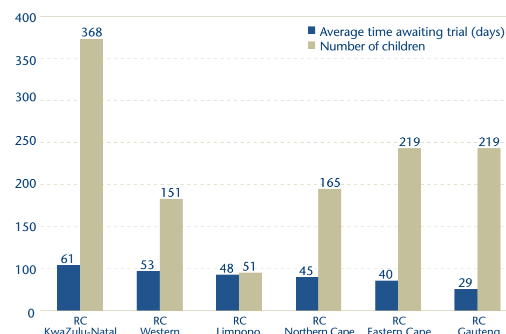
Graph 3: Age of children awaiting trial on 7 March 2006



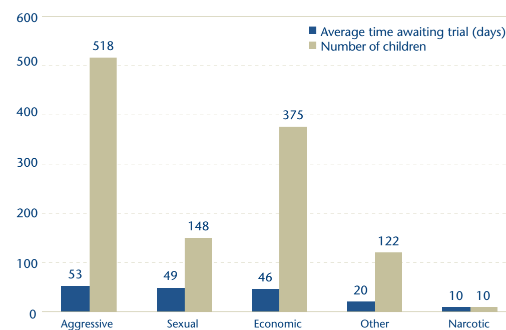
Even more worrying is the length of time children are being held awaiting trial in prison. On 7 March 2006 the average length of time that the 1 173 unsentenced children held on that date had been awaiting trial was 48,8 days – almost seven weeks. However, some children are being held for much longer periods. On the same date, 21 unsentenced children had been held for over one year and one child had been held awaiting trial in prison for 1 922 days – over five years.[17]

The average length of time children have been awaiting trial also differs regionally (Graph 4). KwaZulu-Natal, as well as having the largest number of children awaiting trial on 7 March 2006 of any region, also records the longest average length of time (60,5 days) that children have been awaiting trial. The Eastern Cape records a much lower average awaiting trial time (39,7 days), despite having the second largest number of children awaiting trial in prison. This could be attributed to local interventions such as the Stepping Stones One-Stop Child Justice Centre, based in Port Elizabeth. Gauteng region records the shortest average length of time that children have been awaiting trial (29,3 days).[18]

Graph 4: Number of children and the average length of time (days) they have been awaiting trial in prison in different regions on 7 March 2006 (N=870)



Graph 5: Number of children and the average length of time (days) they had been awaiting trial in prison by crime type on 7 March 2006 (N=1 173)



The crimes children are charged with also have an impact upon the length of time they should expect to be awaiting trial. Just under half (44%) of children held awaiting trial in prisons on 7 March 2006 had been charged with aggressive crimes.[19] As would be expected, children accused of aggressive or sexual crimes had spent the longest period of time awaiting trial, with averages times of 52,7 and 48,8 days respectively (Graph 5). This could be due to the cases being more complex as well as the severity of the alleged crime, increasing the

16 The source of the name list is information captured on a daily basis at the 238 prisons. The information changes every day as prisoners are released and new ones admitted. Therefore, data extracted from this name list and used in this article should be perceived as giving an indication of the current situation rather than being definitive.

17 This assumes that the date of the child's arrest given on the prison name list is correct.

18 Length of time awaiting trial was calculated by subtracting the arrest date from the date of the name list (7 March 2006). Any children who had no date of arrest given on the name list, or a date in the future, were excluded from the calculations of average time spent awaiting trial. For all regions except Gauteng over 77% of the total population of children awaiting trial in prison were used to calculate the average time spent awaiting trial. However, in Gauteng only 39% of the children on the name list had an arrest date given or one that was not in the future. Therefore the average given for Gauteng is less accurate than those for the other five regions. These data are based on an analysis of 870 of the total of 1 173 children in custody at this time.

19 However, it should be noted that robbery was classed as an aggressive crime despite it having a strong economic element in many cases.

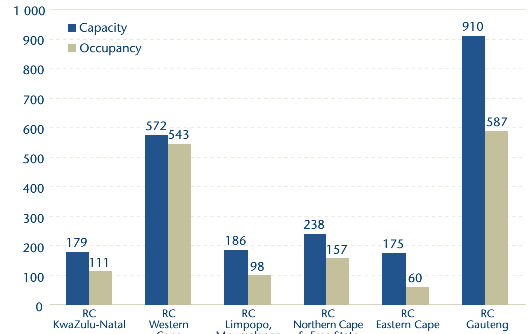
likelihood that a magistrate will keep a child imprisoned on the basis of the 1996 amendment to the 1959 Correctional Services Act; "in circumstances so serious as to warrant such detention". This may also reflect the longer time needed to complete trials, as well as backlogs experienced at regional and high court level, where more of the serious crimes are likely to be heard.

Children awaiting trial in secure care facilities

Secure care facilities run by the Department of Social Development (DSD) are more appropriate for the detention of awaiting-trial children. These facilities offer a less restrictive residential alternative (than prisons) to release into the care of a guardian or home-based supervision, and are designed with the care of children in mind. Despite the Department of Correctional Services' (DCS) figures showing that there is still a high number of children awaiting trial in prisons, statistics from the DSD show that on 28 February 2006 only 71% of the 2 199 secure care beds available were in use. This indicates that potentially another 643 children could have been accommodated in secure care facilities rather than in prison.

The capacity and occupancy of secure care beds vary from region to region (Graph 6). Only the Western Cape is close (95%) to using its full capacity of 572 secure care beds. Interestingly, the Eastern Cape, despite having a shorter average awaiting-trial period, has a small number of secure care beds and is only using 34% of these. The reasons for this given by the DSD are that, of the facilities available in the Eastern Cape, one is not yet operational, one has staffing problems, and magistrates do not refer children to the other two (Department of Social Development: Secure Care Status Report, 2006). It seems that while the average time for children awaiting trial in the Eastern Cape is reduced by interventions such as the Stepping Stones One-Stop Child Justice Centre, the majority of children will nevertheless spend that time awaiting trial in prison due to poor coordination of resources and an unwillingness on the part of magistrates to refer children accused of crimes to more child-appropriate facilities.

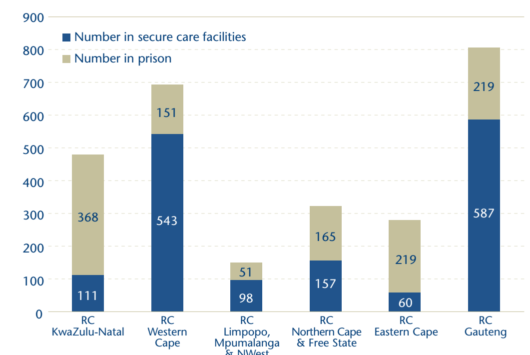
Graph 6: Capacity and occupancy of secure care beds by region on 28 February 2006



That courts do not tend to refer children to secure care facilities in certain regions is a recurring theme. The DSD has identified problems related to magistrates who believe that children should await trial in correctional centres, and prosecutors who are reluctant to accept recommendations from probation officers to send children to secure care centres (Department of Social Development: Secure Care Status Report, 2006). This situation is more likely to occur in a situation where a child is charged with either aggressive or sexual offences (57% of the children awaiting trial on 7 March 2006). Other reasons identified by the DSD for empty beds in secure care facilities include lack of resources for transporting children to these facilities, and structural issues (Department of Social Development: Secure Care Status Report, 2006).

The impact of these problems on children awaiting trial is clear. In KwaZulu-Natal and the Eastern Cape there are more children awaiting trial in prisons than in secure care facilities; with 77% and 78% respectively awaiting trial in prison (Graph 7).[20] In KwaZulu-Natal this largely reflects a lack of bed availability whereas in the Eastern Cape it largely reflects a lack of occupancy of those secure care beds available. Interestingly, in the Western Cape, despite children in prison having to await trial for long periods of time, 78% of children in detention whilst awaiting trial are held in secure care facilities. In Gauteng, in addition to children in prison having short awaiting-trial times, the majority of children awaiting trial (73%) are held in secure care facilities.[21] The reasons for these regional differences need to be examined in more detail and lessons applied to regions where the situation is less optimistic.

Graph 7: Number of children awaiting trial in prison (as at 07/03/06 N=1173) and in secure care facilities (as at 28/02/06 N=1556) by region



20 It should be noted that the numbers on children awaiting trial in secure care facilities are DoSD figures taken from the 28th of February 2006 whereas the numbers of children awaiting trial in prison are DCS figures taken from the 7th of March 2006. These numbers give a good indication of the overall picture, but because the numbers were taken a week apart comparison is not exact.

21 These figures only include those detained awaiting trial in either secure care facilities or prison and do police stations.

While the number of children awaiting trial in prison has gone down in recent years, a number of implementation problems need to be addressed which are preventing the reduction of awaiting-trial times and the movement of more children to secure care facilities. It would be useful to compare the change in the number of children held awaiting trial in prison to the change in the number of children held awaiting trial in secure care facilities over the past few years. However, these figures are not currently available.

The way forward

Whilst the figures show a very encouraging reduction in the number of children awaiting trial in South African prisons, there is still some way to go. Implementation problems in relation to the reduction of children in prison need to be assessed and addressed where possible. In addition, a proper evaluation of successful initiatives, such as the Port Elizabeth One-Stop Child Justice Centre and the Awaiting Trial Project in the Western Cape, could result in information that would help other less successful provinces introduce similar measures.

Targets need to be set to ensure that sufficient nation-wide secure care facilities, as well as the resources to run them, are available for children awaiting trial. The Department of Social Development is currently in the process of developing a blueprint for secure care facilities and plans for the completion of 11 new secure care facilities in the near future. It is hoped that these developments will significantly improve the situation for many children awaiting trial. In addition, magistrates need to become familiar with non-custodial options for awaiting-trial children.

The implementation of the Child Justice Bill would go a long way to clarifying the position of children in custody, and reducing their detention through alternative mechanisms. However, in the absence of such a coherent policy, the figures illustrate that a concerted effort on the part of many stakeholders can change a bad situation into one with a positive outlook. Several lessons can be learned from this process:

- Political leadership, such as President Mbeki's undertaking to reduce the number of children in custody, plays a key role in identifying national priorities that can then be implemented on the ground.
- It is clear that regular monitoring is a key component to the safeguarding of children's rights, but only if the information is communicated to key stakeholders so that they can act on it.
- The safeguarding of children's rights is a collective responsibility, and it is only through coordinated interdepartmental collaboration that effective and sustainable solutions can be reached.
- Change requires support, guidance and problem-solving at implementation level where local-level solutions can be developed and tested. ●

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NOTICE-BOARD

Day of General Discussion 2006

Since 1992, the Committee on the Rights of the Child has organised 14 general days of discussion on specific provisions of the Convention on the Rights of the Child, or on related issues, in order to improve implementation of the Convention on this topic. At the end of these thematic discussion days, the Committee always adopts Recommendations.

The United Nations Committee on the Rights of the Child will hold the Day of General Discussion 2006 on 15 September 2006 and will focus on article 12 of the Convention on the Rights of the Child on the child's right to be heard.

For more information, visit http://www.ohchr.org/english/bodies/crc/

Upcoming conferences

- The International Academy of Law and Mental Health will hold its 30th International Congress on Law and Mental Health at the University of Padua from 25 to 30 June 2007. For more information, visit http://www.ialmh.org.
- The International Juvenile Justice Observatory will host its 2nd International Conference: *Juvenile Justice In Europe – A framework for integration* on 24 and 25 October 2006 in Brussels, Belgium. For more information, contact bruxelles2006@oijj.org.

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