Article 40

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

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Article 40(3)(b)

Wherever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected

Lack of reform schools

A most unsatisfactory and undesirable state of affairs

Ann Skelton reports on another High Court pronouncement on the problem of the lack of reform schools and children being held in prisons to await transfer.

On 24 August two cases appeared on urgent special review before Levinsohn DJP and Jappie J in the Natal Provincial Division. The two cases were treated as one because the same issues arose in both. TN had been convicted on a charge of being in possession of suspected stolen property (a jacket and a microphone), BS had been convicted of housebreaking and theft. Both were sentenced to reform school. By the date of the urgent special review, both had spent approximately 22 months in Westville prison, part of this time awaiting trial, but the majority of it awaiting transfer to a reform school. The boys were represented by counsel briefed by the Legal Aid Board. The Centre for Child Law of the University of Pretoria entered as *amicus curiae*. The *amicus* placed information before the court regarding the history of

EDITORIAL

In August 2006 the Child Justice Alliance and the Open Society Foundation for South Africa hosted a two-day workshop on child justice. The workshop was an inspiring experience, as it brought together all the role-players who deal with child justice issues on a daily basis to discuss progress and developments in child justice. This column has often been used to lament the fact that the Child Justice Bill is still "a twinkle in its parents' eyes" and has not been passed despite being introduced into Parliament over four years ago. However, the workshop proceedings positively reinforced the fact that there is both governmental and civil society concern, passion and commitment to changing the criminal justice system that deals with children who come into conflict with the law. All of the papers that were delivered at the workshop confirmed the fact that child justice is still an issue that is receiving dedicated attention in research, policy and practice despite the apparent lack of political will to see that legislation is passed to complete the longstanding law reform process. It is evident that the promotion of child justice issues is high on the policy agendas of various government departments, that the development of a child justice jurisprudence has been embraced by our courts and that research on questions pertinent to children in conflict with the law is ongoing. These outcomes of the workshop should re-energise many cynical and jaded criminal justice system spectators and participants.

However, as is often the case, euphoria usually fades and one is again faced with reality. The reality for children who commit crimes in South Africa is that while there are committed officials in the criminal justice system on all levels – national, provincial and local – who recognise the need for a separate child justice system and who strive to create such a system in the absence of dedicated law, the child rights and human rights culture that our politicians extol to illustrate the transformative and progressive nature of our fledgling democracy does not appear to extend to the most vulnerable of the vulnerable – children in the criminal justice system.

Yet, in the face of adversity, one must brave any onslaught and continue to advocate for what is right. To that end, we congratulate all our readers who contribute to the development of a separate child justice system in their daily work and we urge everyone to continue to strive for a system that recognises the rights of children in order to achieve a balance between their needs and the needs of society.

reform schools. They also explained the nature of reform schools, clarifying how they differ from prisons in that children placed there have access to educational and recreational programmes in a therapeutic environment. The *amicus* also emphasised the fact that the Criminal Procedure Act provides that, pending placement in a reform school, the Court may order that the child in question be detained in a place of safety, but that the courts nowadays remand offenders to prison to await placement. The *amicus* explained the current geographical imbalance of reform schools in the country, with only one reform school in Mpumulanga serving all provinces other than the Western Cape. In this regard, the Court observed as follows:

"Manifestly this is a most unsatisfactory and undesirable state of affairs. It calls for drastic and urgent attention by the executive. Mr Budlender [appearing for *amicus*] emphasised during the course of his argument that this type of sentence should not be turned into a dead letter. He drew attention to the constitutional duty of the executive to assist the judiciary in properly carrying out its functions. That means of course that resources must urgently be made available to establish new reform schools."

Making the correct decision

Following the approach of the court in State v Z and 23 similar cases 2004 (1) SACR 400, the Court accepted the principle that, notwithstanding the fact that the Lower Court imposed a competent sentence, subsequent events occurred which revealed that the sentence imposed was incapable of being carried into effect, the High Court could interfere on review. The Court accordingly did not set aside the sentence (which they found to be competent and appropriate), but said that justice demanded that the applicants, who had both been detained for a "grossly unreasonable period" should be released.

It should be noted that this approach differs from the approach followed by the Northern Cape High Court in the case of S and M, which was reported on in *Article 40*, Vol 7, No. 4, Dec 2005. In that case, where a girl and a boy had also been held for 15 and a half and 18 and half months respectively, the court set aside their sentences and replaced them with periods of imprisonment for the duration already served. The *amicus* in the KwaZulu-Natal case under discussion argued respectfully that this approach was flawed, as the sentence was competent and also because the offenders would be prejudiced by the new sentences if their criminal records were ever called for, as the sentences were harsher than the original ones handed down. Similarly, a case cited by the *amicus* regarding an instance where a court had set aside a reform school sentence and replaced it with a "caution and discharge" had also been wrongly decided, as this would benefit the accused should his record be called for in the future. The approach in the S v Z and 23 similar cases, followed in the KwaZulu-Natal case, is clearly the correct one.

A practical solution for the future

Striving for a practical interim solution, the court concluded its judgment with the following suggestion:

"To avoid a situation where juvenile offenders languish in gaol pending placement in a reform school, the Department of Justice and Constitutional Development is respectfully urged to cause magistrates to implement an administrative system whereby the progress made by

the relevant authorities to place offenders in a reform school is constantly monitored. It seems to us that these cases can be diarised by the clerk of the court for a given period. When the date occurs the case can then be placed before the particular magistrate or another magistrate in order for such magistrate consider submitting the case for special review. We do not think that the suggested monitoring system will place an undue administrative burden on the magistracy. It is further envisaged that the magistrate will call for reports from the authorities, and in the light of those reports he/she may take steps to place the matter before a judge on special review in terms of section 304."

The Court directed the Registrar to send a copy of the judgement to the Regional Office of the Department of Justice and Constitutional Development for its information.

These suggestions from the Court will be a useful interim measure whilst the relevant departments are working on the finalisation of a protocol for the management of children awaiting designation to reform school, and indeed might be incorporated into the protocol. In the long run, it is essential that the Department of Education examines the situation with regard to reform schools in the light of the High Court judgements that have been mentioned. It is also necessary as preparation for passing and implementation of the Children's Act Amendment Bill which will set up a new legal framework for Child and Youth Care Centres, under which all residential facilities, including reform schools, will fall. Indications are that the Department of Education is aware of these recent developments and that a proper analysis and future planning will soon be under way.

Letter to the editor

Dear Editor

Pardon me for addressing this note to you directly but I am so impressed with the contents of the magazine that I feel it is my duty to bring my experience in reading your magazine to your attention.

From my E Mail address you will see that I am employed by the Department of Justice and hold the rank of Magistrate for the last 25 years. One of my biggest concerns with the Criminal Justice system all these years is the exposure of young offenders with a court ... the fear in their eyes when they appear in court for the first time and the trauma they go through when they are removed from their parents is a shocking experience for me irrespective my years on the bench. This very same trauma I see in the Children's Court.

It is however very encouraging to see that there are people out there that are doing something about this situation...unfortunately there are those who do crime because they have no place else to stay and they beg for a safe place in custody somewhere. I really hope that in years to come the situation will change so much so that no juvenile offender appears in a criminal court anywhere in our country.

Thank you for sending the magazine to me.

Regards

Magistrate Walter la Grange
Port Alfred/EC Province

(Note from editor: this letter was printed in its original form)

Child Justice in Malawi

by Benyam D Mezmur

Child justice in Malawi is dispensed in accordance with the Children and Young Persons Act and partly by provisions spread throughout separate statutes. It should be of no surprise that this Act, adopted in 1969, is lagging behind the country's Constitution of 1994 as well as international and regional instruments, in particular the UN Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Children's Charter)[1] to which Malawi is a party. However, a new bill is in the offing ...

In 2002, after considering Malawi's initial state party report, the UN Committee on the Rights of the Child (UN Committee) raised a number of concerns about the administration of juvenile justice in the country. Among others, the Committee stated that the too-low age of criminal responsibility, the non-respect of the rights of children during the penal procedure, the overuse and length of pre-trial detention, the appaling conditions of detention, and the lack of access to assistance towards the rehabilitation and reintegration of juveniles following justice proceedings were causes for concern.

Accordingly, in order to bring the administration of child justice in Malawi in line with the prevailing social, political and economic changes, a Special Law Commission, appointed in 2001, commenced a review process of the Act in 2003. After considering a review of the Act in light of international and regional instruments and standards, oral and written submissions, consultative workshops and study visits, at the end of 2005 the Commission prepared and recommended draft legislation, the Child Care, Protection and Justice Act (the Bill).

The Bill modernises the law relating to child justice by upholding the cardinal principle of the best interest of the child. New provisions on preliminary inquiry, age determination, diversion, legal representation, the establishment of a separate court system for children, detention

1 *Malawi ratified the CRC and the African Children's Charter on January 1991 and September 1999 respectively.*

> *... no child should be imprisoned for any offence.*

places for children pending trial, and guidelines for the arrest of children have been introduced, while provisions considered to be inconsistent with the above-mentioned provisions have been removed from the Act or amended.

Definition of "a child"

Against the provision of the Constitution (section 23) and other subordinate legislation which provides for a lower age limit, the Bill defines a child as one below 18 years of age. Additionally, in a more progressive approach, the term "child" is defined to include, when the age is unknown and before age determination is conducted, a person who appears to be below 18 years of age. This is in the best interest of the child in a number of ways. For instance, recent reports show that some police officers – apparently to get away from the long process of prosecuting juveniles – force child suspects to cheat on age so that they are tried as adults in court.[2] In situations like these, giving the benefit of the doubt to persons who appear to be below the age of 18 would contribute to reducing the risk of stripping children of the protective status of a "child" and subjecting them to the punitive forces of the adult criminal justice system. Moreover, the use of the term "child" throughout the Bill to consciously avoid the term "juvenile" which is considered to have a criminal connotation, is laudable.

The age of criminal responsibility in Malawi, as it stands now, is seven. To belabour the obvious, this is too low. The Commission reckons with this. Although its compliance with international law and practice could still be arguable, the Commission recommends that children who should not be liable should be those below the age of ten. However, because the Commission is convinced that the age of criminal responsibility is part of the general principles of criminal law, with reference in the Bill to the Penal Code provision, it leaves the issue to the latter.

The importance of diversion

It would not be original to state the importance of diversion in the administration of child justice. Thus, not only does the Bill place diversion at its core, it further provides for a long list of diversion options, minimum standards for application and the important fact, especially for a poor country like Malawi, that no child can be excluded from a diversion option on account of inability to pay a fee or charge for such a programme.

Furthermore, although the Constitution provides for the right to legal representation where the interests of justice so require, the availability is often lacking in serious criminal offences. The Bill provides for detailed provisions to bridge this gap, including the requirements to be complied with by legal representatives who represent a child and the mode of seeking legal representation at state expense. The role a parent or guardian should play towards ensuring legal representation for the child is also identified.

Important provisions

The Bill also provides for the establishment of a Child Justice Court and specifies its jurisdiction, composition, procedures and powers. The importance of specialised training for officers presiding over and assisting during child justice proceedings is accorded due attention. The probation officer is but one professional to play a crucial role in the court proceedings. For the purpose of upholding the right to privacy of the child as incorporated in the CRC and the African Children's Charter, under a threat of sanction, provisions are made restricting the media from reporting proceedings in a court. The list of group of persons who can be present at any sitting of the court is also regulated. In an effort to make the court proceedings as informal as possible, a list of criteria has been included in the Bill. The Commission also recommends that, against section 42(2)(g) of the Constitution which implicitly allows for the imprisonment of a child for the shortest period of time, no child should be imprisoned for any offence. In line with the Beijing Rules, a large variety of disposition measures are made available allowing for flexibility so as to avoid institutionalisation to the greatest extent possible.

Given the detailed nature of the Bill, the brief discussion above does not do justice to its content. However, to sum up, it makes it clear that the fundamental philosophy of the Bill in the area of child justice has rightly focused on the best interest of children and their rehabilitation and reintegration into society. Its adoption and its effective implementation pending, the Bill addresses many of the concerns raised by the UN Committee. The law reform process in Malawi in child justice is yet more proof of the understanding that is taking root the continent that how we treat our children, including those who "break" our laws, reflects significantly on our individual and universal society.

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2 The Daily Times (4 September 2006), "Treat Children as they are" <http://www.dailytimes.bppmw.com/article.asp?ArticleID=2611> (accessed 27 September 2006).

Child Justice workshop

On 1 and 2 August 2006 the Open Society Foundation and the Child Justice Alliance hosted a workshop entitled "Child Justice in South Africa: Children's rights under construction".

The purpose of the workshop was to take stock of the situation relating to the criminal justice system for children in conflict with the law. Although South Africa has been on the brink of a new law for child offenders for the last few years, such law reform has not become a reality and children who commit crime are still treated in a manner that is similar to the way adults are treated in the criminal justice system. Despite this, in recent years there has been a range of new research undertaken by both government and civil society on child justice issues. This includes among others work on children involved in organised armed violence, research on children used by adults to commit crimes, and a study on the use of life sentencing for children. Initial findings from all of these studies as well as developments in South African jurisprudence emphasise the urgent need for a legislative framework in order to ensure that the rights of children in the criminal justice system are protected.

The workshop was the ideal opportunity to create a platform to engage with the current research findings and promote informed debate on child justice issues.

The objectives of the workshop were to:

- showcase a range of new research findings in relation to child justice
- review policy and legal precedents
- provide an opportunity to further the debate on child justice in South Africa.

The conference participants included NGOs working in the field of child justice, academics and representatives from the Departments of Justice, Correctional Services, Treasury, and Education, the National Prosecuting Authority, SAPS and the Legal Aid Board.

In an address at a pre-workshop function, Justice Yvonne Mokgoro stated that, "in the context of criminal justice, no matter how heinous and no matter how vile their actions, children have a right to be treated as children". She stressed that a child's age must always be taken into account and that he or she must never be kept together with adults.

The keynote address at the workshop was delivered by Professor Jaap Doek, chairperson of the United Nations Committee on the Rights of the Child. He noted that international studies prove that managing child offenders outside the court system is the more cost-effective and socially beneficial

"The workshop was the ideal opportunity to ... promote informed debate on child justice issues."

alternative. He also called for state-led measures that treat the root causes of juvenile delinquency – most frequently related to poverty – and the standardisation of diversion policies which are purpose-made, counselling, and educational and life-skills programmes that deal with the child offender in an appropriate way.

The Department of Justice

Raesibe Tladi of the Department of Justice and chairperson of the Inter-Sectoral Committee on Child Justice also addressed the gathering and outlined the department's policies and recent progress in moving towards a separate criminal justice system for children. She specifically mentioned the establishment of the One-Stop Child Justice Centres and how they were promoting the use of diversion and piloting the preliminary inquiry procedure that is proposed in the Child Justice Bill. She stressed that there was a need for further cooperation to inform legislators about successful interventions in the child justice field and to enable the creation of similar services elsewhere in South Africa.

The National Prosecuting Authority

Advocate Maggie Tserere of the National Prosecuting Authority (NPA) spoke on the activities of the NPA and its policies regarding diversion. She noted, *inter alia*, that:

- In 2000 the NPA (SOCA) conducted a national audit on diversion programmes. The findings of the audit indicated that there were few diversions in the rural areas as opposed to the urban areas where there are resources; prosecutors needed training on diversion with other role-players such as probation officers and police officers.
- The first decentralised multi-disciplinary training on diversion was conducted in 2002. It was facilitated by the NPA in conjunction with Nicro and the Department of Social Development. So far, the NPA has trained 403 prosecutors and other role-players.
- From July 1999 until December 2005 the NPA has diverted 115 582 cases.
- In order to determine the effectiveness of diversion in rehabilitating the lives of young offenders, the NPA has deemed it necessary that these services need to be reviewed. The Institute for Security Studies has proposed a research study on child justice. The research will be done in cooperation with the the NPA, the Department of Justice and the Department of Social Development. The research is divided into two projects: A National Review of Diversion Services to Children in South Africa and An Overview of Child Offending in South Africa.

Other presentations included papers on SAPS crime prevention, the development of minimum standards for diversion, the trends regarding children deprived of their liberty and the valuable contribution that progressive case-law and judicial precedents have made in the child justice arena.

Outcomes

Ultimately, delegates agreed that it was critical to not only raise awareness of the issues among legislators and implementing agencies but also among the public to help involve society in the broader objectives of protecting children's rights. After two successful days of deliberations, the outcomes of the workshop reaffirmed the fact that there was an urgent need for the enactment of the Child Justice Bill.

Children in prisons and the privilege system

by Lukas Muntingh

Recently the Parliamentary Portfolio Committee on Correctional Services invited submissions from selected NGOs on the current privilege system in force in South Africa's prisons.[1] It is the intention of the Committee to review the privileges of offenders convicted of serious offences such as rape and the murder of police officers. The attention drawn to the privilege system prompted the question of whether children are subject to the same or a different privilege system. The short answer to this question is that children (sentenced and un-sentenced) are subject to the same privilege system as their adult counterparts. Before exploring this issue further it necessary to briefly explain the privilege system.

The Correctional Services Act (111 of 1998) does not refer to privileges but rather to **amenities** which are *"recreational and other activities, diversion or privileges which are granted to prisoners in addition to what they are entitled to as of right and in terms of the Act and include exercise, contact with the community, reading material, recreation, and incentive schemes".*[2] More specifically, amenities deal with, for instance, the following issues: visits; delicacies during visits; making of telephone calls; receiving letters, television, TV games; participation in choirs; access to a library; and temporary leave from prison.

The security classification of a prisoner determines the amenities that the prisoner is allowed to enjoy. For example, minimum security prisoners are entitled to enjoy more amenities or privileges than medium security prisoners. Each security classification category is divided into A, B and C groups. Depending on a prisoner's behaviour, cooperation and attitude he or she can move up or down in the classification system and thus enjoy more or less privileges. This system is part and parcel of prison management and an important tool for prison managers to foster good behaviour and promote a positive attitude, but also punish negative behaviour.[3]

International law

International law is replete with assertions that children are different and should therefore be treated differently from adults.[4] The CRC is clear on this issue and states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". The fact that children and adults are subject to exactly the same privilege system in our prisons, is therefore immediate cause for concern as it does not afford children the special treatment required by the CRC. In a prison, or any other situation of deprivation of liberty, this warrants further attention.

The privileges described above, reflect many of those aspects of life that we regard as adding quality to life. While we do not need them to survive, they make life more enjoyable, bring satisfaction and add quality to our personal lives and the contact that we have with other people. In a prison, access to these are restricted based on the security classification of a prisoner, which in turn is (in South Africa) by and large determined by the length of the prison sentence and the crime that was committed. The security classification does not take into account the age of the prisoner in any manner, although it has a critical impact on how a child will experience a term of imprisonment.

Van Bueren points out that there is in fact little treaty law setting out the objectives of institutions depriving children or their liberty, and that guidance is reliant on non-binding instruments such as the UN Rules for the Protection of Juveniles Deprived of their Liberty (UNJDLs) and the Beijing Rules.[5] The latter, for example, in Rule 26.2, states:

26.2 Juveniles in institutions shall receive care, protection and all necessary assistance-social, educational, vocational, psycholog-

1 *PMG Minutes 29 August and 1 September 2006. Two NGOs (SAPOHR and the PSA) and the Office of the Inspecting Judge made presentations.*

2 *Correctional Services Act (111 of 1998) Definitions*

3 *For a more detailed description on the privilege system, please see Muntingh L (2006) Prisons in a democratic South Africa – a guide to the rights of prisoners as described in the Correctional Services Act and Regulations, CSPRI Report, Cape Town.*

4 *See for example the Preamble to the Convention on the Rights of the Child making reference to the Geneva Convention on the Rights on the Child (1928), the Declaration on the Rights of the Child (1959), International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.*

5 *Van Bueren G (1995) The International Law on the Rights of the Child, Marthinus Nijhoff Publishers, Dordrecht, p. 217.*

ical, medical and physical-that they may require because of their age, sex, and personality and in the interest of their wholesome development .

Privileges

Throughout the international law, privileges are associated with release preparation and social integration. The underlying argument is that the more a prisoner maintains contact with the outside world (for example his/her family), occupies him/herself with what is happening outside of prison (for example in terms of current events), and engages in activities that approximates life on the outside (for example education and work in the prison or on the outside through day parole), the better his/her chances are for successful reintegration. What should be avoided is a culture of institutionalisation, where prisoners focus entirely on what is happening inside prison and lose sight of their release.[6]

The privilege system is therefore seen as an important mechanism to facilitate these aims as it covers issues such as family contact, incentive schemes, access to recreation and so forth. Privileges are important means of "normalising" prisons - to make them reflect as far as possible life in normal society.[7] To prepare a prisoner for release, it is necessary to develop those skills and abilities that will assist the person once released. The emphasis should therefore be on maximising privileges and not on limiting them. Access to privileges should not be part of the punishment as the deprivation of liberty is the punishment.

Family contact in South African prisons

To illustrate the problems with the current privilege system a closer look is taken at contact between an imprisoned child and his or her family. The Commissioner of Correctional Services has a duty (see S 19(3) of the Correctional Services Act) to facilitate this and see to it that a child maintains, as far as possible, contact with his or her family. The privilege system places severe restrictions on this. A prisoner who is classified as medium security and in the B-group, which is where all prisoners start within their security classification, will be entitled to 36 visits of 45 minutes each per year by at most two visitors per occasion and at most four visits per month will be allowed.[8] Roughly this amounts to 3 visits per month of 45 minutes each or just more than 0.2% of total time in custody in a month.

However, because prisoners (adults and children) are often not imprisoned close to home or families do not have the means to visit regularly, visits can be exchanged for telephone calls. The same category of prisoner (medium security B Group) would be entitled to a telephone call instead of a visit only over weekends and public holidays within office hours where telephones are available. Six additional telephone calls can be made per year. The maximum duration of a telephone call is 10 minutes. This is a blatantly unfair exchange - a visit of 45 minutes is exchanged for a telephone call of 10 minutes. A prisoner, who received only visits and make no phone calls, will have access to contact with visitors for a total of 27 hours in a year. A prisoner who only uses phone calls and receive no visits will have access to telephonic contact for 7 hours in a year.

The more important question is whether this amount of contact between a child prisoner and his family (or other support structures) is appropriate? Does this give the family sufficient opportunity to engage with the child and assist him to prepare for his release? Does this give sufficient opportunity to address the harm that has been done? How do corrections become a societal responsibility, if a parent can see his or her child for an hour and half a month? How do we prepare children for release if their contact with the outside world constitutes less than 0.5% of their time incarcerated?

Conclusions

In this discussion attention has been paid to the international law and its limited guidance on the issue of privileges, but more importantly the uncertainty relating to what the objectives of incarcerating children actually are. It was also asserted that in order to prepare prisoners effectively for their release it is necessary to normalise the prison regime as far as possible within safety and security constraints. By using the example of access to visits and telephone calls, it was demonstrated that the current privileges regime is a harsh one and falls far short of facilitating reintegration, even for adults. For children this is regarded as wholly inappropriate and out of touch with what would be regarded as approximating "normality". The current privilege system also denies families sufficient opportunity to make a constructive input into the lives of their imprisoned children.

Lastly, the Department of Correctional Services (DCS) should not be a spectator in this matter, especially where it concerns family contact. When child prisoners do not receive (regular) visits, the DCS has a duty to take active measures to determine the cause of the problem, develop alternatives and enable visits, if cost and distance are problems. Facilitated public transport to prisons at affordable rates is a real and tangible measure that the Department can apply to assist children in their care to main contact with their families.

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6 Haney describes institutionalisation as "the process by which inmates are shaped and transformed by the institutional environments in which they live" and prisonisation as a summary of the negative psychological effects of imprisonment. See Haney C (2001) The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment, Paper presented at the National Policy Conference 30-31 January 2002, US Department of Health and Human Services, The Urban Institute, p 5.

7 Tolstrup J The Danish Prison Model - Normalisation, openness and responsibility, Track Two Vol.11 No.2 April 2002

8 DCS B-Orders, Chapter 16, Para 5.0

Training

for judicial officers on alternative sentencing and youth justice

by Julia Sloth-Nielsen

As the Committee on the Rights of the Child, the treaty body responsible for monitoring the implementation of the Convention has frequently stated in response to country reports, training of all involved in the administration of the juvenile justice system is part and parcel of State Parties' efforts to implement to the fullest extent the Convention provisions (see for example, R Hodgkin and P Newell "Implementation Handbook for the Convention on the Rights of the Child", Geneva, 2002, p 545). South Africa has proceeded in measurable ways over the last few years to give effect to this obligation. Not only has Justice College developed a Child Law manual for magistrates (there is also one for prosecutors, now being reviewed under the auspices of the National Prosecuting Authority) but, in addition, Justice College presents bi-annual specialised training on child law for members of the bench. Further to this, 2005 saw the presentation of provincial workshops on restorative justice, as an element of the emerging child justice system, funded by the Swedish International Development Agency and organised by the Directorate of Vulnerable Groups, Children and Families in the Department of Justice.

In 2006, the spotlight fell on alternative sentencing. In a similar vein, 7 provincial workshops, lasting 2 days each, were held over the period July – September, for groups of magistrates. As the impediments and difficulties associated with the implementation of different alternative sentences are not necessarily different in the case of children by comparison to adults, the trainers decided not to focus exclusively on alternative sentencing for children, but to adopt a broader approach, looking at alternatives more generally. Further, since the implementation of an alternative sentence, or the use of a diversion option as an alternative sentence, is almost always an inter-sectoral affair, an invitation was extended to partners in the criminal Justice system to use the opportunity to network with magis-

"The positive evaluations of the training workshops received indicate that the event was a huge success, and that it is likely to have lasting impact in the sentencing practices of the magistrates who attended."

trates, to present a provincial profile of their services, and to answer questions and respond to problems. This invitation was eagerly taken up at provincial level, and indeed one of the main findings of the analysis of the evaluation was a need for more inter-sectoral collaboration at provincial and local level to enable role players to familiarise themselves with one another's roles, work methods, and so as to expand the range of options available to sentencing officers.

Thus the formal presentations that formed the backbone of the training included an analysis of all legal provisions currently on the statute book that facilitate or permit an alternative sentence to be imposed, both generally and more specifically in the instance of children. This presentation built on the study of alternative sentencing conducted in 2004 by Dr Ann Skelton, commissioned by the Civil Society Prison Reform Initiative. (The study is available on the CSPRI website at http://www.communitylawcentre.org.za/cspri/index.php). This study concluded that there has been a declining use of correctional supervision and community service since the late 1990's. Given that nearly 20 000 prisoners were serving sentences of three years or less on 31/12/2005, and that at least potentially some of these might have been candidates for an alternative to prison, there is seemingly scope to expand our use of alternatives as the legislative framework is indeed adequate.

The second presentation focused on youth programmes, not in the sense that the magistracy should strive to be programme experts, but that they can be alert as to what to look out for. Building on a study undertaken by the HSRC as a backdrop to the drafting of the National Diversion Minimum Standards, the presentation reviewed what works according to the international literature, what does not work, and what questions magistrates should ask of programme managers.

The third presentation was narrowly focussed on the transformation of the youth care sector that has been underway since the formation of the Inter-Ministerial Committee on Young People at Risk in 1996. Whilst some provinces have made progress in providing for alternative residential care, recent cases brought against provincial departments have confirmed that much remains to be done to achieve a situation where children can be referred to educational and therapeutic institutions where they cannot serve a sentence entirely in the community.

The final presentation focused on children used by adults in the commission of offences (CUBAC), and was a briefing as well as an update on the progress of the two pilot projects that have been established to address and combat this form of child labour (see Article 40, Vol 7, No. 1, May 2005.).

The workshops were greatly enriched by presentations from Director Ntuli of the head office of the Department of Correctional Services Directorate of Social Reintegration which bears overall responsibility for the implementation of correctional supervision orders, and for community corrections generally (i.e. including parolees). In a frank but honest assessment of the gaps and difficulties in implementing correctional supervision that have been identified, the DCS was nevertheless able to inject a new spirit of optimism about the use of this form of sentence, and to reassure the bench that identified problems were being addressed. The actual content of community service and programme elements were discussed in many of the provincial inputs. A useful opportunity for exchange was provided by the provincial community corrections teams, a large contingent of whom attended as well.

In all provinces, the Department of Social Services probation section gave briefings as to progress in the roll-out of probation services. The role of assistant probation officers was clarified, and the use of home based supervision as an alternative sentence explained. The information was shared in a collaborative atmosphere and was greatly welcomed by the delegates. A point of concern noted nationally, however, was the poor quality of pre-sentence reports, as well as the length of time remands had to be effected while awaiting such reports. Recommendations in this regard will be made by the trainers to the Inter-Sectoral Child Justice Committee, convened monthly by the Department of Justice.

Finally the delegates were also given insight into the role of the non-governmental sector in diversion and alternative sentencing, notably through the attendance of representatives of NICRO in some provinces, and also Khulisa.

The positive evaluations of the training workshops received indicate that the event was a huge success, and that it is likely to have lasting impact in the sentencing practices of the magistrates who attended. Thanks obviously go to the sponsor, SIDA, as well as the organisers at the Department of Justice: Directorate Child Justice and Family Law. Justice College also played a crucial role via the services of Joe Ngelanga and Basil King at all the workshops. But the final thanks go the magistrates who were prepared to leave their busy courts to be inspired to put children's interests first.

Nicro: supporting children in conflict with the law

Celia Dawson and Soraya Solomon provide an update on activities.

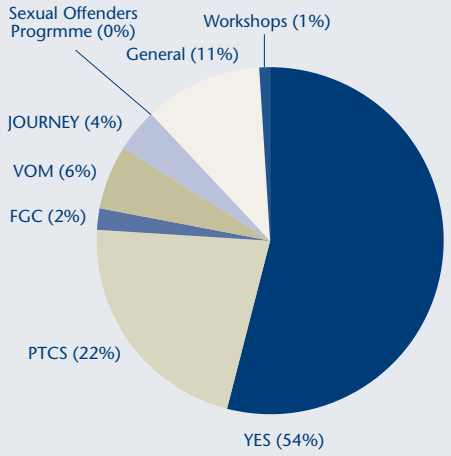
Nicro is widely regarded as the leader of diversion programmes in South Africa. At present it is the only national non-governmental crime prevention service provider in South Africa. By 1993 it was offering three diversion programmes for children in conflict with the law and at present it offers five main options for children in conflict with the law, namely:

- The YES programme
- Pre-trial community service
- The Journey programme
- Family Group Conferencing
- Victim support services.

Other services include a programme for sex offenders.

Graph 1 on the right illustrates the present breakdown of diversion by service rendered.

Graph 1: Diversion by service rendered



New initiatives

Apart from the five main services, Nicro also offers various new initiatives for young offenders, namely:

- Family Journey programme
- Parenting programme
- Safety ambassadors programme
- Substance abuse programme
- Sexual offenders programme

Safety ambassadors

The aim of the safety ambassadors programme is to reduce anti-social behaviour among youth at school level. The project utilises the voices of peers to interact with and influence youth in communities against committing anti-social acts.

The principles and elements of the programme include:

- Changing anti-social to pro-social behaviour through cognitive-behavioural and eco-systemic theories.
- It is based on the specific developmental needs of young people – the need to belong, have an identity, feel good about themselves, etc.
- It encompasses sustainability and partnership with key players.
- Mentorship
- It builds on the resilience of youth.

The various phases of the safety ambassadors programme consist of the following:

1. Recruiting learners – through an essay
2. Deputising the safety ambassador. This involves pro-social values and insights to buffer against crime, as well as a trauma and healing workshop
3. Grouping against crime – this consists of a community project to build cohesiveness
4. Empowerment through life skills. This involves the running of the YES programme

5. Community and media support. Making use of media and mentors and celebrities
6. Graduation ceremony. The participants receive safety ambassador certificates (silver level, or gold level for second year)
7. Celebration of resilience. Based on consolidating, connecting, cohesion, celebrating, community.

In addition to these programmes, Nicro is at present busy developing a young violent offenders programme as well as a social enterprise project for young offenders.

Research

At present, in 2006, Nicro is embarking on a longitudinal study on the impact of diversion. This is the second such research undertaken by the organisation. In addition, Nicro is determining how to integrate indigenous practice into diversion programmes. This initiative will be aimed at the Journey Programme. Other activities include:

- The development of a diversion toolkit for the child justice sector.
- The development of a user-friendly booklet on the minimum standards for diversion.
- The development of compliance indicators in respect of the minimum standards for diversion

Regional collaboration

Nicro has also been very active in the Southern African region through undertaking diversion training in Namibia in 2002 and 2006, assisting with the development of diversion materials for Namibia in 2005 and the development of a diversion service for Malawi in 2005 – 2006.

Conclusion

It is noteworthy that the Nicro diversion programmes have developed such credibility within the criminal justice system, that widespread referrals come from officials within the system in the absence of formal legal provisions permitting diversion practices.

NEW PUBLICATION
BY CHILD JUSTICE INITIATIVE

FIRST Occasional Paper

The Criminal Justice Initiative of the Open Society Foundation for South Africa has recently released it's first Occasional Paper in a series of four.

In this paper Louise Ehlers seeks to examine some debates that have shaped the contours of the Child Justice Bill in Parliament. It reflects upon these against the backdrop of legislative and policy trends in juvenile justice in the United States and attempts to locate the future of the Child Justice Bill in current socio-political context. It notes that, historically, there has been a tendency by South African law and policy makers when seeking solutions to the crime problem to look to US models for guidance. This is illustrated by, for example, the modelling of the Scorpions on US equivalents, the introduction of privatised prisons and the development of the Prevention of Organised Crime Act (the clauses regarding penalties for gang affiliation being taken largely from US law).

The paper goes on to argue that while the parliamentary deliberations concerning the Child Justice Bill have not overtly adduced or cited US models of juvenile justice in support of particular positions, there is some evidence that the changes may result in a system in which protection is selectively provided to deserving cases, whilst a punitive response is obligatory where serious crimes are involved, or where the children are regarded as undeserving of the protection of childhood.

The paper concludes by stating that South Africa still has the opportunity of reversing some of the adverse changes to the Child Justice Bill before it is voted into law. In its original form, the Child Justice Bill has already served as a model law elsewhere in Africa, and it would be unfortunate indeed if regressive measures, such as bifurcation, mandatory sentencing and pre-trial detention of children aged below 14 years in prisons, were allowed to survive. Rather than following the lead of the US, we should be championing the restorative and reintegrative models embraced closer to home in Africa, and associating ourselves with the values of ubuntu, proportionality and individualisation that they have enshrined as central in their child justice laws.

Copies can be downloaded from the OSF website: www.osf.org.za or telephone Louise Ehlers on 021 683 3489.

Cause for concern?

What is happening to the Professional Board for Probation Practice?

by Roland Graser, criminologist and formerly with the Department of Social Development, UCT

There appears to be a disconcerting tendency in this country to delay important processes for long periods of time. This is true for the Child Justice Bill as well as the establishment of the Professional Board for Probation Practice.

Over a period of more than ten years a number of important developments have taken place to professionalise probation practice. These include the establishment of occupation-specific training programmes for probation practitioners, the development of post-graduate academic qualifications (Honours and Master's) in probation practice, the establishment of the occupational category of assistant probation officer, and the development of a SAQA approved training curriculum for APOs. In addition, the development of a Bachelor's degree in probation practice is in its final stages.

During the past ten years, probation officers in all provinces have received training in aspects relevant to their daily practice. Numerous workshops, on subjects ranging from the psychology of the criminal court, legislation relevant to probation practice, the probation officer as expert witness and restorative justice, to developing and implementing crime prevention programmes in disadvantaged communities were presented throughout the country.

The process of establishing a professional board for probation practice has also run its course during the past ten years. At a meeting of the Probation Advocacy Group (PAG) held on 29-30 August 1996, the then registrar of the former Council for Social Work even addressed the meeting on the procedures to be followed in establishing a statutory body for probation officers. All the necessary steps were followed, and the process was finalised. The matter was even published in the Government Gazette. Everything was ready, and probation officers across the country were waiting for the establishment of the Board.

On 22 August 2006 a fax was forwarded by the National Department of Social Development advising of a meeting to be held in Pretoria on 23 August. At that meeting, apparently called by the acting registrar of the Council for Probation Service Professions, the matter of the establishment of a professional Board for Probation Services was to be discussed. The late notification of the meeting made it impossible for many interested parties to attend, including members of the Standard Generating Body (SGB) for Probation Work, probation coordinators and other important role-players across the country. At any rate, why hold a meeting to determine whether there is a need for a professional board for probation practice when, over a period of ten years, the process had gone its course, and was finalised?

Professionalising Probation

It would appear that some social work managers hold the view that probation is not a profession in its own right, but a specialisation of social work. A study of the historical development of both professions clearly proves this to be a fallacy. In fact, countries such as the USA had legislation formalising probation before there was legislation formalising social work – e.g. the Massachusetts Probation Act of 1878.

As far as the professionalisation of probation in other countries is concerned, a collaborative research project on that matter was conducted by the United Nations Interregional Crime and Justice Research Institute (UNICRI) and the British Home Office. The outcome of the research, edited by Koichi Hamai, Renaud Ville, Robert Harris, Mike Hough and Ugljesa Zvedie, was published in 1995 in a book entitled, *Probation Round the World: A comparative study*. This international research project studied probation practices in: Australia, Canada, Hungary, Israel, Japan, Papua New Guinea, the Philippines, Sweden, England, Wales and Scotland. One chapter – Chapter 6 – is devoted specifically to "Probation as a profession". Subsequent to this research, the UNICRI organised the "International Training Workshop on Probation". This workshop led to the publication of the *Handbook on Probation Services: Guidelines for Probation Practitioners and Managers*.

A perusal of the contents of the abovementioned publications, and considering the fact that numerous books have been written on probation and that there are professional journals specifically devoted to probation, (e.g. *Federal Probation in the USA*), there can be no doubt that, internationally, probation is regarded as a profession in its own right. In several countries specialised qualifications in probation practice are offered and probation officers can register as such with professional associations. A study of international sources also reveals that, in some countries, probation officers come from disciplines other than social work. In fact, one of the UCT Honours/Master's graduates in probation, who has no social work qualifications, was recently appointed as a professional probation officer in New Zealand.

Broadening the scope

At a workshop on "Transformation of Probation Service, View from National Department of Welfare", organised by the then National Department of Welfare (9-11 July 1997), there was agreement that "Probation officers need not be social workers. The base of probation officers must be extended beyond social workers". With the establishment of the occupational category of assistant probation officer a few years ago, the base of probation practice has already been broadened to include practitioners outside the field of social work.

In July 2003 the National Department of Social Development contracted the Department of Social Development at the University of Cape Town to "facilitate and manage the development of a curriculum for assistant probation officers, a programme to re-skill probation officers, do research and set up an education programme in probation practice". These tasks included the development of a curriculum for a Bachelor's degree in Probation Practice – which has almost been completed. Furthermore, the University was to train probation officers in all provinces, and conduct research on probation-related topics. This, which has already been completed, was clearly aimed at the professionalisation of probation practice. During the past nine years, some 100 students have graduated with the post-graduate qualification in Probation at UCT. Several have also qualified at other universities offering qualifications Probation Practice, e.g. Johannesburg University, UPE, and Rhodes/Fort Hare. These were mainly practising probation officers.

The establishment of an SGB for Probation Work is another clear indication of the professionalisation of probation practice. Since its inception two years ago, the SGB has developed a number of unit standards for probation practice, and has almost completed the development of a Bachelor's degree in Probation Practice.

Unjustified delays

Finally, some persons appear to hold the view that there has not been adequate consultation regarding the establishment of a professional board for Probation Practice. This is not true. A study of the minutes of the PAG over a period of ten years reveals that, in fact, there has been considerable consultation regarding the possible establishment of a board. For the past ten years the matter has been extensively discussed across the country among probation officers and other relevant role-players, such as NGOs and universities offering specific training to probation officers.

In the September 2004 issue of the SA Council for Social Services Professions' Newsletter the following statement appears under the heading "Professional Board for Probation Services (PBPS)": "The necessary regulations to establish the Professional Board for Probation Services in terms of the Social Services Professions Act 1978, as amended were published in the Government Gazette of 25 June 2004. This means that the process to establish this professional board is to be started shortly by calling for nominations of the persons to be elected as members and by requesting the Minister to make his appointments."

What has become of the Board?

It is in the interest of providing a more professional service to South African criminal justice and social welfare systems that the professionalisation of probation practice is formalised by the prompt establishment of the Board for Probation Work. This has already been delayed unnecessarily for much too long.

Practitioners in the field of youth justice – especially probation officers, magistrates and prosecutors – are strongly encouraged to advocate for the establishment of the Professional Board for Probation Work, without any further delay.

COMMUNITY LAW CENTRE

NOTICE-BOARD

USEFUL DETAILS ABOUT CHILD JUSTICE ORGANISATIONS

Defence for Children International (DCI/DEI/DNI)

Organisation aims and activities: Defence for Children International is an independent international non-governmental organisation established in 1979 devoted to the promotion of the rights of the child. In addition to juvenile justice it's main activities include: child labour, child participation, violence against children, child commerce & sexual commercial exploitation.

Website: www.dci-is.org

COAV – Children in Organised Armed Violence/Viva Rio (COAV/Viva Rio)

Organisation aims and activities: The key objectives of the COAV website are to document cases of children and youth involved in armed groups in countries that are not at war; produce and make available information on this issue; inform the public and the international community on the problem; raise awareness and share solutions to it.

Website: www.coav.org.br

Howard League for Penal Reform

Organisation aims and activities: The Howard League for Penal Reform is the oldest penal reform charity in the UK. The Howard League for Penal Reform works for a safe society where fewer people are victims of crime; it believes that offenders must make amends for what they have done and change their lives; it believes that community sentences make a person take responsibility and live a law-abiding life in the community.

Website: www.howardleague.org

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