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## INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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## **PREFACE**

This issue paper (which reflects information gathered up to the end of March 1997), was prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations it contains should not be regarded as the Commission's final views. The paper is published in full so as to provide persons and bodies wishing to comment or make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

The Commission will assume that respondents agreed to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit written comments, representations or requests to the Commission by 31 August 1997 at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The researcher allocated to this project, who may be contacted for further information, is Hennie Potgieter. The project leader responsible for the project is Ms Ann Skelton of Lawyers of Human Rights in Pietermaritzburg who is also the Chairperson of the project committee appointed to assist the Commission in the investigation. The other members of the project committee are Ms Pat Moodley (lecturer in Public Law at the University of Durban-Westville), Ms Zubeda Seedat (member of the Commission), Ms Julia Sloth-Nielsen (senior researcher at the University of the Western Cape's Community Law Centre), Mr Tseliso Thipanyane (National Institute for Public Interest Law and Research) and Ms Magdalene Tserere (Lawyers for Human Rights in Umtata).

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## **1. INTRODUCTION**

1.1 South Africa ratified the United Nations Convention on the Rights of the Child (1989) on 16 June 1995. This important Convention deals with a broad range of children's rights and provides a comprehensive framework within which the issue of juvenile justice must be understood. By ratifying the Convention, South Africa is now obliged, in terms of article 40(3) thereof, to establish laws, procedures, authorities and institutions specifically applicable to children in conflict with the law. The Convention requires, 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 takes 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".

1.2 A steering committee chaired by the Minister of Health has been established to develop a National Plan of Action to give life to the Convention, and the justice sectoral group linked to the National Plan of Action has identified the drafting of composite juvenile justice legislation as a priority. The justice sectoral group recommended that the South African Law Commission should be requested to develop a juvenile justice system to give effect to the Convention. Following a request by the Minister of Justice the Commission included an investigation into juvenile justice in its law reform programme. The Commission established a project committee for the investigation to which the Minister made appointments on 5 December 1996.

1.3 South Africa does not have a cohesive juvenile justice system. Limited provisions providing specifically for the management of young people caught up in the criminal justice system are spread throughout a number of separate statutes. They are the Criminal Procedure Act 51 of 1977, the Probation Services Act 116 of 1991, the Child Care Act 74 of 1983 and the Correctional Services Act 8 of 1959.

1.4 In the 1970's and 1980's the detention of children without trial was a major concern to NGOs, parent committees and other interested parties. Towards the end of the 1980's, political detention of children drew to an end but large numbers of children continued to be held in custody awaiting trial and NGOs focussed on the plight of these children. In 1993 the South African Government undertook an investigation into alternative centres for children in detention in which a number of suggestions were made but were not acted upon. In 1994 a group of NGOs published proposals for policy and legislative change in the field of juvenile



justice.<sup>1</sup> There have also in recent years been a number of national and international conferences on juvenile justice in South Africa as well as a range of NGO and Government initiatives and pilot projects. In addition interest in the field of juvenile justice has led to local research and publications.

1.5 Piece-meal attempts to introduce reforms to the criminal justice system with the aim of protecting young people charged with offences have not been effective. What is now needed, and what is propounded in this issue paper, is the development of a separate piece of legislation which governs a comprehensive juvenile justice system for South Africa. Apart from the international requirements, the National Crime Prevention Strategy and the Interim Policy Recommendations of the Inter-Ministerial Committee (IMC) on Young People at Risk<sup>2</sup> which have been approved by Cabinet, also recognise the need for a separate juvenile justice system.

1.6 Ultimately the aim should be the achievement of composite legislation regarding children. For this reason all efforts at legislative reform for children should be coordinated.

1.7 The following issues, in respect of which certain preliminary proposals are made or options are put forward for consideration, have been identified and are discussed in this issue paper with a view to eliciting comment and stimulating debate on the entire question of juvenile justice legislation in South Africa:

- (i) Principles to underpin juvenile justice legislation
- (ii) Age and criminal capacity
- (iii) Legal representation
- (iv) Police procedures
- (v) Release policy
- (vi) Diversion
- (vii) Juvenile courts
- (viii) Sentencing
- (ix) Monitoring

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<sup>1</sup>Juvenile Justice Drafting Consultancy **Juvenile Justice for South Africa: Proposals for Policy and Legislative Change** Cape Town: Allies Printers 1994.

<sup>2</sup>November 1996. The IMC was established to manage the process of crisis intervention and transformation of the Child and Youth Care System over a limited time period.

## **2. PRINCIPLES AND FRAMEWORK**

2.1 In recent years the enshrining of principles within the body of juvenile justice legislation has found favour internationally, for example in New Zealand and Uganda. There are a number of international instruments which can be drawn on in order to crystallise what the relevant principles should be. The United Nations Convention on the Rights of the Child, referred to above, is a binding instrument and provides a backdrop to relevant sections in the Constitution such as sections 28 and 35. Other international instruments which have a direct bearing on the subject of young people in conflict with the law are the 1990 United Nations Guidelines for the Prevention of Juvenile Delinquency (known as the Riyadh Guidelines); the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (known as the Beijing Rules), and the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (known as the JDLs). Although not legally in force, the African Charter on the Rights and Welfare of the Child is a useful document for the purposes of defining relevant principles.

2.2 Comment is invited on the question as to whether and in what way identified principles should be incorporated into proposed legislation for juveniles. The following four options are given for consideration:

- (i) General principles could be set out at the beginning of the legislation.**
- (ii) Principles pertaining to a particular section could be set out at that section where they could be used to assist with interpretation of those provisions, for example principles relating to sentencing.**
- (iii) A combination of the above two options could be applied.**
- (iv) Principles could be incorporated as provisions within specific clauses.**

2.3 In addition to principles, the objectives of the legislation could be set out in order to enlighten all persons involved with the administration of such legislation as well as the public at large.

2.4 The international instruments read together with the South African Constitution are useful in two respects. Firstly, they may be incorporated into legislation to guide

interpretation and action within its scope. Secondly, they can offer guidance in the legislative process by providing standards that new juvenile justice legislation should meet.

#### *Framework derived from the principles*

2.5 The South African Constitution and international instruments give an outline of what should be included in a future South African juvenile justice system. In line with these principles the project committee is of the view that the over-all approach should aim to promote the well-being of the child, and to deal with each child in an individualised way. A key aspect should be diversion of cases in defined circumstances away from 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, as is sensitivity to culture, tradition and the empowerment of victims. There should be an emphasis on young people being held accountable for their actions. This should be done in a manner which gives them an opportunity to turn away from criminal activity.

2.6 Children going through the criminal justice system 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. All proceedings should take place within the shortest appropriate period of time and there should be no unnecessary delays.

2.7 In deciding on the outcome of any matter involving a young offender, the presiding officer should be guided by the principle of proportionality, the best interests of the child, the least possible restriction on the child's liberty and the right of the community to live in safety. Depriving children of their liberty, either whilst they await trial or as a sentence, should be a measure of last resort and should be restricted to the shortest possible period of time. Mechanisms for ensuring all of this need to be built into the juvenile justice system.<sup>3</sup>

#### *Framework derived from the South African policy documents*

2.8 Linked to international developments is the recent endorsement in the National Crime Prevention Strategy and the IMC's Interim Policy Recommendations of the need to introduce restorative justice values, principles and practices for juvenile justice. Restorative justice relies on reconciliation rather than punishment, on offenders accepting responsibility for their

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<sup>3</sup>A Skelton *Developing a juvenile justice system for South Africa: International instruments and restorative justice* 1996 **Acta Juridica** 180 - 196.

behaviour, and on the involvement of victims in the negotiation of an agreement or outcome including restitution, which may be symbolic. Restorative justice practices facilitate the reintegration of the offender back into society,<sup>4</sup> drawing on community-based and indigenous models of dispute resolution. In line with national policy, the restorative justice approach forms part of the framework underpinning a new juvenile justice system.

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<sup>4</sup>United Nations Convention on the Rights of the Child, article 40(1).

### 3. AGE AND CRIMINAL CAPACITY

(i) Age

*Current South African law*

3.1 In both international and national law, the definition of a juvenile is directly or indirectly related to age. The term "juvenile", however, may differ from that of "child". The Constitution of South Africa, in section 28, defines a child as a person below the age of 18. Section 28 also enshrines certain rights relevant to juvenile justice, which then apply to those below the age of 18: specifically, the right to be detained only as a matter of last resort, and the right when detained to be treated in a manner consistent with the child's age. Also, children under 18 are to be detained separately from adults. The Criminal Procedure Act 51 of 1977 provides for special procedures in instances where children under 18 are dealt with after arrest, and during court proceedings. Examples in point are section 50(4) and (5) (duty to notify parent or guardian of arrest of person under the age of 18; duty to notify probation officer of arrest of child under the age of 18); section 72(3) (accused under the age of 18 entitled to be assisted at criminal proceedings by parent or guardian) and section 153(4) (proceedings to be held in camera where the accused is under the age of 18 years).

3.2 The present Correctional Services Act 8 of 1959 defines a juvenile as a person under the age of 21 years. Within the departmental practice, however, the category "child" has now been recognised as distinct from juvenile and children are those under the age of 18. In the new draft Correctional Services Bill, a definition of child has been incorporated, and the age limit of 18 is used. No definition of juvenile or youth other than this has been included.

*International perspective*

3.3 According to Rule 2(2) (a) of the Beijing Rules, "a juvenile is a child or young person who under the respective legal system may be dealt with for an offence in a manner which is different for an adult". This definition allows a national system to define who should be considered to be a juvenile. However, the later United Nations Rules for the Protection of Juveniles Deprived of their Liberty addresses this anomaly by defining a juvenile as every person under the age of 18 years.<sup>5</sup> The United Nations Convention on the Rights of the Child (hereafter "the CRC") is applicable to all children under the age of 18 years. The Convention's juvenile justice rules apply to all persons below this age, regardless of whether national criminal law treats younger persons as if they were adults. For those states who are

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<sup>5</sup>Rule 11 (a).

party to the CRC, the principal definitional limitation of the Beijing Rules is overcome and the concepts of juvenility and childhood under 18 are linked.

### *Proposal*

3.4 Both international law and national law have recognised the age of 18 years as the appropriate age for separation of young people from the adult criminal justice system. **It would appear that no reform in respect of this age is necessary.** However, the choice of the terminology ‘juvenile’ or ‘child’ or ‘youth’ or ‘young person’ would be relevant to the title and wording of the new proposed legislation. The word *juvenile* has negative connotations and is no longer accepted internationally.<sup>6</sup> The word *youth* has particular meanings within the South African context and includes people over the age of 18 years. ***Child and/or young person would seem to be the most appropriate choices.*** The word *offender*, for example as in Child Offenders Act, should be avoided as it is labelling and assumes guilt. Comment on this issue is invited.

(ii) Criminal capacity (the presumption of *doli capax* and *doli incapax*)

### *Current South African law*

3.5 In South Africa the minimum age of criminal capacity is determined by the *doli capax/ doli incapax* rule. Below the age of 7 years, the child is irrebuttably presumed to lack criminal capacity.<sup>7</sup> Between the ages of 7 and 14 years there is a rebuttable presumption that children under 14 years, but 7 years or older, are deemed to lack criminal capacity unless the State proves that the child in question can distinguish between right and wrong and knew the wrongfulness of the offending at the time of commission of the offence. This rule dates back to Roman law.

3.6 The presumption was designed to protect children, but practitioners have noted that it is all too easily rebutted, and that it does not in fact present an impediment to the prosecution and conviction of young people.<sup>8</sup> For instance, mothers of children are asked to indicate

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<sup>6</sup>The term “juvenile” has been used throughout this document as the committee’s brief was to investigate “juvenile justice”. Use of the term does not indicate support for it.

<sup>7</sup>It has been pointed out that this is one of the lowest ages of commencement of criminal capacity in the world. See A Skelton 1996 *Acta Juridica* (*supra*) 186.

<sup>8</sup>C McClain *Problems relating to age and criminal capacity* in J Sloth-Nielsen (ed) **South African Juvenile Justice: Law Practice and Policy** (forthcoming).

whether their children understand the difference between right and wrong. An answer in the affirmative is often considered sufficient grounds to rebut the presumption of *doli incapax*. The courts have noted that caution should be exercised where accused are illiterate, unsophisticated, and moreover are children "with limited grasp of the proceedings".<sup>9</sup>

3.7 The practical considerations noted here, namely the fact that many children do not enjoy legal representation during criminal proceedings - many appear without parental assistance and are ill-equipped to defend themselves in criminal proceedings - may have a bearing on decisions relating to the fixing of a minimum age of criminal capacity.

#### *International perspective*

3.8 "International law incorporates a number of basic principles upon which a juvenile justice system should be based. The first purpose is the encouragement of the well-being of children; the second goal is that children should be dealt with in a manner proportionate both to their circumstances and to the offence";<sup>10</sup> "another principle ... is that the concept of criminal responsibility should be related to the age at which children are able to understand the consequences of their actions".<sup>11</sup>

3.9 The Convention on the Rights of the Child places a duty on state parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe penal law. The Beijing Rules (Rule 4) recommend that when states establish such an age of criminal responsibility, "the beginning of that age shall not be fixed at too low an age level bearing in mind the facts of emotional mental and intellectual maturity". The Commentary to the Rules points out that if the age were set too low or was non-existent, the concept of responsibility would become meaningless.

3.10 There are wide differences internationally in relation to when criminal capacity is deemed to commence. Within Europe, for example, the lowest is Ireland (7 years), while in Sweden it is 15 years. In the USA, different states have adopted different ages, with the lowest reportedly being 10 years.<sup>12</sup>

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<sup>9</sup>*S v M* 1982 (1) SA 240 (N).

<sup>10</sup>G van Bueren **The International Law on the Rights of the Child** Dordrecht: Kluwer Academic Publishers 1995 172 (hereafter "Van Bueren").

<sup>11</sup>Van Bueren 173.

<sup>12</sup>*C McClain (supra)*.

3.11 In Africa, recent legislative reforms have indicated a trend towards raising the age of criminal capacity. In the 1996 Uganda Children's Statute, the age of criminal capacity has been fixed at 12 years (article 89). It had previously been 7 years. In Ghana, the Proposals for a Children's Code recommend that "the minimum age of criminal responsibility shall be fourteen years".<sup>13</sup>

### *Proposals*

3.12 A survey of available statistics and published research indicate that a rough estimate can be made as to the percentage of children who would be affected by raising the age of criminal capacity. Field research in six geographical areas, spanning 5 provinces and encompassing both rural and urban areas, using a 2 month sample of juvenile court records, found that out of an overall sample of 970 cases, fewer than 10% of the sample concerned children below the age of 14.<sup>14</sup> No child of 10 or younger was actually tried by a criminal court. In 80% of the cases where the accused was 12 years or younger, no criminal trial eventuated.

3.13 The most recent official statistics concerning juvenile arrest and detention pertain to 1993/1994, and are not age differentiated. Arrest statistics for 1995 and 1996 for the Western Cape, the only province for which this information was available, demonstrate that the proportion of children arrested in 1995 aged between 7 and 13 years was 16,3%. This proportion dropped to 14,7% in 1996.

3.14 There are indications that younger children are rarely convicted in criminal courts. Raising the age of criminal capacity to 12 or 14 as described below may prevent unnecessary pre-trial arrest and detention of such younger children.

3.15 Widespread dissatisfaction has been noted with respect to the rebuttable presumption of incapacity that applies to children between the ages of 7 and 14, on the basis that it is too easily rebutted, and does not protect children from prosecution and conviction.

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<sup>13</sup>Report by the Ghana National Commission on Children 1996 Part VII article 1.

<sup>14</sup>J Sloth-Nielsen and S Said *Statistical research on juvenile justice: Examining court records of juvenile offenders* in J Sloth-Nielsen (ed) **South African Juvenile Justice: Law Practice and Policy** (forthcoming).



**3.16 One option would be to retain the *doli capax / doli incapax* presumption, ie with a lower threshold age of 7 years, placing more emphasis on rebutting the presumption.** Suggestions in this regard have included raising the burden of proof from a balance of probabilities to beyond all reasonable doubt, and/or a requirement that the state lead expert testimony on an accused child's development. This option may have cost implications and because it involves a distinct procedural step, may cause delays.

**3.17 A second option would be to raise the lower age of criminal capacity from 7 to 10 years and retain the presumption for children over 10 years and under 14 years with the safeguards referred to in paragraph 3.16.**

**3.18 A third option would be to part with the rule of *doli capax / doli incapax* and to raise the minimum age of criminal responsibility to the age of 12 or 14 years.** South Africa has one of the lowest threshold ages of criminal capacity in the world. Many academics and practitioners have argued that the minimum age should be raised in accordance with international rules. The age set should be related to the age at which children are able to understand the consequences of their actions. The age chosen should be linked to cultural conceptions relating to childhood and maturity, as well as to the practical realities noted above. Recent examples from neighbouring countries in Africa suggest an age of 12 or 14 years.

Comment is invited on these or on any other options.

#### *Children's court inquiry*

3.19 Use of children's court inquiries is linked to debates about raising the age of criminal capacity. Many countries which have a higher minimum age of criminal capacity than does South Africa retain care and protection or welfare-oriented proceedings. World wide, very young children who find themselves in trouble with the law are often those who require social welfare investigation and support.

3.20 The Children's court exists in terms of the Child Care Act, 1983. It is a non-adversarial forum in which inquiries are held as to the care needs of children. The option of converting criminal cases into Children's court inquiries where the child accused is perceived to be in need of care, is provided for in section 254 of the Criminal Procedure Act, 1977. The advantage of a Children's court inquiry for children in trouble with the law who also have care needs is that a full assessment is made by a social worker relating to the child's circumstances, and also the fact that the criminal matter falls away, thereby giving the child a

chance of avoiding a criminal record. There are, however, problems associated with the Children's court inquiry process. The procedure of conversion is not frequently used. Research<sup>15</sup> involving a specific sample of 970 cases found that only 11 cases were routed to the children's court.<sup>16</sup> A second disadvantage is that the current Children's courts require additional personnel, better resources and more training.

**3.21 One option is the proposal of the Inter-Ministerial Committee on Young People at Risk<sup>17</sup> (hereafter "the IMC") that "[t]he children's court should become far more central to the issue of youth justice than it currently is ... It is recommended that serious consideration be given to the referral of all cases of children under the age of 14 or under the age of 12 to a children's court. This would require legislative change".<sup>18</sup> This would mean mandatory referral to the children's court regardless of the seriousness of the offence.**

**3.22 A second option is discretionary referral of children under the age of 14 or under the age of 12 to a children's court with other options such as police cautioning or family group conferencing being retained.**

3.23 Because a new, higher age of criminal capacity would place additional demands on the children's court system, the IMC report notes that "appropriate expansion of the [Children's Court] would need to be planned and budgeted for".<sup>19</sup>

Comment is invited on these issues.

(iii) Age determination

*Current South African law*

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<sup>15</sup>J Sloth-Nielsen and S Said in **South African Juvenile Justice: Law Practice and Policy** (*supra*).

<sup>16</sup>For further discussion of problems impeding the use of Children's courts see N Zaal and C Matthias *Journeys to Nowhere: Moving children from juvenile courts to children's courts* in J Sloth-Nielsen (ed) **South African Juvenile Justice: Law Practice and Policy** (forthcoming).

<sup>17</sup>Established as a result of the crisis which ensued after the promulgation of Act 17 of 1994.

<sup>18</sup>IMC **Interim Policy Recommendations** November 1996 46 (hereafter "IMC Recommendations").

<sup>19</sup>IMC Recommendations 48.

3.24 It is not uncommon for South African children to be unaware of their ages and dates of birth. In some cases even the parents of such children are unable to give particulars in this regard.

3.25 In terms of section 337 of the Criminal Procedure Act 51 of 1977 the presiding judicial officer may estimate the age of a person if in any criminal proceedings the age of that person is a relevant fact of which no or insufficient evidence is available. The Court has correctly indicated, however, that the finding of the presiding officer may not be simply based on observation.<sup>20</sup> There should be a proper attempt at finding evidence and in the absence of such evidence the accused should, for example, be examined by a district surgeon.<sup>21</sup>

3.26 The recent changes to the law concerning pre-trial juvenile detention<sup>22</sup> put the question of age determination firmly on the agenda. In the past “there were few benefits to be had by false declarations of youthfulness. This changed dramatically with the introduction of section 29<sup>23</sup> with its twin cut-off points of 14 years and 18 years. It was, for juveniles and adults, all the more tempting to deceive about age, since release from custody was more or less guaranteed”.<sup>24</sup> A related problem reflects the converse: it also became more tempting for officials to record ages of arrestees on warrants as being 14 or over, since only then was the option of detention after first appearance in court possible.

3.27 Documentary proof of age is not always available, for several reasons, one of which is that many children's births were not registered in the past. Alternative methods, such as examination by the district surgeon, are inexact, and are not always helpful when precise cut off points (like 14 or 18 years) have to be established.

3.28 In the past it has been argued that the best way in which to solve the problem of proof of age (or lack thereof), would be to formulate a presumption that a juvenile should be deemed to be the age he or she claims to be until such time as the contrary is proved.<sup>25</sup>

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<sup>20</sup>*S v Manyololo* 1969 (4) SA 356 (E); *S v Job* 1978 (1) SA 736 (NC).

<sup>21</sup>A Skelton *Children, young persons and the criminal procedure* in J A Robinson (ed) **Children, Young People and the Law** (forthcoming).

<sup>22</sup>See the discussion of pre-trial detention and release policy below.

<sup>23</sup>Section 29 of Act 8 of 1959, as amended by Act 74 of 1994 and re-amended by Act 14 of 1996.

<sup>24</sup>J Sloth-Nielsen *Recent changes in South African juvenile justice* in **South African Juvenile Justice: Law Practice and Policy** (forthcoming).

<sup>25</sup>C V McClain (ed) **Report of the International Seminar on Children in Trouble with the Law** Community Law Centre, 1995.

3.29 However, given recent unfavourable experiences with the implementation of section 29,<sup>26</sup> and abuse by adults claiming to be juveniles, this proposal may not be ideal. Monitoring of prisons by the IMC<sup>27</sup> has revealed the presence of older persons incarcerated with children, claiming to be juveniles, as well as the converse: very young children, whose ages are reflected on the warrants of detention as being 14 years or over.

3.30 The IMC report concludes that "the only answer to the problem in the long term is for the birth date of every young person to be registered ...".<sup>28</sup> There are no quick solutions to this issue.

*International perspective*

3.31 The problem of age determination is not discussed in the international instruments.

*Proposals*

3.32 The proof of age problem is one that, in the short term, could increase with a dedicated juvenile justice act, rather than diminish. There are, however, no clear practical solutions where documentary evidence cannot be found, and where the age of the child is in dispute. **It is however, essential that the issue be addressed within the confines of legislation on juvenile justice. Clear guidelines are required for the guidance of all role-players - probation officers, police and judicial personnel - as well as for the young people concerned. Duties should also be placed upon probation officers, police and other relevant officials to collect and find documentary proof of age where possible.**

3.33 **Guidelines on age determination could be cast as a series of options, the weight of each diminishing from the most reliable evidence (a birth certificate) to the least reliable, and could include presumptions where no oral or documentary proof exists. The determination envisaged by the present section 337 of the Criminal Procedure Act may warrant re-enactment in juvenile justice legislation.**

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<sup>26</sup>The IMC Report asserts that police and probation officers have said that the promulgation of section 29 has led to an upsurge of young people claiming to be under 18 or under 14 (p51).

<sup>27</sup>A monitoring project involving NGOs was set up by the IMC to investigate the effects of the Correctional Services Amendment Act 14 of 1996. Reference is made hereafter to the work of "the monitors".

<sup>28</sup>IMC Recommendations 51.

Comment on these proposals and/or alternative suggestions are invited.

## 4. LEGAL REPRESENTATION

### *Current South African law*

#### (i) Assistance by parent or guardian

4.1 Section 73 of the Criminal Procedure Act provides for the assistance of an accused under 18 by his or her parent or guardian in criminal proceedings. This includes the right to assistance in the pre-trial stage of the proceedings such as identity parades, pointing outs and confessions.<sup>29</sup> The courts have noted that the entitlement to a legal representative (section 73(1) of the Criminal Procedure Act) and the right to assistance by a parent or guardian are separate. It is suggested that both options should be retained in proposed legislation.

#### (ii) The right to legal representation

4.2 Like adults, juvenile accused persons have a right to legal representation as from the time of arrest. There is a duty on magistrates to explain the right to legal representation to every accused who appears before the court. The services provided by the Legal Aid Board are also explained. However, in over 80% of cases accused persons under 18 appear before the courts unrepresented.<sup>30</sup> Some reasons for this are that children<sup>31</sup> -

- \* claim that they were not informed about the possibility of free legal assistance;
- \* distrust what they call “government lawyers”;
- \* proclaim that they are innocent and do not need a lawyer;
- \* claim that lawyers on legal aid briefs delay and/or prolong cases unnecessarily;
- \* allege that lawyers coerce them to plead guilty;
- \* say that they would prefer to speak on their own behalf rather than have lawyers speaking for them.

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<sup>29</sup>*S v Kondile* 1995 (1) SACR 394 (SEC). See further J Sloth-Nielsen *Juvenile Justice Review 1994-95* 1995 **SACJ** at 338 *et seq.*

<sup>30</sup>Raulinga, Siditi and Thipanyane in L Pollecut *et al Legal Rights of Children in South Africa* National Institute of Public and International law 1995 at 63, 86 and 101.

<sup>31</sup>Lawyers for Human Rights Project 1992-94 where 1 140 juvenile accused were interviewed.

4.3 Section 35 of the Constitution of the Republic of South Africa 108 of 1996 guarantees the right of all detained and sentenced persons (including children) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly. Due to their youth and immaturity, children facing criminal charges are particularly vulnerable and in need of competent legal representation.

4.4 The Minister of Justice, acting on the request of the Committee on the Co-ordination of the Management of Juveniles Awaiting Trial,<sup>32</sup> has noted that juveniles in custody are not provided with adequate legal representation. As an interim measure, the Committee has called upon the Legal Aid Board, NADEL, BLA, the Association of Law Societies of the Republic of South Africa and Lawyers for Human Rights to assist in the provision of such services. In the long run, however, the constitutional obligation to provide legal representation will rest with the state.

#### *International perspective*

4.5 Article 12(2) of the UN Convention on the Rights of the Child states that “the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”. In terms of Rule 15.1

of the Beijing Rules, “the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country” throughout the proceedings.

#### *Proposals*

(i) General

4.6 Despite the constitutional recognition of the need for legal assistance, and the reality that substantial injustice is likely when children face significant criminal charges without legal representation, the practical problem that 80% of children are not currently represented in criminal proceedings has to be faced. A model for effective legal representation must be found. Three possible options are presented here for comment:

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<sup>32</sup>This is an inter-sectoral committee chaired by the Department of Welfare. The committee was formed to oversee the management of children awaiting trial.

- (a) **In order to overcome the reluctance of many children and their parents or guardians to apply for legal assistance through the Legal Aid Board (for example due to the perceptions of poor quality of services), the children through their parents or guardians should be allowed to approach lawyers of their own choice whose fees will then be paid for by the state.**
- (b) **In order to provide quality legal representation, it is recommended that some form of specialisation should be aimed for. In larger centres, where the number of children appearing in the courts warrant it, a simple way to provide consistent good quality legal representation for young people would be through an appropriately trained special public defender.**
- (c) **The third possibility is the current judicare system, with certain measures taken to provide a level of specialisation. This could possibly be done through a specialised roster or panel. Lawyers could be invited to apply for inclusion in the roster on the basis of certain criteria such as a preparedness to respond to ongoing legal education specific to youth justice (training sessions, receive newsletters etc) as well as the willingness to give juvenile cases priority so that cases involving young people are not subjected to lengthy remands at the request of the defence. Because of the competitiveness of lawyers within the judicare system, lawyers should be made to understand that the cases allocated to them on a specialised roster will be *instead of*, and not *as well as* other legal aid briefs.**

(ii) Waiver of legal representation

4.7 The practical problems mentioned above which indicate that children often refuse legal assistance, raises the matter of waiver of this right. Children have the right to refuse legal representation. This however leaves them unprotected, and **consideration should be given to the appointment of a lawyer to monitor the proceedings and ensure the protection of the best interests of the child. This applies most importantly to cases that go to trial, and to cases where the possibility of deprivation of liberty exists. The appointment of an independent lawyer (not on brief from the child) should also be applicable to any child who is in pre-trial detention.**

(iii) Legal representation and diversion



4.8 In cases where children are to be diverted, there are different views on the necessity and/or desirability of the young person having a legal representative. **One view is that there should be no deviation from the general rule of legal representation in every case and that even where a decision is made to divert a particular young person he or she should nevertheless be legally represented.** The young person is entitled to be advised of his/her rights to legal representation, but the responsibility of the State to provide such representation will depend on whether a substantial injustice is likely to occur when a case is being diverted away from the criminal justice system. The view that young people should be legally represented in every case, even diverted, stresses the due process risks which diversion occasions (discussed below).

4.9 **An alternative view is that because lawyers are currently trained to work within an adversarial system, their presence at a process to decide on diversion may hinder rather than assist the young person.** Diversion rests on the requirement that the young person must accept responsibility for his or her actions. Lawyers trained in the adversarial model of justice will frequently advise their clients to make no admissions and this would effectively prevent the child from being diverted. This problem could be solved, however, if lawyers representing children were specially trained for the task (see paragraph 4.6(b)). Should a young person give any indication of reluctance to acknowledge responsibility, however, he or she should be considered to be pleading not guilty and be offered legal representation.

4.10 Constitutional provisions guaranteeing the right to legal representation from the moment of arrest cannot be dispensed with, but where there has been no arrest (for example police caution, notice to appear at a referral meeting) the state is not obliged to provide legal representation. A private lawyer can, of course, be retained.

Comment on all the above proposals is invited.

## 5. POLICE POWERS AND DUTIES

### *Current South African law*

#### (i) Due process rights and the Constitution

5.1 In terms of section 35 of the Constitution all the due process rights applicable to arrested, detained and accused persons also apply to children. Additional rights granted children in section 28 are the right not to be detained except as a measure of last resort and for the shortest appropriate period of time; the right when detained to be kept separately from persons over the age of 18; and the right, when detained, to be treated in a manner and kept in conditions that take account of the child's age. These rules may affect pre-trial procedures.

#### (ii) Legal provisions regarding pre-trial detention

5.2 The current South African legal position regarding pre-trial detention including detention in police cells is dealt with in Chapter 6 below.

#### (iii) Arrest and alternatives to arrest

5.3 It has been noted that arrest is the primary method of securing the attendance of juveniles in court. Other options in the Criminal Procedure Act include a written notice to appear in terms of section 56 which can be issued by the police, and the use of a summons in terms of section 54. However, their use in practice has been hindered by reason of the fact that a written notice can only be issued for very minor offences, and because of the necessity of 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.<sup>33</sup>

5.4 There appears to be an inconsistency in the Criminal Procedure Act as far as warning and notification of the parent and guardian of an accused person under 18 are concerned. Section 50(4) requires the *investigating officer* to notify the parent or guardian about the arrest, while section 74(2) requires the *arresting officer* to inform the parent or guardian of the time, date and place where the accused is to appear. In practice, the task of notification has been neglected, with the arresting officer and the investigating officer relying on each

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<sup>33</sup>In 1995, in the Western Cape, only 11% of arrested children were released before court appearance on police warning (J127).

other to carry out the task.<sup>34</sup> The consequence of this is that the child, on first appearance in court, cannot be released into the care of his or her parents.

5.5 In terms of section 50(5) of the Criminal Procedure Act, the police have to notify a probation officer when a child is arrested. In the absence of a probation officer, an available correctional official must be notified of the arrest of any juvenile. It appears that this is not consistently done in practice.

5.6 Although the present South African system regards the prosecutor as *dominus litis*, it has been widely noted that the police too have a gatekeeping role in the criminal justice system.<sup>35</sup> They can choose not to charge an arrested person in certain instances (for example loitering). There is no known study of informal police decision making of this type in South Africa to illustrate the extent to which the police at present play this role.

#### *International perspective*

5.7 There are a number of international principles regulating police powers and duties in relation to juvenile justice. Some of these include:

- \* No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.<sup>36</sup>
- \* A child should be informed promptly and directly of the charges against him or her and, if appropriate, through his or her parents or legal guardians.<sup>37</sup>
- \* Contacts between law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to him or her with due regard to the circumstances of the case.<sup>38</sup>

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<sup>34</sup>A Skelton *Children, young persons and the criminal procedure (supra)*.

<sup>35</sup>L Fernandez *Juvenile diversion through police cautioning* in J Sloth-Nielsen (ed) **South African Juvenile Justice: Law Practice and Policy** (forthcoming).

<sup>36</sup>CRC article 37 (b).

<sup>37</sup>CRC article 40(2)(b)(ii).

<sup>38</sup>Beijing Rule 10.

- \* Discretion of officials shall be exercised in such a way as to enhance the rights of children/young people.
- \* Diversion of children/young people away from the mainstream criminal justice system should be possible at all stages of the process.<sup>39</sup>

### *Proposals*

#### (i) Arrest and alternatives to arrest

**5.8 National guidelines should be drawn up on the powers of the police to arrest persons who appear to be under the age of 18.**<sup>40</sup> The current norm that arrest is the primary means of securing the presence of the juvenile at court should be reconsidered. Initial statistics from the Arrest, Reception and Referral Centre at the Durban Magistrates Court (hereinafter referred to as the ARR Centre) indicate that the majority of children that appeared at the Centre are school-going children with residential addresses. This indicates that arrest is not the only manner in which the juvenile's attendance at Court may be secured. **However, broadening of the scope of application of the written notice to appear and the summons would need to occur.** Whether national guidelines on powers of arrest should be included in proposed legislation, or developed by the SAPS, is a matter on which comment is invited.

**5.9 Distinctions between minor and serious offences could be drawn and alternative methods of securing the attendance at Court of young persons involved in the commission of less serious offences could become mandatory.** In Canada, provisions within the Young Offenders Act empower the police to directly issue process to a young offender, requiring him or her to appear at youth court on a certain date. An improvement on this practice more compatible with our evolving system of juvenile justice might be for the police to serve a process on the juvenile requesting her/him to present herself/himself to the Reception Centre where a joint recommendation could be made as to whether or not she/he should be prosecuted.

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<sup>39</sup>CRC article 40(3)(b).

<sup>40</sup>Also see IMC Recommendations 36.

(ii) Notification of parents, guardians and other role players<sup>41</sup>

5.10 In concurrence with the IMC recommendations, it is proposed that the police continue to bear the primary responsibility for tracing and notifying parents, guardians or other persons able to fulfil a supportive role towards the juvenile. Notification should occur whether arrest or an alternative means of securing attendance of the juvenile is used, but failure to find parents or guardians should not preclude the use of alternative means of securing attendance where necessary. A provision similar to section 50(4) of the Criminal Procedure Act would therefore need to be included in proposed legislation. The arresting officer or the officer who issues the summons or written notice (issuing officer) would bear this responsibility. As is currently the case, the legislation should place the responsibility on the arresting officer/issuing officer to also notify the probation services. Finally, where assessment, reception or referral centres are functioning, the police would have a duty to take the juvenile as soon as possible to this centre, even if it is after hours.<sup>42</sup>

(iii) Diversion by police

5.11 Informal diversion as presently practised by police (for example, asking juveniles to move, instead of arresting for loitering) may not need to be legislated, but, in line with international rules, provision needs to be made for a greater possibility of diversion options to be exercised by police prior to arrest, summons or written notice to appear. Police cautioning has been suggested as an appropriate and inexpensive option for South Africa.<sup>43</sup> International studies show that there are two possible types of police caution to be considered. One is an informal police caution to be administered by the police officer at the scene. A second type of police caution is a formal caution in the presence of the parents or guardian by a ranking officer. The decision to divert to a formal caution could be made by the police. This would be the most efficient and practical process. However, another option would be to include other persons in the decision-making process.

Comment or suggestions on the proposals outlined above are invited.

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<sup>41</sup>The Correctional Services Amendment Act 17 of 1994 extends *parent* and *guardian* to *parent, guardian and other suitable person*. Future legislation may need to define *other suitable person* to include social workers, etc.

<sup>42</sup>The practice of bringing children to court just before the expiry of the 48 hour period is counter productive. Legislation may need to exclude this practice.

<sup>43</sup>IMC Recommendations 39.



## **6. PRE-TRIAL DETENTION AND RELEASE POLICY**

6.1 Release policy is inextricably linked to the aims of de-institutionalisation and restorative justice. It is widely recognised that pre-trial detention for children is undesirable and that legal mechanisms to facilitate the minimum use of pre-trial detention need to be included in juvenile justice legislation. There are several reasons why it has been found to be undesirable to institutionalise children who await trial. Amongst them are adverse results of institutionalisation, as shown internationally by criminological research, and possible further introduction into delinquency, as well as the undesirability of separation of children from their families, which inhibits re-integration of the child into society.

### *Current South African law*

6.2 The present South African position is regulated by the Constitution, the Criminal Procedure Act, the Correctional Services Act (as amended) and to a lesser extent, the Child Care Act. The constitutional provision mirrors that to be found in international instruments, as cited below, and provides, with respect to children, that detention shall be used as a matter of last resort only, and for the shortest appropriate period of time. The 1996 Constitution, in section 28(1)(g), also makes the point that the child has the additional right to be "treated in a manner, and kept in conditions, that take account of the child's age."

6.3 The Criminal Procedure Act includes several mechanisms designed to facilitate pre-trial release once a child has been arrested. These include:

- \* Written notice to appear (s 56), which can be issued at the police station where minor offences are involved. The effect is the release of the child from custody.
- \* Bail, which can be granted either before first appearance in court at the police station in the instance of certain minor offences (s 59) or by a judicial officer after appearance in court (s 60).
- \* Release on warning by a judicial officer after first appearance in court (s 72). This section provides that in the instance of a juvenile under the age of 18 years, the accused can be released in the custody of the person in whose custody he or she is, and that person would then be warned to return with the accused to court on a specified day.

6.4 Widespread attention has been devoted over recent years to the continued pre-trial detention of children under the age of 18, despite the above alternative provisions. With respect to pre-trial detention after first appearance in court, this may be either in a place of safety, designated for the detention of children awaiting trial, and established in terms of the Child Care Act, or a prison. Police cells have also been used, and are still sometimes utilised as places of detention after court appearances, although the 1996 amendment to section 29 of the Correctional Services Act sought to abolish this practice. Before appearing, many children are detained in police cells.<sup>44</sup>

6.5 The position of children detained in adult prisons became a source of concern to political activists and NGOs in the 1990's. Campaigns to advocate for the release of children from pre-trial detention were launched by NGOs and the movement culminated in the adoption of Act 17 of 1994 by Parliament in October 1994 to attempt to regulate the continued use of imprisonment for pre-trial detention for children. This legislation, promulgated in May 1995, led to the release of 829 children who at that time were awaiting trial in prisons, and approximately the same number who were then detained in police cells. Since the legislation prohibited pre-trial detention after first appearance in court other than in a place of safety, children then had to be accommodated in places of safety, or alternatively released. The crisis which ensued in both places of safety, and in the courts, as released children failed to return for trial, led to the establishment of the IMC referred to above, and later to the introduction of temporary legislation (Act 14 of 1996) which allows for certain young people to be held in prison awaiting trial. Currently there are approximately 800 children awaiting trial in prisons.<sup>45</sup>

6.6 Monitoring of the implementation of the new legal provisions regulating juvenile detention shows that some children are held awaiting trial in prison after high monetary bail has been set, which they are unable to pay. One study showed the use of bail in 9,9% of cases in that sample.<sup>46</sup>

6.7 General statistics comparing the use of pre-trial detention in comparison to pre-trial release are not readily available. In the Western Cape 41,3% (1995) and 33,3% (1996) of arrested children were released by courts into the care of parents or guardians after first

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<sup>44</sup>See footnote 33 above.

<sup>45</sup>Figures from the Department of Correctional Services for 28 February 1997.

<sup>46</sup>J Sloth-Nielsen and S Said *Statistical research on juvenile justice: Examining court records of juvenile offenders (supra)*.



appearance, and a further 9,1% (1995) and 12,1% (1996) were released by courts on their own recognisance. This suggests that a large number of arrested children were detained for some period after arrest only to be released at court. Bearing in mind that least 50% were released by courts, it is questionable whether detention was necessary at all. In this province only 25% of arrested children are held after first appearance in court in some form of detention.

6.8 Pilot projects and provincial initiatives have shown that the key to effective release policy is the speedy location and involvement of parents and guardians, so that children may be released into their care. Early intervention, ie assessment and reception of young offenders, form one pillar of the overall IMC Recommendations regarding transformation of the child and youth care system.

6.9 Alternative placement possibilities, such as places of safety, are not evenly situated throughout the country and in poorer resourced areas, children have been incarcerated simply because welfare institutions do not exist. From an equality perspective, it cannot be acceptable that a child accused, say, of theft, be held in prison in one province, whilst in another such accused child would ordinarily be referred to an alternative institution. This supports the contention that limits need to be placed on the circumstances in which a child can be remanded in custody. A further important outcome of the IMC process has been the focus on secure care facilities to provide an alternative to prison for young offenders who cannot be released while awaiting trial, and who require the type of secure care that is not available in a place of safety. One such facility is to be established in each province. This will be an important step towards ending the detention of awaiting trial children in prisons.

#### Legislative limitations on pre-trial detention

6.10 In the Draft Correctional Services Bill, which is currently being circulated for comment, no similar provision to replace the current section 29, as amended, is included. In the Notes to the Draft Bill<sup>47</sup> the drafters advise that "(t)his Bill provides for what happens to children who are detained in prison. It does not, however, determine when children, either sentenced or unsentenced, may be held in prison. That question should properly be dealt with in the Criminal Procedure Bill or in more specialised juvenile justice legislation."

6.11 Both the 1994 and 1996 amendments to Section 29 attempted to limit magisterial discretion, with the aim of reducing juvenile detention in prisons before trial. The first

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<sup>47</sup>At 6.

amendment simply disallowed detention in a prison as an option, save for an interim 48 hour period, and then only for certain specified offences, and for children between 14 and 18 years only.

6.12 The second Amendment Act, adopted after it became clear that there was dissatisfaction with the earlier enactment, also allowed juvenile detention in prison, but with certain limits.<sup>48</sup> The Act included a schedule of offences for which a child could be remanded to prison, but also left the option open of a discretionary referral where the offence was committed in circumstances so serious as to warrant such detention. The legislature attempted to include further safeguards, such as the requirement that oral evidence be led pertaining to the risk (of re-offending, of danger to other children, or of absconding) that the child may pose before a detention decision is taken, and that the detention must be necessary and in the interests of society. The detention is subject to review every 14 days.

6.13 There have been numerous interpretation problems with this Act, and monitors and NGOs have found breaches of its provisions. Approximately half the children currently in detention have been remanded, not for offences enumerated in the schedule, but for other offences under the category "offences committed in circumstances so serious as to warrant such detention". Some of these have been found to be serious, whilst in many instances investigation has shown the matters to be petty (theft of minor items, shoplifting etc). According to statistics provided by the Department of Correctional Services for March 1997, there were a total number of 789 children awaiting trial in South African prisons. Of this number, 321 were charged with offences listed in Schedule 2 of the Act, and 467 charged with offences not listed in the Schedule.<sup>49</sup> The question that arises from the experience with section 29 is how juvenile justice legislation can limit juvenile detention, in accordance with the Constitution, without repeating the inflexibility of the 1994 legislation.

#### *International perspective*

6.14 The UN Convention on the Rights of the Child provides in article 37(b) that "arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time". Release of children from pre-trial detention has been emphasised as a primary concern for the protection

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<sup>48</sup>These are described in J Sloth-Nielsen *Pre-trial detention of juveniles revisited: Amending section 29 of the Correctional Services Act 1996* SACJ 61.

<sup>49</sup>Children charged with both scheduled and non-scheduled offences are also held in places of safety.

of children.<sup>50</sup> The Human Rights Committee of the United Nations has disapproved of pre-trial detention for juveniles and has expressed its concern to Canada where juveniles aged between 12 and 18 could be detained by the juvenile courts before trial.<sup>51</sup>

6.15 The Beijing Rules spell out that "[w]herever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home".<sup>52</sup> The Commentary to the Rules stresses the danger to juveniles of "criminal contamination" while they remain in detention pending trial, and encourages the development of new and innovative measures to avoid pre-trial detention.

### *Proposals*

#### (i) Detention

6.16 International law and constitutional law provide that children awaiting trial should be detained only as a measure of last resort. South African law has provided a range of options to enable the release of the child, post arrest as well as after the first appearance in court. Practice has revealed that there are still numerous problems preventing or hindering<sup>53</sup> the application of the Constitution and the international rules.

6.17 The South African experience has shown that unfettered discretion and wide detention powers have resulted in inappropriate use of custodial detention for children who await trial<sup>54</sup> (see paragraph 6.13). Attempts to eliminate prison as a detention option have been abandoned, and the present temporary legislation aims to structure judicial discretion in such a way as to limit the use of pre-trial detention for children in prisons. The application of the new legislation has been problematic, and the use of a schedule to determine seriousness of offence (and therefore the option of detention) has met with opposition from some role-players.

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<sup>50</sup>Van Bueren 176.

<sup>51</sup>*Ibid.*

<sup>52</sup>Rule 13.2.

<sup>53</sup>Such as the failure to locate parents or guardians into whose care the child could be released, setting of bail amounts that children cannot pay, and absconding of children from placements such as places of safety.

<sup>54</sup>See J Sloth-Nielsen *No child should be caged: Closing doors on the detention of children* 1995 **SACJ** 47-59.

6.18 As far as legislation is concerned, one option would be to provide for mandatory assessment of all children prior to a valid decision to detain a child in an institution (here, places of safety, prisons and secure care facilities would be relevant, as inappropriate placements occur in all of these). A further option, based on the legislation currently in place, would be to devise schedules listing instances where a juvenile offender may not be detained, with a further schedule of offences in respect of which a detention decision is possible.<sup>55</sup> Suggestions in this regard will be welcomed.

(ii) Bail

6.19 Research has shown that in many cases bail amounts currently being set are such that children (or their parents) cannot pay, thereby necessitating the child remaining in detention. **An option to be considered is that monetary payments of bail as a condition of pre-trial release should not be included in the proposed legislation.**<sup>56</sup> Conditional release should remain an option, but could be linked to other conditions of release, such as reporting to a police station or a probation officer or other official. Existing options could be developed innovatively, for example by including curfews, school attendance, or regular attendance at another programme (such as a shelter for homeless children).

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<sup>55</sup>But not mandatory: at the time that section 29 was re-amended in 1996, some magistrates interpreted the schedule to mean that alternatives, such as bail, or release on warning, were no longer available options, and that they were obliged to remand in custody in the instances set out in the schedule.

<sup>56</sup>Report by the IMC Monitoring Project to the Committee on the Management of Juveniles Awaiting Trial.

## 7. DIVERSION

### *Current South African practice*

7.1 Diversion is the channelling of *prima facie* cases away from the criminal justice system with or without conditions. Conditions can range from a simple caution, or referral to the welfare system to participation in particular programmes and/or reparation or restitution. Diversion can take place prior to arrest, prior to charge, prior to plea, prior to trial or prior to sentencing.

7.2 Diversion programmes can assist the young person and the people important to him or her to understand what went wrong, what can be done to repair the damage and how further offending can be avoided. The diversion process can thus assist the young person to be accountable for his or her actions, and help the young person to become a contributing member of society. This reflects the principles of restorative justice which aim to empower victims as well as to deal with young people in the context of their communities and families. Indigenous traditional methods of conflict resolution embody restorative justice values and principles.

7.3 Diversion in South Africa has taken place for some years. However, the chief referral mechanism used has been withdrawals of charges by prosecutors. There is no formal legislative framework for diversion.

7.4 At present diversion services are mostly rendered by NICRO branches in 20 areas. In the year 1994/5 a total of 3 565 cases were referred to NICRO for participation in diversion programmes. NICRO accepted 3 355 (94,11%) of the cases, and of these 2 725 (76,44%) were completed successfully.<sup>57</sup> Diversion programmes are run by probation services in some areas.

7.5 At present the opportunity to be diverted into a programme is limited.<sup>58</sup> Studies indicate that fewer than 5% of juvenile cases are channelled to children's court enquiries.<sup>59</sup> The number of diversions handled by NICRO annually represent a small percentage of the potential number of juvenile cases which would be suitable for diversion.

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<sup>57</sup>See further L Muntingh (ed) **Perspectives on Diversion** NICRO National Office Cape Town: 1995 for an in depth discussion on NICRO diversion programmes.

<sup>58</sup>IMC Recommendations 40.

<sup>59</sup>See par 8.9.

7.6 Diversion programmes currently run in South Africa by NICRO include youth empowerment schemes (a six session life skills training programme), pre-trial community service (between 30 and 100 hours), family group conferencing<sup>60</sup> (a restorative justice alternative conflict resolution forum involving victims) and the journey programme (outdoor experiential learning). These are the most frequently used programmes. *Ad hoc* examples of diversion have also emerged, such as referral of matters to traditional structures or street committees. There have been imaginative and inexpensive examples of diversion practices operated by prosecutors such as essay writing. A need has been identified for programmes which would be of benefit to children charged with sexual offences. These programmes could be used as diversion options or as components of sentence.

7.7 Whilst the development of diversion programmes by both the NGO sector and the state in South Africa is of great importance, the absence of formal programmes, administrative and other difficulties need not be a serious impediment to the operation of diversion. This view is endorsed by the Constitutional Court in *S v Williams*<sup>61</sup> quoting *S v Sikunyana*<sup>62</sup> with approval.

7.8 According to the Interim Policy Recommendations of the IMC, diversion programmes need to be appropriate in intensity. Diversion is described in terms of three levels: level one is the withdrawal of cases with a possible caution, level two is diversion to a programme, and level three is diversion that incorporates a formal diversion programme and involves more intensive intervention.

#### *International perspective*

7.9 The significance of the UN Convention on the Rights of the Child with regard to juvenile justice is that it has elevated diversion to a legal norm which is binding on South Africa since ratification. Article 40(3)(b) of the Convention provides as follows:

State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) ...

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<sup>60</sup>The IMC has a pilot project operating in Pretoria on family group conferencing.

<sup>61</sup>1995 (3) SA 632 (CC).

<sup>62</sup>1994 (1) SACR 206 (Tk).

- (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

7.10 Diversion is also addressed in the Beijing Rules. Rule 11 enunciates the following principles:

- 11.1 Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority, referred to in rule 14.1.
- 11.2 The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these rules.
- 11.3 Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.
- 11.4 In order to facilitate the discretionary disposition of juvenile cases, efforts shall be to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims.

### *Proposals*

- (i) Referral

7.11 Under South African law the prosecutor is *dominus litis*, and therefore diversion up until the present time has depended upon the mechanism of voluntary withdrawals by the prosecutor. Indications are that this has not been effective on a wide scale. Prosecutors are not specialised in or trained for this type of assessment and decision making and have operated in the absence of a legislative framework for diversion.

7.12 There is a need for a distinct procedure prior to charge, to ensure that diversion decisions are taken and that cases involving juveniles are correctly channelled to a suitable option such as a programme, to a children's court inquiry, or to criminal court. In recent juvenile justice literature in South Africa, this step has become known as "referral".<sup>63</sup> It has

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<sup>63</sup>See for example Juvenile Justice Drafting Consultancy Proposals and IMC Recommendations.

been suggested that referral should take place as soon as possible after arrest or after an alternative means for securing attendance of the juvenile has occurred.

Comment is invited on how this distinct step should be legislatively framed.

7.13 A second question that arises is who should be involved in the referral process. Several options present themselves:

- (a) **The prosecutor continues to be the key decision-maker concerning the channelling of juvenile cases.** However, the difficulty with this option is that prosecutors are not specialised in or trained for the type of individualised assessment that is required. Also, many prosecutors bear heavy case loads, and do not have the time to be involved in psycho-social determinations regarding children.
- (b) **Some systems use the court itself as the referral mechanism.**<sup>64</sup> The presiding officer is then compelled by statute to consider the possibility of diversion in each and every case. The advantage of this system is that it provides due process protections ; however, it too requires specialised training of judicial officials and more problematically, strips diversion of its most valuable advantages, namely keeping children away from contact with the courts and enhancing early release from detention.<sup>65</sup>
- (c) **The IMC recommended that the referral be done on a multi-disciplinary basis.** The decision to divert is not just dependent on the specific nature of the offence, but also on the personal circumstances and individual needs of a particular child. Therefore, a person with social work training such as a probation officer may be more suited to the task than a person with a purely legal background. The multi-disciplinary approach, though, recognises that a number of role players may be involved, including police, prosecutors and potentially even victims. The difficulty with such an approach is the practical problem of getting a number of officials together to decide on a case by case basis.
- (d) **A specially trained official, using a process and/or instrument developed by a multi-disciplinary team and subject to monitoring by such a team, could**

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<sup>64</sup>For example New Zealand.

<sup>65</sup>Magistrates may not be available outside regular court hours. A child may have to spend time in detention awaiting the first court sitting.



**undertake referral of cases for diversion.** Difficult cases could be decided by engaging with other members of the multi-disciplinary team.

(ii) The need for legislating diversion options

7.14 The international instruments require the inclusion of diversion in juvenile justice legislation. They do not spell out how this should be done. Two overlapping issues arise in regard to legislation on diversion. The first is the extent to which details regarding diversion programmes need to be included in proposed legislation. Two possible approaches are put forward for consideration:

- (a) **One view would favour excluding details of any kind about types of diversion programmes, leaving that to the discretion of the officials concerned.**
- (b) **Another view holds that in order to ensure the delivery of appropriate programmes, some detail, at least about the “levels of intensity”, needs to be spelt out. Also, specific reference to restorative justice processes will ensure that this option will be developed and will be used by the system.**

Comment on these two options is invited.

7.15 The second issue in relation to diversion and legislation concerns the mechanism for the selection of cases for diversion. The following options are put forward for consideration:

- (a) **The example of enabling provisions such as section 254 of the Criminal Procedure Act which currently allows the diversion of criminal juvenile cases under certain circumstances to a children’s court inquiry could be followed. The proposed legislation could include specific provisions detailing a range of different diversion options.<sup>66</sup> The difficulty with this is that it may not increase the use of diversion in practice, as is evidenced by the under-utilisation of the children’s court procedure (and alternative sentencing provisions) despite enabling legislation.**
- (b) **In order to overcome the difficulty set out in option (a), proposed legislation could include a mandatory consideration by a court as to whether a matter should have been diverted.<sup>67</sup> This could be an addition to option (a) providing a**

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<sup>66</sup>Compare the wording of s 297 of the Criminal Procedure Act which allows a number of options such as attendance at programmes, restitution to victims etc. See the discussion on sentencing below.

<sup>67</sup>For example New Zealand.

**further protection against criminal trials.** The aim would then be to ensure that no trial commences without consideration having been given to diversion.

- (c) **Another means of overcoming the difficulties set out in option (a) is to provide specific legislative indications (for example in a schedule of offences) as to when and in which circumstances diversion is mandatory, discretionary or excluded.**

This model can be illustrated with the following examples:

- \* Diversion may be mandatory for children under the age of 14 (for example to a children's court inquiry) and in respect of certain less serious offences.
- \* Diversion would be discretionary with regard to certain more serious offences and in cases of repeat offending.
- \* Diversion would be excluded where serious, violent offences are involved.

- (d) **Diversion could be regulated in detailed guidelines to be used by police, probation officers, prosecutors and other officials. These guidelines could have the status of directives or standing orders or could be gazetted as regulations to the proposed legislation.** The notion of minimum standards and practice guidelines appear in recent South African juvenile justice literature including the IMC Interim Policy Recommendations.

7.16 The four options as set out above may be used singly or in combination. Comment is invited on these four options, and on any other possible options.

(iii) Protection for due process rights, and equality of access to diversion

7.17 It is necessary to build in safeguards to minimise the risk of loss of due process rights (those rights built up by the courts over centuries to protect the right of accused). The first risk comes right at the outset when the young person is required to acknowledge responsibility for the wrongdoing before being considered for diversion. This is a departure from the legal rule that a person is innocent until proven guilty, and that he or she has a right to remain silent. A young person who is in fact innocent of the offence with which he or she is charged, may be tempted to opt for diversion because of a fear of going to trial. In order to minimise the risk of coercion, the option of diversion should be explained before the young person has been asked whether he or she is prepared to acknowledge responsibility for the actions leading up to the arrest. The option of a trial should not be posed as threatening, and

it should be explained that if the case should go to trial, the young person will be offered protection in the form of legal representation. Specialised training will be necessary for all personnel dealing with referral of diversion. During the explanation the terms "guilty " or "innocent" should be avoided. The relevant terms should be "taking responsibility for", or "being accountable for". Any discussion with the young person about diversion must happen in the presence of the parent or guardian.<sup>68</sup>

**7.18 In order to minimise these risks, there should be rules set out in either legislation, or practice guidelines regarding the manner in which the option of diversion is offered.**

7.19 In South Africa diversion efforts have been marked by inequalities such as an urban bias and discrimination regarding race, gender and age.<sup>69</sup> In order to ensure the constitutional rights of children to equality of services, efforts will have to be made to ensure equal access. These may include provisions of services and programmes in rural areas, effective referral which takes into consideration the best interests of the child and the removal of constraints to diversion such as the requirement that children have fixed addresses before they can be considered eligible.

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<sup>68</sup>See A Skelton *Diversion and due process* in L Munting (ed) **Perspectives on Diversion** 1995 31 - 37.

<sup>69</sup>Children under 15 years of age do not qualify for community service or correctional supervision.

## 8. JUVENILE COURTS

### *Current South African law*

#### (i) Juvenile court

8.1 There is no separate criminal court for juveniles in South Africa. In some urban areas where there are sufficient numbers of accused persons under the age of eighteen to warrant it, a court is set aside to deal exclusively 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 juveniles are required by law to be held in camera, regardless of which court they are appearing in.<sup>70</sup>

8.2 In the present system, courts at all three levels (district, regional and high court) can and do have jurisdiction over cases where juveniles are accused. The choice of forum usually depends on the seriousness of the charge and the sentencing powers of the courts. District courts do exercise an increased jurisdiction with regard to juvenile cases linked to the fact that the sentences for juveniles differ from those of their adult counterparts, and it is therefore not uncommon for robbery cases involving juveniles, 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 juvenile 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, meaning that a sentence in excess of district court jurisdiction is warranted.

8.3 It has generally been advocated that the procedure and conduct of juvenile courts in South Africa fall short of the minimum standards provided by the international children's rights instruments. This is despite some statutory provisions meant, at least in theory, to protect and promote children's rights under the juvenile justice system and courts.

8.4 It would appear that the courts have not succeeded in promoting the dignity and worth of young people appearing before them, their proper growth and development and their reintegration into society, as is required by the international instruments. Some problems relate to the physical appearance of court rooms, with elevated benches and an absence of a child friendly environment. In addition there are a number of specific concerns which have been noted by academics and activists in the field. These relate to procedural problems such as the lack of legal representation of children in the criminal courts,<sup>71</sup> long delays in the

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<sup>70</sup>Section 153 of the Criminal Procedure Act 51 of 1977.

<sup>71</sup>Also see par 4.2.

finalisation of trials involving juveniles and problems with the separation of young offenders from adult co-accused persons. In addition personnel working with young offenders are not specially qualified or trained for this work and there is a high turnover of staff.<sup>72</sup>

(ii) Children's court

8.5 The children's court is a creation in terms of the Child Care Act 74 of 1983 and as such does not form part of the criminal process. There are, however, a number of overlaps with the criminal justice system. Every magistrate is automatically a Commissioner of Child Welfare in terms of section 6 of the Child Care Act.

8.6 There are at present three ways in which cases can be diverted from the criminal courts to a children's court. Firstly, the prosecutor may decide that a matter should be heard in the children's court rather than in a criminal court. The case is then referred by the prosecutor withdrawing the charges against the accused juvenile and instructing that the case be referred. The grounds upon which prosecutors tend to base the decision to withdraw the charge would generally include one of the following: that the offence with which the child has been charged is of a less serious nature; that the child appears physically to be in need of care; that the motive for the crime is of a less serious nature, or because the prosecutor knows the child from previous appearances and feels that he or she is merely mischievous or still too young to deserve the possibility of a criminal conviction.<sup>73</sup>

8.7 Secondly, section 11 of the Child Care Act provides that if it appears to a magistrate during the course of proceedings or on the grounds of any information given under oath that the child does not have a parent or guardian or that it would be in the interest of the safety or welfare of the child to be taken to a place of safety, the magistrate may order that the child be taken to a place of safety and brought as soon as possible before a children's court. Thirdly, section 254 of the Criminal Procedure Act provides that if it appears to a magistrate at the trial of any person under 18 that the accused may be a child as referred to in section 14(4) of the Child Care Act, the trial may be stopped and the court may order that the accused be brought before a children's court. If conviction has already occurred before the court decides to stop the proceedings, the verdict shall be of no force and the court may refer the case to the children's court.

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<sup>72</sup>T Thipanyane *Transformation of the South African juvenile justice system: Court procedures and conduct* in J Sloth-Nielsen (ed) **South African Juvenile Justice: Law Practice and Policy** (*supra*).

<sup>73</sup>F N Zaal and C R Matthias *Journeys to nowhere: Moving children from juvenile courts to children's courts* in **South African Juvenile Justice: Law Practice and Policy** (*supra*).

8.8 The children's court proceedings take the form of an inquiry, not of a trial, and no conviction or sentence is given at the end of it. After the inquiry the court is empowered to make an order placing the child, normally with parents under supervision, with foster parents, in a children's home or in a school of industries.

8.9 Currently the option of referring or converting a criminal matter involving a child charged with an offence is under-utilised, with only an estimated 5% of cases being referred.<sup>74</sup>

### *International perspective*

8.10 A wide variety of models which establish juvenile justice court systems are to be found in international literature. These range from separate criminal courts for juveniles, which are in many other respects similar to adult criminal courts (for example Canada), to child and family courts which have jurisdiction over both criminal and civil matters concerning children (Uganda), to lay systems of adjudication, rather than court systems, such as the renowned Scottish Children's panels.

8.11 In the last decade, all international examples of juvenile justice legislation are characterised by the creation of a separate court system for children in trouble with the law, sometimes together with children in difficult circumstances. Examples in point are India, Uganda, New Zealand and Canada.

8.12 It would seem therefore, that in order to give effect to the international standards, the proposed legislation should provide for some form of differentiated juvenile court.

### *Proposals*

8.13 In making proposals regarding possible models of a juvenile court for South Africa, there are certain problems which need to be kept in mind.

(i) Jurisdiction.

8.14 **A fundamental question to be considered is whether multi-level jurisdiction should be preserved in a juvenile justice court structure.** The alternatives are a specialised court which manages all juvenile cases, or a juvenile court which handles the majority of cases, but which refers certain matters on to superior courts. The process of transferring

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<sup>74</sup>*Ibid.*

young people charged with more serious offences out of the juvenile court to other levels is common in the USA. This approach, however, may render pointless the creation of a separate juvenile justice system, especially if significant proportions of juveniles are no longer subject to juvenile court jurisdiction.

(ii) Separation of juveniles from adult co-accused

8.15 A related problem is where a juvenile is co-accused with an adult or adults. Estimates have shown that as many as 30% of all juvenile cases involve co-accused, many of whom are adults. **In many jurisdictions, for example, Canada, the juvenile justice system does not try adults, who proceed conventionally to criminal courts.** There is thus an obligatory separation of trials. The difficulty with this approach is that trials have to be duplicated, and successful prosecution becomes more difficult due to evidentiary problems (one accused can shift blame to the other, who is being tried in another forum). However, the advantage is the maintenance of a completely separate juvenile justice system, and avoidance of “criminal contamination” by adults.

8.16 The 1996 Uganda Children’s Statute takes a different approach, and allows for trial of all children who are co-accused with adults in the adult system. If children are convicted, they are transferred back to the special Family and Children court for an appropriate order to be made.<sup>75</sup>

(iii) Rural and urban differences.

8.17 The differences in the urban and rural situations in South Africa pose a particular problem to the setting up of a separate juvenile court system. The number of young people under 18 years old charged with offences in urban areas is substantial enough to warrant the setting up of specialised courts with specially selected and trained staff. In many rural areas, however, there may be only one or two young people charged with offences per week or even per month and it is difficult to justify the setting up of special courts with specially trained staff in such areas.

8.18 Solutions will need to be provided by the proposed legislation to ensure equality of services for young people. One possible solution may be a circuit court system for juvenile cases, as long as this does not cause unreasonable delays or necessitate the unnecessary holding of young people in custody. Another possible solution would be widespread

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<sup>75</sup>An equivalent proposal features in the Ghanaian draft code.

specialised training of all prosecutors, magistrates, interpreters and social workers. The role of indigenous law systems in dealing with young offenders needs to be considered, including the possibility of fusing the two systems or keeping them separate but ensuring that in either situation the rights of children are protected.

8.19 There are several options which might be considered with regard to a proposed new juvenile court system. The following are set out for discussion:

- (a) **A completely separate juvenile court which does not form part of the current district, regional and high court structure.** These would be special courts, with increased jurisdiction to try all juvenile cases. The formulation of these courts need not follow any current court structure, but could instead operate through panels or assessors in order to reach their outcomes. They would nevertheless be bound by statutory and common law provisions regarding criminal law and procedure save in the case of specific provisions which could be set out in the proposed legislation.
- (b) **A specialised juvenile court at district level with increased jurisdiction, but with an additional capacity to refer certain serious cases to the regional or high courts.**
- (c) **No separate division or special court but special rules and procedures set out in the legislation binding any court before which an accused person under 18 appears.** In urban areas and at district court level such courts could become permanent and specialised. In rural areas and at regional or high court level the court would reconstitute itself as a juvenile court and would conduct itself according to the rules and procedures as set out in the legislation.<sup>76</sup> This option provides flexibility but would require widespread training for personnel.
- (d) **A juvenile court which operates chiefly as a mechanism to refer juvenile matters to other community based fora such as family group conferences<sup>77</sup> or sentencing circles.<sup>78</sup>** Trials would be run in such courts, according to rules set out in the proposed legislation, but sentencing could be referred to the community, to be decided upon in terms of special rules or guidelines provided by the legislation. This model could be used in combination with any of the above-mentioned options.

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<sup>76</sup>**Juvenile Justice for South Africa: Proposals for policy and legislative change** (*supra*).

<sup>77</sup>In New Zealand.

<sup>78</sup>In Canada.



8.20 In addition to the above-mentioned 4 options, there are two further proposals which might be applicable in any form of juvenile court;

*Lay assessors*

8.21 While the law provides for the appointment of assessors in magistrates' courts,<sup>79</sup> this does not appear to be a widespread practice in juvenile courts even though they are part of the magistrates' courts system. The following proposal is put forward for consideration:

**In all cases before a juvenile court, there should be at least two lay assessors sitting with the presiding officer. These assessors must also have a say on the disposition of all matters before the court. Such assessors must be persons with an appreciation of children's rights and must all have an understanding and appreciation of the backgrounds of the children appearing in the court.**

*Probation officers or social workers*

8.22 There is provision for social enquiry reports, or probationers reports as they are referred to in South Africa, in juvenile courts in cases involving children.<sup>80</sup> These reports help the court to determine the appropriate disposition measure against any child appearing before it. However, few of these reports are submitted to the court by probation officers or social workers, and those few are usually inadequate and sometime come late and even delay the conclusion of a matter against a child. The explanation is usually that there are not enough probation officers or social workers, and the few that are available are over-worked and have excessive case-loads to perform their task properly. The juvenile courts, as a result, often hear and dispose of many cases without the assistance of such reports. This certainly results in some injustices and inappropriate disposition in some instances by the juvenile court.<sup>81</sup>

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<sup>79</sup>Section 93ter of the Magistrate's Courts Act 32 of 1944.

<sup>80</sup>See ss 50 (5) and 274 (1) of the Criminal Procedure Act 51 of 1977.

<sup>81</sup>This was highlighted in *S v M* 1982 (1) SA 240 (N) where Didcott J, as he then was, said at 245H: "To make matters worse, the magistrate did nothing at all to investigate the boy's background and personality, to seek the advice of a probation officer, to consult his parents. She did not enquire what sort of a child he was, how a whipping might affect him, whether his parents had already punished him, what they might yet do in that connection, whether the experience of a criminal prosecution had already taught him a lesson sufficient to deter him from playing again with fire. It is plain from her reply to this Court's query that none of this occurred to her. More insight and imagination could fairly have been expected from a judicial officer."

**8.23 In order to address this situation, it is proposed that there should be a state appointed probation officer or social worker based at or connected to every juvenile court who would be involved in a number of functions relating to the child, including the preparation of social enquiry reports on children appearing in the court.**

8.24 This proposal would help to overcome the apparent lack of adequate understanding and appreciation of the socio-economic backgrounds of many children appearing in juvenile courts and might replace the need for assessors.

*Family courts*

8.25 There is currently much debate regarding a family court model for South Africa. It is proposed that the debate should include a discussion of the suitability of incorporating the juvenile court in the structure of a future family court.

## 9. SENTENCING

9.1 Sentencing is linked to diversion as well as to the principles and values underlying a juvenile justice system. These include restorative justice, proportionality and limitations on the restriction of liberty.

### *Current South African law*

#### (i) Constitutional framework

9.2 The 1996 Constitution mirrors international law - section 28 contains the presumption against institutionalisation referred to above, and at the same time, holds that a detained child should be "treated in a manner, and kept in conditions, that take account of the child's age."

9.3 The most prevalent sentence for juvenile offenders, whipping, was abolished by the South African Constitutional Court in *S v Williams*.<sup>82</sup> Prior to its abolition, whippings were imposed on approximately 35 000 child offenders annually. Although it was argued that whipping served as a deterrent, the court held that society's greater concern was with the form of punishment, which must be consistent with the values in the Constitution. Although it was mooted that the abolition of whipping would lead to an increase in imprisonment for children, the court, after considering current sentencing options and trends in juvenile justice, and penology, endorsed the development of alternative sentence and diversion possibilities, citing examples of a non-custodial nature.<sup>83</sup>

9.4 The Bill of Rights in the 1996 Constitution and the Constitutional Court's decision in *S v Williams* suggest that South Africa's juvenile justice legislation should incorporate the accepted international standards, as well as such further rules and limitations as to ensure effective implementation of the international standards.

9.5 Until now, there has been no distinctive approach to juvenile sentencing. As a general principle, juveniles are sentenced more leniently than are adults.<sup>84</sup>

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<sup>82</sup>1995 (3) SA 632 (CC).

<sup>83</sup>See J Sloth-Nielsen *Juvenile Justice Review 1994 - 1995* 1995 **SACJ** 331 at 341.

<sup>84</sup>T Geldenhuys and G Joubert **Criminal Procedure Handbook** Cape Town: Juta 1994.

(ii) Current sentencing options in the Criminal Procedure Act, 51 of 1977, as amended

9.6 The Criminal Procedure Act provides for a range of sentences which may be imposed upon children (or those who, at the time of commission of the offence, were below the age of eighteen). They include:

- \* Discharge with a caution and reprimand (section 297);
- \* postponement of sentence, unconditionally or with one or more conditions (section 297);
- \* suspension of sentence, with or without conditions;
- \* placement under the supervision of a probation officer or correctional official (section 290, as amended);
- \* placement in the custody of any suitable person designated by court (section 290(1)(b));
- \* a fine, which the court may suspend or allow to be paid in instalments (section 297(5)((a) and(b));
- \* correctional supervision (section 276A);
- \* sentence to a reform school (section 290(1)(d));
- \* imprisonment, including periodical imprisonment.

9.7 Of note is the wide range of options allowed in the Criminal Procedure Act for conditions of suspension of postponement of sentence. In section 297, these are enumerated as follows:

- \* Compensation;
- \* rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;
- \* performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organisation or institution (ie community service);
- \* submission to instruction or treatment;
- \* submission to the supervision or control of a probation officer;
- \* compulsory attendance or residence at some specified centre for a specified purpose;
- \* good conduct;
- \* any other matter.

9.8 With respect to the community service order, however, the present legislation does not permit its imposition on a young offender below the age of 15 years.

9.9 The sentence of correctional supervision has been described not so much as a sentence, but as a collective term for a wide variety of measures which have in common that they are all applied outside prison.<sup>85</sup> These measures can include monitoring, house arrest, community service and placement in employment. Correctional supervision can only be imposed on a juvenile after a report by a probation officer and can be imposed for any offence. In *S v Williams*, the Constitutional Court described correctional supervision as a “milestone in the process of *humanising* the criminal justice system”. In the draft Correctional Services Bill, a separate chapter on community corrections serves to emphasise the vital role that these sentences are destined to play in the development of a new South African correctional system.

9.10 The current sentencing provisions in the Criminal Procedure Act, as outlined above, are regarded as being quite wide.<sup>86</sup> The Constitutional Court, too, regarded the present penalties as permitting of a more flexible but effective approach in dealing with juvenile offenders.<sup>87</sup>

(iii) Post-conviction measures, other than sentencing in terms of the Criminal Procedure Act

9.11 After conviction, it is still possible to convert a criminal matter into a Children's Court Inquiry in terms of section 254 of the Criminal Procedure Act. The criminal conviction then falls away, and a range of outcomes as provided for the Child Care Act 74 of 1983 become available. These include:

- \* Placement of the child in the custody of a foster parent;
- \* placement in a children's home;
- \* sending the child to a school of industries;
- \* return of the child to a parent or guardian under supervision of a social worker.

(iv) Procedures related to sentence and review

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<sup>85</sup>*S v R* 1993 (1) SA 476 (A).

<sup>86</sup>IMC Recommendations 54.

<sup>87</sup>*S v Williams and Others* 1995 (7) BCLR 861 (CC) at 883.

9.12 The normal rules relating to restrictions placed on the sentencing powers of district and regional courts apply to magistrates dealing with juvenile offenders, as do the rules pertaining to automatic review procedures, with the addition that for the purpose of automatic review *imprisonment* includes detention in a reform school. In brief these rules are as follows: Where the magistrate has held the substantive rank of magistrate for less than seven years, any sentence longer than three months will automatically be reviewed by a judge of the provincial or local division of the High Court. Where the magistrate has held the substantive rank of magistrate for longer than seven years, however, only sentences of over six months imprisonment will automatically be reviewed.

### *International perspective*

9.13 "The twin principles of proportionality and the duty on the state to take account of the child's well-being underline much of the detail found in international law concerning the aims, restrictions and prohibitions on the sentencing of children".<sup>88</sup> These include:

- \* In all except minor cases, the juvenile's background and circumstances should be made known to the authority through social inquiry or pre-sentence reports (Beijing Rule 16). The commentary maintains that these reports are an indispensable aid in legal proceedings involving juveniles.
- \* Juveniles should not be subject to corporal punishment (Beijing Rule 17.3), capital punishment, nor should they be sentenced to life imprisonment without possibility of release (Convention on the Rights of the Child article 37(a)).
- \* Deprivation of liberty shall be used as a measure of last resort and for the shortest appropriate period of time. There is, therefore, a presumption in international law against institutionalisation, evident in both the Beijing Rules and the Convention.

### *Proposals*

#### (i) Sentencing options

9.14 The disposition of matters before the juvenile court should reflect the best interests of children, the intention to promote and protect such interests, and the need to return such children back to society where they should lead constructive lives. In this regard, the following proposal is made:

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<sup>88</sup>Van Bueren 183.

9.15 **Custodial sentences should be the last resort in children's matters. Where such sentences are passed, they should be for a minimum period and should be conducive for the return of children back to the society. Non-custodial measures should be explored and used as much possible.**

9.16 The IMC report<sup>89</sup> recommends that more emphasis be placed on community based sentencing. Programmes used for diversion can also be used for community-based sentencing.<sup>90</sup> **It would seem that the present wide legislative framework could accommodate this, but further development of options in new legislation may be possible.**

9.17 An issue which has been canvassed by NGOs and academics in South Africa, and not presently directly accommodated in legislation, is the possibility of further post-conviction strategies, other than the imposition of sentence or conversion to a children's court inquiry. **These might, for example, include referral after conviction to a family group conference or restorative justice process. It could be argued that the conviction should then fall away, as is currently the case with the conversion to a children's court inquiry. This would entrench the concept of diversion even after conviction.**

(ii) Current sentencing trends

*Imprisonment*

9.18 It is difficult to obtain statistics on relevant sentencing trends. The last available CSS statistics<sup>91</sup> pertain to the time when whipping was still a prevalent sentence for juvenile offenders.

9.19 According to statistics supplied by the Department of Correctional Services, there is a daily average of almost 900 children under the age of 18 serving sentences of imprisonment. This average has increased from approximately 600 three years ago.<sup>92</sup> In the *1996 Annual Juvenile Justice Review*,<sup>93</sup> evidence of an increase in imprisonment as a sanction for young

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<sup>89</sup>P 25.

<sup>90</sup>For example, the youth empowerment programme of NICRO is currently available as a pre-trial diversion, or as a condition of suspension or postponement of sentence.

<sup>91</sup>Report 00-011-01 for the period 1993 to 1994.

<sup>92</sup>According to a personal communication with the Department of Correctional Services.

<sup>93</sup>Forthcoming in 1996 SACJ.

offenders is provided. A comparison between children serving sentences in prison on 31/7/1995 and 31/7/1996 revealed that 29,9% more children were in prison on that day in 1996 by comparison to 1995. At this same time, the overall prison population increased by only 10%. Of the children serving sentences of imprisonment on 31 July 1996, almost half were serving sentences for economic offences. Six were serving sentences for narcotic offences, and 35 for a category "other". The remainder were serving sentences for violent offences.

#### *Other institutions*

9.20 The IMC investigation into 30 places of safety, 17 industrial schools and 5 reform schools found that in June 1996 there were 6127 children in these institutions, of whom 85% were placed there because they had been found to be in need of care and protection under the Child Care Act. Children may be transferred from children's homes to schools of industry and from there to reform school by bureaucratic action. It is therefore not possible to determine how many children are serving sentences for criminal offences in reform schools. Because referral to a school of industry is not a sentence option, but rather an outcome of a children's court inquiry, it is also not possible to determine how many children are placed in schools of industry after diversion from the juvenile court.

#### *Alternative sentences*

9.21 A NICRO study estimated that nearly 60% of the cases referred to the youth offender programme are pre-trial diversions, with the rest being sentenced offenders.<sup>94</sup> In these cases, a suspended or postponed sentence is passed on condition that the offender attends the course.

9.22 In a study of juvenile courts in nine jurisdictions, it was found that the majority of sentences of cases in that sample were suspended or postponed.<sup>95</sup> In 60% of the cases which proceeded to sentence in the sample, no immediate punishment was imposed.

9.23 In the same study, large disparities in sentencing of juveniles in different regions were also noted. Some regions used a much wider variety of sentence options. Imprisonment was used disproportionately in different jurisdictions. Also, the findings suggest that magistrates "make use of a very limited number of sentencing options. Community service orders,

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<sup>94</sup>L Munting (ed) **Perspectives on Diversion** *supra* 16.

<sup>95</sup>Study by J Sloth-Nielsen and S Said.



correctional supervision and other non-custodial alternatives that are available are not frequently used."

(iii) Sentencing guidelines

9.24 The disparities noted above, and the apparent trend towards over-use of imprisonment as a sentence for children, even where non-violent offences are involved, together with the need to introduce community-based sanctions and restorative justice options at the sentencing phase, raises the issue of whether sentencing guidelines, limitations on the imposition of certain sentences or some other limiting mechanism should be incorporated in proposed legislation. At present, South African judicial officials enjoy wide ranging discretion in sentencing, and interference on appeal would only be justified if a lower court's sentence was "shockingly or startlingly inappropriate". It has been suggested that South Africa does not have a coherent sentencing policy, and that a Sentencing Commission would be an appropriate institution to draw up such policy "which complies with the emphasis on Human Rights of the Constitution and which uses the language of rehabilitation and community within the framework of 'limiting retributivism'".<sup>96</sup>

9.25 Suggestions such as these may promote equality with respect to the use of imprisonment and other custodial sentences for children, and may be able to assist in implementation of the constitutional requirement that detention be used only as a last resort and for the shortest appropriate period of time. Also, legislative provisions on sentencing may encourage the development of alternative sentences, including restorative and community based sentencing options.

9.26 Various options can be considered in this regard, singly or in combination:

- (a) **Sentencing guidelines, based on international rules and accepted sentencing "best practice" could be drafted to assist sentencers in the exercise of their discretion. For example, guidelines could indicate that imprisonment should not be imposed for offences other than serious and violent offences.**<sup>97</sup>
- (b) **A further option would be to exclude the use of certain sentences in certain instances, for example, no imprisonment for children below the age of fourteen.**

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<sup>96</sup>N Hutton **Sentencing in the new South Africa: Prospects for Reform** (unpublished). The South African Law Commission also appointed a project committee in respect of its investigation into sentencing during September 1996 to make recommendations regarding all aspects of sentencing.

<sup>97</sup>In compliance with the Beijing Rules.

**This could be effected by means of direct provisions, or use could be made of schedules of offences, indicating when (for example) imprisonment is a possible sentence, and when it is not permissible as an option.**

- (c) **Sentencing could be done according to current procedure, but improved monitoring and review of sentences could be built into proposed legislation. For example, all sentences of a certain nature could be included in automatic review procedures, which could then be expanded. In this scheme, short term prison sentences, for example, which presently fall outside of review criteria, would be subject to review. Alternatively, a juvenile sentencing commission or similar monitoring body could undertake regular review of all juvenile sentences.**

(iv) Reform schools

9.27 The IMC investigation into places of safety, industrial schools and reform schools revealed numerous problems with respect to these institutions. Reform schools are not evenly spread throughout the country, and of the nine existing institutions, six are in the Western Cape. Some institutions are under-utilised. Children are frequently sent to distant reform schools from other provinces, which does not promote reintegration and maintenance of family contact. Additionally, it is observed that children sometimes serve longer sentences in reform schools than they would if imprisonment were imposed. This results in unequal sentencing.

9.28 However, an equally powerful argument is that if this sentence were not available, children may then be sentenced to imprisonment. This is of concern particularly when younger children are convicted of serious and violent offences, where custodial punishment will be imposed for the safety of the community. Proposed secure care facilities for children are at present being designed only as facilities for children who await trial, although suggestions have been put forward that they could in future also function as centres where custodial sentences can be served. But, at the present time, no alternative custodial sanction is available other than imprisonment or a sentence to attend a reform school.

**9.29 In view of these considerations as well as the recent findings of the IMC investigation report, there is a need for a thorough review of the sentencing option of reform schools including an exploration of possible alternatives and the minimum period of time that a child spends in such institution.**

Comment is invited on this issue.

(v) Fines

9.30 Research shows that, along with monetary bail, fines are used in practice as a sentence for juvenile offenders, even though it may be thought that children would not have the means to pay a monetary amount. Some children, or their parents, are unable to pay the amounts concerned and serve alternative prison terms instead. NGOs have argued that the imposition of a fine on child offenders is, by virtue of their youthful status, inappropriate. It is also felt that it is unfair to expect families of juvenile offenders to pay their fines, the proceeds of which accrue to the state. **It is therefore suggested that a monetary fine may be excluded from the range of sentence options provided for in proposed legislation.**

9.31 However, the payment of reparation to victims (which may be symbolic rather than representative of an actual amount due to the victim by virtue of the loss or damage caused), falls within the notion of restorative justice. It is also beneficial from the point of view of community and victim involvement in justice processes, whereas a fine is paid to the State; in this case the victim receives some contribution towards making good the harm done. International studies have shown that the payment of reparation, even if the contribution is in part made by families of juvenile offenders, enhances the juvenile's acceptance of accountability for wrongdoing. **It is suggested that the exclusion of monetary fines should therefore not preclude the possibility of payment of money as an aspect of reparation or restorative justice options.**

Comment is invited on the above.

(vi) Alternative sentencing and restorative justice

9.32 In the IMC Interim Policy Recommendations it is noted that in order for alternative sentencing to work, an adequate infrastructure should ideally be widely available. On the other hand, as with diversion, the courts should not be unduly hamstrung by administrative and other difficulties (*S v Sikunyana*, which involved a community service order in a rural area where formal services were not available). The proposed legislation should encourage sentencers to be innovative and creative, in the absence of formal alternative sentencing programmes (with due regard to due process considerations and proportionality).<sup>98</sup>

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<sup>98</sup>N Hutton *supra* quoting NC Steytler **Constitutional Principles of Criminal Procedure** (forthcoming).

9.33 At present, most sentences that would be described as alternative sentences (for example compensation, community service, attendance at courses or treatment at specified centres) cannot be imposed on their own. They can only be imposed as conditions of suspension or postponement of sentence. Conversely, all suspended sentences in present legislation must have conditions attached (including the negative condition not to re-offend) in order to be legally enforceable. It is not possible to ascertain (either in respect of adults or in respect of juveniles) the rate of breach of suspended sentences.<sup>99</sup> The structure outlined here may not be desirable for proposed juvenile justice legislation which aims to introduce a restorative justice approach. **It may be desirable to legislate for alternative sentences to be imposed independently, without the necessity of always linking these to suspended or postponed sentences.** If the alternative fails or is not carried out, that matter could be referred back to court for fresh consideration of sentence, including the imposition of another alternative sanction. The advantage would be to encourage maximum consideration of alternative sentencing.

9.34 Restorative justice has been described as a theory of reconciliation, rather than a theory of punishment. Encompassing a range of options, it focusses on repairing harm done to the victim or to society, rather than on retribution exacted by the state. As a model, no system can be entirely restorative, yet it is possible to include restorative processes as part of continuum of sanctions. Restorative options are, in other systems, not necessarily confined to petty offences, given the time and resources required to implement negotiated agreements with victims and/or other role players. They are thus used as intermediate sanctions. Although current pilot projects in South Africa focus on Family Group Conferences (FGC) as processes rather than results of criminal trials, **it may be useful to include in proposed legislation the possibility of referral to a FGC or community sentencing circle<sup>100</sup> after conviction.**<sup>101</sup>

Comment on the legislative incorporation of restorative, or community based sentencing options is invited.

(vii) Correctional Supervision

9.35 Correctional supervision, introduced in 1993, is also a community based sentence composed of various measures, such as house arrest and attendance of programmes. It is

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<sup>99</sup>*Ibid.*

<sup>100</sup>As related sentencing tribunals are known in areas of North America.

<sup>101</sup>It should be noted that in the pioneering New Zealand juvenile justice legislation, such referral after conviction is mandatory.

considered a severe punishment, and has been used for offences such as rape, major thefts and assaults. It is unknown to what extent it has been imposed upon children under the age of 18, but many correctional officials have expressed discomfort with the idea that young children below, say 15 years, be included within the ambit of this sentence. It requires a great degree of responsibility in order to fulfil the reporting and attendance requirements, as well as to comply with conditions such as house arrest. In addition, there is the difficulty with the community service aspect of the sentence, in that the current minimum age limit for this in the Criminal Procedure Act is 15 years.

9.36 However, many would argue that correctional supervision is nevertheless preferable to imprisonment, and may even be preferable to a reform school sentence which frequently removes the juvenile offender from his or her home province<sup>102</sup> and therefore from any access to his or her family. In addition, reform school sentences are two years in length. **Correctional supervision might therefore provide an alternative to this two year custodial sentence, especially where children are to be removed to another province.**

9.37 **In order to delineate juvenile sentencing from the adult sentencing system, different restrictions should be placed upon the maximum length of time for which correctional supervision may be imposed. This is also in accordance with the principle that time frames should be appropriate to children. Two years is suggested as a possibility.**<sup>103</sup> In relation to the content of correctional supervision orders, it is possible that conditions which are appropriate to children's capabilities and degree of responsibility are not impossible or unachievable. These may be included in proposed legislation itself, or, in the alternative, such sentences could be subject to automatic review or monitoring by and independent sentencing structure (see below).

Comment is invited.

(viii) Pre-sentence reports

9.38 Monitoring of children in detention, and children serving sentences has revealed that many children serve terms of imprisonment without a pre-sentence report having been requested or provided. **It is therefore proposed, in line with the international rules and**

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<sup>102</sup>See the IMC Recommendations which indicates that in June 1996, 215 children in reform schools were placed away from their home province, while 1 425 children in schools of industry had been similarly placed in another province. In the Northern Cape, it has been estimated that R800 000 is spent annually on travel arrangements for children from that province who have been placed in institutions in the Western Cape.

<sup>103</sup>The draft Correctional Services Bill (clause 52) refers to 3 years as a maximum period.

**also with South African court decisions,<sup>104</sup> that pre-sentence reports should be mandatory before a custodial sentence can be imposed.**

(ix) Evidence relevant to sentence

9.39 A question is raised as to whether evidence of previous pre-trial diversion is admissible at the sentencing stage at a later trial. South African law would at present not permit this. The evidence involved could be general (any evidence relating to a previous diversion is admissible) or specific to certain types of diversion, for example evidence of a previous formal caution.

**9.40 The advantage of allowing this evidence would be that it would give the diversionary sanctions some "teeth". The disadvantage, however, is that the previous diversion would have been predicated on an "acceptance of guilt", and is not a previous conviction.**

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<sup>104</sup>*S v H and Another* 1978 (4) SA 385 (EC), *S v Ramadzanga* 1988 (2) SA 837 (V), *S v Quandu en Andere* 1989 (1) SA 517 (A).

## 10. MONITORING OF A NEW JUVENILE JUSTICE SYSTEM

### *Proposals*

10.1 At present, appeal and review form the only method of control over juvenile sentencing. The present review criteria<sup>105</sup> do not protect children sufficiently. Sentences of imprisonment imposed by longer serving magistrates, and short sentences imposed by other courts frequently escape High Court scrutiny. Monitors have found numerous cases of children serving prison sentences imposed as alternatives to paltry fines, which they cannot pay. This does not accord with the principles of detention as a measure of last resort.

10.2 In addition, sentences imposed by regional courts are not reviewable, nor are sentences where the accused was legally represented.

10.3 **In principle, all custodial sentences imposed upon children should be reviewable.** The present automatic review system is limited to convictions, and then only where certain sanctions have been imposed. It has already been suggested that the proposed expansion of diversion should also be subjected to regular review and monitoring.<sup>106</sup> In addition, the piecemeal manner in which juvenile justice has functioned until now, with juvenile offenders being regulated by a range of legislative provisions in different acts, and kept in a range of different institutions, has led to suggestions that the entire proposed system should be monitored to ensure effective implementation of the underlying principles. Several international instruments also support monitoring, inspections and complaints mechanisms.<sup>107</sup> Such a system could supplement the present system of automatic judicial review of cases where custodial sentences are imposed.

10.4 Various options can be described which singly or in combination would enhance effective implementation of the proposed legislation:

- (a) **A precedent for monitoring at the lower court level, in each magisterial division, is to be found in the assessment centre committees which were established in many jurisdictions in the Western Cape when pre-trial assessment of all juveniles was implemented in 1994.**<sup>108</sup> A similar committee was established in

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<sup>105</sup>See par 9.12.

<sup>106</sup>See par 7.13.

<sup>107</sup>For example Rules 72 to 78 of the International Rules for Juveniles Deprived of their Liberty.

<sup>108</sup>See J Sloth-Nielsen *Juvenile Justice Review 1994 - 1995* SACJ 331.

Durban, to assist in the pilot assessment and referral project there. The committees include at the moment representatives from the courts, welfare and the police, as well as relevant NGOs and organisations involved in diversion programmes such as NICRO. The Legal Aid Board is often also in attendance. The advantage of these committees, which meet monthly or every two months, is that local trends can be identified, blockages and difficulties ironed out, and they can form the basis for the introduction of new role players who have the potential to positively affect juvenile justice in that area. Examples would be the facilitation of community referrals as a diversion option, setting up of a family group conference scheme, finding safe houses for children who do not require pre-trial detention, but have no alternative accommodation, and the like.

- (b) **Provincial monitoring has been implemented through the provincial IMC structures in various provinces.** Provincial monitoring is important as it allows for the monitoring of institutions in a province (as welfare-run institutions, such as places of safety, or in future, secure care facilities, are provincially managed). Thus low occupancy levels of places of safety can be identified, or cases where children have been admitted without the required assessment. Provincial monitoring as well as monitoring of individual prisons has also been the thrust of the IMC pilot project on monitoring of children awaiting trial in prison. Focussing on children in a particular prison may reveal problems which span various magisterial jurisdictions.

The proper collection of statistics at provincial level by the Safety and Security and Justice Departments would be useful indicators in the monitoring of the effectiveness of aspects of a juvenile justice system.<sup>109</sup> They can also assist in planning for programme development.

The inter-sectoral provincial committees have possibly been less effective than originally anticipated. They have no formal powers, and simply oversee trends. They cannot intervene to improve, change matters or investigate complaints.

Comment on the role envisaged for provincial inter sectoral committees to monitor juvenile justice legislation, if any, is invited.

- (c) **A national monitoring body could be introduced to ensure effective implementation of the legislation.** Several possibilities present themselves:

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<sup>109</sup>See for example, the previously cited statistics on release of children, provided from the Western Cape.



- \* A department of government, located in, for example, the department of Welfare or the department of Justice. This could be called "the juvenile justice office" or other suitable name.<sup>110</sup> It would have the task of monitoring and overseeing implementation of the legislation, as well as the collection of proper statistics. Since many issues in juvenile justice are intersectoral and depend on co-operation from a variety of role players from within different departments, the national office would, in order to fulfil a meaningful role, have to be granted sufficient powers as to permit effective operation.
- \* A juvenile justice office could be located outside the relevant departments involved in juvenile justice, such as within the Deputy-President's office.
- \* An advisory council on juvenile justice could function independently of government departments, and report to the Minister (of Justice, Welfare, etc). The council would, however, need to employ a secretariat to fulfil the research and implementation tasks that will arise in relation to the proposed legislation.
- \* The Draft Correctional Services Act, released for comment by the Department of Correctional Services in February 1997, proposes the concept of a Judicial Inspectorate. Headed by an inspecting Judge, functions include inspections of prisons, offices and other institutions concerned with community corrections, dealing with complaints (but not directly received complaints), reporting on inspections, holding enquiries, and reviewing specific correctional sanctions such as solitary confinement. It is proposed that this model may be suitable in the sphere of juvenile justice as well and could be extended to cover all aspects of the system. It has the obvious advantage of independence from specific government departments who will be tasked with implementation of the proposed new legislation, as well as the benefit of judicial seniority in the form of the appointment of a judge of the High Court to lead the office.

Comment is invited on the specific monitoring and implementation powers that would be assigned to such an office.

(d) **Another option is to select certain key issues in the legislation worthy of special monitoring, and then to examine structures for those specific issues.** One such

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<sup>110</sup>There are Australian precedents for this.

issue could be children in institutions. The plight of children in institutions has not only been a key concern in South Africa until now, but the international rules also evidence particular concern for children deprived of their liberty. This option proposes that all children who have been placed in institutions by juvenile justice legislation (rather than care proceedings) should be monitored. The Child Care Act at present incorporates a provision relating to the inspection of institutions falling within the Child Care Act, but these are not mandatory or regular. The task of monitoring children in prison has at present been carried out by NGOs rather than by any official body. Educational institutions which receive children charged with or convicted of criminal offences, were the subject of the IMC report into places of safety, reform schools and schools of industry and it was found that human rights abuses were prevalent. Another key issue worthy of monitoring is diversion, with regard to which both the referral process and the content of the programme could be monitored.

The IMC recommended that, in fulfilment of Rule 72 of the United Nations Rules for Juveniles Deprived of their Liberty, a duly constituted independent authority should conduct regular inspections, including unannounced inspections, of all institutions where children from the juvenile justice system are sent.

It has been noted that, as inappropriate placements of children appear to occur throughout the current system, an effective inspectorate would need to be able to inspect all facilities in the child and youth care system including places of safety, reform schools, secure care facilities and schools of industry, whichever department they fall under. The inspectorate may need the power to recommend transfers/referrals back to court of children who have been inappropriately placed.

The advantage of this option is that sectoral approaches, which draw on the skills and resources of different groups of people could be achieved.<sup>111</sup> However, the disadvantage would be that it perpetuates a piecemeal approach to juvenile justice, which has been shown to have had negative consequences in the past.

Comment on the monitoring and implementation model desired, and whether that should be legislatively provided for, is invited.

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<sup>111</sup>For example, child care workers and social workers could be included in a monitoring team looking at children in residential facilities, whilst persons with expertise in diversion and related matters could be involved in monitoring diversion.

## **CONCLUSION**

This issue paper proposes a legislative framework for a separate juvenile justice system for South Africa. The options are put forward within the context of international and constitutional standards and build on the suggestions and ideas which have already evolved in the local debates about juvenile justice reform. Juvenile justice reform is one aspect of a major reform process, the goal being comprehensive and integrated legislation on children.

The issues and options raised are not exhaustive, and an effort has been made to set out options in such a way as to encourage debate. It is crucial that role-players and practitioners in the field of juvenile justice are involved in the development of the proposed legislation, as it is through such a consultative process that a workable model will best be developed. In addition, young people, families and communities whose participation in the future system will be instrumental will also be involved in the creation of the new system through debate and discussion. In order to facilitate this, workshops and information seminars with various interest groups throughout the country are planned. Comments from any interested parties will be of vital importance to the Commission. All respondents are invited to express their preferences with regard to the various options set out in the issue paper, or to offer alternative options where appropriate.