

Child Justice in South Africa

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Contents

About the authors	iii
Acknowledgements	iv
Acronyms	v
CHAPTER 1	
Introduction	1
CHAPTER 2	
General developments in child justice	7
Restorative justice	9
CHAPTER 3	
International instruments pertaining to child justice	15
The United Nations Convention on the Rights of the Child	16
The United Nations Guidelines for the Prevention of Juvenile Delinquency	18
The United Nations Standard Minimum Rules for the Administration of Juvenile Justice	20
United Nations Standards Minimum Rules for the Protection of Juvenciles Deprived of their Liberty	24
The African Charter on the Rights and Welfare of the Child	25
The overall message of the instruments	26
CHAPTER 4	
Overview of South African developments	29
CHAPTER 5	
Probation services	35
The history of probation services	36

The development of probation services in South Africa	36
Policy and law reform regarding probation services	37
The role of the probation officer	38
New activities for probation officers.....	39
CHAPTER 6	
Current law and the child justice bill compared	41
Introduction	41
Age and criminal responsibility	42
Age determination.....	44
Arrest and notification	45
Children awaiting trial in detention.....	46
Assessment.....	48
The preliminary inquiry	50
Children in need of care	51
Diversion	52
Legal representation.....	54
The court process.....	55
Sentencing	57
Review and appeal of convictions and sentences by the High Court.....	60
Summary of the provisions of the Child Justice Bill	62
Epilogue.....	63
Notes	67
References	69

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Acronyms

AfReC	Applied Fiscal Research Centre
CRC	Convention on the Rights of the Child
IMC	Inter-Ministerial Committee on Young People at Risk
JDLs	United Nations Rules for the Protection of Juveniles Deprived of their Liberty
NCPS	National Crime Prevention Strategy
NGO	Non-governmental Organisation
NICRO	National Institute for Crime Prevention and the Reintegration of Offenders
SALRC	South African Law Reform Commission
SCA	Supreme Court of Appeal
UN	United Nations
US	United States

1 Introduction

The Pietermaritzburg High Court was the venue for the trial of a girl who was only 12 years of age at the time of the commission of the offence which resulted in her being convicted for murder. She was 14 years old at the time of her ten-day trial and sentencing. The public was barred from being present at the trial in accordance with section 153(4) of the Criminal Procedure Act 51 of 1977 (hereafter the Criminal Procedure Act). The media, however, had been allowed to attend as the judge had exercised his discretion in terms of that section of the Act. Although media representatives were excluded from the proceedings while the girl gave evidence, they listened to her testimony through an audio system in a room adjoining the courtroom.

The media interest in this case was intense – and the girl struggled to cope with having to walk past ranks of reporters and journalists on her way to and from Court. They could not publish pictures that would identify her, because of the protection afforded by the Criminal Procedure Act. In this case section 154(3), which prohibits the publication of any information that can identify an accused person who is below the age of 18 years. A few pictures were published in which her face was hidden¹ or deliberately blurred.² Media reports did reveal that the deceased was the girl's grandmother, and some reports named

the grandmother. Some even revealed details of her residential address. These reports could have led to the girl being identified, and were thus technically in breach of the Act. Yet her name has never appeared in the media. When the case was reported in the South African Criminal Law Reports, it was referenced as *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA). This is evidence of an enlightened, protective approach, in South Africa which sadly seems to have died in many other legal systems from which the rules guiding our system were originally inherited.

Consider, for instance, the case of Jon Venables and Robert Thompson, who were found guilty of murdering two year-old Jamie Bulger in the UK in 1993. They were named by the newspapers with the permission of the judge in a trial which stunned the world (Sereny 1994). The two accused were ten years old when the crime was committed and only 11 when they were tried. The dock had to be reconstructed so that they could see over it. Today Venables and Thompson have to live under false identities.

In the 1960s the case of Mary Bell, who was 11 years old at the time of the two murders for which she was convicted, was treated in a similar way. Even today Mary Bell lives under a false identity and has had to move home and jobs many times as the media hounded her every move (Sereny 1998).

In the United States the identity of children in criminal matters is often known to the public. Thus we know the name of Nathaniel Abrahams who was only 11 years old when he shot a man from a distance of two hundred feet and was tried and convicted for murder in 1999 when he was 13. Nathaniel was more fortunate than others as he was sentenced to be detained in a juvenile facility until the age of 21 years (Tannenhaus 2004). This was in contrast with the possibility of life imprisonment, which could also have been imposed. A sentence of 30 years was passed down in the case of Christopher Pittman who was convicted of the murder of his grandparents in Charleston, South Carolina on 16 February 2005. He was 12 years old when the offence was committed.³

In 2005 the United States (US) was presented with a challenge. The Supreme Court was required to rule on the constitutionality of the death penalty for persons under 18 years of age. The case in point was that of Christopher Simmons (in *Roper vs Simmons*), a juvenile who was on death row for a murder committed when he was 17 years old. On 1 March 2005, the Supreme Court held (by a vote of five to four) that it was unconstitutional to execute offenders who were under the age of 18 years at the time of the commission of the crime.

Technically, the Court made its decision on the basis of the prohibition on ‘cruel and unusual punishment’, and the finding was made on the basis of three arguments (Van Zyl Smit 2005). The first was that when deciding on whether a punishment is cruel and unusual, it is necessary to consider public views, as reflected in ‘evolving standards of decency’, and that the emerging consensus in the United States was that the death penalty should not be applicable to juveniles. The second was that the sentence of death for a juvenile is disproportionately severe. The third argument was that virtually all other countries in the world have abolished capital punishment for persons under the age of 18 years, thus the Court took into consideration international sentiment against the death penalty for children. The ruling will affect 72 juvenile offenders in 12 states in the US.⁴ It should be noted, however, that the penalty they now face is one of life imprisonment without the possibility of parole, which is also prohibited as a sentencing option for a child by the United Nations Convention on the Rights of the Child (discussed later).

While the decision in *Roper v Simmons* goes some way in improving the fate of children in conflict with the law, the rights of children in America’s juvenile justice system have been radically eroded in many other ways. In 1994 there was no dissent in either house of the Florida legislature when a 400-page Bill was passed into law that severely curtailed the protection of the rights of the children in the criminal justice system. Not a single delegate voted against a provision in the Bill to allow prosecutors to try children as young as 14 years of age as adults. There also were no objections to ending confidentiality rules for juvenile records. In that year, and in the decade following it, tough legislation against teenage offenders gained approval in legislatures throughout the United States, and beyond.

These changes are tragic when viewed against the successful battle waged by juvenile justice pioneers in the United States to achieve the protections that have existed for children in the criminal justice system during most of the twentieth century. A proud tradition of awareness of the special needs of children who commit crimes has been sacrificed a century later on the altar of public anger and fear. This was a tradition that began with the remarkable efforts of dedicated women and men in the late nineteenth century that led to the establishment of the first Juvenile Court in Chicago in 1899.

Concern and public anger about crime appear to reach a high point in relation to children committing serious crimes. But this does not seem to be because

children commit the most crimes, nor the most serious of crimes. Since the facts suggest that they do not. Rather it seems to have to do with the fact that the media and society focus perhaps undue attention on these cases. Consider the following: in the United States in 1997, Janet Reno (Attorney General) announced that there had been a 30 per cent reduction in serious crimes committed by children. This positive news was totally overshadowed by an announcement in the same week of two murders committed by juveniles in the United States. The media preferred to report on the drama arising from these individual incidents rather than on the statistics showing a positive general trend.

The Canadian Centre for Justice Statistics has been reporting a downward trend in crimes committed by youths measured against the general crime rate since 1991. At the same time, however, well-publicised local reports pointed out worrying increases in youth crime. In 1996 the Toronto Police Department released figures showing that an increasing percentage of children were committing more serious crimes. It turned out, however, that these shifts were a result of the change in the definition of youth crime: 1995 was the last year in which 16 and 17 year-olds were regarded as adults. The comparison was therefore meaningless and misleading (Caley 1998), yet caught the attention of the public.

Advocates for juvenile justice policy reform complain that there is an enormous discrepancy between research and data about juvenile crime and the establishment of public policy in this area. A major factor contributing to this imbalance is that media coverage of crime, particularly crime committed by children, tends to obscure people's understanding of what is happening and what the solutions are. Schiraldi and Ziedenberg (2002:114) charge that

[C]overage of juvenile crime is badly skewed toward hyper-violent, idiosyncratic acts, presented out of context with social forces that foster delinquency. This non-contextual, exaggerated coverage negatively affects both public opinion and policy making in the field of juvenile justice.

Bernadine Dohrn (2001) draws attention to a 'tidal wave of fear' associated with children during the last decade, resulting in adults responding to this fear through legislative and policy decisions to criminalise vast sectors of youth behaviour. The American zero tolerance and 'get tough' approaches have begun to permeate other juvenile justice systems in the world. South Africa, too, has shown signs of opting for this approach with minimum sentencing, tougher bail

laws and hard-hitting anti-gang legislation having been passed by Parliament in the late 1990s (Skelton 1999).

The extent to which the new South African Child Justice Bill B 49B of 2002 (hereafter the Child Justice Bill – passed by the National Assembly on 25 June 2008 and the National Council of Provinces on 5 September 2008) has managed to resist the ‘get tough’ approach, as well as the law reform process that gave rise to the Bill as introduced into Parliament, will be discussed in some detail later.

2 General developments in child justice

It is important to understand the history of juvenile justice in order to contextualise current developments. Sociologist Ellen Key (1909), writing just over a hundred years ago, predicted that the 20th century would be the ‘century of the child’. She was writing at the end of a century during which welfare-oriented individuals and organisations had founded houses of refuge⁵ and reformatories⁶ to which children could be referred instead of being sent to prison or deported. Also during the 19th century, a juvenile probation system was developed in Massachusetts, and by 1891 criminal courts in that state were required to appoint probation officers (employed by the courts) in juvenile cases.

The people conducting campaigns to promote these initiatives were known as ‘child savers’, and as the century drew to a close, two of the ‘child savers’ worked tirelessly to introduce the first juvenile court in the world. Interestingly, they were two women, Lucy Flowers and Julia Lathrop. The central idea embodied in the Illinois Juvenile Court Act of 1899, was that neglected, dependent and delinquent children should all be dealt with in a separate children’s court. ‘A sympathetic judge could now use his discretion to apply individualized treatments to rehabilitate children, instead of punishing them’ (Tannenhaus 2002:42).

The first ideas about a separate juvenile justice system for children stemmed from a welfarist approach that coincided with the rise of behavioural sciences such as social work and psychology (Sloth-Nielsen 2001). A transatlantic social movement in the 1880s and 1890s concerned itself with the effect of market processes and industrialisation on the social lives of urban populations. These reformers were of the view that individual responsibility could not be a complete explanation for widespread disorders in modern cities. They questioned the free will on which the liberal state was being built, de-emphasising individual choice and re-describing crime and poverty as environmental problems, the root causes of which needed to be understood and resolved (Tannenhaus 2004:5). Thus it is often said that the welfarist approach to juvenile justice focused on the child's needs rather than on the child's deeds (Muncie 1999:254). The welfare of the child was the most important consideration. Welfarism promoted the idea that in the justice system children should be separated from adults and that they should be dealt with in different forums with different procedures from those used for adults. There was a heavy reliance on the involvement of social workers and probation officers.

A legal concept underpinning the welfarist approach was that of *parens patriae*. This was an English legal doctrine which allowed the monarch to protect vulnerable parties, usually in issues of inheritance or guardianship. The doctrine was much more broadly applied in the United States, allowing the State to act as a 'kind and just parent' for abandoned, abused, neglected and delinquent children. The focus was on the welfare of the child rather than on the rights of the child or the rights of the parents. The first annual report of the Juvenile Court of Cook County published in June 1900 proudly announced that '(t)he law, this Court, this idea of a separate court to administer justice like a kind and just parent ought to treat his children has gone beyond the experimental stage and attracted the attention of the entire world' (quoted in Ayers 1997).

The welfarist approach spread through the United States and also manifested in other parts of the world. The approach flourished for 70 years, but its flaws were brought into sharp relief by the landmark US Supreme Court case of *In re Gault* 387 U.S.1 (1967). In this case a 15 year-old boy named Gerald Gault was taken into custody by police for making a telephone call containing lewd or indecent remarks. He was dealt with by the juvenile court. His parents were not given notice, he was not legally represented, there was no sworn testimony, no recorded transcript and no right to appeal. Gerald was referred to an industrial

school until he turned 21 years of age. The Supreme Court overturned his conviction and recognised that a child, like any person, enjoyed certain due process rights under the constitution, namely the right to be notified of the charges, the right to legal representation, the right against self-incrimination and the right to confront witnesses.⁷ Three years later, in *In re Winship* 397 U.S. 358 (1970: 365–366), the Supreme court stated: ‘We made it clear in that [*Gault*] decision that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts’. The court famously observed that “(u)nder our constitution, the condition of being a boy does not justify a kangaroo court”.

Following *Gault*, a wider disillusionment with the dominance of welfarism came to prevail. In the United Kingdom, Canada and Australia welfare approaches lost momentum, as a number of criticisms emerged to undercut the dominance of the welfare philosophy. The principal thrust of these arguments was that child (or juvenile) court processes were in fact highly punitive and stigmatising; that they could be more injurious than curative and that there was a need to safeguard children against the ‘excesses of indeterminate sentences’ (Sloth-Nielsen 2001:65). The pendulum began to swing back to a ‘justice’ approach, which emphasised the need for visible and accountable decision-making accompanied by due process rights. The focus thus came back to the idea that each individual (including each child) was responsible for his or her own behaviour as a rational being who could make free choices. As we have seen from the description of the juvenile justice system in the United States in Chapter 1, there has been an over-correction, resulting in very harsh measures for young people.

RESTORATIVE JUSTICE

In the last two decades of the 20th century, a new approach has begun to dominate the terrain of juvenile justice. This approach is the theory and practice of restorative justice. Restorative justice theory aims to transcend the oppositional debates such as ‘welfarist’ versus ‘justice’, and ‘retributive’ versus ‘utilitarian’. It relies instead on the idea that all participants in the justice process should be treated humanely and in a manner that respects their dignity.

According to Howard Zehr (2002a:37), ‘[r]estorative justice is a process to involve, to the extent possible, those who have a stake in a specific offence and

to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible’.

Zehr (2002a:22) describes three pillars of restorative justice. One of these is engagement, which he also refers to as participation. In some cases this may mean actual dialogue. Zehr stresses that the principle of engagement implies involvement of an enlarged circle of parties as compared to the traditional justice process. The other two pillars are harms and needs, on the one hand, and obligations, on the other. According to Zehr (2002a:22), ‘restorative justice understands crime first of all as harm done to people and communities’. He points out that the legal system, with its focus on rules, laws and making sure offenders get what they deserve, often overlooks the harm. Victims are, at best, a secondary concern of justice. ‘Focusing on harm, on the contrary, implies an inherent concern for victims’ needs and roles.’ He goes on to add that although the victims’ needs are the first concern in restorative justice, the focus on harm implies that we also need to be concerned about harm experienced by offenders and communities and this may require us to address the causes of crime. The third pillar described by Zehr is that of ‘obligations’ which arise from the harm inflicted. This is the focus on offender accountability and responsibility. If crime is essentially about harm, then accountability must encourage offenders to understand the consequences of their actions. This in turn means that they have a responsibility to make things right as far as is possible, both concretely and symbolically. The first obligation is the offender’s, but the community and society may have obligations as well.

According to Sharpe (2004), there is wide agreement that restorative justice is fundamentally characterised by different kinds of values, namely: inclusion, democracy, responsibility, reparation, safety, healing and reintegration. Zehr (2002a:36) gives a succinct view: ‘If I had to put restorative justice into one word, I would choose respect ... The value of respect underlies restorative justice principles and must guide and shape their application’. In recent writing, Zehr (2002b) has also added the idea of ‘belonging’ to the list of values linked to restorative justice.

Advocates of restorative justice point to experiments that have been going on since the mid-1970s, which – although they make minimal use of coercion and punishment – are apparently proving highly successful in reducing crime, satisfying victims that justice has been done, and even revitalising communities that have been torn apart by crime and disorder (Johnstone 2002:11). Many of the experiments in restorative justice have been interventions regarding children

accused of crimes, and thus the field of child justice has been greatly enriched by the development of restorative justice theory and practice (Morris & Maxwell 2001). Restorative justice requires offenders to understand and experience the consequences of their crimes, an experience that should lead to a change in their behaviour. This makes juvenile justice an important realm to work in because behavioural change is arguably more likely to occur in children, while positive results can be achieved throughout the individual's life (Skelton 2002:510).

It has always been difficult for juvenile justice professionals to demonstrate that a non-punitive approach can enhance public safety. A restorative justice approach provides an opportunity to define community protection more holistically (Bazemore 1996). Bazemore and Schiff (2005:5) observe that '[t]he international popularity of restorative justice is due largely to the potential suggested by the restorative justice vision for a more holistic, more effective approach to youth crime'. The authors point out, however, that the greatest challenge to even the strongest and most effective restorative justice process lies in the effort to fit these interventions into juvenile justice models which generally pull in the opposite direction, towards more repressive responses to crimes committed by young people.

Despite the lack of a legal framework for restorative justice in many countries, experimental programmes abound. There is a myriad of practical projects engaging in restorative justice encounters with young offenders, their victims, families and communities. These encounters consist of face-to-face dialogues between children who have committed crimes and the people against whom those crimes have been committed. The purpose of these restorative justice processes is to make children understand the impact of their behaviour on others, and to make agreements to put right what has been damaged, as far as is possible. There are many models, ranging from family group conferencing (which originated in New Zealand) to sentencing circles (used in Canada). The linkages between indigenous justice and restorative justice are often highlighted, and this gives restorative justice a particular resonance in South Africa (Kgosimore 2001; Nhlapo 2005; Qhubu 2005).

Skelton and Frank (2001:118) have stated that

[b]y choosing healing rather than vengeance through the Truth and Reconciliation Commission South Africans have demonstrated that they understand the value of a restorative approach to justice. There is a will

to make family group conferencing an important part of the future child justice system. We need now to find the way towards a unique model which unlocks the innate conflict resolutions skills which undoubtedly exist in communities, and merge them with the realities of life in South Africa in the 21st century.

A recent study conducted in a rural area in South Africa provides the basis for cautious optimism that restorative justice is indeed easily understood by ordinary South Africans. In her study on the perspectives of victims of juvenile crime towards restorative justice in the village of Malumulele, Ntsoakie Maluleke (2004) found that although the victims interviewed in her study had no theoretical knowledge of restorative justice, the majority did want to meet the young offender face-to-face and resolve the conflict. They wanted accountability from the offenders, and stressed the importance of apology. The respondents also showed concern for the young offenders, and they wanted the offenders to change their behaviour. Maluleke (2004:77) concluded that 'restorative justice is in the hearts of the people rather than retribution'.

Does restorative justice provide adequate protection for children? After decades of the importance of 'due process' being drummed into juvenile justice practitioners following the decision in *Gault*, some fear that the increasing use of restorative justice may lead to negative inroads being made on the protection of children's rights. Due to the fact that restorative justice does not focus on punishment, there is a perception that there is less need for strong procedural protection.

Johnstone (2002) points out that advocates of restorative justice tend to be less insistent about procedural protection for suspects, and even see strict procedural rules as being a stumbling block to achieving restorative outcomes. He argues that this may be because many proponents of restorative justice see the process as a non-punitive approach, focused on restitution and reparation, rather like a civil law compensation claim. Johnstone warns that this approach could be dangerous, because the wider context in which restorative justice operates is essentially one of crime and punishment. The whole process is organised around the idea that what has been done is a criminal wrong. The terms 'offender' and 'victim' are used, and the police or prosecutors are sometimes involved. If the offender fails to fulfil his or her obligations, this will result in him or her being brought back into the criminal justice system.

Ashworth (2002) puts forward similar views. He points out that although communities have a greater stake in the resolution of criminal justice matters through restorative justice, the State nevertheless retains a responsibility to impose a framework that guarantees rights and safeguards for offenders, because restorative justice processes still involve public censure and the imposition of obligations on offenders. He remarks: 'The State surely owes it to offenders to exercise its power according to settled principles that uphold citizens' rights to equal respect and equality of treatment' (Ashworth 2002:581).

Even amongst writers who take a more relaxed view of the need for procedural rules, there is agreement that certain protections are nevertheless required. Braithwaite (2002) describes the incident of a restorative community conference in Canberra, Australia, which decided that a boy who had stolen from a shop should be made to stand outside the shop wearing a t-shirt emblazoned with the words 'I am a thief'. Braithwaite concludes that the risk of such blatant bad practice requires the setting of standards. He believes there should be protection against what he calls 'domination' or power imbalance, and that restorative justice processes must never be able to impose a punishment beyond the maximum allowed by the law for that kind of offence, nor to impose a punishment that is degrading or humiliating.

Braithwaite would agree that there is a need for standards, but he would disagree with Ashworth that the State should 'impose' such a framework. He favours a more democratic process of participation by community stakeholders in the development of certain practical principles in order to ensure that rights are protected. As a constitutional democracy, the South African state does have a duty to uphold the rights of children. It would appear that the Child Justice Bill, referred to earlier, includes in the clause on objectives both the aim of protecting children's constitutional rights, and the aim of promoting a restorative justice response to child offending through the involvement of victims, families and communities.

As far as diversion of child offenders is concerned, the Child Justice Bill regards the promotion of the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society, as objectives of diversion. Diversion options and programmes also have to comply with certain minimum standards. In this regard the Bill provides that diversion options may not be exploitative, harmful and hazardous to a child's physical or mental health. It would appear, therefore, that the benefits of restorative justice

far outweigh the risks to due process, and those risks can be managed through the setting of standards which aim to provide protection for all the role-players involved in restorative justice processes. The Restorative Justice Initiative commissioned the drafting of such standards for restorative justice in South Africa and these were published during 2007 (Frank & Skelton 2007).

3 International instruments pertaining to child justice

Although the rights of young people in conflict with the law should be seen against a wider backdrop of human rights, there are four international instruments which have a direct bearing on the subject. These are the United Nations Convention on the Rights of the Child 1989 (commonly referred to as the CRC), the United Nations Guidelines for the Prevention of Juvenile Delinquency (also known as the Riyadh Guidelines), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (also known as the Beijing Rules), and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (commonly referred to as the JDLs).

The United Nations Convention on the Rights of the Child (the CRC) is a treaty and according to international law is binding upon parties to the Convention and must be implemented by them in good faith. The first question to be considered is whether the CRC is binding in South African Law. The Convention is not self-executing; it requires legislative enactments to make the terms of the Convention become part of South African law (Olivier 2000:201). Nevertheless, international law is recognised by South African courts.

In terms of section 39(1) of the Constitution a court must consider international law and may consider foreign law. A court must furthermore interpret

the Bill of Rights in accordance with the values of ‘*human dignity, equality and freedom*’. Moreover, the provisions of section 233 of the Constitution provide that when interpreting any legislation, courts must give preference to any reasonable interpretation of the legislation that is consistent with international law. The Constitutional Court has affirmed that both binding and non-binding international instruments may be referred to when interpreting the provisions of the Bill of Rights. The CRC is the most widely ratified treaty in the world, with the United States of America and Somalia the only states that have not yet ratified it. South Africa’s ratification took place in 1995, and since then numerous reported judgments have made reference to the CRC.⁸

International guidelines and rules are generally considered to be non-binding. However, there is a growing view that it is an over-simplification to regard these instruments as having no legal force. Some refer to these instruments as ‘soft law’, implying that when read together with other related instruments, the rules or guidelines take on a strongly persuasive quality akin to law (O’Donnell 1993). Additionally, some aspects of the Beijing Rules, the Riyadh Guidelines and the JDLs have been incorporated into the CRC. The rules and guidelines set out in these instruments are detailed, and provide specific suggestions as to how the broader concepts of the CRC might be realised.

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

This important Convention⁹ deals with a broad range of children’s rights and provides a comprehensive framework within which the issue of juvenile justice must be understood. Articles 40 and 37 refer directly to juvenile justice. However, the phenomenon of children committing crimes should not be seen as a pathology that can be separated from other developmental issues regarding children, and therefore the CRC should ideally be read in its entirety (Skelton 1996:182).

Article 40 deals with the administration of juvenile justice, providing in article 40(1) that:

State parties recognise the right of every child alleged as, accused of or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth,

which reinforces the child's respect for the human rights and fundamental freedoms of others and which take into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

This provision reflects a child-centred approach and sets a high standard. The second part of article 40(1) highlights reintegration and the child assuming a constructive role in society. This hints at a more restorative justice approach, which will be discussed in more detail below.

Several due process rights are set out in article 40(2). These are guaranteed to every child accused of a criminal offence. These provisions, together with sections 28(1)(g) and 35 of the Constitution of the Republic of South Africa (1996) provide a protective armoury for children charged with crimes in South Africa. The effectiveness of these provisions can be enhanced and given greater specificity by writing such protections into law. In fact, article 40(3) obliges states to establish laws, procedures, authorities and institutions specifically applicable to children in conflict with the law. This means that by ratifying the CRC, South Africa undertook to develop a specialised legal framework and infrastructure for dealing with children suspected or accused of convicted of crimes.

Article 40(3)(b) states that whenever appropriate and desirable, measures should be established for dealing with children in conflict with the law without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. This article refers to the process of diverting children out of the mainstream criminal justice system into other programmes or procedures. Diversion is a central feature of all progressive juvenile justice systems in the world today, and is set out fully in the UN Standard Minimum Rules for the Administration of Juvenile Justice, to be discussed below.

The need for alternative sentences is set out in article 40(4). This indicates the importance of the development of programmes that can serve as positive alternatives to the sanctions presently used. While the South African legal framework allows for a range of alternative sentencing options, in practice the access to such options is limited by the fact that the programmes supporting such alternatives tend to be clustered in urban areas.

Article 37 of the CRC is also central to the rights of children in conflict with the law. It specifies that no child shall be subjected to torture, cruel, inhuman or degrading treatment or punishment, and that neither the death penalty nor

life imprisonment without the possibility of release should be imposed upon persons under the age of 18 years. While there is no death penalty in South Africa, life imprisonment is still possible, and in 2005 there were 32 cases of young people below the age of 18 years (at the time that they committed offences) serving life sentences in the country (Du Toit 2006:17). Although these life sentences are not entirely without parole, the Correctional Services Act 111 of 1998 requires that 25 years must be served before parole can be considered. It is submitted that South Africa's current sentencing regime falls short of the international requirement in this regard.

Article 37 further states that any child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so. The South African Constitution echoes this provision (without the proviso). However, breaches of this constitutional protection still occur, with children being held together with adults in police cells and prisons (Centre for Child Law Newsletter 2004).

THE UNITED NATIONS GUIDELINES FOR THE PREVENTION OF JUVENILE DELINQUENCY

The United Nations Guidelines for the Prevention of Juvenile Delinquency¹⁰ (the Riyadh Guidelines) give guidance to States for strategies to prevent children from becoming involved in the commission of crimes. The Riyadh Guidelines do not provide quick or easy answers. They present the long answer to the big question of what to do about children committing criminal offences within the context of development. Real efforts must be made to provide a continuum of services which tackle the problem of juvenile offending before it occurs, followed by supporting services based in the family and the community. Without this developmental approach, no new child justice system will be effective.

The Riyadh Guidelines propound a social policy focusing on the centrality of the child, the family and the involvement of the community, which are cardinally important to the development of a juvenile justice system. The Guidelines are characterised by a verbose drafting style, with many complex ideas being linked together in intricate statements. This makes it difficult to distil the information into a succinct form. Perhaps this is because the idea of prevention is so intricately connected with issues of social philosophy that it inevitably

needs more words than usual to formulate provisions on such a matter (Skelton 1996:184).

The heart of the document is the chapter headed 'Socialisation Process', which looks at involvement of the family, education, the central role of the community and community-based prevention programmes.

The involvement of the family is emphasised in guideline 12:

Since the family is the central unit responsible for the primary socialisation of children, governmental and social efforts to preserve the integrity of the family, including the extended family, should be pursued. The society has a responsibility to assist the family in providing care and protection and in ensuring the physical and mental well being of children.

To this end, governments should establish policies conducive to the raising of children in stable family environments – and families in need of services to achieve this goal should be granted such services. The Guidelines make the point that special attention should be given to children of families affected by problems brought about by rapid and uneven economic, social and cultural change.

Education is the second focus of 'Socialisation processes'. Interesting suggestions are provided for a much more varied curriculum, involving the cultural, emotional and psychological life of the child. The Guidelines specify that educational systems should seek to work together with parents and community organisations. They also recommend the avoidance of harsh disciplinary measures in schools, particularly corporal punishment.

Community involvement and community-based solutions are vital. In guideline 32, the following is stated:

Community based services and programmes which respond to the special needs, problems, interests and concerns of young persons and which offer appropriate counselling and guidelines to young persons and their families should be developed, or strengthened where they exist.

The Guidelines require that particular attention be paid to homeless children and that voluntary organisations providing services for young people should be given financial and other support by the government. The participation of young people is also encouraged. Youth organisations should be created or

strengthened at local level and such organisations should become involved in management and decision-making within the community.

The final aspect of the 'Socialisation processes' relates to the mass media and the role they should play in portraying the positive contribution of young people to society. In addition, the media should minimise scenes of violent pornography, drug-taking, and degradation of women, children and interpersonal relationships. Although laudable, the difficulty with this aspect of the guidelines is that the independence of the media will make it difficult to enforce, particularly in the light of the protection of freedom of expression afforded by the Constitution.

Guidelines 45 to 51 set out the social policy framework within which governments should strive to prevent juvenile offending. Sufficient funds should be provided for medical services, nutrition, housing, counselling and substance abuse prevention. In South Africa these issues fall within the mandates of the Ministries of Health, Education, Welfare and Housing, again highlighting the fact that prevention is closely linked to broader social development issues.

The concept of separating prevention efforts from a focus on pathological behaviour and linking them instead to a general social policy is very refreshing. Because of this feature, Geert Cappelaere (1995:5) describes the Riyadh Guidelines as being amongst the most advanced proposals within the field of criminology. The Guidelines have received very little recognition in South Africa. The National Crime Prevention Strategy (NCPS), published in 1996, was hailed as an excellent example of social crime prevention policy. It did contain ideas about crime prevention for children in particular. It is unfortunate that the NCPS appears to have fallen by the wayside and is rarely referred to by government. It was overtaken by a crime control approach characterised by short-term measures to reassure voters that crime was under control. Long-term crime prevention work requires public understanding and support (Simpson, Hamber & Stott 2001).

THE UNITED NATIONS STANDARD MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice¹¹ (the Beijing Rules) provide a blue print of the essential elements of an effective juvenile justice system. The Rules are set out with commentaries

following each section. The commentaries are intended to be read as an essential part of the document.

Minimum age of criminal capacity

In a section on general principles, the Beijing Rules require that the minimum age of criminal responsibility should not be fixed too low, bearing in mind the emotional, mental and intellectual maturity of the child. In South African law, only children below the age of seven years are irrebuttably presumed to lack criminal capacity. This represents one of the lowest ages of criminal capacity in the world. Children between the ages of seven and 14 years are rebuttably presumed to lack criminal capacity. Although this presumption is designed to protect children under 14, it is too easily rebutted in our courts. In contrast to South African law, many other countries have opted for a clear cut-off age of 12 or 14 years. The Child Justice Bill's proposals on the minimum age of criminal capacity will be discussed in more detail later.

Aims of juvenile justice – the proportionality principle

The Beijing Rules describe the aims of juvenile justice in the following terms:

The Juvenile Justice system shall emphasise the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offender and the offence.

The proportionality principle is important when dealing with young offenders, not only regarding the handling of a case and the outcome of a trial, but even when children are being dealt with outside the criminal justice system. The commentary following this rule warns that reactions designed to ensure the welfare of the young offender should not be disproportionate to the offence as this would infringe upon the fundamental rights of the young individual.

Scope of discretion

Rule 6 of the Beijing Rules envisages more discretion being granted to officials at all stages of proceedings involving juvenile offenders, including the

investigation, prosecution, adjudication and follow-up stages. A corollary to such discretion is a system to ensure accountability on the part of officials, and the requirement that officials exercising such discretion be specially trained to exercise it judiciously.

The purpose of this increased discretion is to allow for the most appropriate action in each individual case. It presents an opportunity for a creative approach, so that officials are not bound by precedents, and are able to develop new approaches to deal with the cases coming before them.

Under the rubric of 'Investigation and Prosecution', the Rules require that initial contacts between the police and the juvenile offender should be managed in such a way as to respect the legal status of the juvenile, promote his or her well-being and avoid harm being done to him or her. Legislation has limitations in ensuring this. The training and attitude of the officials concerned will be pivotal factors in the success of any system.

The immediate contacting of parents and guardians and the consideration of release as soon as possible after arrest are also stressed in rules 10.1 and 10.2 which deal with initial contact. With the promulgation of the amended section 29 of the Correctional Services Act 8 of 1959 in May 1995 (Correctional Services Amendment Act 17 of 1994), South African law has been brought into line with these rules, at least on paper. Section 29, however, is to be repealed by the Child Justice Bill, once enacted, since the Bill contains new provisions on the arrest and pre-trial detention of children.

Diversion

Mechanisms for diverting children away from the criminal justice system lie at the heart of any good juvenile justice system. The Beijing Rules centralise the principle of diversion. Rule 11.1 provides that:

Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority.

The involvement of the individual and of the community in the diversion process is also envisaged. In this regard rule 11.3 states that diversion involving community service or other services should only be done with the consent

of the juvenile or his or her parents or guardians, and rule 11.4 requires that efforts must be made to provide for community programmes, such as temporary supervision and guidance, restitution and compensation. Chapter 6 of this monograph refers to the practice of diversion as it occurs in South Africa at present. The Child Justice Bill aims to create a legal framework for present diversion practices.

Specialisation within the police service

Rule 12 provides that police personnel who deal with juvenile offenders should be specially trained, and that in large cities special police units should be established for that purpose. In South Africa at present there is no specialisation within the police service regarding the handling of juvenile offenders. The Child Protection Unit deals solely with the child victims of crime. Reasons given by the police as to why they do not wish to opt for specialisation are, firstly, that because of the lack of police personnel in rural areas it would be difficult to allow for specialisation in those areas, and secondly, because young people can be arrested by any police officer, it is necessary for every police officer to be trained how to deal with young people whom they arrest. This Rule appears to have had very little influence in South Africa.

Adjudication and sentencing

The Beijing Rules provide that where a young person has not been diverted, he or she should be dealt with by the competent authority. The proceedings must aim to serve the best interests of the child and be conducted in an atmosphere of understanding. The young person should be encouraged to participate. The atmosphere of courts in South Africa will have to change substantially to fit these criteria.

Access to legal representation is a requirement in terms of the Rules and free legal aid must be granted in those countries where there is provision for such aid. The Legal Aid Board in South Africa is therefore the suitable provider of such representation, and is at present at least partially fulfilling this mandate.

Guiding principles of sentencing are provided which include the need for proportionality, and the well-being of the juvenile as central to the consideration of his or her case. The least possible use of measures which restrict or remove

the personal liberty of the young offender is stressed, and corporal punishment for juveniles is prohibited. With regard to corporal punishment, one of the first Constitutional Court judgments, *S v Williams and Others* (1995 (7) BCLR 861 (CC)), brought South Africa in line with this requirement.

The Beijing Rules conclude with guidelines which stress the importance of research as a basis for on-going planning and policy formulation. This indicates that even when South Africa has enacted a new child justice system, it is imperative that research and evaluation of the new system be carried on so that the system may be constantly redeveloped to meet changing realities.

UNITED NATIONS STANDARDS MINIMUM RULES FOR THE PROTECTION OF JUVENILES DEPRIVED OF THEIR LIBERTY

These Minimum Standards¹², known as the 'JDLs', deal with a range of children who have been deprived of their liberty. This includes those held in custody during the pre-trial and trial stage as well as those sentenced to imprisonment. Deprivation of liberty is defined as meaning any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which this person is not permitted to leave at will. In the South African situation this definition would include children awaiting trial in places of safety, those placed in schools of industry and those sentenced to reform schools. The latter terminology has changed with the adoption of the Children's Act 38 of 2005 – these institutions will now be referred to as 'child and youth care centres'.

The overriding message of the JDLs is that young people under the age of 18 years should not be deprived of their liberty except as a measure of last resort, and that where this does occur, each young person must be dealt with as an individual, having his or her needs met as far as possible. There is an emphasis on preparing the young person for his or her return to society from the moment of entry into the detention facility.

The JDLs start off with a number of fundamental principles, the first of which states that the juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. It further states that imprisonment should be used as a last resort and for the minimum period necessary and should be limited to exceptional cases. This is an important point, stressed by all of the instruments.

A major portion of the JDLs governs the management of juvenile facilities, including their administration, the physical environment and services they offer, and disciplinary procedures considered appropriate. Compliance with all of the above is assured through the requirement of regular and unannounced inspections and an independent complaints procedure. The JDLs conclude with a section on the appointment and training of specialised personnel to deal with young people deprived of their liberty.

The JDLs are extremely comprehensive, with detailed reference to a large number of issues which may be of importance to the daily lives of young people in prison, and are set out in 87 rules. In South Africa it is likely that we will continue to see a number, hopefully dwindling, of persons under 18 years of age sentenced to terms of imprisonment and other forms of detention. Section 28(1)(g)(ii) of the Constitution requires that children should be held in a manner which is appropriate to their age. In determining what is meant by these words, the JDLs will be of great assistance.

THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

This charter was adopted by the (then) OAU in 1990 but only came into force on 29 November 1999. South Africa ratified it on 7 January 2000. Although the African Charter increases the protection of children in a number of areas (Viljoen 2000), the administration of juvenile justice has not been given a proper voice by the Charter. Disappointingly, the important rule in the CRC that ‘no child shall be deprived of his or her liberty unlawfully or arbitrarily’ does not appear, nor the provision that imprisonment should be used only as a measure of last resort and for the shortest possible period of time. There is no logical reason for these omissions, and it is a concern that they may have been deliberately omitted (Gose 2002). Fortunately for South African children, these important provisions are included in the South African Constitution, which states very clearly at section 28(1)(g) that a child has the right

not to be detained except as a measure of last resort, in which case, in addition to the rights that a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be (i) kept separately from detained persons over the age of

18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child's age.

THE OVERALL MESSAGE OF THE INSTRUMENTS

The international instruments discussed above give a clear picture of what an ideal child justice system should include. The approach to be adopted should aim at promoting the well-being of the child and at dealing with each child in an individualised way. The central focus of the system should be on diversion out of the criminal justice system as early as possible, either to the welfare system, or to suitable diversion programmes run by competent staff. There should be a vigilant approach to the protection of due process rights. The involvement of family and community is of vital importance. If a child does go through the criminal justice system, he or she should be tried by a competent authority (with legal representation and parental assistance) in an atmosphere of understanding conducive to his or her best interests. The child should be able to participate in decision-making. The proceedings should take place within time frames which are appropriate to children and there should be no unnecessary delays.

In deciding on the outcome of any matter involving a young offender, the presiding officer should be guided in the decision-making process by a set of principles, including the principle of proportionality; the best interests of the child; and the least possible restriction on the child's liberty. Depriving children of their liberty, either while they await trial or before sentencing, should be a measure of last resort and should be restricted to the shortest possible period of time. Mechanisms for ensuring all of these principles need to be built into the child justice system.

The United Nations Committee on the Rights of the Child, during the 44th session in Geneva in January to February 2007, issued a general comment (General Comment No. 10 (2007)) on the topic of 'Children's rights in juvenile justice'. The Comment deals with the leading principles underlying a comprehensive policy relating to juvenile justice, and includes, among others, a discussion of the following issues:

- Prevention of juvenile delinquency
- Interventions / diversion

- Age and children in conflict with the law
- The guarantees for a fair trial
- Deprivation of liberty, including pre-trial detention and post-trial incarceration
- The organisation of juvenile justice
- Awareness-raising and training
- Data collection, evaluation and research

As will be shown later, the Child Justice Bill reflects the requirements laid down by the various international instruments as well as guidelines issued by the UN. The preamble to the Bill mentions South Africa's obligations as party to international and regional instruments relating to children, with particular reference to the CRC and African Charter.

4 Overview of South African developments

No account of child justice in South African would be complete without reference to the pre-colonial practices and the effect of African customary law. During the pre-colonial era, under African customary law, childhood was not defined by age but by other defining characteristics such as circumcision or the setting up of a separate household (Maithufi 2000:140). The welfare of children was tied up with the communal welfare of the extended family, tribe or group, and children's interests might well be subjugated to the broader interests of the group – thus children were sometimes given over to other relatives to look after cattle or provide companionship, and a common method of surviving lean years was the pledging of girls in marriage (Bennett 1999).

Customary law relating to children focussed on deciding which family had the stronger title to a child – this largely centred around the payment of *lobolo* (bridewealth). Offences were dealt with by traditional leaders' courts. There was no imprisonment or institutionalisation of any kind. Crimes were treated as wrongs between individuals and families, to be solved in ways that promoted harmony and well-being in society.

Colonisation in South Africa caused the customary law system to be overlaid by the Roman Dutch and English legal systems. Corporal punishment,

deportation (to Robben Island, for example) and imprisonment for crimes became commonplace (Saffy 2003:16). It could therefore be argued that there has been a replacement of the African customary approach to child justice by more punitive forms of justice. So it may be observed that while the welfarist approach gained favour worldwide, as indicated above, the South African child justice regime was based on the retributive approach which was largely punitive. Children who committed offences had to receive their just deserts like their adult counterparts, with the difference being in the *locus* (place) of punishment.

News of child-saving efforts that were happening elsewhere in the world did drift across the Atlantic, and those efforts were emulated by William Porter, the Attorney-General of the Cape Colony. He set aside £20 000 for the establishment of a reformatory for juvenile offenders. This led to the Reformatory Institutions Act in 1879 and the subsequent establishment of Porter Reform School in Cape Town. Other reform schools were established and, later on, these were transferred from the Department of Prisons to the Department of Education – again an example of a welfarist approach which focussed on education and rehabilitation of offenders. Alan Paton was appointed as the first principal for Diepkloof Reformatory when it was transferred to the Department of Education. He was a passionate reformer, and caused consternation when he took down the fences at the reformatory school.¹³

Further evidence of the influence of the welfarist approach was the provision in the Prisons and Reformatories Act 13 of 1911 which introduced industrial schools. Although the Act relied heavily on institutional care, it was the first piece of legislation that established the principle that children and young adults should not be imprisoned. However, due to a lack of facilities, this did not in effect protect all children from imprisonment. These protections were built upon by the Children's Protection Act 25 of 1913, which allowed for arrested children to be released by a police official. The Act also provided the option for children to be held in places of safety during the investigation of the offence. An important procedure included in both the 1911 and the 1913 Acts was the power of the court to decline to proceed with a trial in any case concerning a child, and to commit such a child to a government industrial school. This protection has survived through many subsequent enactments and currently exists in section 254 of the Criminal Procedure Act.

This allowed for a 'bridge' to be built between the criminal justice system and the system for children in need of care. However, at no stage was there a

court established along the lines of the Illinois juvenile court model, and the majority of child offenders in South Africa remained in a punitive criminal justice system. The 1937 Children's Act established the children's court but this did not have criminal jurisdiction, though cases could be referred to it from the criminal court. The Act did stress that the treatment of child offenders was an educational rather than a penal problem. However, the majority of the children in the country were herded through a criminal justice system which paid minimal attention to their special needs as children.

Reform efforts in the 1930s to establish a dedicated system for child offenders culminated in the Young Offenders' Bill of 1937. This Bill, if enacted, would have made sweeping changes to the way in which children in the criminal justice system would have been dealt with. Important changes proposed by the Bill included raising the minimum age of criminal capacity from seven to ten years (and the upper limit of *doli incapax* from 14 to 16 years), a ban on imprisonment for children below the age of 16 years, and the abolition of the death penalty for children. This Bill was published at the same time as the Children's Bill. The then Minister for Education decided that the Children's Bill should be promulgated, with the addition of a few provisions relating to child offenders – such as provisions relating to the power of referral of cases to the children's court and reform schools as a sentencing option. Once the consolidated Bill was passed into law as the Children's Act of 1937, the Young Offenders' Bill faded into obscurity. Thus an important opportunity to establish a separate system for child offenders was lost (Skelton 2005:344–351).

In considering the history of child justice in South Africa it is necessary to make mention of the use of corporal punishment as a sentence. This was based on the idea articulated in the 1870s that children should be 'birched and not branded as criminals' (Venter 1959). This suggests that whipping was initially seen as a reformist alternative to the system of incarceration, but the use of corporal punishment for juvenile offenders was to become shockingly popular over the next century, and by the early 1990s the state was carrying out more than 30 000 whippings a year (Le Roux 2004). It was thus not surprising that the issue of whipping as a sentence for juveniles was the first matter concerning juvenile offenders to come before the Constitutional Court established by the first democratic government. *S v Williams and Others* (1995 (7) BCLR 861 (CC)) struck down whipping as being unconstitutional on the grounds that it was cruel and unusual punishment.

During the 1970s and 1980s thousands of young people were detained in terms of the emergency regulations for political offences, causing a national and international outcry. At the time, political organisations, human rights lawyers and detainee support groups rallied to the assistance of many of these children. Their efforts centred on children involved in political activism, but during this period there were equally large numbers of children awaiting trial on crimes which were non-political in nature but which could invariably be traced to the prevailing socio-economic ills caused by Apartheid. There was no strategy to ensure that these youngsters were treated humanely and with adherence to just principles. By the end of the 1980s the number of political detentions waned, but the country's police cells and prisons continued to be occupied by large numbers of children caught up in the criminal justice system. The 1989 Harare International Children's Conference provided a springboard for the development of the child rights movement in South Africa.

Because of the focus on the struggle to achieve basic human rights in South Africa, the call for a fair and equitable child justice system emerged somewhat later than in many comparable countries. The first intensive calls for such reforms came about in the early 1990s, and emanated from a group of NGOs who went into courts, police cells and prisons to provide assistance to juveniles awaiting trial.

In 1992 these NGOs initiated a campaign to raise national and international awareness about young people in trouble with the law. They issued a report¹⁴ which called for the creation of a comprehensive juvenile justice system, for humane treatment of young people in conflict with the law, for diversion of minor offences away from the criminal justice system and for systems that humanised rather than brutalised young offenders.

A further initiative was launched in 1992 by NICRO, and constituted an important milestone in child justice history. NICRO decided to offer courts alternative diversion and sentencing options that aimed to promote the emerging restorative justice concepts specifically focused on youth. With no enabling legislation in place, the diversion programmes and alternative sentencing options now offered by NICRO are widely accepted, are the subject of various Prosecuting Authority circulars and have been implemented in practice in most urban areas of the country. However, a caution was sounded that in the absence of clear guidelines concerning diversion and alternative sentencing, there are substantial inconsistencies and contradictions regarding the cases that are considered (Skelton & Potgieter 2002).

In 1993, at an international seminar titled 'Children in Trouble with the Law', a paper was presented which called for a comprehensive juvenile justice system (Skelton 1993). A drafting committee (the Juvenile Justice Drafting Consultancy) was set up following the conference, which led to the publication of *Juvenile Justice for South Africa: Proposals for Policy and Legislative Change* in 1994. The new vision needed to encompass the charging, arresting, diverting, trying and sentencing of young offenders in a system that would affirm the child's sense of dignity and worth and clearly define the role and responsibility of the police, prosecutors, probation officers and judicial officers with due regard to the rights of victims.

With the coming into power of the new democratic government in 1994, the stage was set for transformation of the way which children were dealt with by the criminal justice system. The Minister of Justice (at the time) requested the South African Law Commission (now known as the South African Law Reform Commission – the SALRC) to include an investigation regarding juvenile justice in its programme, which led to the appointment of a project committee.

The committee commenced with its work in the beginning of 1997. A consultative process was followed and a report accompanied by a proposed draft Child Justice Bill was handed to the Minister for Justice and Constitutional Development in August 2000. The Bill was introduced into Parliament towards the end of 2002 and, after a series of public hearings, was deliberated upon by the Portfolio Committee on Justice and Constitutional Development during 2003.

Deliberations on the Child Justice Bill (and others) came to a halt because of the general elections in 2004, and the Bill, although still appearing on the Parliamentary agenda, remained in limbo for almost four years. Discussions on the Bill resumed in the Portfolio Committee in February 2008, starting off with another round of public hearings. A host of NGOs seized the opportunity to make new submissions to the Committee based on what were widely perceived as major flaws in the last official version of the Bill and called for amendments to bring the Bill closer to the objectives enshrined in the international instruments discussed earlier.

The Child Justice Bill, after thorough and at times even fierce debate, was approved by the National Assembly on 25 June 2008. It has also been approved by the National Council of Provinces (on 5 September 2008) with minor changes and will be referred back to the Portfolio Committee to attend to the amendments after which it will again have to be approved by the National Assembly.

The Bill will only become an Act upon the President signing the Bill into law and being published in the *Government Gazette*. Even if enacted it will take some time for the Act to come into operation, since the various role-players (the Departments of Justice, Safety and Security, Social Development, Correctional Services and Education) have to get systems and procedures in place to give effect to the prescripts of the Bill and the regulations, which will also need to be drafted. At present the Child Justice Bill envisages the Act to come into effect on 1 April 2010 – or an earlier date fixed by the President.

The fact that the Child Justice Bill was developed during the last few years of the 20th century has had a distinct impact on the theoretical point of departure of the legislation. The main factors that influenced the development of the Bill have been identified as international rights and the theory of restorative justice.

5 Probation services

The word ‘probation’ comes from the Latin word ‘*probare*’ meaning ‘to prove’. From this we may gather that the essence of probation services is to give offenders a chance to prove themselves, to demonstrate that they can conduct themselves in a law-abiding manner.

Probation work aspires to be a separate professional category. In South Africa, probation officers are social workers who carry out work in the fields of crime prevention, treatment of offenders, care and treatment of victims of crime, and with families and communities. Some probation officers perform this work on a full-time basis, while others are social workers who carry out probation services as part of a wider range of functions. The general pattern is that in urban areas there is more of a tendency to specialise and designate persons as full-time probation officers, while in rural areas social work tends to be more generic, where the number of children in conflict with the law is not always high enough to warrant full-time probation officers.

Over the past decade, the recognition of probation work in South Africa as a core component of the child justice system has developed rapidly. It is worth looking at the history of probation work, charting the recent developments and taking a look at the new responsibilities that emerge for the probation officer in terms of the Child Justice Bill.

THE HISTORY OF PROBATION SERVICES

Probation services developed as a result of the realisation that imprisonment has negative effects for offenders, their families and the community. The approach followed in probation work is that of treatment within the community, with supervision, and under certain conditions.

The history of probation services goes back about 180 years. In the first half of the 19th century, the concept of probation services developed in both England and America as a result of concerned citizens, church groups and community organisations who were working to reform the harsh conditions in prisons. John August, a shoemaker, was appointed in 1848 as the first probation officer in the State of Boston. In America this practice led to the promulgation of the Probation Act, 1878, in the State of Massachusetts. This Act made provision for probation services and the appointment of probation officers. The Probation Act, 1878, was only applicable in the State of Massachusetts and therefore probation practice in America developed in a very fragmented way. From England, probation services spread throughout the English-speaking colonies worldwide to New Zealand, Australia and also to South Africa.

THE DEVELOPMENT OF PROBATION SERVICES IN SOUTH AFRICA

The first Act which contributed to the development of probation services in South Africa was the First Offenders Act, 1906, of the Cape Colony. This Act did not make provision for the appointment of probation officers, but the courts were given the option of alternative sentencing in the form of offenders being placed on probation on condition of good behaviour. The regulations issued in terms of the Prisons and Reformatories Act, 1911, explicitly provided for the appointment of probation officers. These regulations, published in 1913, spelt out the duties of probation officers and the conditions of supervision for offenders. The provisions were aimed at adult offenders, but this opened the path for probation services for child offenders.

The Children's Act, 1917, made provision for the supervision of young people, as did the Criminal Procedure and Evidence Act 31 of 1917. If no probation officer was available in a particular area, a police officer or an official from the then Department of Native Affairs could be appointed to render the

service. In the beginning it was mostly private organisations that ran probation services, notably the Prisons Aid Association that was established in 1910 and the Probation League of South Africa, established in 1933. These two organisations merged in 1935 to form the Social Services Association, which became known as NICRO in 1970.

Chisholm (1989) records that the first black probation officer, Charlotte Maxexe, who was a leading figure in the Bantu Women's League, was appointed in 1923. However, she was discharged in 1939, 'the relinquishing of her services a sign of both cost-cutting exercises in the context of the great depression, as well as the steadily hardening segregationist programme of non-recognition of the right of Africans to be in urban area'.¹⁵

POLICY AND LAW REFORM REGARDING PROBATION SERVICES

Policy and law reform has contributed to the development of probation practice in South Africa. The Lansdowne Commission into prison and penal reform was appointed in 1945 and submitted a report to Parliament in 1947. Following the Lansdowne Commission's report, the Criminal Procedure Act 56 of 1955 included provision for supervision, thus allowing for greater scope in alternative sentencing. The Criminal Procedure Act 51 of 1977 gave further statutory recognition to probation services.

The Children's Act 33 of 1960 included provisions regarding probation services, and probation officers were appointed in terms of Section 58 of that Act. Unfortunately this legislation was applied on a racially segregated basis until the late 1980s. The first Act which specifically addressed probation services was the Probation Services Act 98 of 1986, but due to Apartheid it was 'own affairs' legislation that applied to whites only. Ultimately, the Probation Services Act 116 of 1991 was passed which applied to all people in South Africa.

In 1995 the Inter-Ministerial Committee on Young People at Risk (IMC) was established to lead the transformation of the Child and Youth Care System. A pivotal factor in this development was the identification of probation officers as key role-players in the criminal justice system in relation to child offenders. This led to the setting up of a probation advocacy group which met to discuss matters relating to personnel administration standards for probation services and issues relating to training. The body did not enjoy any official status, but

did guide matters such as training of probation officers and the development of a personnel administration standard for probation officers.

In terms of the current law, only social workers may qualify to be appointed as probation officers. The last few years have seen the development of a number of training options. Training programmes have been developed for a *B. Tech* qualification and the University of Cape Town, the University of Johannesburg and the University of Port Elizabeth are now all offering post-graduate degrees in probation practice. The graduates are drawn from a number of disciplines including social work, criminology, penology, criminal law, psychology and sociology. The required educational standard for probation officers is set out in the personnel administration standard.

THE ROLE OF THE PROBATION OFFICER

In terms of the Probation Services Act 116 of 1991 the probation officer has a number of duties towards offenders and their families and communities, as well as towards victims of crime. Offenders of any age may be eligible for probation services, but in practice probation officers have been actively prioritising child offenders during the past decade, which is in line with policy and legislative developments.

According to the Probation Services Act the probation officer has a duty, among others, to –

- Investigate the circumstances of an accused person for the purpose of reporting to the court on his or her treatment and committal to an institution as well as to render assistance to the family
- Assist the probationer in complying with his or her probation conditions in order to improve his or her social functioning, which includes supervision, pre-trial programmes for children, as well as community-based sentencing options
- Report to the court on progress and supervision of a probationer

The Criminal Procedure Act also prescribes certain roles and tasks for the probation officer. When a child is arrested, the police are required to inform a probation officer about the arrest. A child may be placed under the supervision of a probation officer, both as a pre-trial measure or as a sentence.

NEW ACTIVITIES FOR PROBATION OFFICERS

The Probation Services Amendment Act 35 of 2002 was signed into law by the President in 2002. This Act provides a legislative framework for a number of activities already being provided by probation services on the basis of pilot projects and innovations in service delivery. The Act amends the Probation Services Act in several ways, for example by –

- Introducing assessment, support, referral and mediation services in respect of victims of crime
- Providing for the establishment of restorative justice programmes and services as part of appropriate sentencing and diversion options
- Providing for the reception, assessment and referral of an accused person and the rendering of early intervention services and programmes, the investigation of the circumstances of an accused person and the provision of a pre-trial report on the desirability or otherwise of prosecution and the investigation of the circumstances of convicted persons
- Providing for the mandatory assessment of every arrested child who remains in custody before his or her first appearance in court
- Providing for the competency of a probation officer to recommend an appropriate sentence or other options to the court (a function already recognised by the courts in practice)
- Providing for the establishment of a probation advisory committee to advise the Minister on matters relating to probation services

6 Current law and the child justice bill compared

INTRODUCTION

It is evident that there continues to be a need for concerted efforts to reform criminal justice systems dealing with children, both in South Africa and abroad. This view is premised on the fact that, as many court judgments and international instruments have acknowledged, children should be accorded special consideration and treatment due to their diminished capacity arising from their immaturity, and the younger they are, the less culpable they are likely to be. It is also necessary to keep children away from the effects of institutionalisation, hence the deep commitment in the child justice field to the principle of detention as a measure of last resort, and the shortest possible period of time. Another important premise is the appreciation that delinquency in children does not inevitably lead to adult criminality and that it is frequently a phase of adolescent development (Sloth-Nielsen 2001).

As the discussion at the beginning of this monograph suggests, debates about child justice have been characterised by an ideological contest between the ‘welfarist’ approach and the ‘justice’ approach. It would appear that the international tendency has been towards the hardening of attitudes when dealing

with children in conflict with the law – especially children who have committed serious crimes.

However, parallel with this hardening of attitudes, there has also been a growth of an important new approach to crime and justice, namely, the idea of restorative justice. The drafting of the Child Justice Bill was influenced by both a growing awareness of children's rights, as well as the development of restorative justice (Skelton 1999; Sloth-Nielsen 2001). The Child Justice Bill aims to establish a criminal justice process for children accused of committing offences which protects the rights of children entrenched in the Constitution and provided for in international instruments. The clause describing the objectives of the Bill focuses on the promotion of *ubuntu* in the child justice system through fostering children's sense of dignity and worth and reinforcing children's respect for human rights of others. It also stresses the importance of restorative justice concepts such as accountability, reconciliation, and the involvement of victims, families and communities.

The law governing children in the criminal justice system has been fragmented and has to be gleaned from common law as well as various statutes: the Criminal Procedure Act, the former Child Care Act (now replaced by the Children's Act), the Correctional Services Act and the Probation Services Act. Passage of the Child Justice Bill will cause parts of these fragmented laws to be amended or repealed, and the entire procedure for children accused of crimes will be found within that one piece of legislation. An attempt is made below to compare pertinent practical manifestations of the current, fragmented child justice law with the Child Justice Bill.

AGE AND CRIMINAL RESPONSIBILITY

Current law and practice

The South African law on the minimum age of criminal capacity (in other words the youngest age at which a child can be charged with and found guilty of a crime) has its roots in Roman law. It contains two presumptions: first, that a child under the age of seven years is irrebuttably presumed not to have criminal responsibility. The presumption, being irrebuttable, is considered to be a fact. The second common law presumption lays down that a child between the ages of seven and 14 years is rebuttably presumed not to

have criminal responsibility. This means that the court will start off presuming that the child does not have criminal capacity. However, the prosecutor can charge the child and then lead evidence to prove that the child does, in fact, have criminal capacity.

Although the presumptions were designed to protect children, practitioners and academics have noted that the second presumption is all too easily rebutted and that it does not provide adequate protection for children. In practice, for instance, a mother of an accused child is frequently called to testify as to whether her child understands the difference between right and wrong. If she answers in the affirmative, this is often considered sufficient grounds to prove that the child has criminal responsibility (Skelton 1996:180). It has also been pointed out that generally the test, when used in practice, focuses on whether the child understands the difference between right and wrong and tends to ignore a second important question – namely whether the child is able to control his or her behaviour in line with what he understands to be wrong or right (Van Oosten & Louw 1997:125).

The Child Justice Bill

The United Nations Committee on the Rights of the Child that oversees the CRC has on numerous occasions criticised countries that have a minimum age of criminal capacity of ten years or younger. This was a strong factor that influenced the drafters of the Child Justice Bill to raise the minimum age from seven to ten years (Sloth-Nielsen 2001). This means that children below the age of ten years cannot be prosecuted. Children aged between ten and 14 are presumed not to have the capacity to appreciate the difference between right and wrong and to act in accordance with that appreciation. The presumption may be rebutted if the prosecutor subsequently proves, beyond a reasonable doubt, that a child did have the capacity at the time the offence was committed. In addition, the Child Justice Bill devotes a whole clause to proving criminal capacity, which also makes provision for an evaluation report by a suitably qualified person containing an assessment of the child's cognitive, moral, emotional, psychological and social development. Moreover, in view of calls especially from the NGO sector to raise the minimum age of criminal capacity even higher, the Bill provides a mechanism for the review of this age within five years of the commencement of the relevant clause.

AGE DETERMINATION

Current law and practice

A peculiar challenge relating to the practice of child justice in South Africa is the fact that so many children do not know their correct birth dates or ages, or choose not to tell the correct birth date or age. It is estimated that only 40 per cent of births are registered.¹⁶ Thus criminal justice personnel often find themselves dealing with difficult choices.

In terms of section 337 of the Criminal Procedure Act the magistrate may estimate the age of a person if there is not enough evidence to prove the date of birth. The courts have held, however, that it is not sufficient for the judicial officer simply to record that he or she find the accused to be a particular age.¹⁷ Magistrates are reluctant to use this power, and very often rely on an age assessment by a medical practitioner. However, this is time consuming and expensive, and often it is found not to be very helpful as the medical practitioners rarely indicate a specific age (Skelton 1997). In the case of *S v Dial* (2006 (1) SACR 395 (E)), Plaskett warned against magistrates estimating the age of young people claiming to be below the age of 18 years. He pointed out that the determination of being 18 years or below that age was crucial, as a person below 18 is a child and falls within the purview of the Constitution. He recommended that, in the absence of unequivocal documentary evidence, magistrates should obtain a report from a district surgeon regarding the probable age of the young person.

The Child Justice Bill

The Child Justice Bill proposes certain measures to overcome the problem where a child's age is uncertain or in dispute. For instance, the Bill sets out a list of documents and other relevant information that a probation officer can use to estimate a child's age. The probation officer will include this information in the assessment form (assessment of the child will be discussed later), together with an estimation of the child's age, and the magistrate may use this information – in conjunction with other evidence which is now specified – as a basis to determine the age of a child. This age is then considered to be the correct age of the child until evidence is brought to the court to prove the contrary. The Bill also sets out procedures to be followed in the event that an error has been made regarding the age of a child.

ARREST AND NOTIFICATION

Current law and practice

Arrest is the most commonly used method of making sure that children attend their first court appearance. The Criminal Procedure Act does give the police the power to release the child into the care of the parent or guardian with a written notice to appear in court. The police may also issue a summons which is delivered to the child's home. However, the use of these alternatives in practice has been hindered by the fact that a written notice can only be issued for very minor offences, and because of difficulties in locating a parent or guardian prior to the handing over of a written notice or summons for the purposes of warning the parent or guardian to attend court proceedings (Skelton 1997).

The Criminal Procedure Act also requires that the police should notify the parent or guardian of the child about the time, place and date at which a child will appear in court. The police are further required to notify a probation officer that the child has been arrested. In recent years provincial departments of Social Development have made it easier by obtaining cell phones for probation officers to enable them to be contacted after hours, and in some cities after-hours services are available. In 2001 a Protocol for the Management of Children Awaiting Trial was issued by government, which directs that the provincial departments of Social Development must make available to all police stations in the area of service the times that probation services are available, venues where children are to be brought for assessment, relevant names and contact details of probation officers and the assistance the department can offer in tracing a family.

The Child Justice Bill

The Child Justice Bill encourages the use of alternatives to arrest. A child may for instance not be arrested for a petty offence (listed in Schedule 1 to the Bill), unless there are compelling reasons justifying an arrest. Instead of arresting a child, the police official may give the child and his or her parent or other appropriate adult a written notice to attend the next stage of the proceedings (which will be a preliminary inquiry, discussed later). Another alternative is the issue of a summons directing the child and his or her parents or an appropriate adult – defined in the Bill – to appear at a preliminary inquiry.

If a child has been arrested or a written notice has been issued or summons delivered, the police official is required to notify the child's parent. It is also required that a probation officer be notified about the arrest or the use of an alternative to arrest within 24 hours. If the police official is unable to inform a probation officer of the arrest of a child, he or she must submit a written report to the officer presiding at the preliminary inquiry (the inquiry magistrate) giving reasons as to why this requirement was not complied with.

CHILDREN AWAITING TRIAL IN DETENTION

Current law and practice

The South African Constitution, in section 28(1)(g) gives every child the right not to be detained except as a measure of last resort, in which case, he or she may be detained only for the shortest period of time. Despite this provision and numerous *ad hoc* efforts on the part of the legislature to limit pre-trial detention of children, the problem of too many children being detained in prison has continued.

The current law relating to the release and detention of children awaiting trial is complex. In order to see the full picture, certain sections of the Criminal Procedure Act must be read together with section 29 of the Correctional Services Act. The law derived from these sections can be summarised as follows:

A child who has been arrested and charged with a crime other than a crime referred to in Part II or Part III of Schedule 2 to the Criminal Procedure Act (in other words, a less serious crime), may be released by a police official on bail or into the care of the person in whose custody he or she is with a written warning. The police are also empowered to place a child in a place of safety or under the supervision of a probation officer or correctional official. If a child is not released by the police, he or she can be held for 24 hours in police cells whereafter he or she should be released into the care of his or her parents or guardians. Where this is not possible the child may be held in a place of safety. Where there is no secure place of safety within a reasonable distance from the court and if the child is 14 years or older and is charged with an offence listed in a Schedule to the Correctional Services Act, then the child may be sent to prison to await trial.

The magistrate also has the discretion to send a child of 14 years or older to prison if the child is charged with any other offence, and if the magistrate is of the view that the circumstances are so serious as to warrant such detention.

These discretionary cases (often referred to as ‘non-scheduled offences’) account for over one third of children awaiting trial in South African prisons. The law relating to bail also applies to children, so magistrates can and do set bail for children who are imprisoned. The magistrate makes the decision regarding placement of the child in a particular facility. If a child is placed in prison he or she must be brought back before the court every 14 days.

The Child Justice Bill, as it was initially introduced, extended the 14-day period to 30 days. However, the Portfolio Committee, when it again deliberated on the Bill in 2008, viewed this as a retrogressive step and reinstated the 14-day rule in the version of the Bill passed by the National Assembly.

The Child Justice Bill

A specific chapter in the Child Justice Bill is devoted to the release or detention and placement of children prior to being sentenced. It covers the release or detention of a child after arrest until first appearance at a preliminary inquiry (which is regarded as the child’s first appearance in a court), as well as the placement of a child after the first or subsequent appearances prior to sentencing.

If the child has committed a Schedule 1 offence (in other words a less serious offence), the Bill promotes the idea that the child should be released – either on police bail or into the care of a parent or an appropriate adult. A prosecutor may also authorise the release of a child on bail in the case of a Schedule 1 or 2 (more serious) offence, and once the child appears at a preliminary inquiry, the inquiry magistrate, taking all circumstances – specified in the Bill – into account, may order the release of the child into the care of a parent or appropriate adult, irrespective of the nature of the offence.

The release of a child on bail is also dealt with in a novel way. Bail must be considered in three stages: first, whether the interests of justice permits the release of a child on bail; second, a separate inquiry must be held into the ability of the child or his or her parents to pay the bail amount; and third, if it is found that there is an inability to pay the bail amount, consideration must be given to the setting of conditions which do not include payment of money.

If a decision has been made not to release the child (either on bail or into the care of a parent or an appropriate adult) after arrest and before the child’s first appearance, which must take place within 48 hours, the Bill provides that preference must be given to the placement of the child in a suitable child and youth care centre

or, if that is not appropriate, placement in a police cell. Once the child appears at a preliminary inquiry, the inquiry magistrate may consider the placement of a child who, for example, has been detained in a police cell, in a child and youth care centre, or in a prison. Placement in a prison may only be considered if –

- An application for bail has been postponed or refused or bail has been granted but one or more conditions have not been complied with
- The child is 14 years or older
- The child is accused of having committed a Schedule 3 (very serious) offence
- The detention is necessary in the interests of the administration of justice or the safety or protection of the public or of another child in detention
- There is a likelihood that the child, if convicted, could be sentenced to imprisonment

As stated above, the rule that a child who has been placed in prison must be brought back to the preliminary inquiry every 14 days has been retained – despite objections to this rule.

Essentially, the Bill aims to give effect to the constitutional imperative that detention of children should be a measure of last resort. The extent to which the Bill also promotes another constitutional imperative, namely that detention should be for the shortest period of time, is not clear as it will probably be dependent on case loads and on whether magistrates will adequately exercise the new powers afforded them when reconsidering the continued detention and placement of children.

ASSESSMENT

Current law and practice

The importance of individual assessment of each child who comes in contact with the criminal justice system has gained recognition over the past few years in South Africa. The Department of Social Development has adopted a model of developmental, strengths-based assessment, and many probation officers have been trained in the use of this method.

The assessment of children by probation officers prior to the first appearance in court is already practised in a number of urban centres. With regard to the

availability of probation officers to carry out assessments within 48 hours, the major urban areas are reasonably well-served. There are some smaller towns and rural areas which may not have sufficient staff to undertake these assessments, or where the probation officer is required to cover a large geographical area. The contracting out of such services for a fee to trained personnel in the private or non-governmental sector is part of the plan envisaged by the Department of Social Development to ensure the availability of probation services to meet the assessment requirements that the forthcoming legislation will set (Inter-sectoral Committee on Child Justice 2002).

The Probation Services Amendment Act introduces assessment of children by probation officers as a legal requirement for the first time in South African law. The Act defines assessment as ‘a process of developmental assessment or evaluation of a person, the family circumstances of the person, the nature and circumstances surrounding the alleged commission of the offence, its impact on the victim, the attitude of the alleged offender in relation to the offence and any other relevant factor’. The Act requires that all arrested children who have not been released must be assessed by a probation officer as soon as is reasonably possible, but before his or her first appearance in court. The Act also provides that if a child has not been assessed by the time he or she is brought to court, the court may extend the time for the child to be assessed by periods not exceeding seven days at a time following his or her first court appearance.

When the Child Justice Bill re-emerged in 2008, child justice advocates sharply criticised the fact that the Bill, as re-introduced, had retained assessment of children in the case of less serious offences only. Many civil society organisations drew attention to this in their submissions, and the Portfolio Committee became convinced that assessment of all child offenders was essential.

The Child Justice Bill

The Bill reinforces the duty of probation officers to assess all child offenders. Every child who is alleged to have committed an offence, even those who are under the age of ten years and who therefore have no criminal capacity, must be assessed. Assessment, in the case of arrested children who remain in detention, must take place within 48 hours after the arrest. Longer time periods are applicable in the case of children who have been given a written notice to appear or served with a summons. Children under the age of ten years must be assessed

within seven days after the probation officer has been notified by a police official that an offence has been committed.

The purposes of assessment are listed in the Bill and include –

- Establishing whether a child may be in need of care in order to refer the child to a children’s court
- Gathering information relating to any previous conviction, previous diversion or pending charges in respect of a child
- Establishing the prospect of diversion of the matter
- Determining whether the child has been used by an adult to commit the crime in question

Moreover, the Bill contains provisions relating to the confidentiality of information obtained during an assessment; the places where assessments are to be conducted; the persons who are permitted to attend an assessment; the powers and duties of probation officers at assessments; and probation officers’ assessment reports.

THE PRELIMINARY INQUIRY

Current law and practice

A child who has committed an offence and who is arrested or served with a summons or a written notice appears in a normal criminal court, much the same way as adults do. The Criminal Procedure Act does afford child offenders some additional protections, such as *in camera* proceedings and a prohibition on the publication of the offender’s name and particulars, and others. However, there is no intermediate stage between arrest, the issue of a summons or a written notice to appear, and the child’s appearance in court.

The Child Justice Bill

The Bill introduces the concept of a preliminary inquiry. It is described as an informal, pre-trial procedure and is inquisitorial (as opposed to adversarial) in nature. All child offenders, irrespective of the nature of the offence committed, will first appear at a preliminary inquiry before an inquiry magistrate – unless the prosecutor has withdrawn the charges or diverted the matter himself or

herself in the case of Schedule 1 offences (the less serious offences). The objectives of the preliminary inquiry are to –

- Consider the probation officer’s assessment report
- Establish whether the matter can be diverted before plea (diversion is discussed later)
- Identify a suitable diversion option, where applicable
- Establish whether the matter should be referred to a children’s court (discussed below)
- Ensure that all available information relevant to the child, his or her circumstances and the offence are considered in order to make a decision on diversion and placement of the child
- Ensure that the views of all persons present are considered before a decision is taken
- Encourage the participation of the child and his or her parent in decisions concerning the child
- Determine the release or placement of a child

After conclusion of the preliminary inquiry the prosecutor has to indicate whether the matter may be diverted away from the formal criminal justice system. If he or she indicates that the matter may not be diverted, it will be referred to what is known in the Bill as a child justice court, which is an ordinary criminal court but which has to apply the provisions of the Child Justice Bill (and all the additional protections afforded children in terms of the Bill). The idea of a preliminary inquiry is to act as a sifting mechanism so that only serious cases where diversion is not an option end up in the criminal courts.

CHILDREN IN NEED OF CARE

Current law and practice

The children’s court exists in terms of the Children’s Act, 2005, (formerly in terms of the Child Care Act, 1983) and it does not form part of the criminal justice system. Since 1977 it has been possible, however, for any magistrate, in terms of the Criminal Procedure Act, to stop the criminal case against a child and order that he or she be brought before a children’s court inquiry as soon as

possible to determine if he or she is a child in need of care. Evidence that the child may be in need of care might spontaneously emerge during the case, or it may be brought to the attention of the court by any person who must give evidence under oath. This means that any social worker or probation officer may be sworn in to give evidence indicating that there are grounds that the child may be a child in need of care. This can happen at any stage during the trial, even after the child has been found guilty – in which case the criminal conviction will fall away, and the child does not get a criminal record.

Another way that a child accused of a crime can be referred to a children's court is that the prosecutor may withdraw the charges before the plea is taken, and the social worker then opens a children's court inquiry in terms of the relevant sections of the Child Care Act.

The Child Justice Bill

The Bill repeals the relevant provisions in the Criminal Procedure Act providing for the termination of criminal proceedings and the transfer of the matter to a children's court and replaces them with similar but more extensive provisions. An inquiry magistrate may stop the proceedings during a preliminary inquiry and order that the matter be brought before a children's court (established under the Children's Act, 2005) if it appears that –

- The child is a child in need of care and protection as referred to in the Children's Act
- The child does not live at his or her family home or in appropriate alternative care
- The child is alleged to have committed a minor offence or offences aimed at meeting the child's basic need for food and warmth

DIVERSION

Current law and practice

Diversion is a process through which children can be 'diverted' away from the criminal justice system on certain conditions such as attending a specified programme. If a child acknowledges responsibility for the wrongdoing, he or she

can be diverted to such a programme, thereby avoiding the stigmatising and even brutalising effects of the criminal justice system. Diversion gives children a chance to avoid a criminal record, while at the same time the programmes are aimed at teaching them to be responsible for their actions and how to avoid getting into trouble again. If they fail to complete the diversion programme and cannot provide a reasonable explanation for such a failure, the prosecutor will continue with prosecution.

Diversion is practised in South Africa. Although the current law does not specifically provide for diversion, experiments with the diversion of young offenders were pioneered by NICRO since 1992, with the co-operation of Public Prosecutors and probation officers.

Although diversion is currently not mentioned in the statutes, it has been recognised and pronounced upon by the courts.¹⁸ Diversion can thus be said to be officially recognised by South African Law. In addition, the National Prosecuting Authority has published a Policy Directive on Diversion, setting out the circumstances in which diversion may take place.

The Child Justice Bill

Diversion forms a central feature of the proposed legislation. The purposes or objectives of diversion, reflected in the Bill, include concepts such as:

- Encouraging the child to be accountable for the harm caused by him or her
- Providing an opportunity for victims to express their views, encouraging restitution and promoting reconciliation
- Reintegrating the child into his or her family and community, preventing stigmatisation and ensuring that the child does not acquire a criminal record

A range of innovative diversion options are provided for in the Child Justice Bill. A series of orders for new diversion options have been designed, such as a compulsory school attendance order, a family time order, a positive peer association order, a good behaviour order and so forth. These orders allow children to remain in their homes whilst providing a back-up to parents and families having difficulty in guiding their children through adolescence. The Child Justice Bill also describes clear procedures for the holding of restorative

justice procedures, namely family group conferencing and victim offender mediation.

The Child Justice Bill aims to increase the number of children who are diverted, but at the same time builds in a number of safeguards to protect children's procedural rights. For example, a child must be considered for diversion only if he or she voluntarily acknowledges responsibility for the offence, if the child understands his or her right to remain silent and has not been unduly influenced to acknowledge responsibility, if there is sufficient evidence to prosecute, if the child and his or her parent consent to the diversion option, and if the prosecutor or the Director of Public Prosecutions indicates that the matter may be diverted.

These requirements all stress the importance of a child making an informed choice, and aim to ensure that the child is not put under pressure to admit to something he or she has not done, merely because diversion is made to sound like a better or easier option. This means that probation officers, who will usually be the first to talk to the child about diversion and about whether or not the child intends to acknowledge responsibility, will need to be well versed in children's rights, and will need to be skilled in the way that they talk about diversion so as to minimise the risk of 'coercion', or children being pressured into admitting guilt.

The Department of Social Development will have the responsibility, in terms of the proposed legislation, to ensure that there are sufficient diversion options available. This does not prevent any other department or organisation from developing diversion programmes, although all such programmes will have to be accredited. The Department will also be responsible for keeping records of diversion orders made.

LEGAL REPRESENTATION

Current law and practice

Children have a right to legal assistance in South Africa in cases where a substantial injustice would otherwise occur, and where a child or his or her family cannot afford to pay for the services of a lawyer, State funded legal representation can be obtained through the Legal Aid Board (Zaal & Skelton 1998). During the period March to November 2007 the Legal Aid Board represented

almost 25 000 children in criminal matters. This was achieved through the appointment, at each of the approximately 60 Justice Centres, of one dedicated professional assistant for child law. The Legal Aid Board planned its roll-out of child law services in Children's Units through ongoing consideration of a number of factors, including the number of arrests of children in an area, the availability of human resource capacity and the availability of resources to support that capacity. Rural areas are currently served by satellite Justice Centres which operate under the mentorship of the main centre. Each satellite slowly expands and is capacitated until it reaches the status of a Justice Centre (Sloth-Nielsen nd).

The Child Justice Bill

The Bill strengthens the notion of specialised legal representation in respect of children by laying down requirements to be complied with by legal representatives. For instance, the legal representative is required, as far as is reasonably possible, to allow the child to give independent instructions concerning the case and to explain the child's rights in a manner appropriate to the age and intellectual development of the child. If a presiding officer finds that a legal representative has not acted in the best interests of a child, he or she may make an order which includes appropriate remedial action or sanction and must notify the relevant controlling body of which the legal representative is a member (the relevant Law Society or Bar Council). Legal representation of a child during a preliminary inquiry is also permitted, but is not a requirement.

THE COURT PROCESS

Current law and practice

There is no separate criminal court for children in South Africa. In some urban areas where there are sufficient numbers of accused persons under the age of 18 years to make it useful, a court is set aside to deal with such cases and these courts are referred to administratively as 'juvenile courts'. In areas where there is a lower population all criminal cases are channelled through the same courts. Trials of children are required by law to be held *in camera*, which means in private or not open to the public, regardless of which court they are appearing in.

In the present system, courts at all three levels (district, regional and high court) can and do have jurisdiction over cases where children are accused. Jurisdiction means that that court has the power to hear the case. The choice of which court should hear the case usually depends on the seriousness of the charge and the sentencing powers of the courts. District courts have an increased jurisdiction with regard to child cases linked to the fact that the sentences for children differ from those of their adult counterparts, and it is therefore not uncommon for robbery cases involving children, for example, to be dealt with by the district court. However, there appears to be a lack of consistency in this approach and some cases involving child accused are referred to the regional and high courts. Cases may also be referred to the regional court only for sentence, especially if the accused has previous convictions, because the higher courts can set heavier sentences (Skelton & Potgieter 2002).

A pilot project of this model has been operating at 'Stepping Stone' in Port Elizabeth since 1996. The project has now been accepted as part of the normal line functions of government, with staff having been permanently appointed. A second One-Stop Child Justice Centre has been established in Bloemfontein and a third, slightly different model, in Port Nolloth. Although initially these centres were co-ordinated by the Department of Social Development, there are recent moves for the Department of Justice and Constitutional Development to take a more active lead in the management of such centres.

In their report on costing and implementation of the Child Justice Bill, Barberton and Stuart recommended that the distribution of One-Stop Child Justice Centres should seek to maximize impact by being established across metropolitan and certain large urban areas. They proposed that the establishment of 19 such centres would serve at least 30 per cent of the country's arrested children, or possibly more given the metropolitan and urban bias in child crime rates (Barberton & Stuart 1999). The Department of Justice budgeted R31 million between 2003 and 2005 to be spent on infrastructural costs for One-Stop Child Justice Centres.

The Child Justice Bill

Only children whose matters have not been diverted by a prosecutor or during a preliminary inquiry will proceed to trial. Trials will be conducted in more specialised *child justice courts*, which could be magistrates' courts, regional courts

or High Courts, depending on the severity of the charge and the jurisdiction of the court. Any court before which a child appears as an accused will be constituted as a child justice court and will have to apply the provisions of the Child Justice Act. These courts must ensure that all trials of children are concluded as speedily as possible and that postponements are limited in number and duration. Despite the fact that the child has not been diverted at a preliminary inquiry, the child justice court may consider diversion of the matter afresh and may make a diversion order if it is found to be appropriate.

Statutory provision is also made for the establishment of One-Stop Child Justice Centres as outlined above. The Minister for Justice and Constitutional Development is the primary role-player in the establishment of such centres.

SENTENCING

Current law and practice

Youth has long been regarded as a mitigating factor in the imposition of sentence in South Africa. The reasons underlying this are firstly, that the moral culpability of the child is reduced if he or she is very young, and secondly, that age is relevant to the determination of a sentence which is appropriate to the individual accused (Sloth-Nielsen 2001). In the case of *S v Z* (1999 (1) SACR 427 (ECD)) the court pronounced three guidelines that should be followed when sentencing a child. Firstly; the younger the child, the more inappropriate the use of imprisonment would be. Secondly; imprisonment is particularly unsuitable for first offenders, and thirdly; even if the sentence of imprisonment is only of short duration, this shortness does not render it appropriate. In *S v Kwalase* (2000 (2) SACR 135 (CPD)), the issue of proportionality was dealt with and the court underscored the importance of an individualised approach to sentencing child offenders. The Supreme Court of Appeal has described in detail the principles relevant to the sentencing of child offenders in the cases of *S v B* (2006 (1) SACR 311 (SCA)), *DPP KwaZulu-Natal v P* (2006 (1) SACR 243 (SCA)) and *Ntaka v The State* ((469/2007) [2008] ZASCA 30 (28 March 2008)). The best interests of the child principle, which is of paramount importance, also applies in the sentencing of children, though it will of course be weighed against competing rights. Rehabilitation as an aim of sentencing weighs heavily, and the court should utilise a sentencing option that will improve a child's ability to

lead a crime-free life in future. Deterrence is accorded a lesser status, and a wide discretion is of vital importance.

A range of non-custodial sentences is currently available to the courts for the sentencing of convicted children, as provided for in the Criminal Procedure Act. It is possible to postpone the passing of sentence conditionally or unconditionally. In the case of unconditional postponement the court does not pass sentence but warns that the offender may have to appear again before the court if called upon to do so. The postponement may be made conditional to compensation, rendering of a benefit or service to the victim, community service, instruction or treatment, supervision or attendance at a centre for a specified purpose. Postponement of sentence is used regularly by the courts, particularly for non-violent offences. Also available under the current law is the option of correctional supervision. This provides for an offender to be placed under correctional supervision which takes the form of house arrest, combined with a set period of community service and attendance of a course. This can either be done totally as a community-based sentence, or a person can spend a portion of the sentence in prison, and then be released to carry out the rest of the sentence under correctional supervision.

While the courts have for many years had the power to use community-based sentences, they have often opted for less imaginative options from the list available to them, such as postponed sentences.

In the current system, children may also be sentenced to reform schools (managed by the Department of Education) which are compulsory residential facilities offering academic and technical education. With regard to the availability of reform schools, the court, in *S v Z & 23 Similar Cases* (2004 (4) BCLR 410 (E)), dealt with a review of 24 cases where child offenders had been sentenced to a reform school but had been in prison for long periods of time awaiting transfer. The court directed the Department of Education to report on a range of matters, as well as the immediate release of 24 child offenders whose two-year orders had either lapsed or would soon lapse. After six months the Department had presented a plan for structural alteration of an existing school of industries to create a reform school that could receive sentenced children. The court order included a structural interdict overseeing the Department's fulfilment of their plans.

Finally, children can be sentenced to imprisonment. Under the current law there is no limit regarding a minimum age for imprisonment of sentenced

children. In practice children under the age of 14 years are not often sentenced to imprisonment, but the fact that it happens at all remains a concern. According to the annual report issued by the Office of the Inspecting Judge of Prisons (2005 – 2006), of the 2 354 children (awaiting trial and sentenced), 12 were under 14 years of age.

South Africa remains one of only a few countries in the world that retains life imprisonment as a sentence for children. A person sentenced to life imprisonment must serve 25 years in prison before he or she can be considered for parole.

The Child Justice Bill

For the first time in South African law a statute will contain provisions regarding the objectives of sentencing and factors to be considered during sentencing. The Child Justice Bill provides that the objectives of sentencing child offenders are to –

- Encourage the child to understand the implications of and be accountable for the harm caused
- Promote an individualised response which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the offence
- Promote the reintegration of the child into the family and community
- Ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration
- Use imprisonment only as a measure of last resort and only for the shortest appropriate period of time

The Bill provides for community based sentences (or non-custodial sentences, as outlined above), which allows the child to remain in the community and may include compliance with any of the diversion options listed in the Bill as a substantial sentence. This would include referral of the matter to a family group conference or victim-offender mediation, which are typical of a restorative justice approach. Correctional supervision is also provided for, with the difference that children under the age of 14 years may only be sentenced to correctional supervision which amount to house arrest (and other conditions), and not to correctional supervision which is preceded by a term of imprisonment. Children aged 14 years or older would qualify for both types of correctional supervision.

The old reform schools are to be replaced by child and youth care centres providing a programme designed to receive sentenced children and will, within two years of commencement of the relevant provisions the Children's Act, 2005, fall under the jurisdiction of the Department of Social Development. Child offenders may be referred to such centres as a substantial sentence. The Bill provides for a unique and novel sentencing option in this respect: In the case of very serious offences which, if committed by an adult, would have justified a term of imprisonment exceeding ten years, the child may first be sentenced to an appropriate child and youth care centre, and after serving such sentence, be transferred to a prison to serve the remainder of his or her sentence. Upon completion of the sentence in the child and youth care centre, the child will first appear in the court which imposed the sentence to consider the extent to which the child had been rehabilitated. If satisfied that rehabilitation had been successful, the court may order the release of the child with or without conditions. This would serve as an incentive for child offenders to give their co-operation while serving a sentence in a child and youth care centre and to rehabilitate themselves in order to become productive members of society.

The Child Justice Bill places a prohibition on the imprisonment of children who are under the age of 14 years *at the time of being sentenced for the offence* (not at the time of the commission of the offence), and prescribes that when sentencing a child who is 14 years or older at the time of sentencing to imprisonment, such imprisonment may only be done as a measure of last resort and for the shortest appropriate period of time. In addition, a child who is 14 years or older may only be sentenced to imprisonment for a Schedule 1 offence (less serious offence) if he or she has a record of relevant previous convictions *and* substantial and compelling reasons exist for imposing a sentence of imprisonment, and in the case of a Schedule 2 (more serious) offence, if substantial and compelling reasons exist. No similar criteria apply in the case of a Schedule 3 (or serious) offence.

REVIEW AND APPEAL OF CONVICTIONS AND SENTENCES BY THE HIGH COURT

Current law and practice

The South African legal system has an effective and reasonably prompt review system. This allows the High Court to look at the judgment of a lower court and

decide if it was correct and fair. The High Court may confirm the judgment or set it aside and overturn the conviction or change the sentence.

The system is applicable to all convicted persons, not only children. The rule is that where a magistrate has held the substantive rank of magistrate for less than seven years, any sentence longer than three months imprisonment will automatically be reviewed by a High Court judge, and where a magistrate has held the substantive rank of magistrate for longer than seven years, then any sentence longer than six months imprisonment will go on automatic review.

In recent years there have been numerous review cases regarding children in the criminal justice system, and these have helped to set guidelines for good practice. Besides automatic review, judges can also call cases on special review if these are brought to the attention of the High Court. The Criminal Procedure Act allows for a very simple procedure. All that is required to bring a matter to the notice of the judge is the case number and the name of the child, as well as the name of the court where the child was sentenced and the date of sentence. The Registrar of the High Court can be contacted by telephone or in writing, and he or she will take the matter further.

With regard to appeal, recent amendments to sections 309 and 316 of the Criminal Procedure Act (Criminal Procedure Amendment Act 42 of 2003) provide that an accused sentenced to imprisonment who, at the time of the commission of the offence, was below 16 years, or was at least 16 years but below 18 years and was not legally represented, may note an appeal without having to apply for leave to do so.

The Child Justice Bill

The Bill retains the present position regarding the noting of appeals by repealing the relevant provisions in the Criminal Procedure Act pertaining to children and incorporating those provisions in the Bill. In addition, the Bill requires the presiding officer to inform the child of his or her rights in respect of appeal and legal representation and of the correct procedures to give effect to these rights.

As far as review is concerned, the Bill retains the position regarding the automatic review of criminal proceedings in lower courts as embodied in the Criminal Procedure Act but extends the protections afforded children. It provides that where an accused was under the age of 16 years at the time of

commission of the alleged offence, *any sentence* imposed on him or her is automatically reviewed, irrespective of the duration of the sentence. If the accused was at least 16 years but below 18 years of age, and the sentence involved imprisonment that was not wholly suspended or involved compulsory residence in a child and youth care centre, such sentence is automatically reviewed, again irrespective of the duration of the sentence.

SUMMARY OF THE PROVISIONS OF THE CHILD JUSTICE BILL

The Bill applies to any person under the age of 18 years who is alleged to have committed an offence. The minimum age of criminal capacity is raised from seven to ten years. It is presumed that children between the age of ten and 14 years lack criminal capacity, but the State may prove such capacity beyond reasonable doubt.

In order to keep children out of police cells and prisons, the Bill encourages the release of children into the care of their parents or other suitable adults and entrenches the constitutional requirement that detention should be a measure of last resort for a child. A probation officer will assess every child who is alleged to have committed an offence, irrespective of the child's age. A preliminary inquiry is held in respect of every child within 48 hours of arrest and is presided over by a magistrate, referred to as the 'inquiry magistrate'. Prosecutors may, however, divert children who have committed Schedule 1 (less serious offences) before a child's appearance at a preliminary inquiry. Decisions to divert the child away from the formal court procedure to a suitable programme may be taken at the preliminary inquiry stage, if the prosecutor indicates that the matter may be diverted. Diversion is a central feature of the new system, and the Bill sets out a range of diversion options.

Those children who are not diverted (because they indicate that they intend to plead not guilty to the charge, or because the prosecutor or Director of Public Prosecutions refuses to divert the matter) will proceed to plea and trial in the child justice court. The envisaged child justice court is not a completely specialised or separate court. In urban areas, where there are sufficient cases to warrant it, full-time child justice courts with specially selected and trained personnel will be set aside, in the manner of the current juvenile courts. In rural areas, the court will simply constitute itself as a child justice court, following

the procedures set out in the legislation. The superior courts are bound by the special provisions for children set out in the draft Child Justice Bill.

The Bill includes a wide range of sentencing options, including non-residential or community-based sentences, sentencing involving restorative justice concepts such as restitution and compensation to the victim, and, finally, sentences involving compulsory residence in a child and youth care centre. The Bill makes it clear that imprisonment should only be used as a measure of last resort and then for the shortest possible period of time. A prohibition is placed on imprisonment as a sentence in respect of children who are under the age of 14 years at the time of being sentenced, and certain criteria that are linked to the severity of the offence are laid down in respect of children who are 14 years or older.

The Bill also proposes monitoring mechanisms to ensure the effective operation of this legislation, and promotes co-operation between all government departments and other organisations and agencies involved in implementing an effective child justice system.

The system proposed by the Child Justice Bill incorporates and builds on some sections in existing laws that have in the past provided fragmented, uncoordinated protection for children accused of crimes. The new system has been developing in a piecemeal way for a number of years. This development has grown through the introduction of reforms and improved systems by NGOs and government departments, often working in partnership. The advantage of the fact that these developments have occurred is that many of the services that will be made mandatory in terms of the Child Justice Bill are already part of every day practice for probation officers.

The Child Justice Bill brings about significant changes to the South African criminal justice system as far as children in conflict with the law are concerned. It has led to a great deal of work on budgeting and implementation planning, which will not only smooth the way for successful implementation of the new law, but which has already led to an improvement in service delivery.

EPILOGUE

We conclude by returning to the story with which we began this monograph about the girl aged 12 years who instructed two men to kill her grandmother. The child was convicted by the Pietermaritzburg High Court on 7 October

2004. Substantial evidence was led during the sentencing phase of the case, and in December 2004 the High Court handed down sentence. She was sentenced to correctional supervision, which allowed her to continue to attend school and receive regular therapy while living at home. The sentence order set out stringent conditions that required her to remain within the apartment where she lived. She was only permitted to spend one hour in the garden of the apartment block at a specified time each afternoon. In this case the judge took into account the personal circumstances of the child and imposed a sentence that catered for her developmental needs. The judge took issue with the fact that the state would have liked to keep the child in a situation where there was little chance of rehabilitation. He referred to conditions in the prisons for female child offenders that were shown to be non-conducive to rehabilitation. At the centre of this judgment lay the need to take care of the best interests of the child.

The State, however, was not satisfied with this outcome. Bent on obtaining a prison term of eight years for the girl, they applied for leave to appeal. After the application failed in the High Court, the State used its final remedy – a petition directly to the Supreme Court of Appeal (SCA). The petition succeeded, and the matter was finally heard in the SCA in Bloemfontein in November 2005.

The essence of the State's argument was that the judge had merely paid lip service to the nature of the crime and the interests of society and that the court had effectively ignored a number of aggravating factors. The State accused the trial judge of misdirection by placing undue emphasis on the expert evidence that was led at the sentencing stage. A further misdirection by the trial judge, according to the State, was that while he purported to individualise the sentence, he had failed to consider that the accused functioned at the level of a person substantially more mature than the average 12 year-old.

Counsel for the defence argued that there was overwhelming evidence that imprisonment was not an appropriate option on the facts of the case, and would not be conducive to the child's rehabilitation or her best interests. The respondents objected to the fact that the State pursued the appeal in the absence of any evidence to suggest that the child posed any threat to society, knowing full well that imprisonment would be in the Westville women's prison where the child would be exposed to adult offenders, where educational facilities were parlous, psychological support services were minimal to non-existent, and that the child would be locked in her cell for approximately 16 hours a day. In brief, it was

argued by the respondent that the state was seeking a sentencing option that would serve no legitimate purpose of punishment, would be likely to have a negative effect on the accused and would be particularly cruel having regard to the conditions under which she would be incarcerated. By contrast, the defence proceeded to argue, the sentence actually imposed on the child was consistent with all the purposes of punishment, designed to have a rehabilitative impact and was achieving that purpose, was constitutionally compliant and had been the product of a balanced judgment based on the evidence. The defence argued, therefore, that the Supreme Court of Appeal should not intervene, and should allow the sentence to stand as it was.

The judgment in the case of *The Director of Public Prosecutions KwaZulu-Natal v P* was handed down in December 2005. The child was not sentenced to direct imprisonment. The SCA did, however, interfere with the sentence, replacing the postponement with a fully suspended prison term, still linked to three years of correctional supervision. Although this had little practical effect on the sentence, the message it sent was subtly different from that of the High Court. Although the judgment upheld the constitutional requirement that imprisonment should be a measure of last resort, it did so with less clarity and conviction than the judgment on sentence handed down by the trial court.

The positive points of the judgment are that the child is kept out of prison, and the principles pertaining the sentencing of children set out in previous judgments of South African courts (including *S v B*, the decision of a differently constituted bench of the same court) were restated and upheld. The judgment acknowledged that the traditional approach to sentencing should, where a child offender is concerned, 'be adapted and applied to fit in with the sentencing regime enshrined in the Constitution, and in keeping with the international instruments which lay "emphasis on *reintegration* of the child into society"¹⁹. Positive references were made to the UN Convention on the Rights of the Child, and the draft Child Justice Bill, as it was at the time of the judgment, was also recognised. However, the judgment lacked a sense of coherence.

Although the principles were clearly stated, they were not comprehensively applied to the case in point. The court did not use the opportunity to explain what is meant by 'a measure of last resort', nor was there a clear explanation as to why the child concerned should not be imprisoned. At one stage the judge delivering the judgment for a unanimous court observed that it was 'too late' to send her to prison.

With respect, the validity of this observation as a principled basis for determining a suitable sentencing is doubtful. Elsewhere the judgment toys with a range of other issues such as the problem of prison conditions which the court declared was generally a matter with which a sentencing court could not concern itself. The court observed that 'we cannot close our eyes to the facts as we know them'. The court also complained about the quality of correctional supervision, but in the final analysis left the order for correctional supervision substantially as ordered by the trial court, save for adding that the prosecution should also receive regular reports regarding the child's progress. Terblanche (2007) also added his voice to criticism against this judgment.

The judgment amounts to a missed opportunity. In our view, the SCA could have built further on the excellent judgment in *S v B*, and could have given a clear, unequivocal statement about the constitutional protection for children, namely that they should not be imprisoned except as a last resort. The court failed to do so. That has subsequently been done in the case of *Ntaka v the State* ((469/2007) [2008] ZASCA 30 (28 March 2008)). However, the child has been allowed to stay in the community and has completed the correctional supervision portion of her sentence at the time of writing.

Notes

- 1 The Natal Witness, 14 December 2004, p 1.
- 2 *You Magazine*, 21 October 2004, p 166.
- 3 Pitmann raised the defence that he was taking an anti-depressant (Zolofit) at the time of the murder, but the jury dismissed this. Thirty years is the minimum sentence for murder in the state of South Carolina, and it applies to children as well as adults. See www.cnn.com/2005/LAW/02/16/pitmann.
- 4 See www.deathpenaltyinfo.org for further details and analysis of the case.
- 5 The first one in New York in 1825.
- 6 The first reformatory for juveniles was established in the US in 1848.
- 7 Three years later, in *In re Winship* 397 U.S. 358 (1970), the Supreme court noted at p 365–366: ‘We made it clear in that [*Gault*] decision that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts’.
- 8 *S v Howells* [1999] 2 All SA 234 (C); *Kirsch v Kirsch* 1999 (4) SA 691 (C); *Jooste v Botha* 2000 (2) BCLR 187 (SCA); *Grootboom v Oostenburg Municipality and Others* 2000 (3) BCLR 277(C); *Minister for Welfare and Population Development v Fitzpatrick* 2000 (7) BCLR 713 (CC); *S v J and Others* 2000 (3) SACR 310 (C).
- 9 Adopted by the General Assembly on 20 Nov 1989 and ratified by South Africa on 16 June 1995.
- 10 Adopted by the General Assembly on 14 December 1990.
- 11 Adopted on 29 November 1985.
- 12 Adopted by the General Assembly on 14 December 1990.
- 13 For further reading see Sargeant, R 1997. *The Principal: Alan Paton’s Years at Diepkloof Reformatory*. South Africa:Penguin
- 14 *No Child Shall be Caged*, Issued jointly by the Community Law Centre, Lawyers for Human Rights and NICRO, 1992.
- 15 The Institute of Race Relations lobbied successfully for Mrs Maxeke’s reinstatement on a temporary basis in 1938.

- 16 *Child Law Manual for Judicial Officers*, Pretoria: Justice College 2004, C-12.
- 17 *S v Hadebe and Another* 1960 (1) SA 488 (T), *S v Mavhungu* 1988 (2) SA 67 (V).
- 18 *S v D* 1997 (2) SACR 673 (C), *S v Z en Vier Ander Sake* 1999 (1) SACR 427 (EC), *M v The Senior Public Prosecutor, Randburg and Another* unreported case number 3284/00 (W).
- 19 *Supra*, par 14.

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