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Child Justice Alliance: A baseline study of children in the criminal justice system in 3 magisterial districts

Jacqui Gallinetti and Daksha Kassan

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2007

Published by

The Child Justice Alliance
c/o Community Law Centre
University of the Western Cape
Private Bag X17
Bellville 7535

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The views expressed in this publication are in all cases those of the writers concerned and do not necessarily reflect the views of the Open Society Foundation for South Africa, the Child Justice Alliance or the Community Law Centre, University of the Western Cape.

ISBN No: 978-1-86808-650-4

Acknowledgements

The Child Justice Alliance wishes to thank the Open Society Foundation for South Africa for its generous financial support in producing this research and publication.

In addition we would like to express our sincere appreciation to Lukas Muntingh for his valuable assistance in editing this report as well as his comments on the two seperate baseline study reports.

We would also like to thank Cheryl Frank for editing this publication.

In relation to the first baseline study we would like to thank the following:

- Julie Berg from the Institute of Criminology at UCT and the field researchers at Wynberg Magistrates Court
- Carmen Domingo Swartz and Christa Jansen van Vuuren at The Defence, Peace, Safety and Security (DPSS) Crime Prevention (CP) Research Group (formerly the Crime Prevention Centre) at the Council for Scientific and Industrial Research (CSIR) and the field researchers at Pretoria Magistrates Court
- Sue Padayachee from Lawyers for Human Rights, Pietermartizburg and the field researchers at Pietermaritzburg Magistrates Court
- Mandy Charles from the Community Law Centre at UWC
- Nesira Singh from Lawyers for Human Rights, Pietermartizburg

In relation to the second baseline study we would like to thank the following:

- Julie Berg and Ricky Röntsch from the Institute of Criminology at UCT for conducting field research at Wynberg Magistrates Court and co-ordinating and drafting the second baseline study report.
- Carmen Domingo Swartz and Christa Jansen van Vuuren at The Defence, Peace, Safety and Security (DPSS) Crime Prevention (CP) Research Group (formerly the Crime Prevention Centre) at the Council for Scientific and Industrial Research (CSIR) and the field researchers at Pretoria Magistrates Court
- Devani Delomoney and Shantal Naicker from Campus Law Clinic at the University of KwaZulu-Natal and the field researchers at Pietermaritzburg Magistrates Court

Finally we wish to express our thanks to the court officials at Wynberg Magistrates Court, Pretoria Magistrates Court and Pietermaritzburg Magistrates Court, as well as the Department of Justice and Constitutional Development, the National Prosecuting Authority and the Department of Social Development (Western Cape, KwaZulu-Natal and Gauteng) for their support.

Contents

1 Introduction p7

2. The monitoring research project p8

The Child Justice Alliance

3. Methodology p10

3.1 The development of research indicators and tools
3.2 The selection of research sites
3.3 Requests for permission to undertake the research
3.4 Training of field researchers
3.5 Piloting of research tools
3.6 Field research
3.7 Capturing of research data

4 Contextualising the baseline studies p15

4.1 Mapping the criminal justice process for children at present
4.2 Setting the baseline

5. Research findings p17

5.1 Profile of the children whose information appeared on charge sheets during the research
5.1.1 Total number of children
5.1.2 Age profile of the children
5.1.3 Cases where the age of the child was in dispute
5.1.4 Reasons for matter being placed on the court roll

5.2 Crime categories, gender and age distribution
5.2.1 Offence according to age and gender

5.3 Detention of children
5.3.1 Placement of the child

5.4 Assessment
5.4.1 Release of children from court prior to assessment
5.4.2 Recommendations by probation officers

5.5 Diversion

5.6 Court proceedings
5.6.1 Plea
Guilty plea
Not guilty plea
5.6.2 Time period between first appearance and plea
First baseline study
Second baseline study
5.6.3 Time period between first appearance and judgment
First baseline study
Second baseline study
5.6.4 Postponements
5.6.5 Withdrawal of cases

5.7 Sentence
5.7.1 Time period between date of first appearance and date of sentence
First baseline study
Second baseline study
5.7.2 Sentences handed down
5.7.3 Pre-sentence reports

5.8 Referral to a Children's Court

6. Conclusion p44

Annexure 1: Driver group members p45

PART 1
Introduction

In July 2000, the South African Law Commission [Project 106] released the Child Justice Bill (the Bill), together with its Report on Juvenile Justice. After having been revised by State Law Advisors the Bill was introduced into Parliament in 2002.[1] The Bill is aimed at protecting the rights of children accused of committing crimes as well as regulating the system that deals with children. The Bill also seeks to ensure that the roles and responsibilities of all those involved in the process are clearly defined in order to provide for effective implementation. The Bill recognises the fact that children do commit serious offences and that they must be held accountable for their actions as well as take responsibility for the effects of those actions on others. This is achieved through the provision that allows for children to be imprisoned, albeit only after certain prerequisites have been met.

Generally the proposed legislation deals with issues such as police powers and duties, arrest, diversion and court procedures. It also creates a system of child justice courts, which will operate at district court level and deal with all matters pertaining to children in conflict with the law. Children will no longer appear in courts designated for adults; rather, they will be adjudicated by a court staffed by a magistrate and prosecutor trained in child justice. Furthermore, the Bill regulates the detention and release of children, providing definite guidelines for the exercise of judicial discretion in detaining children in prison while awaiting trial.

The Bill has sought to address the problems currently encountered with regard to children that come into conflict with the law. The effect of the Bill being adopted as legislation will be to revolutionise the criminal justice system in South Africa in so far as it affects children in conflict with the law. While ensuring that a child's sense of dignity and self-worth is recognised, the Bill also provides for mechanisms that ensure that a child respects the rights of others. In this regard, the formal introduction of diversion and the underlying principles of restorative justice into South Africa's child justice system echo the move away from punitive forms of criminal justice and encapsulate the spirit of the United Nations Convention on the Rights of the Child and the South African Constitution. The Bill encompasses the ultimate goal of achieving a system that allows child offenders to participate in a meaningful process of taking responsibility for their actions, making amends for those actions and reducing re-offending.

At the time of writing, the Bill had not been passed by Parliament. It was debated at length in 2003; but nothing more has happened since then. During the Parliamentary debates certain key issues in the Bill were changed, such as the age of imprisonment and the age of children who may be detained in prison awaiting trial. However, most of the core provisions of the Bill that provide for a new and separate child justice system have remained, i.e. diversion, assessment, the preliminary inquiry and alternative sentences.[2]

These changes are not final and may yet be revisited once the Bill continues to be deliberated upon in Parliament. It is hoped that the information that emerges from this research report may inform future debates on the Bill.

1 As Bill 49 of 2002.

2 However, the actual content of these provisions has been radically reworked by the Portfolio Committee on Justice and Constitutional Development during the Parliamentary debates.

PART 2

The monitoring research project

This research report constitutes an attempt to obtain baseline data on the present criminal justice processes pertaining to children in three magisterial districts, namely Wynberg in the Western Cape, Pretoria in Gauteng and Pietermaritzburg in KwaZulu-Natal. It is intended to form the basis of ongoing monitoring research that will examine the implementation of the Child Justice Bill, once enacted. Therefore, this study represents the first phase of a broader monitoring process.

This report represents two separate baseline studies undertaken between 2005 and 2007.[3] The first baseline study was undertaken from June 2005 until the end of September 2005.[4] The second one was conducted from September 2006 until mid-February 2007 (with a break between mid-December and mid-January).[5]

When the Bill is enacted and promulgated, further research will be undertaken to monitor the implementation of the legislation. This baseline research will inform the findings of that monitoring research as these baseline studies will provide comparative data against which the implementation may be measured to establish whether the Child Justice Bill is indeed having the intended results.

The baseline studies consist of quantitative research. The decision to monitor using quantitative data only was based on the fact that information of a qualitative nature may only be available once the Bill (Child Justice Act) has been in operation for at least six months. In addition, the quantitative data will potentially provide baseline data once the Act has been implemented for a while.

2.1 The Child Justice Alliance

This research was undertaken by the Child Justice Alliance (the Alliance). The Alliance was formed in February 2001. From 2001 to 2003, the Alliance undertook an awareness campaign around the Bill and focused on garnering support for it during the Parliamentary process.

However, from 2003, once the public hearings on the Bill were completed, the work of the Alliance took on a new focus. Its work then concentrated primarily on research projects and awareness-raising activities relating to the content of the Bill, the implementation of the Bill, once it is enacted and the monitoring such implementation.

The Alliance consists of over 400 members and friends, who are either civil society organisations or concerned individuals. It is run by a driver group comprising a core of eight organisations that has now been expanded to twelve. For a breakdown of the members of the driver group, see Annexure 1.

3 The separate reports for each baseline study are available on request from the Community Law Centre or they can be accessed at www.childjustice.org.za.

4 Gallinetti, J and Kassan, D (eds) (2006) *Consolidated research on the criminal justice system pertaining to children in three magisterial districts*. Child Justice Alliance.

5 Berg, J with Röntsch, R (2007) *Child Justice Alliance Court Monitoring Project, Phase Two: Report on the Attendance of Children in Court at Three Magisterial Districts from September to December 2006 and from January to February 2007*, Child Justice Alliance.

The selection of these organisations was based on their expertise and experience in the field of children's rights, available resources and shared interests. The primary responsibility for the co-ordination of the activities of the Child Justice Alliance rests with the Children's Rights Project of the Community Law Centre (CLC).

This research report outlines the methodology and main research findings from the two baseline studies. The research findings illustrate the current functioning of the criminal justice system in the three sites in relation to children. They include information about assessment, detention awaiting trial, diversion and the sentencing of children. This report analyses this information with a view to noting gaps and problems, and noting problems that exist in the system that should be resolved by the new child justice legislationwould require attention.

PART 3

Methodology

The research was aimed at monitoring the current practice of the criminal justice system in relation to children, in order to obtain baseline information on the management of child offenders in the criminal justice system, with specific reference to:

- the general principles and objects of the Child Justice Bill, in so far as there is adherence thereto in the absence of the Act;
- methods of securing attendance of the child at the first court appearance;
- placement of the child awaiting trial;
- court process;
- assessment of the child by a probation officer;
- access to diversion; and
- the sentencing of children convicted of an offence.

The methodology included a range of steps aimed at establishing a sound and credible basis for the research. The methodology was also contructed with the recognition that this study constitutes the first in a series of research projects that will commence once the Bill is passed. As the studies will form the basis for measuring the implementation of the new child justice legislation, the methodology was designed in such a way that future research can be conducted in the same manner to allow for credible comparison.

3.1 The development of research indicators and tools

In July 2004, the Gender, Health and Justice Research Unit at the University of Cape Town was contracted to develop monitoring indicators for this research. The brief to them was to use the Criminal Procedure Act and Child Justice Bill as the primary documents against which the indicators should be drafted. To inform the final indicators, a number of meetings with the members of the driver group of the Alliance were held in order to get their expert input on focus areas for research. The indicators were finalised in December 2004 and are available at www.childjustice.org.za.

Once the indicators were finalised, the Gender, Health and Justice Research Unit developed the actual research tools that were to be applied at the research sites during the field research. The tools were finalised in May 2005, again with inputs from members of the driver group of the Child Justice Alliance. In total, four research tools were developed. Three of these related to the collection of information from records, and one to serve as a template to record information relating to actual court proceedings via observation. The tools were:

- charge sheet template;
- police docket template;
- probation records template; and
- observation template.

3.2 The selection of research sites

It was recognised at the outset that the selection of the research sites would be crucial. Prior to selecting the sites, the following issues were discussed in detail: the number of children arrested at a site, sites where there were amenable magistrates (to facilitate access to information), sites where the role-players had a greater knowledge of the Bill versus sites where there was no such awareness of the Bill, functionality of the sites, sites where juvenile courts existed, sites near a university so that students could be employed to do the field research, the rural versus urban sites, as well as the availability of resources. Following these discussions, the driver group agreed that the monitoring would be undertaken at the following sites: Pretoria, Mitchell's Plain and Durban or Pietermaritzburg. The reasons for the selection of these included the fact that the courts had good resources and that all three locations had NGOs and universities in the area. The sites that were ultimately selected were Pretoria, Wynberg and Pietermaritzburg once the research organisations were chosen, on account of the good relationships that existed between courts in those areas and the organisations doing the research.

The Pretoria Juvenile Court is situated in Pretoria. The court has a dedicated magistrate and prosecutor. The Pietermaritzburg Court is one of busiest courts serving the capital of KwaZulu-Natal and, at regional court level, the outlying Midlands areas such as New Hanover, Greytown, Camperdown and Cato Ridge. The juvenile court has one presiding officer, one prosecutor, an interpreter and two court orderlies. The Wynberg Magistrate's Court serves the largest magisterial district in the country. It has a dedicated juvenile court, with a magistrate, prosecutor, court orderlies and a probation officer situated at the court to undertake assessments. The Wynberg juvenile court serves numerous suburbs including Hout Bay, Constantia, Retreat and Grassy Park.

3.3 Requests for permission to undertake the research

Given that the field research was to acquire information at magistrate's courts, official documents and various departmental officials, it was necessary to obtain the permission from relevant authorities before proceeding.

For both baseline studies letters seeking permission, setting out the scope and purpose of the research as well as the research methodology, were sent to the following:

- The Department of Justice and Constitutional Development (DoJ) – to conduct research at courts and obtain access to charge sheets;
- The National Prosecuting Authority (NPA) – to conduct research at courts and obtain access to charge sheets;
- Provincial departments of Social Development (Western Cape, Gauteng and KwaZulu-Natal) – to obtain access to probation records; and
- The South African Police Service, Legal Services (SAPS) – to obtain access to police dockets.

With the exception of SAPS, permission was obtained from all of the above departments for the first baseline study. In a letter dated 7 April 2005, SAPS refused access to police dockets in cases "not yet finalised". It was therefore decided not to pursue the research in relation to police dockets. To maintain consistency between the first and second baseline studies, the issue of police dockets was not pursued for the second study. Also in relation to the second baseline study, following numerous attempts to secure permission from the KwaZulu-Natal Department of Social Development for access to probation records, written permission was not forthcoming, despite verbal communications that in principle there would be no objection. Therefore these data are not available for the second baseline study.

Following the permission that was granted, each research organisation tasked with the research proceeded to obtain permission from the relevant officials at each magistrate's court.

3.4 Training of field researchers

Prior to both baseline studies commencing, training workshops were held with the field researchers appointed by the relevant organisations responsible for the field research.[6] The training sessions included:

- an introduction to child justice and the criminal justice system;
- an overview of the monitoring research project;
- a discussion on research ethics;
- a discussion on court process, charge sheets, probation reports and the relevant role-players in the criminal justice system;
- application of the research tools; and
- reporting requirements.

The purpose of the training was to explain the aims of the research, prepare the field researchers for the application of the research tools and equip them, as far as possible, with knowledge of how the present child justice system works in order to achieve consistency in research at the three sites, for both baseline studies.

3.5 Piloting of research tools

Once the research tools had been developed and the field researchers had been trained for the first baseline study, the tools were piloted over two days during May 2005. The purpose was to determine the suitability, effectiveness and applicability of the research tools. The pilot constituted a simulated version of the actual field work that was expected to be undertaken. Once the pilot was completed, written feedback relating to the research tools was provided and adjustments were made to the research tools, which were then finalised. The same tools were used in the second baseline study, with some minor adjustments based on the findings of the first baseline study. For example, the tools now required information on the reasons for sentence if a sentence of direct imprisonment had been imposed on a child.

Prior to the commencement of the second baseline study, the field researchers undertook a two-day "testing" of the tools as they were new to the research project. While this did not constitute a further pilot of the tools, it did allow the field researchers to become acquainted with the application of the tools and the court process.

6 The field research in respect of the first baseline study was undertaken by the Institute of Criminology (Wynberg); Lawyers for Human Rights (Pietermaritzburg) and Council of Scientific and Industrial Research (Pretoria). The organisations remained the same for the second baseline study, with the exception of the Campus Law Clinic (University of KwaZulu-Natal) undertaking the research in Pietermaritzburg instead of Lawyers for Human Rights. The driver group of the Child Justice Alliance decided that it would be appropriate and expedient to appoint organisations that served on the driver group structure to undertake the research. This decision was based on the fact that the relevant organisations had a good working knowledge of child justice, had an intimate understanding of the purpose and objects of the research and could source and manage field researchers to undertake the research. In addition, because of the limited resources available to undertake the research, it would have to be carried out in close vicinity of the research organisation, with minimal travel involved. The Community Law Centre (CLC) supervised the first baseline study and consolidated all the findings into a separate report. For the second baseline study it was decided that the Institute of Criminology (University of Cape Town) take up the role of supervising and coordinating the second baseline study, housing all the data and, on completion of the research, compiling a consolidated report on the findings at all three courts. This decision was based on difficulties in merging the findings of the first baseline study, as each site had compiled a separate report which the CLC was then assigned to merge into a consolidated report. Attempting to merge the different styles and content proved to be a very difficult task, hence assigning the housing, collation and consolidation of the data to one site in the production of a single report for the second baseline study.

3.6 Field research

For the first baseline study the field research commenced at the beginning of June 2005 and was completed by the end of September 2005. The field research was conducted by two field researchers on any two days of a week, every week over a four-month period. The research involved the application of the research tools including data collection on court documents and probation records, as well as interviews with probation officers relating to the number of cases that were dealt with by them on the particular day that the relevant field researcher attended court. The researchers had to collect information on and apply the tools to all the cases that were dealt with at the relevant court on the days that they were stationed there each week.[7]

For the second baseline study the field work took place for two days per week from 25 September 2006 to 15 December 2006 and then recommenced on 15 January 2007 to 16 February 2007. The fact that the field workers at the sites were university students paid to conduct the monitoring had to be taken into account, as well as the impact that the seasonal holidays would have on court proceedings, hence the one-month suspension of the research during this time. It must be noted that some of the research was conducted at Pietermaritzburg Court after 16 February 2007 (concluding on 21 February 2007) due to a change in personnel undertaking the research and the need to make up for the times when court was not attended during the research period.

3.7 Capturing of research data

Prior to the commencement of the first baseline study, the Child Justice Alliance made arrangements for the design and development of a database onto which all the information would be captured. It was intended to allow for consistent data-capturing and the generation of similar reports for all three sites to allow for the continuous interpretation of the research data. However, due to long delays occasioned by misunderstandings between the coordinators and the database developers, the database was not accessible during the actual field work and only came into operation after the completion of the field research. While it was originally envisaged that data would be captured on a weekly basis, the research organisations had to transcribe all information from hard-copy to electronic format after September 2005. Further delays resulted from fact that there had been no trial data-capturing process and problems in the system had to be addressed at that stage.

Due to the fact that the database had not been ready during for the first baseline study, many problems in relation to the database only came to light at the end of the field research. These problems were mostly of a technical nature. Among other things, the database limited the types of information that could be entered and a review had to be undertaken of how and why the database was excluding and/or incorrectly allocating information. This resulted in much of the data having to be manually counted by the researchers, In fact, while the database was meant to facilitate easy capturing and access to the data, the fact that manual reviews of data needed to be conducted slowed down the research process. Other problems were experienced with the database such as the user-friendliness of outputs for the purposes of developing graphs and tables. These problems were resolved by multiple manual recounts of the data (to ensure the accuracy of the information) and the researchers ultimately agreeing on a set of rules regarding the interpretation of the data.

7 Towards the end of the research Lawyers for Human Rights (LHR) reported that their field researchers had not been capturing the data as specified at the outset of the study. The LHR research supervisor then obtained all the dockets and assessment sheets that were on the roll for the days that the field researchers were supposed to have collected the data and reconstructed the necessary data.

Notwithstanding these issues, the use of the database did prompt data capturers to conduct cross-checks of all the electronic data with the data collection tools, and to discuss amongst themselves the nuances of the data-capturing process, thereby forcing a systematic check on the validity and reliability of the data. The database also provided a reference point where the researchers could find and review data. Despite the many problems encountered with the database, it provided a useful point of contact for the researchers who were dispersed across the three sites.

For the second baseline study it was decided that the Institute of Criminology would be responsible for management of the database. A new service-provider was commissioned to take over the running of the database and was assigned the task of ensuring that the database would allow for more user-friendly and accurate retrieval of data reports. Thus various changes were made to the database since the first baseline study to eliminate the need for a manual count of research templates.

The capturing of data onto the database for the second baseline study commenced in early November 2006, and by mid-January 2007 all the 2006 data had been captured, with the exception of the the data collected in Pietermaritzburg in December 2006. This had been delayed by unforeseen circumstances at the University of KwaZulu-Natal Campus Law Clinic in December/January. Overall this system worked except for occasional delays in receiving data from the field research sites.

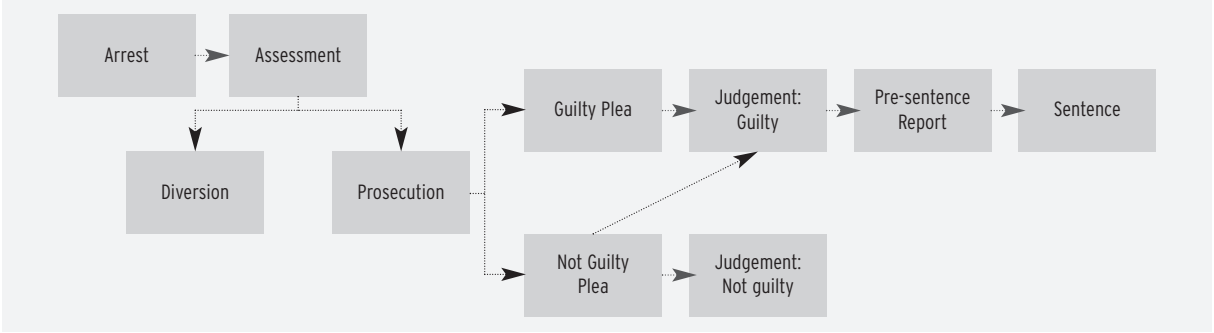
PART 4

Contextualising the baseline studies

4.1 Mapping the criminal justice process for children at present

When a child enters the criminal justice system, various procedures have to be followed. These relate to procedures contained in the Criminal Procedure Act 51 of 1977 or practice that has developed but that has not yet been legislated, such as diversion, assessment and the provision of pre-sentence reports.[8]

To contextualise the findings of the two baseline studies, the following section describes the journey a child might take through the criminal justice system once accused of committing an offence.



4.2 Setting the baseline

In the two baseline studies, a number of indicators were used to capture information relevant to children proceeding through the criminal justice system. The findings of each of the individual baseline studies are available at www.childjustice.org.za. In drafting the present report, which seeks to provide consolidated information related to the findings of both reports, it was decided to present the findings in a combined baseline that serves the following two purposes:

- provide insight into the functioning of the current criminal justice system pertaining to children, and,
- provide data against which the implementation of the Child Justice Bill (once enacted) may be measured.

In order to achieve the second purpose above, the combined baseline would have to provide information on certain key aspects of the child justice system that would most likely be affected by the introduction of the Child Justice Bill. In addition, information regarding children entering the criminal justice system (such as age, gender and offence profile) was considered essential in order to contextualise issues such as age and criminal capacity and children awaiting trial in prison.

8 While the Probation Services Act 116 of 1991 as amended provides for diversion and assessments, this legislation is only binding on the Department of Social Development and creates obligations for probation officers alone. There is no legislation within the criminal justice system regulating these practices. Likewise, there is no legislative framework for pre-sentence reports and it is case law that has created an obligation on presiding officers to obtain such reports for children prior to handing down a sentence.

Therefore this report covers the following:

- Profile of the children from charge sheets: total number of children; age ; gender; cases in which the child's age was in dispute, and reasons for matters being placed on the roll;
- Crime categories according to the age and gender of the child;
- Detention of children: the types of placement, and placements made according to the age of the child;
- Assessments: in how many matters children were released prior to being assessed; the nature of the recommendations made by probation officers as to the disposition of the matter, and placement;
- Diversion: how many diversions occurred, diversion according to age and the types of diversion referrals;
- Court proceedings: the nature and number of pleas according to the age of the children; the time that elapsed between the first appearance and plea and the first appearance and judgment; types of post-ponements, and the number of withdrawals per court;
- Sentence: the time that elapsed between the first appearance and sentence; types of sentences handed down per court, and the availability of pre-sentence reports;
- The number of referrals to children's courts.

PART 5

Research findings

Selected findings from both baseline studies are presented below.[9] While a wide range of information was obtained relating to the management of children in the present criminal justice system, only key findings are presented here in order to illustrate baseline information on the following issues:

- profile of children;
- placement of children;
- assessment of children;
- diversion;
- court process; and
- sentence.

The information presented was obtained from an analysis of charge sheets. In the first baseline study in Pretoria, a total of 494 charge sheets were analysed. These charge sheets included information on 459 children (under the age of 18 years). Some of the charge sheets included information on persons who were 18 and older and were not counted for the purposes of this research. At Wynberg Court, 359 charge sheets were collected during the four-month monitoring project. Only 231 of these were actually analysed due to the fact that the balance of charge sheets contained such minimal information that they were impossible to include. Accordingly, information was provided on 286 children. At Pietermaritzburg Court, 408 charge sheets were analysed and these provided information on a total of 421 children.

During the second baseline study, 489 charge sheets were recorded from Pretoria Court during the research period. Of these, 301 of these were analysed, involving 504 children. At Pietermaritzburg Court, 278 cases charge sheets were recorded during the research period. Of these, 125 were analysed and these involved 216 children. At Wynberg Court, 408 cases were recorded during the research period. Of these, 285 were analysed and these involved 473 children.

9 The separate baseline study reports are available on www.childjustice.org.za.

Table 1: Number of cases and children recorded per site and per study

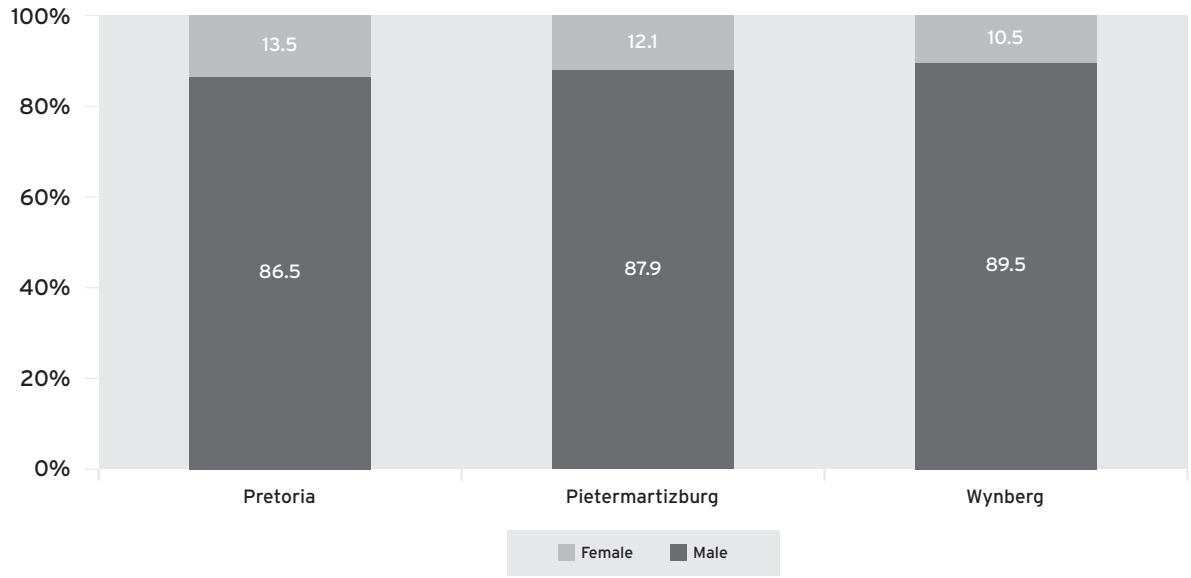
Study	Category	Pretoria	PMB	Wynberg	Total
First	Cases	494	408	231	1 133[10]
	Children	459	421	286	1 166
Second	Cases	301	125	285	711[11]
	Children	504	216	473	1 193
Total cases		795	533	516	1 844
Total children		963	637	759	2 359
Percentages					
First	Cases	43.6	36	20.4	100
	Children	39.4	36.1	24.5	100
Second	Cases	42.3	17.6	40.1	100
	Children	42.2	18.1	39.6	100

5.1 Profile of the children whose information appeared on charge sheets during the research

5.1.1 Total number of children

In the first baseline study, the details relating to total of 1 166 children were captured (Wynberg 24.5%; Pietermaritzburg 36.1% and Pretoria 39.4%). Similarly, in the second baseline study the details of a total of 1 193 children were captured (Wynberg 39.6%; Pietermaritzburg 18.1%; Pretoria 42.2%). So while the figures for each court differed, the total number of children appearing over two sets of four months each a year apart is very similar. What is puzzling is the marked difference between the number of children appearing in Wynberg and Pietermaritzburg over the two studies respectively. No clear reason could be found for this. The following graph illustrates the total number of children according to their gender for both studies.

Chart 1: Overall gender profile for the three sites and two studies



10 This total constitutes the total number of charge sheets that was analysed during the first baseline study.

11 This total constitutes the total number of charge sheets that was analysed during the second baseline study.

The data indicated that 87.8% of the children appearing in the three courts were male (Wynberg n= 679, Pretoria n= 833 and Pietermaritzburg n=560).[12]

5.1.2 Age profile of the children

The age profile of the children in this study is represented in three categories: under 10 years, between the ages of 10 and 14 years,[13] and those who are over 14 years of age but under 18. This categorisation was followed due to the fact that the Child Justice Bill raises the age of criminal capacity to 10 years and retains the rebuttable presumption that children lack criminal capacity between the ages of 10 and 14 years. It was believed that this age differentiation would illustrate the number of children at present being prosecuted who would not be so prosecuted under the new legislation. In addition, as the Child Justice Bill provides specific steps that require the State to apply its mind to the prosecution of a child between 10 and 14 years (which do not presently exist), it was decided to collect information on the number of children being prosecuted currently to compare this information with the number of those who would be similarly prosecuted once the Bill is enacted.

Table 2: Gender and age profile per court; percentages

Gender and age category	Wynberg	PMB	Pretoria	Overall average
Male <10 yrs	0.1	0.0	0.3	0.1
Female <10yrs	0.0	0.0	0.0	0.0
Male ≥10 <14 yrs	5.4	3.0	3.6	4.0
Female ≥10 <14 yrs	0.8	1.6	0.8	1.1
Male ≥14 yrs	83.9	84.9	82.6	83.8
Female ≥14 yrs	9.7	10.5	12.7	11.0
Total	100	100	100	
N=	759	637	963	2 359

The figures indicate that while there are very few children under 10 being prosecuted (n=4), such prosecutions are still occurring. This constitutes 0.17 % of the total number of children. It may be argued that raising the age of criminal capacity to 10 years as is contemplated by the Child Justice Bill would not make a substantial difference to the number of prosecutions of young children.[14]

More interesting are the results relating to children between 10 and 14. This category constituted 4.02% of the total number of children in the study. While this is not a significant percentage, the State nevertheless had to prove that these children were criminally responsible. While the onus on the State will remain the same under the Child Justice Bill, the State will, in addition, have to ensure that it has applied its mind to the prosecution of children in this age group. The Child Justice Bill creates the requirement that a certificate be issued by the Director of Public Prosecutions (DPP) indicating the State's intention to prosecute. This provision was introduced to ensure that the test for criminal responsibility is properly considered and applied by the State. It will be interesting to see whether this figure of 4.02% would decrease or increase due to the introduction of the certificate.

12 This accords with findings from previous research on children in conflict with the law that show that child offenders are mostly male. See for example Muntingh L (ed) (2003) *Children in conflict with the law: A compendium of child justice statistics 1995-2001* (study commissioned by the Child Justice Alliance) – hereinafter referred to as the Muntingh study.

13 This category of children includes children who are aged 10, 11, 12 and 13 years. It excludes children who are 14 years of age.

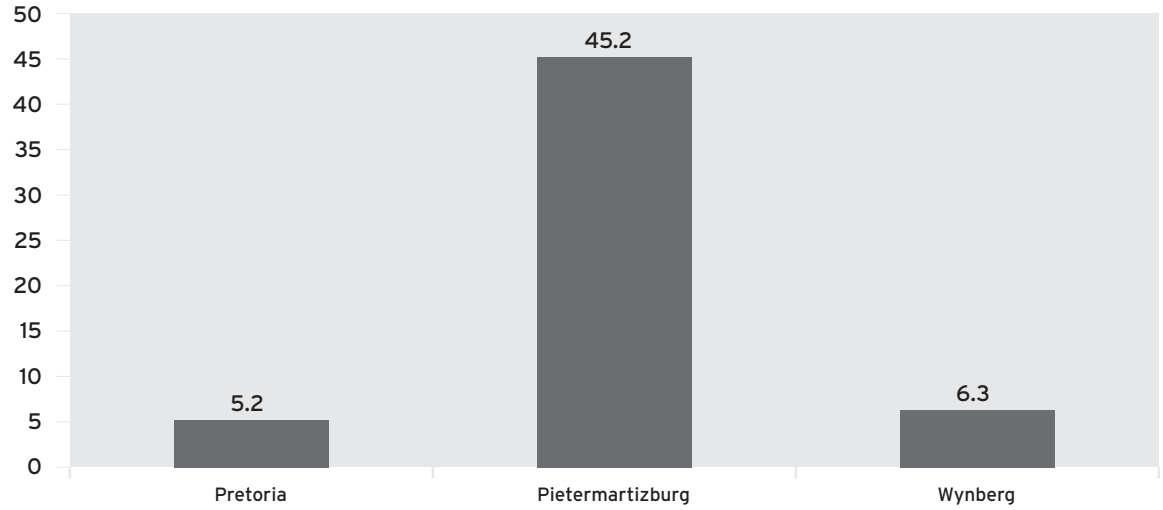
14 This table indicates that the majority of children coming into conflict with the law are over 14 years. Again this accords with previous research such as the Muntingh study referred to above.

5.1.3 Cases where the age of the child was in dispute

The Discussion Paper of the South African Law Reform Commission, Project 106, noted that it is not uncommon for South African children to be unaware of their ages and dates of birth; in some cases even the parents are unable to provide particulars in this regard.[15] The Discussion Paper also points out that where legislation contains different provisions for different ages, the issue of age determination is placed firmly on the agenda. Therefore, various proposals were made that culminated in specific provisions in the Bill to assist with age determination at the assessment stage. The information obtained in this study as to the numbers of cases where the age of the child is in dispute is intended to form the basis against which the success of the provisions of the Child Justice Bill may be measured once it is enacted.

The following graph represents the total number of cases in which the age of a child was in dispute for both baseline studies.

Chart 2: Percentage of cases per court where the age of the child was in dispute



In the first baseline study, in Pietermaritzburg, a disproportionately high number of cases involved a dispute over the child's age in 49.98% of cases. Pretoria and Wynberg had significantly fewer cases where the child's age was in dispute (3.3% and 1.7% respectively).

Likewise in the second baseline study, of all the cases appearing at Wynberg, 9% of them involved a dispute over age, while this was the case for 40% at Pietermaritzburg and 7% at Pretoria. This illustrated a continuation of the trend identified in the first baseline study. These findings are open to a number of interpretations, namely that Wynberg and Pretoria are either doing their assessments well, or the court is not engaging in age determinations; or Pietermaritzburg's assessments of children are not being completed properly, or the court is overly concerned with the child's age. On the other hand, the possibility exists that most children appearing in the Pietermaritzburg Court were born in the rural areas and did not have their births registered, thereby resulting in a dispute over the child's age.

15 Discussion Paper 79, Project 106, 1998, paragraph 6.52.

5.1.4 Reasons for matter being placed on the court roll

There have been many reports of delays in court that result in children's matters not being dealt with expediently, causing them to be held in detention awaiting trial for long periods of time. The field researchers were therefore requested to record the reasons for cases appearing in court on the days that they attended court in order to determine the nature of court proceedings that most frequently occur on any particular day.

Table 3: Reasons for matters placed on the role; percentages and overall average

Reason	Wynberg	PMB	Pretoria	Average
Postponement	15.0	35.8	36.5	29.1
Other	25.0	8.9	24.1	19.4
Plea	22.2	19.5	4.8	15.5
First appearance	15.5	10.7	15.9	14.0
Withdrawal of charge	2.7	6.0	6.7	5.1
Sentence	3.7	7.4	1.3	4.1
Trial	3.6	7.4	1.0	4.0
Unknown	6.5	2.2	3.1	3.9
Bail application	5.1	0.9	0.0	2.0
Plea and trial	0.0	0.0	4.6	1.5
Age determination	0.9	0.6	2.0	1.2
Judgement	0.0	0.6	0.0	0.2
Total	100	100	100	
N=	788	637	983	2 408

The Child Justice Bill lengthens the remand time for children in custody from 14 days to 30 days for children in prison, and from 30 days to 60 days for children in welfare facilities. While the reasons for postponement were not always clear, the most frequent reason for children appearing in court has been a postponement; on average in 29.1% of cases. It is also noted that only 4% of cases are set down for trial and a further 4% for sentencing. The lengthening of the time periods for children to be brought before court when in detention[16] will hopefully ensure a speedier finalisation of trials (as this will ensure more time for police investigation and subpoenaing witnesses, for example) as well as a less congested court roll. It will be interesting to see the effect of the enactment of the Child Justice Bill on these figures. These figures will be particularly relevant to assessing whether the number of children appearing for plea or trial will decrease once the preliminary inquiry and the regulation of diversion are introduced.

16 At present children who are in detention are brought before court every 14 days. In terms of the Child Justice Bill this will change to 30 days for children detained in prison and 60 days for children detained in welfare facilities such as places of safety or secure care facilities.

5.2 Crime categories, gender and age distribution[17]

The following table illustrates the prevalence of the types of offences committed by children in both studies, disaggregated according to each site.[18]

Table 4: Offence profile per court; percentages

Court	Property	Violent	Victimless	Drug-related	Total	N=
Wynberg	42.7	45.1	6.4	5.9	100	865
PMB	45.0	52.3	1.8	1.0	100	616
Pretoria	55.5	30.9	5.3	8.2	100	974
Average	47.7	42.8	4.5	5.0		

The above figures confirm the view that children are most commonly charged with property-related offences[19] (47.7%). However, this total only marginally exceeds the number of charges for violent offences (42.8%). In fact, the total combined numbers for both studies indicate that at Wynberg Court (45.1% for violent offences as opposed to 42.7% for property offences) and Pietermaritzburg Court (52.3% for violent offences as opposed to 45% for property offences) children were accused of committing more violent offences than property offences. By and large, the three courts show very similar offence profiles.

In the first baseline study some concerns were raised regarding the nature of the offences with which the children were being charged. Firstly, there seemed to be inconsistency of practice in relation to sexual offences, with these offences only passing through Wynberg Court. Secondly, while shoplifting and the theft of a cell phone essentially constitute theft, all three courts used the separate terms instead of including these offences under theft. This implies that the courts were perhaps treating these two offences separately from theft, which may have implications for sentencing. It raised the question as to what constituted theft and, if shoplifting and the theft of cell phones were singled out, why not subcategorise all other types of theft, for example theft of bicycles or pick-pocketing? Finally, there are some offences that should perhaps be considered for admission of guilt rather than prosecution, in particular offences relating to the contravention of a peace order and driving without a driver's licence. It is surprising that these offences were on the roll.

The findings from the second baseline study illustrate that again in all three courts the most common type of crime for which the children were appearing in court was property theft, followed by violent crimes and then victimless crimes. It seems that more children were being charged with property crimes at Pretoria Court than at the other courts.

17 For a full breakdown of the offence categories for each study see the separate reports at www.childjustice.org.za.

18 The categories appearing in the graph include the following offences: Property offences – theft, theft of a motor vehicle, theft out of a motor vehicle, theft of a cell phone, shoplifting, possession of stolen property, possession of housebreaking and motor vehicle breaking implements, housebreaking and theft, housebreaking with intent to commit offence unknown, fraud, stock theft; Violent and interpersonal offences – kidnapping, malicious injury to property, pointing of firearm, common assault, assault grievous bodily harm, arson, murder, attempted murder, culpable homicide, robbery, armed robbery and attempted robbery, indecent assault, rape, assault of a police officer, resisting arrest, crimen injuria, intimidation, animal abuse; Victimless offences – possession of firearm/ammunition/dangerous weapon, conspiracy, attempt , incitement to commit an offence, contravening a peace order, failure to attend court, perjury, trespass, illegal hawking, tampering with a public phone, driving under the influence of alcohol, negligent driving, driving without a license, driving a motor vehicle without permission, possession of crayfish or perlemoen; Drug offences – possession of drugs and dealing in drugs.

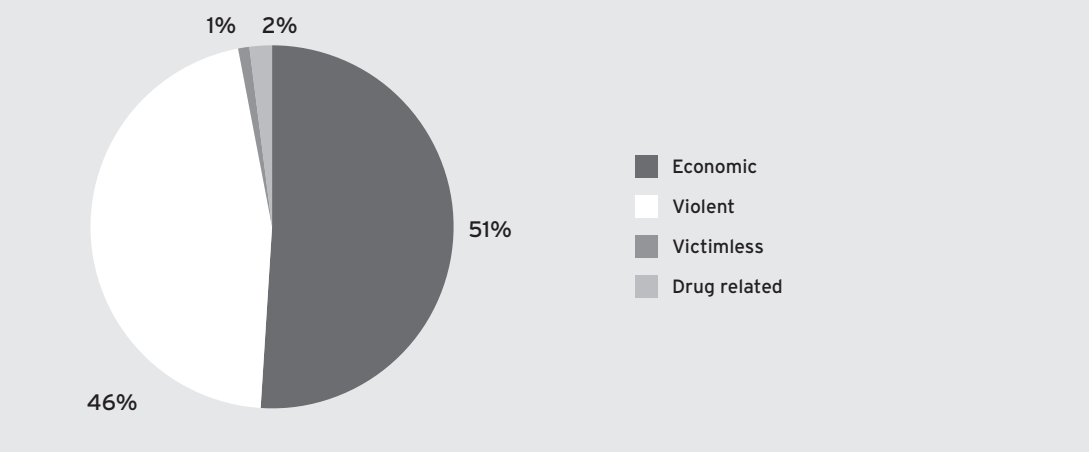
19 Muntingh L (ed) (2003) *Children in conflict with the law: A compendium of child justice statistics 1995-2001* (study commissioned by the Child Justice Alliance)

The main difference between the first and second baseline studies is an increase in the number of violent offences committed by children. For instance, in the first baseline study, 12 children were charged with rape (all from Wynberg) while in the second baseline study 42 children were charged with rape (41 from Wynberg and 1 from Pretoria). Likewise, in the first baseline study there was a total of 109 charges of assault with intent to do grievous bodily harm. In the second baseline study this had increased to a total of 138. Despite these differences, one cannot draw the conclusion that children are committing more violent offences; only a longitudinal study taking a range of factors into account would be able to provide a conclusive answer.

5.2.1 Offence according to age and gender[20]

Similarly, against the backdrop of the findings of the Muntingh study, the two baseline studies have shown that the majority of children accused of offences (89.3%) are boys aged over 14 years. On account of the particular vulnerabilities of children under the age of 14 years (e.g. to awaiting trial in prison and imprisonment as a sentence), as well as female children, the following graphs illustrate the offences that children under the age of 14 years were accused of in both studies, as well as the offences profiles relating to girls in both studies.

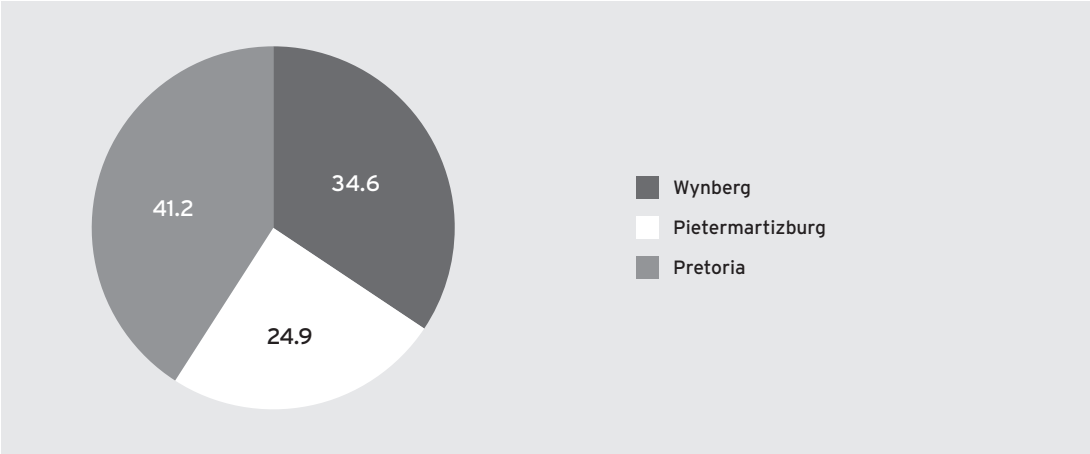
Chart 3: Offence profile relating to children under the age of 14 years, N=124



Although it appears that property offences are most prevalent, there is only a marginal difference between property offences and violent offences. In addition, the violent crimes observed although small in number, are disconcerting, particularly assault with intent to do grievous bodily harm, common assault, attempted murder and indecent assault.

20 For a full breakdown of all offence categories according to age and gender see the separate reports for each study at www.childjustice.org.za

Chart 4: Offence profile of females, N=291



In total, 291 offences of the total offences related to females and 61% of these were property crimes. Again, a proportion of these are violent crimes (33%) such as assault with the intent to commit grievous bodily harm, common assault and attempted murder.

5.3 Detention of children

The detention of children is a high priority issue in relation to children in the criminal justice system. Section 28(1)(g) of the South African Constitution states that detention of children should be a last resort and for the shortest appropriate period of time. There have been numerous developments over the last ten years to limit the detention of children. For example, section 29 of the Correctional Services Act was amended to allow for the release from detention of all children in prison awaiting trial, except in certain limited circumstances. Due to the fact that welfare facilities could not cope with the sudden influx of children, the implementation of this provision was not successful and section 29 was amended again. This amendment, which came into effect in May 1996, provided for the detention in prison of children awaiting trial who were older than 14 years and who had been charged with certain offences. Although it was only intended to be in force for a maximum period of two years, due to a drafting error, the provision still remains on the statute books. Since September 1996, when there were only approximately 600 children awaiting trial in prison on any particular day, this number had steadily increased to the point where, in March 2000, a total of 2 800 children were being detained countrywide. Recent statistics indicate that the average number of children awaiting trial in South African prisons in 2004 was 1 921; a reduction from 2 329 in 2003.[21]

The discussion that follows is intended to describe trends in respect of the placement of children prior to their first appearance in court and while awaiting trial. Given that there is little guidance given to presiding officers at present and that their discretion is very wide, the Bill attempts to curtail that discretion by providing specific guidelines to regulate the placement of children. It makes placement with parents or guardians the first option and seeks to ensure that detention in prison is a measure of last resort. Therefore, the data collected in this and future studies, will enable the assessment the utilisation of detention, and whether the provisions of the Bill, once enacted, impact on this.

21 Muntingh L, "Children in prisons: some good news, some bad news and some questions" August 2005, *Article 40*, Volume 7, Number 2, p 8.

5.3.1 Placement of the child

Table 5 shows that the placement in the care of a parent or guardian is most frequently used by all three courts and in an overall average of 60% of cases. The Wynberg Court is however substantially below this overall average at 49% of cases. Prisons were used on average in 12% of cases and again Wynberg deviates substantially from this average at 16.5%.

Table 5: Placement options utilised per court; percentages and national average

Placement option	Wynberg	PMB	Pretoria	Average
Care of parent/guardian	49.0	64.0	68.2	60.4
Place of safety	12.3	4.4	14.6	10.4
Police cells	1.4	19.2	4.0	8.2
Prison	16.5	9.6	9.8	12.0
Secure care facility	0.4	0.0	0.7	0.4
Unknown	20.4	2.8	2.6	8.6
Total	100	100	100	
N=	759	686	963	2408

Table 6 presents the utilisation of placement options according to the age and gender of the accused. Probably as a result of the offences concerned, older children are slightly less likely to be placed in the care of a parent or guardian. Similarly, it appears that females are more likely to be placed in the care of a parent or guardian than males.

Table 6: Utilisation of placement options per age and gender; percentages and national averages

Age and gender category	Care of parent/ guardian	Place of safety	Police cells	Secure care facility	Prison	Total	N =
Female <10 yrs	0	0	0	0	0	0	0
Male <10 yrs	100	0	0	0	0	100	3
Female ≥10 <14 yrs	86.4	13.6	0	0	0	100	22
Male ≥10 <14 yrs	85.4	6.1	6.1	0	2.4	100	82
Female ≥14 yrs	78.6	6.5	10.5	0.40	4.0	100	248
Male ≥14 yrs	63.7	12.9	8.1	0.49	14.7	100	1854
Average	69.0	6.5	4.1	0.1	3.5		2 209

Various concerns arose from the findings in the first baseline study:

- Firstly, it appears that children in Pietermaritzburg are held in police cells after arrest on a far larger scale than at the other two courts. Likewise, children in Pretoria are sent to Places of Safety far more often than in the other two districts.
- The age breakdown is particularly important as far as placement in prison is concerned because no child may be held in prison awaiting trial if they are below the age of 14. In Pietermaritzburg all the children held in prison were over 14. In Pretoria all the children placed in prison were aged between 14 and 17 years. Likewise, in Wynberg there no children under 14 years were held in prison – they were all males over the age of 14.

- Three girls were placed in prison, despite the general acceptance that prisons do not have adequate facilities to hold female children separately to adults.
- Finally, 97 children were placed in prison and 141 in police cells, yet only one child was placed in a secure care facility, despite the fact that all these courts have ready access to secure care facilities. In addition, the number of children in places of safety is also not as high as children placed in police cells, and the number of children placed in prison is not significantly lower than that of children placed in places of safety. It should be noted from the offence tables listed above that the children involved in the study were mainly charged with property offences and were appearing in district courts. Children charged with serious violent offences that are tried in regional courts are more likely to be held in prison.

The second baseline study again revealed that the preferred placement option for children was with a parent or guardian (65% of placements). However, there are still causes for concern:

- The study noted a disturbing trend at Wynberg in that a much larger proportion of children was being held in prison (n= 120) than was the case during the first baseline study (n=5). This may be due to the lack of available space for children in alternative facilities, or the fact that Wynberg had a slightly higher rate of violent/interpersonal crimes than the other sites, with more children appearing in court for rape than at the other courts. This may have resulted in the court opting for prison as a placement option due to the seriousness of the offence.
- In Wynbert of critical concern is the fact that two boys under the age of 14 years were held in prison at Wynberg on charges of theft and indecent assault. In terms of section 29 of the Correctional Services Act, such detention is illegal.
- In addition, the second baseline study again revealed that Pietermaritzburg was making use of placements in prison more often than the other courts; however, the number of placements in the second baseline study (n=33) was considerably lower than in the first (n=99).
- Again, placement in a secure care facility was the least preferred placement option, with a total of nine such placements across all the courts.

What is promising is that both baseline studies revealed that the courts are attempting to ensure that children are released into the care of their parent or guardian in most instances; however it is of concern that prisons and police cells are used as placement options instead of secure care facilities, despite the fact that such facilities are within travelling distance from all three courts.[22]

5.4 Assessment

The Child Justice Bill makes provision for a framework whereby the assessment of the child becomes a standard procedure in the child justice system. In terms of the proposed legislation, an assessment must occur prior to the child's appearance at the preliminary inquiry. As the preliminary inquiry must occur within 48 hours of arrest, the assessment must occur within that 48 hour period. The result of the assessment is a set of recommendations submitted to the preliminary inquiry magistrate pertaining to the management of the child. This procedure will be

22 It must be acknowledged that the capacities of the relevant secure care facilities to house children during the time that the studies were conducted is unknown and it may well be that they had no space to house any more children. However, in the past decade the Department of Social Development (DSD) has significantly increased its capacity to provide secure care to children. The point has been made by several observers that, despite the high number of children in prison, secure care facilities run by the Department of Social Development are under-utilised and often have available space to accommodate children currently detained in prisons – the occupancy as on 28 February 2006 shows the Western Cape having the highest occupancy rate at 95% and Gauteng and KwaZulu-Natal's occupancy being just over 50%. See Nevill, C and Dissel, A "Children awaiting trial in prison: reversing the trends" July 2006, *Article 40*, Volume 8, Number 1, p 11.

invaluable in determining which children may be dealt with through in processes outside of the criminal justice system. At present the Probation Services Act 116 of 1991, as amended, provides that assessment is one of the core responsibilities of probation officers. However, assessments in the present system are not uniformly applied or regulated and delays often occur. This study will provide a foundation against which to evaluate improvements in the criminal justice system in relation to assessment once the Child Justice Bill is enacted.

5.4.1 Release of children from court prior to assessment

The Child Justice Bill proposes that children should be assessed within 48 hours of arrest. As children have to appear in court within 48 hours of arrest, they should be assessed prior to the first court appearance. This can largely be facilitated by the fact that the child is initially in police custody. If the child is assessed and then released, for example into his or her parents' care, this practice would assist in averting further delays at court as the child has to be assessed before appearing for the first time.

The first baseline study showed that children are released by the police before being assessed. The intention is that the mechanisms provided for in the Child Justice Bill would stop this practice and require police and probation officers to ensure that the child is assessed as early as possible. In Pretoria, out of the 459 children, 51 of them were released before being assessed (11.1%). In Wynberg, 2 out of the 286 children were released (0.7%) and in Pietermaritzburg, 81 out of 421 children were released prior to assessment (19.2%). This seems to indicate that there is a greater problem with assessments at the Pietermaritzburg Court, with children not being assessed before they are released, possibly occasioning delays at court.

The findings from the second baseline study indicated that the situation had worsened. At Wynberg Court, 72 children (15%) were released from court before a probation officer's assessment was made, in Pietermaritzburg 98 children (45%) were released and in Pretoria 356 children (70%) were released prior to assessment. The high number of children being released before an assessment, particularly at Pretoria and Pietermaritzburg again indicates that there is a problem with assessments at these courts.

It will be interesting to note whether the mechanisms introduced in the Bill, once implemented, will impact on the practice at Pretoria, and in particular at Pietermaritzburg Court. The findings illustrate that, although the assessment of arrested children has become a norm within the criminal justice system, without a legislative framework the practice can be applied inconsistently.

In addition to examining the charge sheets to establish whether children were assessed before placement, both baseline studies also examined a limited number of probation records at each court. These probation records did not necessarily correlate to the charge sheets that were examined during the study as the probation records do not form part of the criminal justice records. In addition, the probation records dealt with by probation officers on the days that the field researchers were in court did not necessarily relate to the cases that were being heard in the juvenile court on that day.[23]

Both studies examined the recommendations made by probation officers in relation to 532 children at all three courts. The recommendations of probation officers are a key component of the assessment process as contemplated in the Child Justice Bill and inform the decisions made by the presiding officers at preliminary inquiries. Therefore it will be valuable to assess whether the type of recommendations made by probation officers will change when the Child Justice Bill is enacted.

23 Some of the information elicited from the records related to the children's family circumstances and whether they had previously been involved with a social worker. That information is not reproduced in this report and can be obtained from the separate reports at www.childjustice.org.za.

5.4.2 Recommendations by probation officers

The following table indicates the types of recommendations made by probation officers in both baseline studies relating to the manner in which the matter should be disposed.[24] There is substantial variation between the courts in respect of the probation officers' recommendations, although this may be a function of poor record-keeping.

Table 7: Recommendations made by probation officers per court; percentages and average

Recommendation	Wynberg	PMB	Pretoria	Average
Diversion	24.6	23.5	65.8	38.0
Prosecution	68.5	0.0	27.2	31.9
Formal caution with conditions	0.0	64.7	0.0	21.6
No further action	3.1	2.9	3.3	3.1
Formal caution without conditions	0.0	8.8	0.0	2.9
Unknown	3.8	0.0	3.6	2.5
Total	100	100	100	
N=	130	34	360	524

The following table relates to the types of recommendations made by probation officers in relation to the placement of children in both baseline studies:

Table 8: Recommendations by probation officers regarding placement; percentage and overall averages

Recommendation	Wynberg	PMB	Pretoria	Average
Care of parent or appropriate adult	63.8	88.2	87.8	80.0
Place of safety	14.6	2.9	6.0	7.8
Home-based supervision	1.5	2.9	1.6	2.0
Residential facility/children's home	0.0	0.0	0.8	0.3
Prison	6.9	2.9	0.0	3.3
Other	4.6	0.0	0.5	1.7
Unknown	8.5	0.0	2.4	3.6
Secure care facility	0.0	2.9	0.8	1.3
Total	100	100	100	
N=	130	34	368	532

Again, it is encouraging to note that most recommendations involve placement with an appropriate adult – something that the Bill promotes. However, a startling finding emanates from the above table. Firstly, probation officers have recommended prison on average, for 3.3% of children, and secure care facilities on average for only 1.3%. This concern was raised earlier in the report in relation to the placement of children, and the practice of presiding officers to place children in prison before secure care. This is also reflected in the recommendations of probation officers. It is hoped that once the Child Justice Bill is enacted with provisions requiring residential care placements to be the least restrictive and detention in prison a last resort, this worrying trend will change.

24 It should be noted that there are more recommendations made than there are children regarding the disposition of a case, the reason being that there may have been more than one recommendation in relation to a particular child, e.g. diversion with formal caution.

5.5 Diversion

Diversion involves the referral of cases, where there is sufficient evidence to prosecute, away from the formal criminal court procedures.[25] Diversion can limit children's exposure to the criminal justice system and create opportunities to participate in programmes aimed at reducing the risks of reoffending, including those that relate to restorative justice.[26] Diversion can involve a referral away from the criminal courts conditionally or unconditionally. This illustrates the flexible nature of diversion as a procedure aimed at achieving the result best suited to an individual child. An unconditional diversion can involve, for example, cautioning by a magistrate or presiding officer. A conditional diversion can involve referring the child away from formal court proceedings on condition that the child attends a specified programme or undergoes a restorative justice process such as a family group conference. Often the outcome of such a conference can also include referring a child to a particular programme such as a life skills programme.

The benefits of diversion are many and include the limitation of the child's contact with the criminal justice system, programme interventions that may reduce the risks of further offending as well the avoidance of the stigma of a criminal conviction and record. If the diversion includes a restorative justice process, other benefits may accrue such as the child making amends for the harm that was caused (by, for example, compensating the victim or performing some sort of community service), and enabling victim participation in the process, where appropriate.

It is also useful to note that there are some risks relating to diversion. These have to do with the accused person's rights to a fair trial and due process. It is imperative to ensure that diversion is only utilised in cases where there is a prima facie case against a child. In other words, if the State does not possess sufficient evidence against the child to prosecute the matter, it cannot resort to diversion as a "second prize". The State cannot absolve itself of the onus of proving the guilt of an accused beyond reasonable doubt by making use of diversion to achieve a result that it could otherwise not obtain. This would constitute a serious invasion of the accused person's right to be presumed innocent until proven guilty.

Likewise, an accused person's right to remain silent can potentially be compromised by diversion. Diversion requires that the child accept responsibility for the offence. The danger exists that a child could be unduly influenced into accepting responsibility for an offence at the expense of his or her right to remain silent. This right is inviolable and it is only a voluntary acceptance of responsibility that would give credence to diversion procedures and a rights-based child justice system.

It is therefore important to ensure that diversion is properly regulated. The Bill proposes various forms of diversion. The options range from a formal caution or compulsory school attendance order to the attendance of a specified programme or referral to a programme with a residential element. As diversion is intended to meet the individual needs of a child and, as diversion services are not as readily available in rural areas as they are in urban areas, the Bill allows the preliminary inquiry magistrate to develop individual diversion options that meet the purposes of and standards applicable to diversion in the Bill. This provision allows for flexibility and the utilisation of existing community resources where formal diversion programmes are limited.

This research was designed to assess the extent of diversion in the present system, even though there is no regulatory framework available yet. This will indicate whether prosecutorial discretion is being used in order to further the rights of children. When the Bill is enacted, this information will be useful as baseline data against which to measure the implementation of formal diversion.

25 Muntingh, L (ed) (1995) *Perspectives on Diversion*, NICRO National Office, Cape Town.

26 Skelton, A "Juvenile Justice Reform: Children's Rights and Responsibilities versus Crime Control", in Davel, C J (ed) (1999) *Children's Rights in Transitional Society*, p 93.

In total, the research indicates that 428 children were diverted in both baseline studies (18.1%). This low number may be because children are simply not being diverted,[27] or because courts are not recording the diversions on the charge sheets. The latter may be the likely scenario given that there is no legislative framework for diversion. The following table represents the age and gender of the children that were diverted in both baseline studies:

Table 9: Age and gender profile of children diverted per court; percentages and overall average

Age and gender	Wynberg	PMB	Pretoria	Average
Male <10 yrs	0	0	0.5	0.2
Female <10yrs	0	0	0	0.0
Male ≥ 0 <14 yrs	13.3	14.3	4.4	10.7
Female ≥10 <14yrs	0	0	1.1	0.4
Male ≥14 yrs	73.3	67.3	76.1	72.3
Female ≥14 yrs	13.3	18.4	17.9	16.5
Total	100	100	100	
N=	15	49	364	428

It appears that in both baseline studies a total of 15 (3.5%)[28] children were diverted in Wynberg; 49 (11.5%) in Pietermaritzburg and 364 (85%) in Pretoria. The above information again illustrates inconsistent practice in the different courts for diversion. In other words, while diversions are generally recorded in charge sheets in Pretoria, it may be that diversions are either inconsistently recorded in charge sheets in Wynberg or Pietermaritzburg or very few diversions occur in those courts. These figures illustrate that there is a need for a legislative framework within which procedural certainty can be established. It is hoped that this will be achieved through the Preliminary Inquiry in the Child Justice Bill.

The types of programmes that the children are being diverted to are as follows:

In Pretoria, children who are diverted are referred to NICRO, the Department of Correctional Services (DCS) Drug Programme, the Department of Social Development (DSD) Youth Crime Prevention Programme, National Youth Development Outreach (YDO) and the Restorative Justice Centre (RJC). The breakdown of these referrals is as follows:[29]

27 This could either be because there is a reluctance to divert in the first instance or because children are not qualifying for diversion, e.g. on account of the seriousness of the offence or because they do not acknowledge responsibility for the offence.

28 This represents a percentage of the total number of children that were diverted not the total number of children that appeared during the research.

29 These add up to 392, which is more than the number of children diverted – the reason is that some children were referred to more than one diversion programme.

Table 10: Diversion referrals at Pretoria Court; Numbers and percentages

Programme	N	%
Other	70	17.9
Youth Empowerment Skills at NICRO	62	15.8
Adolescent Development Programme at Youth Development Outreach (YDO)	50	12.8
Drama Therapy at Restorative Justice Centre (RJC)	43	11.0
Youth Offender School (DSD)	37	9.4
Pre-trial Community Service at NICRO	34	8.7
Victim Offender Mediation at RJC	18	4.6
Drug Rehabilitation at NICRO	17	4.3
Youth development outreach	13	3.3
Basic life skills	11	2.8
Unknown	11	2.8
Community Service	6	1.5
SANCA	4	1.0
Family Group Conference at RJC	4	1.0
Youth Crime Prevention Programme at DSD	3	0.8
Eduventor at NICRO	2	0.5
Victim offender mediation	2	0.5
Victim offender mediation at NICRO	1	0.3
Victim offender mediation at YDO	1	0.3
Drug programme at DCS	1	0.3
Anger management and journey of life	1	0.3
Magaliesoord rehabilitation centre	1	0.3
Total	392	100

In Wynberg, the 15 children were diverted to the following interventions:

Table 11: Diversion referrals Wynberg; Numbers and percentages

Programme	N	%
Youth empowerment skills at NICRO	7	46.7
Unknown	4	26.7
SAYStOP programme for young sex offenders	2	13.3
Drug rehabilitation at NICRO	1	6.7
Drug information school (DSD)	1	6.7
Total	15	100

In Pietermaritzburg, children who are diverted are primarily referred to NICRO but are also referred to community service and family group conferences offered by other organisations (however, these organisations are not specified). An analysis of these referrals is presented in Table 12.

Table 12: Diversion referrals Pietermaritzburg; Numbers and percentages

Programme	N	%
Youth Empowerment Skills at NICRO	24	48
Unknown	12	24
Journey Programme at NICRO	4	8
Victim Offender Mediation at NICRO	3	6
Community Service (organisation not specified)	2	4
Pre-trial Community Service at NICRO	1	2
Family Group Conference at NICRO	1	2
Family Group Conference (organisation not specified)	1	2
Drug Rehabilitation at NICRO	1	2
Other	1	2
Total	50	100

It is clear that while Pretoria seems to have a wide range of diversion options available; Pietermaritzburg has to depend heavily on NICRO for diversion services. This can be quite limiting and raises the issue of the need for more diversion programmes.

5.6 Court proceedings

The Child Justice Bill creates a wholly new procedure to facilitate the management of children in conflict with the law, namely, the Preliminary Inquiry, which makes use of current resources and personnel. This inquiry has a number of objectives which include establishing whether a child can be diverted (and if so, identifying a suitable diversion option) and determining whether the child should be detained or released. As the current criminal justice system has no similar procedure, this study was unable to collect information against which to measure the future implementation of the Preliminary Inquiry.

These studies did, however, seek to assess the current functioning and practices of the three juvenile courts. The following information was gathered in relation to the three courts through both baseline studies.[30]

5.6.1 Plea

Table 13: Profile of pleas, percentage and overall averages

Plea	Wynberg	PMB	Pretoria	Average
No. of guilty pleas	39.1	59.4	53.1	50.5
No. of not guilty pleas	12.1	40.2	42.9	31.7
Nature of plea unknown	48.8	0.5	4.1	17.8
Total	100	100	100	
N=	215	219	49	483

30 The information regarding the two separate studies is available at www.childjustice.org.za.

GUILTY PLEA

Table 14: Guilty pleas entered per age and gender per court; percentages and average

Age and gender	Wynberg	PMB	Pretoria	Average
Female <10 yrs	0	0	0	0.0
Male <10 yrs	0	0	0	0.0
Female ≥10 <14 yrs	0	0	3.8	1.3
Male ≥10 <14 yrs	2.4	0	0.0	0.8
Female ≥14 yrs	10.7	12.3	3.8	9.0
Male ≥14 yrs	86.9	87.7	92.3	89.0
Total	84	130	26	240

Of concern is the finding that three children aged between 10 and 14 years pleaded guilty, which constitutes 1.3% of all the children who pleaded guilty. The State bears the onus of proving that children below 14 years of age have criminal responsibility and it is unclear from the research whether the State proved this in these three cases or whether the courts established criminal capacity from the guilty pleas themselves.

This issue was raised in the recent case of *M v S*.[31] In that case, a 13-year-old boy was charged with murder and was tried in the regional court in Pietermaritzburg. He pleaded guilty and in the section 112(2) statement prepared by his legal representative he admitted that his actions were "unlawful and intentional". No other evidence was led and he was found guilty on the basis of his guilty plea. On appeal it was argued that the trial court erred in finding M guilty on the basis of the section 112(2) statement in that the court failed to establish the criminal capacity of M. The appeal court was not convinced and held that as M was 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 words "unlawful and intentional" and noted that the fact that these words were included in the statement implied that the legal representative had canvassed the issue of criminal capacity. An application for leave to appeal on the merits has been lodged.

This is an issue that has not really been addressed in the Child Justice Bill as the issues relate to common law principles of criminal capacity.

NOT GUILTY PLEA

Table 15: Not guilty pleas entered per age and gender per court; percentages and average

Age and Gender	Wynberg	PMB	Pretoria	Average
Female <10yrs	0	0	0	0.0
Male <10 yrs	0	0	0	0.0
Female ≥10 <14 yrs	0	3.4	0	1.1
Male ≥10 <14 yrs	0	1.1	4.8	2.0
Female ≥14 yrs	11.5	2.3	9.5	7.8
Male ≥14 yrs	88.5	93.2	85.7	89.1
Total	100	100	100	
N=	26	88	21	135

31 Discussed in Skelton, A "Examining the age of criminal capacity", August 2006, *Article 40*, Volume 8, Number 1.

5.6.2 Time period between first appearance and plea

There are ongoing concerns expressed about lengthy delays experienced in the criminal justice system. The time periods between first appearance and plea are illustrated below for the random sample used in this study.

It should be noted that this section examines the delays in the two baseline studies separately as opposed to combining the two. The reason for this is that the field research was undertaken during different months of the year and are not directly comparable, as different factors may influence delays at different times of the year, e.g. the second baseline study took place between September and February and, although there was a break from mid-December to mid-January, the holiday period may well have impacted on the delays.

FIRST BASELINE STUDY[32]

Table 16: First study: Delay between first appearance and plea per court and overall average; average and median

	Wynberg	PMB	Pretoria	Overall average
Average No. of days	70	130	162	124
Median No. of days	29	65	150	70
N=	29	165	15	209

SECOND BASELINE STUDY

Table 17: Second study: Delay between first appearance and plea per court and overall average; average and median

	Wynberg	PMB	Pretoria	Overall average
Average No. of days	80	61	220	101
Median No. of days	41	41	132	69
N=	35	32	17	68

It is evident is that the average and median periods in Pretoria Court are inordinately long. In the first baseline study, Pietermaritzburg had longer median and average delays than Wynberg, but this situation was reversed in the second baseline study.

Unfortunately, for the first baseline study, the research did not determine what the reasons for the actual delays were. This can be seen as a shortcoming as the child may well have absconded, thus causing the delay, rather than there having been a fault on the part of the criminal justice system. However, it might also be that the plea was delayed for good reason by either the prosecutor or the defence attorney since once the plea is noted, there is no possibility of withdrawal. Prosecutors may therefore delay the plea because they may still wish to withdraw or divert the matter, but are awaiting further information. Nevertheless, this study has noted the number of postponements that occurred during the research period and the main reasons for these postponements. This information appears later in this report under 5.6.4.

Given that the first baseline study had not gathered information relating to the reasons for the lengthy delays that were observed, it was decided that the second baseline study should gather this information to provide further insight into the functioning of the courts.

32 There are data errors regarding the number of pleas, but the differences are minimal and do not significantly impact on the average and median delays.

The second baseline study also revealed that some matters are taking a long time to be resolved in the district courts. Of concern in relation to these cases is that the offences are not serious ones. For instance, in Pretoria, the average number of days between first appearance and plea is much higher than the other two courts. The reason for this high average is most likely due to the fact that a few cases have been on the roll for lengthy periods. One case involving a 16-year-old male accused of theft had been on the roll for approximately four and a half years. It seems that the lengthy delay was simply due to postponements for either legal aid, disclosure, the accused absence from court, for guardian to be present at court, the accused not being brought to court from prison, for plea and trial, for trial, for attorney to be present or for a further hearing. Another case involving two children had been on the roll for 367 days. One of the children was a 15-year-old male accused of theft and the other was a 17-year-old male accused of shoplifting. It appears that their case had been postponed on three occasions for legal aid, disclosure, for the attorney to be present, because the accused and guardians had been absent ,and then for plea and trial. The other cases at Pretoria had been on the roll for less than a year.

In Pietermaritzburg, however, none of the cases analysed were on the roll for longer than approximately six months.

In Wynberg, the case that had been longest on the roll was one involving a 15-year-old female charged with theft. This had been on the roll for approximately a year and a half. It appears that the reason for this lengthy period on the roll was that the child had been absent from court, a warrant of arrest had been issued, and that it had taken approximately 18 months to locate and arrest the child. The rest of the cases at Wynberg had been on the roll for less than a year.

These findings indicate that lengthy delays cannot be attributed to the functioning of the courts alone. Factors such as the accused or his/her guardian appearing in court when they were meant to, leaving the court with no option but to postpone the matter, also play a role. It is pleasing to see that most of the cases in Wynberg and Pietermaritzburg had been on the roll for less than six months. This is in accordance with the provisions of the Child Justice Bill which stipulates that all matters should be finalised within six months.

5.6.3 Time period between first appearance and judgment

Again, because of the lengthy delays in the criminal justice system at present, this study investigated time delays between all the key procedural stages in a matter in order to lay the basis for determining whether the Child Justice Bill, when enacted, will prevent such delays.

It should be noted that in this category it is possible to have a judgment on first appearance if the accused has pleaded guilty on that date. For children, it is submitted that this may not be the best way to go, as it begs the question of whether the child was assessed or had the opportunity to obtain legal representation or legal aid.

FIRST BASELINE STUDY[33]

Table 18: First study: Delay between first appearance and judgment per court and overall average; average and median

	Wynberg	PMB	Pretoria	Overall
Average No. of days	75	105	520	97
Median No. of days	77	21	127	30
N=	25	49	4	78

33 There may appear to be a discrepancy between the delays between first appearance and plea as compared to the delays between first appearance and judgment - but the data collected for both do not necessarily involve the same case (although in certain instances they might). In addition, there are data errors regarding the number of judgments, but the differences are minimal and do not significantly impact on the average and median delays.

SECOND BASELINE STUDY

Table 19: Second study: Delay between first appearance and judgment per court and overall average; average and median

	Wynberg	PMB	Pretoria	Overall
Average No. of days	106	49	156	110
Median No. of days	41	17	155	69
N=	34	14	7	46

As in the case of the delay between first appearance and plea, there were lengthy delays between first appearance and judgment. Again, the reasons for the delays cannot be determined from this data collected. For both baseline studies Pretoria again seems to be the court where the longest average delays occurred, particularly regarding delays in the court process.

5.6.4 Postponements

As noted, one of the main concerns about the present juvenile justice system is the fact that there are lengthy delays before matters are finalised. This is illustrated by the information listed above relating to the average and median length of delays between the various stages of the criminal justice system. The baseline studies therefore examined the nature of postponements at each site. Given that a case may be postponed for different reasons, the data collected reflect the nature and number of reasons for which matters were postponed. The following results were obtained from both the baseline studies:

Table 20: Profile of reasons for postponements per court; percentages and overall average

Reason	Wynberg	PMB	Pretoria	Average
Postponed for plea/trial/ judgment/sentencing	12.4	15.0	17.6	15.0
Waiting for probation officer's report for sentencing/assessment/ correctional supervision report	17.1	11.4	11.8	13.5
Further investigations	17.1	15.2	4.0	12.1
Legal aid/legal representation absent/ delay on part of legal aid/new attorney	7.7	5.3	13.1	8.7
Absence of accused and guardian/absence of guardian	5.8	7.0	12.9	8.6
Accused person(s) not in court	9.8	10.1	5.5	8.5
Postponed for the completion of a diversion programme	0.0	3.4	13.3	5.6
Postponed for further evidence/partly heard	2.8	6.6	5.0	4.8
Docket/charge sheet not available	3.4	4.0	2.1	3.2
More than one reason	6.9	0.2	0.4	2.5
Reason unknown	1.3	3.2	1.5	2.0
Postponed for further assessment of accused person's age	0.1	4.2	1.7	2.0
Postponed for place of safety placement to become available	4.6	0.0	0.0	1.5
Postponed for disclosure	0.0	0.0	4.0	1.3
Postponed for setting of a regional court/high court date or trial date	1.6	2.7	0.2	1.5
Probation officer absent	3.0	0.0	0.6	1.2
Postponed for bail application	3.0	0.6	0.0	1.2
Witness(es)/complainant absent	1.1	2.1	0.2	1.1
Postponed for witness statement/ forensic report	1.5	0.6	0.2	0.8
Postponed for trial after non-completion of diversion or other programme	0.0	0.0	1.7	0.6
Case transferred to another court	0.3	1.1	0.5	0.6
Mediation	0.0	2.1	0.0	0.7
Postponed for NICRO report	0.0	1.7	0.0	0.6
Postponed for withdrawal of statement by complainant	0.0	0.0	1.0	0.3
Postponed for interpreter	0.3	0.2	0.5	0.3
Postponed to combine different cases against an accused	0.0	0.0	0.7	0.2
Postponed for co-accused to attend court	0.0	1.1	0.0	0.4
Post-diversion assessment	0.0	0.0	0.6	0.2
Pre-trial conference	0.3	0.0	0.2	0.2
DPP's decision	0.0	0.4	0.0	0.1
Separation of trials	0.0	0.4	0.0	0.1
Investigating officer's report	0.0	0.4	0.0	0.1
Compassionate grounds	0.0	0.4	0.0	0.1
Regular magistrate absent	0.0	0.0	0.1	0.0
Postponed for observation	0.0	0.0	0.1	0.0
Postponed for further observation/evaluation after completion of diversion programme	0.1	0.0	0.0	0.0
Trial within a trial	0.0	0.2	0.0	0.1
Evaluation by Child Therapy Centre	0.0	0.0	0.1	0.0
Investigating officer absent	0.0	0.0	0.1	0.0
Forfeiture of bail	0.0	0.2	0.0	0.1
Total	100	100	100	100
N=	743	473	819	2 035

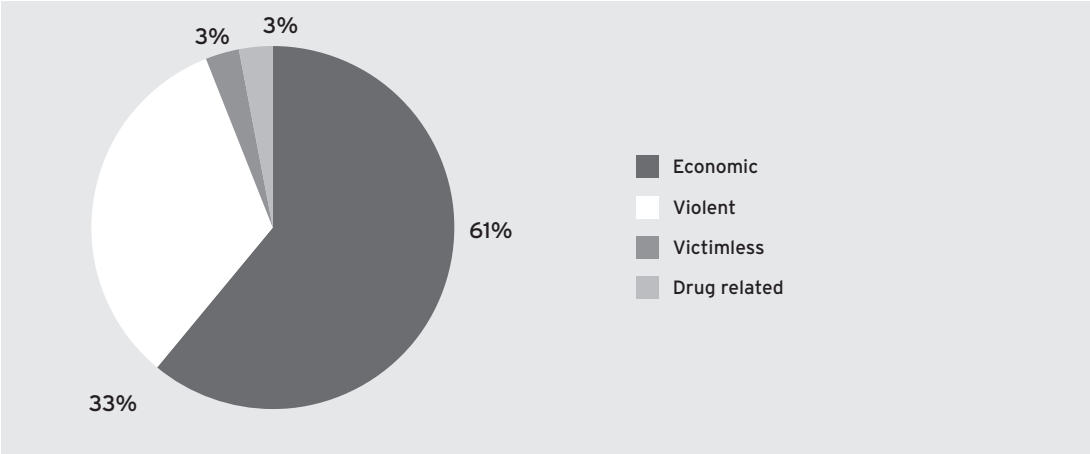
In so far as some of the reasons listed relate to the staffing of the court (availability of magistrate and interpreter), reports by probation officers and the unavailability of the docket or the police, there is cause for concern that the role-players in the criminal justice system can contribute to delays. However, it must be noted that many delays are also occasioned by the absence of guardians, parents, legal representatives and even the accused. The other postponements seem to be part of the natural processes of the criminal justice system, for example, postponements for further evidence, part-heard trials and referral to diversion programmes. Some postponements seem to be avoidable, e.g. postponing to forfeit bail and postponing to combine more than one case against an accused. With some effort, these matters could have proceeded on the same day without having had to resort to a postponement.

Again, regarding diversion, in so far as only 6.1% (n=125) postponements in total occurred for the completion of a diversion programme, it appears that different procedures are used when diverting children. Sometimes, matters are postponed awaiting the outcome of a diversion programme and sometimes (as appears from below) matters are withdrawn because a child has been diverted. This shows that while diversion seems to have become a standard practice, how that practice is implemented differs and therefore a procedure such as the Preliminary Inquiry may be needed to regulate it.

5.6.5 Withdrawal of cases

One of the concerns in the child justice system is that children are unnecessarily arrested when there is no prima facie evidence against them, or that cases are inordinately delayed because of poor investigation. The research therefore set out to determine the frequency of cases being withdrawn and the reasons for withdrawal.

Chart 5: Percentage of cases withdrawn per court; overall



Pretoria had the most withdrawals (41.2%) compared to Wynberg (34.6%) and Pietermaritzburg (24.9%). However there is no significant discrepancy between courts and no conclusion can be drawn regarding the spread of withdrawals across the courts.

Most of the reasons for these withdrawals are standard e.g. the complainant not wishing to proceed, insufficient evidence, case diverted, docket missing, or investigation not completed. However, some reasons as noted on the charge sheet do give cause for concern, for example, the guardian not being present or the child being repentant. While there may be merit in these withdrawals, proper process needs to be followed and adequate reasons should be recorded on the charge sheet.

5.7 Sentence

The Criminal Procedure Act contains a wide range of sentencing options to be used in matters pertaining to children. However, in drafting the original version of the Child Justice Bill, the South African Law Reform Commission decided to reappraise the sentencing of child offenders as it recognised the impact of the concept of restorative justice on the criminal justice system, the effect of the South African Constitution on the traditional aims of punishment, and the shift in the international approach to sentencing from rehabilitation to reintegration into society.

The various types of sentencing in terms of the current juvenile justice system are illustrated below. It is envisaged that the Bill will impact on a wide range of matters in relation to sentencing, including pre-sentence reports, the type and nature of sentences, and the delays occasioned in sentencing children.

5.7.1 Time period between date of first appearance and date of sentence

The following tables represent the delay between first appearance and sentence for the three courts separately and together:

FIRST BASELINE STUDY[34]

The following table represents the delay between first appearance and sentence for the 3 courts separately and together:

Table 21: First study: Delay between first appearance and sentence per court and overall average; average and median

	Wynberg	PMB	Pretoria	Overall
Average No. of days	101	118	280	119
Median No. of days	76	55	213	61
N=	24	55	3	82

SECOND BASELINE STUDY

Table 22: Second study: Delay between first appearance and sentence per court and overall average; average and median

	Wynberg	PMB	Pretoria	Overall
Average No. of days	94	152	216	115
Median No. of days	39	41	156	49
N=	18	8	5	26

As in the case of the delay between first appearance and plea; and first appearance and judgment, there are lengthy delays between first appearance and sentence. Again, the lack of reasons for the delays cannot be determined from the data that was collected. For both baseline studies Pretoria once again seems to be the court where the longest average delays occurred, particularly delays in the court process.

34 There are data errors regarding the number of sentences, but the differences are minimal and do not significantly impact the average and median delays. For example, during the first baseline study, in Wynberg, the following observation by the researchers was made: that the database showed a result of -27 days, which is impossible (probably an inputting error). Also, it is unlikely that the time period between dates of first appearance and sentence would take place on the same day or only take one day, but it is possible. Nevertheless, therefore, this data must be viewed with caution and are probably skewing the results. Also, the dates of sentence were not always known to the researchers, which may have skewed the results generated by the database during the first baseline study.

5.7.2 Sentences handed down

The following table summarises the information collected on sentences to illustrate the types of sentences passed down by each court in both baseline studies:

Table 23: Types of sentences

Sentence	Wynberg	PMB	Pretoria	Average
Suspended sentence	73.5	24.5	57.1	51.7
Postponed sentence	5.9	55.1	0.0	20.3
Imprisonment	0.0	12.2	0.0	4.1
Imprisonment with option of a fine	14.7	2.0	0.0	5.6
Correctional supervision	0.0	4.1	14.3	6.1
Reform school	2.9	0.0	28.6	10.5
Warned and discharge	2.9	2.0	0.0	1.7
Total	100	100	100	100
N=	34	49	7	

At the outset, it should be noted that even though sentences of direct imprisonment only occurred in the first baseline study, it is important to disaggregate the information available on the prison sentences handed down by the Pietermaritzburg Court during the first baseline study because of the harsh nature of these sentences.

Table 24: Breakdown of direct imprisonment sentences in Pietermaritzburg (First baseline study)

Offence	Age and gender of child	Period of imprisonment (in months)	Additional period of suspended period of imprisonment (in months)
Robbery	Male aged 17 years	6	18
Theft	Male aged 16 years	24	0
Common assault	Male aged 17 years	24	0
Housebreaking and theft	Male aged 15 years:[35] Count 1 Count 2 Male aged 16 years	 18 12 24	 0 0 12
Theft out of a motor vehicle	Male aged 17 years	24	0
Total	6		

The information obtained during the two baseline studies raises a number of concerns:

- Of the six children the Pietermaritzburg Court sentenced to direct imprisonment during the first baseline study, two were sentenced for housebreaking and theft and the others for theft, theft out of a motor vehicle, robbery and common assault. These offences are not serious offences and common assault, in particular, is considered a minor offence. Although the children's previous convictions were unknown to the researchers, the sentences of direct imprisonment still seem harsh in the circumstances, taking into account the ages of the children and the type of offences committed.

35 In this matter the child was charged with two counts and sentenced to imprisonment on both. The sentences were to run concurrently.

- In total 45.6% of all sentences constituted suspended sentences. Suspended sentences are also considered a harsh sentence for children as the failure to comply with the sentence means the imposition of direct imprisonment. This issue was raised by the court in *S v Z en 4 ander sake 1999 (1) SACR 427 (E)*. Although this is not binding on high courts except in the Eastern Cape, the court outlined progressive sentencing guidelines that included the principle that the court must not impose suspended imprisonment where direct imprisonment is inappropriate for the particular accused.
- While in total only three sentences of correctional supervision were imposed (3.3%), many of the total sentences were suspended sentences on condition that the child be placed under correctional supervision. This is also a drastic measure for children as correctional supervision is perhaps the next most restrictive sentence to imprisonment and to couple it to a suspended sentence may be a disproportionate sentence considering the circumstances.
- Many of the sentences seem to be formulaic and similar in nature, giving the impression of a "one size fits all" approach.[36]

It is hoped that the Child Justice Bill will open up the scope of sentencing options for children and that judicial officers will become more creative in imposing sentences for children that are appropriate, taking the child's age, needs and circumstances into account.

5.7.3 Pre-sentence reports

This is an issue which our high courts have taken up strongly in the absence of a mandatory legal provision requiring pre-sentence reports for children. In *S v Van Rooyen* (unreported) the Cape High Court, referring to the United Nations Convention on the Rights of the Child as underlining the policy that as far as possible children should be dealt with by the criminal justice system in a way that takes into account their special needs, held that it was difficult to see how the court a quo could properly have determined an individualised punishment without the benefit of a pre-sentence report.

In the case of *S v J and Others*,[37] a 16-year-old first offender had been sentenced on the basis of an "assessment record", instead of a proper probation officer's pre-sentence report. On the one hand the court found that the form was unnecessarily complex, and on the other hand that it was wholly inadequate for the purposes of sentencing.

In *S v P 2001 (2) SACR 70* two probation officers' reports were provided to the court. The first recommended *inter alia* community service and supervision by a probation officer. The second, submitted a month later, departed "drastically" from the first recommendation and recommended committal to a reform school. The apparent reason was that the child did not attend school regularly. The *court a quo* imposed the sentence of reform school without analysing the recommendation and why it had changed in such a short time. The court held that committal to reform school should only be considered as a measure of last resort and that the magistrate had misdirected himself by following the pre-sentence report and not carefully applying his mind to the recommendations in the report. In deciding the matter the court stated that a probation officer's recommendation is merely an expression of opinion and that a presiding officer has an obligation to subject the report and any recommendation to critical scrutiny and analysis, especially in the case of a child.

The decision of *S v Peterson 2001 (1) SACR 16 (SCA)* confirms that sentencing a child to a residential sentence should not be done without a proper pre-sentence report and serious consideration of all appropriate alternative sentencing options. In this case the two appellants were only 15 and 16 years old and were convicted of murder

36 The details of the actual sentences are available from the authors.

37 2000 (2) SACR 310 (C).

and sentenced to 18 years' imprisonment. The matter was postponed for pre-sentence reports but none were obtained for reasons that were inexplicable. The trial court accepted the excuses for the absence of a report. The Supreme Court of Appeal set aside the sentence and remitted it to the trial court to pass sentence after obtaining proper pre-sentence reports. Again in *S v D 1999 (1) SACR 122 (NC)*, *S v J and others 2000 (2) SACR 310 (C)* and *S v N and another 2005 (1) SACR 201 (CkH)*, the courts, sitting as appeal and review courts, set aside the sentences imposed by the *courts a quo* as in none of the cases pre-sentence reports had been provided despite sentences of imprisonment being imposed in all cases.

S v M and Another,[38] citing *S v Petersen en Ander*, found that the magistrate had erred in sentencing the accused in the absence of a pre-sentence report. The matter was referred back for a probation officer's report and sentence, with a directive that the time already served by them would be taken into consideration when setting the sentence afresh.

In the unreported case of *M*,[39] a correctional officer had presented a report that a child of 13 years old was not suitable for correctional supervision and should be sentenced to imprisonment. The court found that this report had been an insufficient basis on which to sentence the child as it concentrated on suitability for correctional supervision, and did not assess the broader ambit of sentencing options provided by sections 290 and 297 of the Criminal Procedure Act 51 of 1977. The prison sentence was thus set aside and the child was remitted back to the regional court for a probation officer's report and a new sentence.

These cases have affirmed the need for sentencing officers to have the accused person's personal circumstances properly placed before them in order to hand down an appropriate sentence.

In Wynberg, pre-sentence reports by a probation officer or correctional official were available in 27 known cases out of the total number of cases.[40] Of the 34 children who were actually sentenced there were 20 pre-sentence reports (59%), while it is unknown whether there was a pre-sentence report available in six out of the 34 sentenced children's matters. In eight matters there was no pre-sentence report.

In Pietermaritzburg, 49 children were sentenced during the two baseline studies. Of these, in 47 cases, probation officer's pre-sentence reports were handed into court (96%).

In Pretoria, there were seven matters in which sentences were handed down. In three of these matters, there were pre-sentence reports (43%). In four of the sentences it was unknown whether a pre-sentence report had been available. There were however, five pre-sentence reports for other matters that had not been finalised.

It would appear that Pietermaritzburg Court is attempting to ensure that children are sentenced with a pre-sentence report. It is worrying that in the other two courts, sentences are being handed down without a pre-sentence report and it is unknown in some matters whether pre-sentence reports were available.

5.8 Referral to a Children's Court

The possibility of referring the matter to a Children's Court in terms of section 254 of the Criminal Procedure Act 51 of 1977 is important and affords the presiding officer in a criminal matter a powerful tool if he or she considers the child to be "in need of care" in terms of one of the grounds set out in section 14(a)(B) of the Child Care Act 74 of 1983, as this means the criminal proceedings are stopped and the child does not obtain a criminal record even if

38 2005 (1) SACR 481 (E).

39 See further Skelton, A "Examining the age of criminal capacity" (2006) *Article 40*, Volume 8, p 1.

40 In the second baseline study, there were sevenpre-sentence reports for other matters in which the sentence was not finalised.

he or she has already been found guilty. The circumstances of children in many criminal matters potentially mean that the child is in need of care, and referral to the welfare system may be the appropriate route to follow for that child. However, it has been reported that this section is not often made use of and, when it is used, it only occurs at the stage of sentencing with the recommendation of a pre-sentence report.[41] These concerns were confirmed by the data collected during this research.

It emerged from both studies is that at Wynberg Court, two boys were found to be in need of care and were referred to the Children's Court at the sentencing stage. In Pretoria, no children were referred to the Children's Court. In Pietermaritzburg, two boys were referred to the Children's Court.

In the Child Justice Bill, one of the recommendations of a probation officer's assessment relates to whether the child is in need of care. It will be interesting to note whether such recommendations will increase the number of children referred to the Children's Court once the Bill is enacted.

41 Skelton, A *Children in trouble with the law: A practical guide*, (2003), Lawyers for Human Rights, pp 13–16. Also see Sloth-Nielsen, J I added this – we need a reference in the text because not everybody will read the footnotes

PART 6

Conclusion

The two baseline studies have produced a wealth of information regarding the three magisterial courts that were the selected sites for the research. This report represents a combined baseline of certain sets of data that are regarded as important to present an overall picture of the functioning of these three courts and how they treat children accused of committing offences. As noted in the introduction, this information will enable an assessment of the implementation of the Child Justice Bill, once enacted, by comparing the data collected on the present criminal justice system pertaining to children with information obtained once the Bill is implemented. In so far as the Bill seeks to provide a legal framework for assessment and diversion; for regulating placement of children to ensure detention is a measure of last resort; minimising delays in the child justice system; promoting diversion, and ensuring children receive appropriate interventions where necessary i.e. by way of referral to the Children's Court and making use of alternative sentences, it is hoped that the baseline data presented here can be used to illustrate whether the Bill will achieve its aims and objectives and improve the procedural mechanisms for managing children in conflict with the law

ANNEXURE 1
Driver group members[1]

The Restorative Justice Centre (RJC). The RJC is a non-profit organisation that seeks to promote the restorative justice paradigm in all sectors of society. The Centre is based in Pretoria.

The Children's Rights Project at the Community Law Centre, University of the Western Cape (CLC). The Children's Rights Project (CRP) of the Community Law Centre (CLC) is one of a number of projects at the Centre which focuses on the needs and status of particularly vulnerable groups such as women, children, people with disabilities and people living in extreme poverty. From the outset, the focus of the CRP was on marginalized and vulnerable children. In addition to contributing to the process of formulating children's rights within the South African interim and final Constitutions, the work of the CRP has concentrated on the goal of law reform within the juvenile justice system and the reform of laws concerning child care and protection. By hosting international seminars on these themes, publishing reports and studies, and soliciting the participation and opinion of children themselves, the CRP has played an important role in transforming and improving the legal landscape for South African children. Nevertheless, much work remains to be done.

The Defence, Peace, Safety and Security (DPSS) Crime Prevention (CP) Research Group (formerly the Crime Prevention Centre) at the Council for Scientific and Industrial Research (CSIR). The CSIR's crime prevention initiative was formally established in 1996. The CSIR — for more than 50 years the vanguard of technology and innovation in this country — saw a clear role for itself in contributing to this endeavour and mobilising its resources to protect the national well-being. Also, with modern-day crimes showing increased sophistication, it became clear that technology was to be the key factor in preventing and addressing crime. Today the organisation plays a crucial role as a support agency in the arena of crime prevention and combating technologies — not only for South African use — but also, in the future, to the benefit of the region and law enforcement entities around the world.

Lawyers for Human Rights (LHR). Lawyers for Human Rights is a non-governmental organisation that strives to promote, uphold and strengthen human rights. The organisation has had a proud history since its inception in 1979 of fighting oppression and the abuse of human rights in South Africa. Almost all of the staff at the head office in Pretoria and its regional offices were active participants in voter education and monitoring in the run up to the historic 1994 elections.

NICRO National Office. NICRO is a non-profit organisation working towards crime reduction and community development. NICRO supports victims of crime through the community victim support project and challenges ex-offenders to become constructive members of society. The youth focus is on diverting young offenders away from the criminal justice system into programmes that make them responsible for their actions, and on youth development. NICRO fights unemployment through skills training and the support of small business.

1 Initially the Chapter 2 Network at IDASA was a member of the driver group, but after restructuring at their offices, this unit was discontinued and therefore IDASA no longer serves on the driver group.

The Institute of Criminology, University of Cape Town (IC). The IC is a multi-disciplinary, inter-faculty unit established within the University of Cape Town. The aim of the unit is to initiate, co-ordinate and develop teaching, research and extension services in the broad field of criminology within and outside of the University, and to promote public interest in, and awareness of, all aspects of criminology. The Institute is affiliated to the faculties of Law and Social Science and Humanities, and offers postgraduate courses leading to degrees in both faculties. The Youth Justice Project specialises in research, advocacy, and teaching in areas that relate to children, young people and crime.

The Centre for Child Law at the University of Pretoria. This organisation is also involved in research around child rights issues, in particular child justice, and offers a masters degree in Child Law. The organisation also focuses on impact litigation on child rights issues and is a useful partner should at any time it become necessary to litigate around provisions in the Act or incidences that occur as a result of improper implementation of the legislation.

The Institute for Security Studies is an applied policy research institute working towards the conceptualisation, and enhancement of the security debate in Africa. Its core functions include applied research and analysis, facilitating and supporting policy formulation, raising the awareness of decision makers and the public, monitoring trends and policy implementation, collecting and disseminating information, capacity building and networking on national, regional and international levels.

The Campus Law Clinic, University of KwaZulu-Natal is a university based organisation that offers clinical legal education to law students as well as providing free legal services to indigent members of the public. The Clinic has a specific child rights unit.

The Civil Society Prison Reform Initiative situated at the Community Law Centre at the University of the Western Cape. The goals of this initiative are to promote civilian oversight over prisons and public participation in the management of prisons with the aim of improving the human rights situation in prisons in South Africa.

Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) is a children's rights organisation and its primary focus is the development of child abuse prevention strategies to combat the patterns of abuse that affect the lives of children and adults everywhere. This is done through a range of programmes including training and materials development, a Child Witness Programme, an advocacy programme and the RAPCAN Resource Centre.

The Department of Social Development within the Faculty of Humanities at the University of Cape Town provides education and training for a number of social service professions which includes that of Probation and Correctional Practice. As such, the Department is committed to giving effect to the country's juvenile justice policies. Apart from its academic programmes, it also contributes to this end through dedicated research and by providing in-service training for relevant professionals.

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